CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 2126 of 2010

(Arising out of Review Order No. ST/32/2010 dated 24.09.2010 passed by the Committee of Chief Commissioners, Bangalore)

Commissioner of Service Tax, Bangalore West
BMTC Building, Banashankari II stage,
Bangalore Urban, Karnataka - 560070 ....**Appellant**

VERSUS

T.R. RAJAN
No.498/1, Opp. Prabha Eye Clinic,
40th Cross, 8th Block, Jayanagar,
Bangalore urban, Karnataka – 560082 ....**Respondent**

AND

Service Tax Appeal No. 1018 of 2011

(Arising out of Order-in-Original No. 32/2010 dated 16.07.2010 passed by the Commissioner of Service Tax, Bangalore)

T.R. Rajan
No.498/1, Opp. Prabha Eye Clinic,
40th Cross, 8th Block, Jayanagar,
Bangalore urban, Karnataka – 560082 ....**Appellant**

VERSUS

Commissioner of Service Tax, Bangalore West
BMTC Building, Banashankari II stage,
Bangalore Urban, Karnataka - 560070 ....**Respondent**

WITH

Service Tax Appeal No. 21213 of 2014

(Arising out of Order-in-Appeal No. 30/2014 dated 02.01.2014 passed by the Commissioner of Central excise (Appeals-II), Bangalore)

T.R. Rajan
No.498/1, Opp. Prabha Eye Clinic,
40th Cross, 8th Block, Jayanagar,
Bangalore urban, Karnataka – 560082 ....**Appellant**

VERSUS

Commissioner of Service Tax, Bangalore West
BMTC Building, Banashankari II stage,
Bangalore Urban, Karnataka - 560070 ....**Respondent**

Appearance:

Mr. R. Chandrasekhar, Mr. Kashinath Kalmath, Advocates for the Assessee
Mr. Rajesh Shastry, Authorised Representative (AR) for the Revenue

CORAM:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER NOS. 21772 - 21774 /2024

Date of Hearing: 28.11.2024
Date of Decision: 28.11.2024

Per: Pullela Nageswara Rao

The issue in Appeal No. ST/1018/2011 is whether the appellant is liable to pay service tax on the gross amount including the value of 'Ready Mix Concrete (RMC)' supplied by the appellant and other material supplied by the customers free of cost to the appellant, the dispute pertains to periods 2005-2006 and 2007-2008; and in Appeal No. 21213/2014 the issue is whether service tax is leviable on the activity of transportation of the ready mix concrete (RMC) to the site and pumping of ready mix concrete (RMC) at the construction site, the dispute pertains to the period 2013 to 2014.

2. The brief facts are the appellant M/s. T.R Rajan is registered with the service tax department and was engaged in the activity of 'commercial or industrial construction' service and 'construction of residential complex' service. During the course of audit of the records of the appellant by the department it was observed that the appellant was availing the benefit of abatement of 67% on the gross amount charged by them by availing the benefit of Notification No. 01/2006-ST dated 01.03.2006 for the above services, however the appellant has not included the value of ready mix concrete (RMC) supplied by them and the value of cement and steel supplied by the customers for construction activity undertaken by the appellant. Alleging that the appellant has not included the value of ready mix concrete (RMC) and the value of cement and steel supplied by the customers in the taxable value and that they are ineligible for the benefit of abatement of 67%

on the gross amount charged as per Notification No. 01/2006-ST dated 01.03.2006, hence there was a short payment of service tax, proceedings were initiated and Adjudication Authority as per the impugned Order-in-Original No. 32/2010 dated 16.07.2010 confirmed the demand of service tax, however as regards the demand for interest as proposed in the show cause notice there was no order and also the proposals for imposing the penalties under Section 77, 76 and 78 of the Finance Act, 1944 were dropped. The Order-in-Original No. 32/2010 dated 16.07.2010 of the Commissioner of Service Tax, Bangalore was reviewed by Committee of Chief Commissioners vide Review Order No. ST/32/2010 dated 24.09.2010 and the Department filed Appeal No. 2126/2010, on the ground that Adjudicating Authority failed to issue an order for interest and dropped penalties. The appellant has also filed Appeal No. 1018/2011 against the Order-in-Original No. 32/2010 dated 16.07.2010 of the Commissioner of Service Tax, Bangalore against the confirmation of demand. During the pendency of appeal, the assessee Shri. T. R. Rajan passed away on 02.04.2013 and his legal heirs have been permitted to continue the proceedings as the appellant in place of the deceased.

3. The legal heir representing late T.R. Rajan filed Appeal No. ST/21213/2014 before the Tribunal, which relates to levy of service tax on pumping and transportation charges after the sale of ready mix concrete (RMC), wherein the adjudicating authority confirmed the service tax demand along with interest and imposed penalties. On appeal before the Commissioner (Appeal), who vide Order-in-Appeal No. 30/2014 dated 07.04.2014 upheld the order of the adjudicating authority. Aggrieved by this impugned order the appellant filed Appeal No. ST/21213/2014 before the Tribunal.

4. Since the issues involved are interconnected all the 3(three) appeals together are taken up for hearing and disposal by this order.

5. Learned Counsel for the appellant during the hearing submits that appellant has obtained registration under construction services and the activities falls under 'works contract' service. Appellant had filed returns

and also paid taxes in accordance with the returns under abatement scheme. As per the Notification No. 15/2004 dated 10.09.2004 as amended by Notification No. 01/2006-ST dated 01.03.2006 payment of service tax is exempted from the taxable service in excess of 33% of gross amount charged by service providers in respect of construction services. Since appellant opted for Notification No. 1/2006 dated 01.03.2006 they were paying service tax, accordingly. In addition to that appellant carried out business of manufacturing and selling of ready mix concrete (RMC). In respect of sales made to their clients, they has raised separate invoices and such sales have been subjected to VAT at the rate of 12.5%.

6. Learned Counsel submits that the clients of the appellant used to supply material including steel and cement etc., on free of cost basis. Alleging that the value of supply of ready mix concrete (RMC) and material supplied free by the customers are includable in the value of taxable service, proceedings were initiated. As per the show cause notice the value of Service Tax short paid by the appellant during the period from 2005-2008 with regard to Ready Mix Concrete (RMC) supplied by the appellant is at Annexure-A below and as regards the value of material supplied free of cost by the customers of the appellant the details for the period from 2005-2008 as per the Annexure–B of the Show Cause Notice are as below.

ANNEXURE-A (in Rupees)

Name of the Project	2005-06	2006-07	2007-08	Total
Scrips N Scrolls	NIL	82391590	29621760	112013350
Total	NIL	82391590	29621760	112013350
Less: 67% abatement	NIL	55202365	19846579	75048944
Taxable Turnout	NIL	27189225	9775181	66964406
Service Tax @ 12.24% & 12.36% respectively	NIL	**3327961**	**1208212**	**4536173**

ANNEXURE-B

Sl. No	Name of the project	Amount			
		2005-2006	2006-2007	2007-2008	Total
1	Global Tech-Park	15595550	6934530	-	22530080
2	Prestige Alpha	-	15384875	927825	16312700
3	Prestige Erogtech	13284900	599930	-	13884830
4	S.J.R. Plaza	33497650	-	-	33497650
5	Salarpuria Gateway	2294500	6189100	-	8483600
6	Salarpuria Nova	20581400	-	-	20581400
7	Salarpuria Ascent	6196760	-	-	6196760
8.	Salarpuria Dominion	-	5900800	3130700	9031500
9	Prestige Alecto	-	2860000	17336000	20196000
10	Prestige Cash Pharmacy	-	2299400	4183000	6482400
11	Prestige Libra	-	3048000	9310000	12358000
12	Scrips N Scrolls	34417200	92583400	31938880	158939480
	Total	125867960	135800035	66826405	328494400
	Less: 67% abatement	84331533	90986023	44773691	220091247
	Taxable Turnover	41536427	44814012	22052714	108403153
	Service Tax @ 10.20%, 12.24% &12.36% Respectively	**4236716**	**5485235**	**2725715**	**12447666**

7. Learned Counsel further submits that the issue regarding exclusion of the free supply material was considered by the Tribunal in

the matter of **Bhayana Builders (P) Ltd. Vs. Commr. of Service Tax, Delhi-2013 (32) STR 49 (Tri.–LB)** and affirmed by the Supreme Court in **Commr. of S.T. Vs. Bhayana Builders (P) Ltd. – 2018 (10) GSTL 118 (SC).** Accordingly, denial of 67% abatement as per Notification No. 01/2006 dated 01.03.2006 on the ground that appellant has not included the cost of free supply of steel and cement in the value of service is unsustainable. Further the activity undertaken by the appellant involves supply of goods/material and services and therefore they are not taxable prior to 01.06.2007 i.e., before the introduction of 'works contract' service since, the activity of 'construction of complex' service and 'commercial and industrial construction' service are composite services involving supply of goods and services and not service simpliciter to attract levy of service tax as held by the Hon'ble Supreme Court in the case of **CC Vs. L & T, 2015 (39) STR 913 (SC)**. Thus, the entire demand for the period prior to 01.06.2007 is prima facie unsustainable. As regards demand after introduction of service tax on 'works contract' service as per the impugned order cost of free supply of material is included which is not in accordance with the provisions as it is covered by the decision of **Bhayana Builders,** following the ratio of the same, cost of free material supplied by client/customers cannot be included in the gross value.

8. Learned Counsel further submits that as regards value of ready mix concrete (RMC) sold by the appellant for the period 2006-07, since the construction activity is not taxable prior to 01.06.2007, the issue of inclusion of the cost of ready mix concrete (RMC) does not arise as the levy on the activity itself is unsustainable.

9. As regards demand for the subsequent period the Learned Counsel submits that supply of ready mix concrete (RMC) after introduction of Service Tax on 'works contract' with effect from 01.06.2007 is includable in the taxable value. Further the learned counsel submits that the appellant had deposited an amount of Rs.34,00,000/- as directed by the Hon'ble Tribunal in the Stay Order No. 1702/2012 dated 26.09.2012. Therefore the appellant is entitled

for refund of the excess amount paid along with interest in accordance with law.

10. As regards Departmental Appeal No. ST/21213/2014, Learned Counsel fairly admits that once service tax demand is confirmed appellant is also liable to pay interest. Accordingly, the impugned order to the extent of confirming the service tax demand by including the cost of ready mix concrete (RMC) for the period after introduction of service tax on 'works contract' service i.e., after 01.06.2007 is sustainable.

11. The learned authorised representative (AR) for the revenue reiterated the grounds of appeal in the Review Order No. ST/32/2010 dated 24.09.2010, the findings of the Commissioner of Service Tax in the impugned Order-in-Original No. 32/2010 dated 16.07.2010 and the findings of Commissioner (Appeals) in Order-in-Appeal No. 30/2014 dated 02.01.2014.

12. Heard both sides and perused the records.

13. We find that the appellant in this case has not included the value of ready mix concrete (RMC) supplied by them for the construction activity undertaken by them and also the value of free supply of cement steel, etc., by their customers. The contention of the department was that both the amounts are required to be included in the taxable value for the payment of service tax. We find that the period involved in this case was prior to 01.06.2007 and also post 01.06.2007 that is after the introduction of service tax on 'works contract' service. Following the judgement of M/s. L&T cited, supra, we find that the activity of the appellant i.e., construction being supply of goods and services is not taxable under 'commercial or industrial construction' service or 'construction of complex' service prior to 01.06.2007. Further, we find that inclusion of value of supply of free material is not includible in the taxable value post 01.06.2007 in view of the decision of the Hon'ble Supreme Court in the case of **M/s. Bhayana builders** (supra). As regards inclusion of supply of ready mix concrete (RMC) by the appellant for their construction activity we find the value of such material is includible in the taxable value for the purpose of

computation of service tax. Therefore the value of ready mix concrete (RMC) is includible in the taxable value post 01.06.2007. We find that the appellant has deposited an amount of Rs., 34,00,000 in deference to the Stay Order No. 1702/2012 dated 26.09.2012. The appellant has contended that they are eligible for refund of the excess amount, if any after computation of service tax amount payable with inclusion of value of ready mix concrete (RMC) supplied by the appellant post 01.06.2007. We find that appellant is eligible for refund of excess amount paid, if any, as per law.

14. As regard Appeal No. 21213/2014, wherein the department has confirmed the demand on the transportation of ready mix concrete to the site and pumping of the same at the site, the appellant has relied on the decision of the Hon'ble High Court of Karnataka in the case of **ACC Limited Vs. State of Karnataka - 2012 (73) Kar. L.J. 525 (HC) (DB),** wherein it is held as under:-

> *" 13............Sale of product viz., RMC and transporting it from the manufacturing place up to the customer's site and pumping it to the place where customer specifies the pumping charges become part of sale transaction".*

15. Therefore the demand of service tax on this activity is not liable to service tax since these charges are included in the cost of the ready mix concrete (RMC) and the appellant has paid VAT on this amount. Following the judgement of the Hon'ble High Court of Karnataka, we find that the impugned order in Appeal No. 21213/2014, is not sustainable and therefore is liable to be set aside.

16. In view of the above discussion the appeal filed by the Revenue to the extent that the interest on the service tax to be computed with inclusion of value of ready mix concrete (RMC) for the period post 01.06.2007 is sustainable and therefore the proposal in the show cause notice for levy of interest to that extent is confirmed. As regards the non imposition of penalty on the appellant, we find that as per the records the appellant had expired on 02.04.2013 therefore imposition of penalty on the appellant is not sustainable and hence the appeal of the

department with respect to non-imposition of penalty is unsustainable and hence rejected. Further the appeal filed by the appellant with regard to inclusion of value of ready mix concrete(RMC) and free supply of material is partially allowed to the extent of inclusion of only the value of ready mix concrete (RMC) supplied by them for the construction activity undertaken by them for the period post 01.06.2007.

17. Accordingly, Appeal Nos. ST/2126/2010 and ST/1018/2011 are partially allowed in the above terms and Appeal No. 21213/2014 is allowed, with consequential relief, if any, as per law.

(Operative portion of the order was pronounced in open court on conclusion of hearing.)

(P.A.AUGUSTIAN)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

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