CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/633/2012-DB

[Arising out of Order-in-Original No. 20/2011 dated 20/12/2011 passed by Commissioner of Central Excise, cochin]

M/s. A.B.M. CIVIL VENTURES PVT LTD — Appellant(s)
ABM TOWERS, P.O.BOX NO.2040,
KADAVANTHRA, COCHIN 682020 KERALA

Versus

C.C.,C.E.& S.T-COCHIN-CCE — Respondent(s)
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018

Appearance:

Mr. P.Raghunathan, Advocate — For the Appellant

Mr. Gopa Kumar, AR — For the Respondent

Date of Hearing: 21/02/2019
Date of Decision:25/02/2019

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. SANJIV SRIVASTAVA, TECHNICAL MEMBER

Final Order No.20198/2019

Per : SANJIV SRIVASTAVA

The present appeal is directed against the Order-in-Original No. 20/2011/ST dated 20.12.2011. By the said order, Commissioner has held as follows:

(i) I hereby confirm Rs.1,42,74,474/-. Rs.2,85,491/- & Rs.1,22,473/- on M/s. ABM Civil Ventures Pvt. Ltd. being the Service Tax, Education Cess and Secondary and Higher Education Cess respectively demanded as per Annexure I to the SCN, under Section 73(2) of the Finance Act, 1994.

(ii) The assessee shall pay interest at appropriate rates on the demands confirmed at SI No. (i) above under Section 75 of the Finance Act, 1994.

(iii) I impose a penalty on the notice under Section 76 of the Finance Act, 1994, calculated @ Rs.100/- for every day starting from the due date till 17.04.2006 and thereafter i.e. from 18.04.2006 @ Rs.200/- or 2% of such tax per month, whichever is higher, till 10.05.2008, subject to a ceiling that the total amount of the penalty payable under Section 76 shall not exceed the Service Tax, Education Cess and Secondary & Higher Education Cess payable for the period.

(iv) I impose a penalty of Rs.5000/- on the notice under Section 77 of the Finance Act, 1994.

(v) I impose a penalty of Rs.1,46,82,438/- under section 78 of the Finance Act, 1994 on M/s. ABM Civil

Ventures for suppression of the facts from the Department with intention to evade payment of Service Tax (including Cess).

2. Appellants are engaged in providing various service such as Site Formation and Clearance and earth moving and demolition services (Section 65(105)(zzza) and Commercial or Industrial Construction Service (Section 65(105)(zzq) and Work Contract Services

He has provided services as

i. a sub-contractor to M/s Degremont Limited for construction of a water treatment plant for Kerala Water Authority.[2007-08 to 2009-110]
ii. a sub-contractor to M/s HydroTech Paryavaran (India) Pvt Limited for construction of a Sewerage treatment plant at MAP, Naval Station Cochin [2008-09]
iii. Laying of water pipeline for the Mangalore Municipality [2005-06)]
iv. for construction of cement silo for M/s Ambuja Cements Limited. [2007-08 to 2009-10]
v. Construction of Commercial Buildings for Mr P K Thomas (Muscat Towers), Mr G Yohannan (Nandan Square) [2004-05 to 2006-07]

2.2 A show cause notice dated demanding Service Tax to tune of Rs.1,46,82,438/- (Rupees One Crore Forty Six Lakhs

Eighty Two Thousand Four Hundred and Thirty Eight only) in respect of the taxable services provided by them was issued to the appellants by invoking extended period of limitation as provided for by the Section 73(1) of the Finance Act, 1994. Interest in terms of Section 75 and penalties under Section 76, 77 and 78 were also proposed.

2.3 Matter was adjudicated by the Commissioner as per his order referred to in para 1, supra.

2.4 Aggrieved appellant filed the appeal before the Tribunal. It was in the first dismissed by the tribunal for not complying with the requirements of Section 35F of Central Excise Act, 1944 read with Section 83 of Finance Act, 1994. Appellant challenged the order dismissing the appeal before High Court without any success. Subsequently after making deposit of entire amount of Service Tax demanded along with interest on the amount demanded and 25% of the penalty imposed the appeals were restored as per direction of the Hon'ble Supreme Court.

3.1 We have heard Sh. P.Raghunath, Ld. Counsel for the appellant and Sh. Gopa Kumar, AR for the Department.

3.2 Learned Chartered Accountant arguing for the appellants, submitted that:

(i) Issue in respect of Services provided by him to government projects like those Kerala Water Authority either directly or through the sub-contractor of main contractor has been settled in their favour by the Commissioner himself in subsequent orders and also by the tribunal in cxase of M/s Rama Construction Company [2018 (9) TMI CESTAT New Delhi].

(ii) In case of the services provided under catregory of Work Contract Services to M/s P K Thomas (Muscat Towers), Mr G Yohannan (Nandan Square), there is no dispute that the said services were provided during the period 2004-05 to 2006-07, i.e. prior to 01.03.2007. It has been held in the case of Larsen and Tubro that these services became taxable only after 01.03.2007. Hence the entire service provided in this case is prior to the same being taxable.

(iii) The demand in respect of the services that fall in the above category is too the tune of Rs 1,01,59,705/- which needs to be set aside.

(iv) In respect of services provided to M/s Ambuja Cements Limited, he submitted that they are in agreement that the Service Tax on the activities undertaken was payable and has been paid by them.

(v) He submitted that till date, he has directed by the Hon'ble

Apex Court paid the entire amount confirmed against him along with interest and 25% of the tax demanded as penalty.

3.3 Arguing for the Revenue, the Ld. AR submitted that-

i. in respect services provided to the government projects either directly or as sub-contractor the matter is no longer ras integra. Commissioner himself has held that the Service Tax is exempted. Hence, demand to that extent may not be maintainable in respect of remaining amount.

ii. It is also the fact that as per the decision in case of Larsen and Tubro it has been held that the Work Contract Services became taxable only from 1st March 2007. Since the services provided to M/s P K Thomas (Muscat Towers), Mr G Yohannan (Nandan Square) were in the category of work contract services during the period prior to 1.03.2007, the same cannot be said to be taxable at that time.

ii. In respect of the services provided for construction of Cement Silo for M/s Ambuja Cement Ltd during the period 2007-08 to 2008-09, even the appellants are not disputing the liablity to tax hence the demand in that respect needs to be upheld.

iii. For the Service Tax short paid for which the demand is to be upheld demand for interest under section 75 and penalties under section 76, 77 & 78 need to be upheld.

4.1 We have considered the submissions of both sides.

4.2 There is no dispute in respect of the facts. In respect of the services provided during the period 2007-08 to 2008-09 for construction of Cement Silo to M/s Ambuja Cement Limited, appellants are not disputing levy of Service Tax and have admittedly paid the same. Since the appellants do not contest the said demand at this stage, we uphold the same.

4.3 In respect of the services provided to government projects either directly or as sub contractor tribunal has in case of Khurana Engineering Ltd. vs. CCE, Ahmedabad - 2011 (21) S.T.R. 115 (Tri. - Ahmd.) = 2010-TIOL-1712-CESTAT-AHM. Held as follows

"*5. Further, in view of the fact that on merits, we have held that service provided by the appellant is to be treated as service provided to Govt. of India directly and end use of the residential complex by Govt. of India is covered by the definition "Personal Use" in the explanation to definition of residential complex service, the other aspects need not be considered. In view of the discussion above, the impugned order cannot be sustained and accordingly the same is set-aside. Appeal is allowed with consequential relief to the appellant".*"

The said decision has been followed by the Tribunal in case M/s Rama Construction Company [2018-TIOL-535-CESTAT-DEL]. Even the jurisdictional Commissioner has in subsequent Order-in-Original No. 19/2011-ST dated 14.12.2011 has held as follows:

"(i) I hold the works done by M/s. Nobletech Engineering (P) Ltd. to M/s. Kerala Water Authority and M/s. KINFRA shown in Annex. B to the SCN falls under the category of Commercial and Industrial

Construction Service and not under Erection Commissioning & Installation Service.

(ii) I hold that the works done by M/s. Nobletech Engineering (P) Ltd. to M/s. Kerala Water Authority and to M/s. Degremount Ltd. falling under the category of Commercial and Industrial Construction Service and Works Contracts Service are exempted from payment of Service Tax and accordingly drop the proceedings proposed in the notice against the services provided in respect of the above works."

Accordingly, we are in agreement with the submissions made by the appellants that demands in respect of these services cannot be upheld

4.4 In respect of the services under the category of work contract services provided to M/s P K Thomas (Muscat Towers), Mr G Yohannan (Nandan Square), there is no dispute that the said services were provided during the period 2004-05 to 2006-07, i.e. prior to 01.03.2007. Hon'ble Apex Court has in case of Larsen and Tubro [2015 TIOL (187) SC] has held that said services became taxable from 1st June 2007. The relevant extracts from the said decision are reproduced below:

"1. This group of appeals is by both assessees and the revenue and concerns itself with whether service tax can be levied on indivisible works contracts prior to the introduction, on 1st June, 2007, of the Finance Act, 2007 which expressly makes such works contracts liable to service tax.

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43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.

45. We, therefore, allow all the appeals of the assessees before us and dismiss all the appeals of the revenue."

Following the said decision of Apex Court we hold that demands made for levy of service tax under various taxable categories in respect of the services provided to M/s P K Thomas (Muscat Towers), Mr G Yohannan (Nandan Square), during the period 2004-05 to 2006-07 cannot survive and we quash the same.

4.5 Thus in result demand made for service tax in respect of services provided for construction of Cement Silo for M/s Ambuja Cement is only upheld and all the other demands need to be dropped. For the demands upheld the contraventions of provisions of the Finance Act, 1994 leading to imposition of penalty under

Section 76, 77 & 78 needs to be upheld. Accordingly, penalties imposed under Section 78 are proportionally modified to that extent. In case of benefit of payment of penalty and the rate of 25% was available to the appellant at the time when they had paid the Service Tax along with interest, the same benefit will continue in the present scenario. Penalties under Section 76 & 77 which relates to procedural contravention need to be upheld.

4.6 For the service tax short paid we also uphold the demand for interest in respect of Service Tax short-paid and confirmed by this order.

4.7 For the re-quantification of the demand interest under Section 75 and penalties under Section 76, 77 & 78 we remand the matter back to adjudicating authority.

4.8. Accordingly, appeal is disposed of in above terms. Commissioner should re-quantify the quantum of service tax payable along with the interest and penalties within three months of receipt of this order.

(Order was pronounced
in Open Court on **25/02/2019**)

SANJIV SRIVASTAVA
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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