CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Appeal No. ST/408/2011

[Arising out of OIO No. 118/STC/CHD-I/2010 dated 20.12.2010 passed by the Commissioner of Central Excise, Chandigarh-I]

M/s Ace Build (P) Ltd. : **Appellant (s)**
SCO NO. 10-12, SEC-17B, CHANDIGARH.

Vs

CCE & ST- Chandigarh-I : **Respondent(s)**
Plot No. 19,CENTRAL REVENUE BUILDING,
SECTOR 17-C, CHANDIGARH
160017

APPEARANCE:
Ms. Krati Somani, Advocate for the Appellant
Shri H. S. Bara, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE Mr. C L MAHAR, MEMBER (TECHNICAL)

ORDER No.A/61015 / 2019

Date of Hearing:03.09.2019

Date of Decision:13.11.2019

Per : Mr. Ashok Jindal

The appellant is in appeal against the demand of service tax of Rs. 4,52,42,094/- alongwith interest and various penalties under the Finance Act, 1944.

2. The facts of the case are that the appellant is registered with the department for providing of "Construction Service"'. The appellant was availing an abatement of 67% from the gross amount charged under Notification No. 15/2004-ST dated 10.09.2004 and Notification No. 01/2006-ST dated 01.03.2006 and was paying service tax on 33% of the gross amount received and an audit was conducted at the appellant's premises and it was observed that the appellant is not paying service tax on Construction Services of complexes developed
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by Nagar Panchayat, Building of private college and boundary wall of the different parties. It was also observed that the appellant did not pay service tax on TDS deducted from the payments released by various parties, amount adjusted on account of electricity charges, water expenses and ESI expenses, retention money and mobilisation advance for the period 10.09.2004 to February 2006. Further, on the basis of audit of M/s Sportking Synthetics, the revenue contended that the appellant did not include the cost of construction material like steel, cement etc., supplied by service recipient, in the gross value of services provided by the appellant. It was also alleged that the appellant has availed cenvat credit on 'Telecom Services'. Therefore, the appellant is not entitled to the benefit of the Notification No. 01/2006-ST dated 01.03.2006. In these set of facts, a show cause notice was issued to proposed demand of service tax on Construction of Complexes developed by Nagar Panchayat, building of private college and boundary wall of different parties. Service Tax was also proposed on TDS deducted from the payments released by various parties, amount adjusted on account of electricity charges, water expenses and ESI expenses, retention money and mobilisation of advances. Service tax was also proposed on material supplied free of cost by the service recipient. It is also proposed for denial of abatement under Notification No. 01/2006-ST dated 01.03.2006 on the ground that the appellant has availed cenvat credit on Telecom Services. The matter was adjudicated, the demand of service tax was confirmed against the appellant alongwith interest and penalties were also imposed. The total period involved is September 2004 to March 2008. Against the said order, the appellant is before us.

3. The Ld. Counsel for the appellant submits that the activity undertaken by the appellant is in nature of 'Works Contract Service'

wherein the said service includes the transfer of property in goods as well as rendering of services and works contract services was taxable w.e.f. 01.06.2007. Therefore, for the period prior to 01.06.2007, they are not required to pay service tax at all as held by the Hon'ble Apex Court in the case of ***CCE & C vs. Larsen & Toubro Ltd. – 2015 (39) STR 913(S.C).*** Further, from 01.06.2007 if services are provided alongwith material, the same have merit classification under 'Works Contract Service' and no demand has been raised against the appellant under 'Works Contract Service'. Therefore, they are not liable to pay service tax as held by this Tribunal in the case of ***Srishti Constructions vs. CCE & ST- Ludhiana -2018-TIOL-337-CESTAT-CHD***. Therefore, they are not liable to pay service tax.

4. It is also submitted that the free material supplied by the service recipient are not required to be included in the gross amount charged as held by the Hon'ble Apex Court in the case of ***Commissioner of Service Tax vs. Bhayana Builders (P) Ltd. – 2018 (10) GSTL 118 (S.C.)***, therefore, they are not required to pay service tax on free material supplied.

5. Further, it is submitted that the appellant has availed cenvat credit on 'Telecom Services' inadvertently and the same was reversed alongwith interest before issuance of the show cause notice, in that circumstances, they are entitled for the benefit of Notification No. 01/2006-ST dated 01.03.2006 as held by this Tribunal in the case of ***JCT Ltd. vs. CCE, Jalandhar – 2017 (345) ELT 289 (Tri.-Chan.)***. It is also submitted that the extended period of limitation is not invokable as the show cause notice has been issued on 16.04.2010 for the period September 2004 to March 2008 by invoking the extended period of limitation. The entire demand is barred by limitation as

there was a dispute on the issue during the relevant period, therefore, no penalty is imposable on the appellant.

6. On the other hand, the Ld. AR relied upon the decision of the adjudicating authority.

7. Heard the parties and considered the submissions.

8. On careful consideration of submission made by both sides, we find that the following issue emerges as under:-

(a) Whether the activities of construction of complex developed by Nagar Panchayat, building of private college and boundary wall of different parties undertaken by the appellant and are liable to be taxed under Construction Services or Works Contract Services as same has been provided alongwith material.

(b) Whether free supplies of material is required to be included in the assessable value of services provided by the appellant or not?

(c) Whether the appellant is entitled for the benefit of Notification No. 01/2006-ST dated 01.03.2006 when they have reversed the cenvat credit availed on input services alongwith interest before issuance of the show cause notice or not?

Issue No. 1.

We find that the issue has already been settled by the decision of the Hon'ble Apex Court in the case of **Larson & Toubro Ltd. (supra)** wherein it has been held that prior to 01.06.2007, if service is provided alongwith material, no service tax is payable by the assessee. Further, for the period, post 01.06.2007, the demand of service tax can be made only under 'Works Contract Services'.

Admittedly, in the case in hand, for the period prior to 01.06.2007, the appellant is providing construction services alongwith material, therefore, the appellant is not liable to pay any service tax. For the period, post 01.06.2007, there is no proposal made by the revenue under works contract service, therefore, in the light of the decision of **Sristhi Constructions (supra),** we hold that the service tax is not payable by the appellant wherein this Tribunal has observed as under:-

> "In view of the above analysis, we hold that on merits, the appropriate classification of the services in question is "Works Contract Service" and show cause notices not allege to demand service tax under Woks Contract, therefore, the demand of service tax is set-aside. We also hold that extended period of limitation is not invokable. Accordingly, the impugned orders are set-aside and appeals are allowed with consequential relief."

In view of this, we answered the Issue No. –I in favour of the appellant and hold that for services provided by the appellant construction of complexes developed by Nagar Panchayat, Building of private college and boundary wall of the different parties, the appellant is not liable to pay service tax under construction service but merit classification is "Work Contract Service".

<u>Issue No. 2.</u>

We find that the said issue has been settled by the Hon'ble Apex Court in the case of ***Bhayana Builders (P) Ltd. (supra)*** wherein the Hon'ble Apex Court has observed as under:-

> "**15.**It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that

> any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider."

Therefore, we hold that the appellant is not liable to pay service tax on the value of free material supplied by the service recipient and that issue is also answered in favour of the appellant.

Issue No. 3

It is evident from the records, the appellant has already reversed the cenvat credit availed on Telecom Services alongwith interest before issuance of the show cause notice, in that circumstances, we hold that the appellant is entitled for the benefit of Notification No. 01/2006-ST dated 01.03.2006.

9. As all the issues are answered herein above, in that circumstances, the appellant is not liable to pay service tax. Therefore, we set-aside the impugned order and allow the appeal with consequential relief, if any.

(Order pronounced on 13.11.2019)

(Ashok Jindal)
Member (Judicial)

(C. L. Mahar)
Member (Technical)

G.Y.