

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 58354 of 2013

[Arising out of Order-in-Original No.31/AKM/2013 dated 28.03.2013 passed by the Commissioner (Adjudication), Service Tax, New Delhi]

M/s Bestech India Pvt. Ltd.

Bestech House 124, Sector-44,
Gurgaon, Haryana

.....Appellant

VERSUS

Commissioner of Service Tax, Delhi

17-B, I.A.E.A. House M.G.Road, I.P Estate,
New Delhi-110002

.....Respondent

APPEARANCE:

Shri Parikshit Agarwal, CA and Ms. Shruti Khandelwal, Advocate

for the Appellant

Shri Anriam Meena and Shri Aneesh Dewan, Authorized Representatives

for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.60024/2025

DATE OF HEARING: 08.01.2025

DATE OF DECISION: 08.01.2025

P. ANJANI KUMAR:

M/s Bestech India Pvt. Ltd., the appellants, are engaged in provision of Commercial or Industrial Construction Service; on scrutiny of the records of the appellants, Revenue noticed that for the period April 2007 to March 2008, the appellants have paid

service tax under Works Contract Composition Scheme from July 2007 by classifying their service under Works Contract. Revenue entertained an opinion that in view of the CBEC Circular No.98/2007-ST dated 04.01.2008, classification of taxable service is determined based on nature of service and that vivisectioning a single composite service and classifying the same under two different taxable services depending on the time of receipt of the consideration is not legally sustainable and a service provider paying service tax on Commercial or Industrial Construction Service cannot classified the same as Works Contract Service after 01.06.2007. Accordingly, a Show Cause Notice dated 23.10.2008 was issued to the appellants demanding service tax of Rs.4,86,14,123/- along with interest and penalties; the proposals in the Show Cause Notice were confirmed vide impugned order dated 28.03.2013. Hence, this appeal.

2. Shri Parikshit Agarwal, learned Consultant for the appellants, assisted by Ms. Shruti Khandelwal submits that contracts executed by the appellant are composite in nature and in view of the Hon'ble Apex Court's judgment in the case of L&T- 2015 (39) STR 913 (SC), the classification was correctly done under Works Contract Services; the Show Cause Notice demanding duty on Commercial or Industrial Construction Service is not sustainable. He relies on the following cases:

- National Building Construction Corporation Ltd.
Vs. CCE, Shillong dated 08.08.2022 cited as 2022
(66) GSTL 476 (Tri. - Kolkata)

- M/s. Rajendra Mittal Construction Company Private Limited Versus Commissioner, Central Excise and Service Tax, Alwar (Rajasthan) dated 29.03.2022 cited as 2022 (3) TMI 1259-CESTAT New Delhi
- M/s Shree Mohangarh Construction Co. Vs. CCE, Jaipur and Vice-Versa Date 12.04.2018 cited as: 2018(4) TMI 619- CESTAT NEW DELHI
- Ashish Ramesh Dasarwar Vs. Commr. of Central Excise & Service Tax, Nagpur Dated 27.07.2017 cited as: 2017 (9) TMI 1001- CESTAT MUMBAI
- M/s Excel Engineering Vs. Commr. of Central Excise & S.T., Meerut-II And Vice- Versa Dated 12.01.2017 cited as: 2017 (2) TMI 490- CESTAT ALLAHABAD
- URC Construction (P) Ltd. Vs. Commr. of Central Excise, Salem Dated 14.07.2016 cited as: 2017 (50) S.T.R. 147 (Tri- Chennai)

3. Learned Consultant submits that the appellants have rightly discharged service tax under Works Contract Service exercising one of the two options available; the appellants have exercised the option and reflected the same in the ST-3 Returns; exercising the option is procedural and substantial right of the appellants cannot be taken away merely for the fact that they have not given declaration/intimation of the intent to avail the compounded Scheme. The issue is no longer *res judicata*. He relies on the following cases:

- M/s Nitson&Amitsu Pvt. Ltd. Vs. Commr. of Service Tax, Kolkata-II Dated 22.03.2018 cited as: 2018 (4) TMI 1322- CESTAT KOLKATA
- Mehta Plast Corporation Vs. Commr. of Central Excise, Jaipur Dated 01.05.2014 cited as: 2014 (5) TMI 1131-CESTAT NEW DELHI
- M/s Pooja Marbles Vs. CST, New Delhi Dated 26.08.2016 cited as: 2016 (10) TMI 620- CESTAT NEW DELHI
- Areva T&D India Ltd. Vs. CCE & ST, LTU Chennai dated 01.10.2021 cited as 2022 (59) GSTL 80 (Tri. - Chennai)

- Harsh Constructions Pvt Ltd Vs. CCE, Nashik dated 05.03.2019 cited as 2020 (37) GSTL 217 (Tri. - Mumbai)

4. Learned Consultant further submits that the demand was based on ST-3 Returns filed by the appellant and therefore, it cannot be said that there was suppression of facts etc. necessitating the invocation of extended period; moreover, the issue involved interpretation and therefore, extended period cannot be invoked. He relies on Thyssenkrupp Industries India Pvt. Ltd. – 2018-TIOL-3828-CESTAT-MUMBAI. He submits that as there is no suppression etc. penalty under Section 78 cannot be imposed. He further submits that in case, the appellants are required to pay duty, the consideration received by the appellants may be treated as inclusive of service tax and benefit of cum-duty may be extended.

4. Shri Aniram Meena, learned Authorized Representative for the Department, assisted by Shri Aneesh Dewan, reiterates the findings of OIO and submits that Hon'ble Supreme Court in the case of Nagarjuna Construction Co. Ltd. – 2012 (28) STR 561 (SC) has upheld the validity of the Circular and therefore, the appellants have been rightly given notice to pay service tax under Commercial or Industrial Construction Service.

5. Learned Consultant for the appellants submits, in rebuttal, that even after the decision of the Hon'ble Supreme Court in the case of Nagarjuna Construction Co. (supra) various Courts and Tribunals

have distinguished the case and held that after 01.06.2007, it was correct to classify even the ongoing projects under "Works Contract Service". He relies on the following:

- ABL Infrastructure Pvt. Ltd. vs Commissioner of Central Excise, Nashik-2015 (2) TMI 801-CESTAT MUMBAI.
- Commissioner of Central Excise vs Lifeline Builders Pvt Ltd.- 2023(12) TMI 783-CESTAT ALLAHABAD.
- Kalpataru Power Transmission Ltd vs Commr. Of CGST & CEX- Gandhinagar-2024 (2) TMI 1254-CESTAT AHMEDABAD.
- Zuberi Engineering Company vs Commissioner of Central Excise & Service Tax- 2024 (3) TMI 986-CESTAT NEW DELHI.

6. Heard both sides and perused the records of the case. We find that the appellants are engaged in the execution of various contracts for construction. It is not denied that the construction contracts undertaken by the appellants involve supply of goods/ material along with provision of services. We find that in view of the decision of the Hon'ble Apex Court in the case of L&T (supra) services which are non-vivisectionable to be classified under Works Contract Service which came into existence after 01.06.2007 and such services cannot be taxed under any other Head before 01.06.2007. Hon'ble Apex Court held that:

- 24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and

installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

7. We find that Tribunals and High Courts have been following the above said decision consistently. We find that Tribunal has also held that the option can be exercised for ongoing projects also. We find that CESTAT, New Delhi in the case of B.R. Kohli Construction Pvt. Ltd.- 2017 (4) TMI 38- CESTAT held that:

4. We have heard both sides and perused the records. The contracts executed by the appellants is composite in nature as the Appellant is engaged in both supply of goods as well as service and have been rightly classified under the tax entry works contract service. It can be understood from the interpretation by the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd (supra) that there is no liability to service tax in respect of indivisible composite works contract prior to 01.06.2007. In the present case the Appellant is not contesting their service tax liability under works contract service after 01.06.2007 but their entitlement to pay the said tax in terms of composition scheme of 2007 The original authority held that the appellants switched over from construction service to works contract service only to avail the benefit of the scheme and thus are in contravention of the provisions of the said scheme. It has been observed that the denial of the composition

scheme by the Adjudicating Authority is only based on the change of head from Commercial or Industrial construction service to works contract service that because of which the Appellant cannot opt for payment of service tax under works contract service under the composition scheme. The legal position with regards to the said dispute has been settled by the Hon'ble Supreme court in Larsen & Toubro (supra) wherein the Apex court has held that subject to fulfilment of the conditions in terms of the Composition Scheme of 2007 the appellants are eligible to discharge service tax on such works contract post 01.06.2007. We note that the activities carried out by the appellants become liable for taxation only with effect from 01.06.2007 as such activities prior to 01.06.2007 were not categorized as taxable services therefore it is inconsequential to the issue. Post introduction of the new tax entry the appellant discharged service tax in tune to the provisions applicable to them therefore their entitlement cannot be denied.

4.1 This issue has been squarely covered by the Hon'ble Tribunal in the case of B.R Kohli Construction Pvt. Ltd (supra) and Jija Builders (supra) and has held that such option can be exercised in case of ongoing projects as well. The relevant portion has been extracted below:

We find that in view of the legal position settled by the Hon'ble Supreme Court in Larsen & Toubro Limited (supra) the appellant is not liable to any service tax in respect of these indivisible composite works contract prior to 1-6-2007. As such, subject to fulfilment of the conditions, the appellants are eligible to discharge service tax on such works contract, after 1-6-2007, in terms of composition scheme of 2007. The reason for denial of the benefit recorded in the impugned order is not sustainable. We find considering the facts and circumstances of the case, the imposition of penalties on the appellant is not justified. The tax liability of the composite works contract has been a subject matter of large number of litigations and the final legal position was clarified only after the decision of the Hon'ble Apex Court, as above. In such situation, no penalty can be imposed on the appellant, especially when they have discharged service tax.

in terms of the provisions, as applicable during the relevant time and as per the understanding of such provision during the relevant time. As noted above, the appellants only contested this differential duty and penalties. No other issue is pressed during the submission by the appellant. Accordingly, we allow the appeal with reference to this differential service tax and the penalties. The appeal is accordingly disposed of.

8. Learned Authorized Representative submits that Hon'ble Apex Court has upheld the validity of the Circular cited above in the case of Nagarjuna Construction Co. Ltd. (supra). However, learned Consultant for the appellants submits that the case has been distinguished by High Courts and Tribunal. Hon'ble Kolkata High Court examined the issue of intimation regarding the exercise of option to pay service tax under compounded Scheme of Works Contract Service and observed [2022 (12) TMI 523 Cal.] that in the absence of statutory format, it cannot be held that the option should be exercised in a particular fashion. Hon'ble High Court held that:

14. The Calcutta High Court also distinguished the decision of the Supreme Court in Nagarjuna Construction Company Limited vs. Government of India [2012 (28) STR 561 (SC)] observed as follows:

"17. Mr. Maiti, Learned Senior Standing Counsel appearing for the revenue referred to the decision of the Hon'ble Supreme Court in Nagarjuna Constructions Company Limited v. Government of India [2012 (28) S.T.R. 561 (S.C.)] for the proposition that the appellant having failed to exercise the option prior to the payment of tax is not entitled to the benefit of the composition scheme at 2%. On this aspect, we have already interpreted Rule 3(1) and (3) of the composition scheme and given our reasons as to how there

has been compliance of the rule and in the absence of any statutory form for exercise of option, the filing of the return, mentioning the relevant notification number and payment of tax at the compounded rate is sufficient compliance of exercise of option under the scheme. That apart, we note the facts in Nagarjuna Constructions to be entirely different. Since the appellant therein had already paid the taxes and did not opt to pay the service tax under the composition scheme but later sought for such a benefit which was negated. Therefore, the said decision is inapplicable to the facts and circumstances of the case on hand."

9. In view of the above, we find that the impugned order is not sustainable. Accordingly, the appeal is allowed.

(Operative part of the order pronounced in the open court)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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