

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Appeal No. ST/25/2011

(Arising out of Order-in-Original No. 12/2010-Commr. Dated 29.10.2010 passed by the Commissioner of Central Excise, Coimbatore)

M/s. Sakthi Engineering Constructions

Appellant

Vs.

CCE, Coimbatore

Respondent

Appearance

Shri S. Durairaj, Advocate for the Appellant

Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 16.05.2018

Date of Pronouncement: 18.06.2018

Final Order No. **41827 / 2018**

Per Bench

Brief facts are that the appellants are engaged in providing construction services. On verification of records, it was noticed that the appellant had not registered themselves with the department in order to file ST-3 returns periodically for the services rendered under the category of Commercial or Industrial Construction Service for the period from April 2005

to September, 2008 and were not discharging service tax. Show cause notice was issued proposing to recover the service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved, the appellants are before the Tribunal.

2. On behalf of the appellant, Id. counsel Shri S. Durairaj submitted that the service tax demand was made on three types of services:-

(a) Construction service for commercial concern during the period from April 2005 to December 2006

(b) Construction services provided to Common Effluent Treatment Plant (CETP) as sub-contracted to M/s. Enkem Engineers Pvt. Ltd. for the period April 2005 to September 2008.

(c) Construction services provided to common effluent treatment plant directly for the period April 2005 to September 2008.

2.1 He submitted that in respect of services rendered to commercial concerns for the period from April 2005 to December, 2006, the appellant paid the service tax of Rs.12,50,990/- along with interest even before issuance of show cause notice and therefore the demand as well as penalties on this count cannot sustain.

2.2 With regard to construction of effluent treatment plant as sub-contracted to M/s. Enkem Engineers Pvt. Ltd. and directly rendered by the appellant, it is submitted by Id. counsel that the said services fall under Works Contract Service and is taxable only with effect from 1.6.2007. The adjudicating authority has wrongly rejected the plea of the appellant and confirmed the tax for the period prior to 1.6.2007 also.

2.3 For the demand after 1.6.2007, the Id. counsel submitted that the amount would be only Rs.21,89,079/- and that construction of effluent treatment plant are not constructions for commercial purposes and therefore not taxable. He explained that Tirupur is an industrial hub of bleaching, dyeing and knitting of garments, mostly exported and contributes heavily to socio economic development of the nation. Noyyal river and its channels, tanks and Orathupalayam dam contribute heavily to the agriculture sector in and around Tirupur. There was constant dispute between the farmers and industrialists because the effluent from the industries polluted the Noyyal River and its channels and tanks. Dispute travelled upto Supreme Court. The Hon'ble Supreme Court vide its judgment in Tirupur Dyeing Factory Owners Association Vs. Noyyal River Ayacutdars Protection Association and Others – (2009) 9 SCC 737 ordered for compensation to farmers, fixed the time limit for setting up and functioning of Common

Effluent Treatment Plant and also allowed the functioning of the industries on principle touching sustainable development and for protection of environment and human health. Thus, the predominant intention for the construction of CETPs is to benefit the public at large. This is also further established from the Memorandum of Association of CETPs. The CEPTs are not constructed or owned by any particular factory. Associations were formed to take up the construction and upkeep of the CETP. The main objects to be pursued on its incorporation are (i) to establish, acquire, own and develop CETPs for chemically treating and processing dyeing effluents, sewage waters in public interest from commercial establishments, factories, lodge houses, restaurants, residential Board Norms and (ii) to carry on the CETP process and programs and allied activities in the interest of public utility with no profit motive. The ancillary objectives are (i) to prepare, edit and publish booklets, literatures and brochures and to develop awareness amongst the public generally about ecology and in particular about environment pollution and take effective steps to overcome the hazards created and to subscribe or contribute or otherwise assist or to grant money to charitable, benevolent, religious, scientific, national, public or any useful institutions, objects or purpose or for any exhibition and to undertake rural development programmes for the welfare or general public in

any part of the country. He thus argued that the aim of the plant is to serve public cause and thus the construction is not primarily used for commerce or industry.

2.4 The Id. counsel relied upon the case of Green Environment Services Co-op Society Ltd. Vs. Union of India – 2009 (13) STR 250 (Guj.) to support his argument that the said services are activities in public interest and therefore cannot be considered as commercial construction. The decision in the case of Jyoti Buildtech (P) Ltd. Vs. Commissioner of Central Excise, Noida – 2017 (3) GSTL 116 (Tri. All.) was relied upon by the Id. counsel to argue the ground of limitation as well as also to support his alternate plea to set aside the penalties. He argued that the issue was wholly interpretational and thus the longer period of limitation is not invocable and the penalties may also be set aside. It is submitted by him that since the issue is interpretational, the demand for the normal period from 1.4.2008 to 30.8.2008 for Rs.5,03,014/ would only survive.

3. The Id. AR Shri A. Cletus supported the findings in the impugned order. He submitted that the ETPs constructed by the appellant cannot be considered as an activity in public interest. Though such ETPs are constructed on the behest of the association formed, it can be said that the said associations are manned by persons like Managing Director etc. of the

companies / factories which discharge the effluents. Thus, the ultimate benefit is for the company as their effluents are getting treated and therefore it is definitely commercial construction. Section 65(25b) of Finance Act, 1994 clearly states that a building or civil structure which is primarily for commerce or industry or for work intended for industry would be subject to levy of tax under 'Commercial or Industrial Construction Service'. Although, the said ETPs are constructed as per directions of the Apex Court, since associations are formed to construct the ETP to facilitate the factories to discharge their effluents, the argument of the Id. counsel that these ETP are for public interest and not subject to levy of service tax cannot be accepted. The ETP is constructed for the purpose of running the factory which is nothing but commerce / industry. If the ETP is not set up they would have to close down the factories. The decision in the case of Green Environment Services Co-Op. Society Ltd. (supra) relied by the Id. counsel for the appellant is not applicable to the facts of the case. He submitted that the authorities have rightly confirmed the demand along with interest and penalties.

4. Heard both sides.

5. The Id. counsel has given the break-up of the services as well as the demand which is shown as below:-

S. No.	Period	Nature of Service and Demand	Total demand
1.	Prior to	(i) WCS for commercial purpose -	Rs.35,03,157/-

	1.6.2007	Rs.12,50,990/- (ii) WCS for non-commercial purpose (CETP) – Rs.22,52,167/-	
2.	After 1.6.2007 upto 30.9.2008	(i) WCS for non-commercial purpose (CETP) as main contractor – Rs.21,85,437/- (ii) WCS for non-commercial purpose (CETP) as sub-contractor – Rs.3,642/-	Rs.21,89,079/-
		Total	Rs.56,92,236/-

5.1 For better appreciation, the definition of Commercial or Industrial Construction Service in Section 65(25b) is reproduced as under:-

“ As per the provisions of section 65(25b) of the Finance Act, 1994,

“Commercial or industrial construction”] means –

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is –

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams”

5.2 One of the contention put forward by the Id. counsel is that the contracts are composite in nature involving both cost

of materials supplied as well as charges for services rendered and therefore will fall under Works Contract Services. It is seen that the department has given the benefit of abatement of 67% on the composite contract value. This establishes that the activities fall within the works contract service. Therefore, the period prior to 1.6.2007 cannot be subject to levy of service tax as laid down by the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC).

5.3 The period after 1.6.2007 upto 30.9.2008 has been defended by the Id. Counsel mainly putting forward arguments contending that the activities / construction were for non-commercial purposes. It is to be pointed out that when the Id. counsel has put forward the argument contending that the activities do not fall under CICS but would fall under WCS, then the argument that the construction being non-commercial is not taxable is not of any consequence. Works contract service would cover all construction activities whether commercial or non-commercial if such construction activities fall within the definition of Section 65(zzza) of the Finance Act, 1994.

5.4 Let us now address the contention of the Id. counsel that the construction activities are for non-commercial and therefore not taxable. The Id. counsel has referred to the decision of the Hon'ble Supreme Court in the case of Tirupur

Dyeing Factory Owners Association Vs. Noyyal River Ayacutdars Protection Association and Others – (2009) 9 SCC 737. The Tirupur Dyeing Factory Owners Association had approached the Hon’ble Supreme court against order dated 23.2.2007 whereby the Hon’ble Madras High Court had dismissed the review application filed by them. The Hon’ble High Court of Madras had given directions to the appellant therein for setting up an ETP and thereafter they had requested for extending the time for setting up which was rejected by the Hon’ble Madras High Court. Thus the matter reached the Hon’ble Supreme Court. In paras 20 to 22, the Hon’ble Supreme Court had observed as under:-

“20. It was, in fact, the Monitoring Committee in its memo dated 12-7-2005 which made various suggestions before the High Court regarding establishment of CETPs and gave costs for various operations and one of the recommendations read as under :

g. “ Apart from the earlier recommendation of the Committee that no CETP which had not achieved financial closure and deposited monies should be permitted to reopen till financial closure is achieved and monies deposited, the Committee further recommends that all CETPs deposit the entire project cost within a period of 2 weeks (after adjusting the money spent by them towards the works in progress). If the units do not so deposit, the Committee recommends that they be shut down. The Committee reiterates the fact that all CETPs ought to have commissioned their RO system by today, if not much earlier, if their earlier undertakings were taken into account.

Apart from the condition on deposit of the entire project cost (minus the monies actually spent), the member units of all CETPs should be subject to a fine of at least 10 paise per litre of effluent as *reflected in the consent*) at least from 1-8-2006.” (emphasis added)

21. The Monitoring Committee vide its memo dated 19-7-2006, submitted the report before the High Court. It also appears from the record that for the purpose of inspection of CETPs the High Court vide order dated 1-8-2005 constituted a Committee consisting of three lawyers, namely Mr T. Mohan, Mr S.Thangavel and Mr.M.M.Sundaresh, making the terms of reference as under :

(1) To arrive at time-frame within which RO plants are commenced and completed in consultation with industries, their consultants and suppliers.

(2) To consult with the Expert Committee constituted by this Court earlier or any member thereof on what measures required to achieve zero discharge and eliminate pollutants in the effluent through adoption of clean production measures.

(3) To monitor the implementation of reverse osmosis plants and related facilities to deal with RO rejects.

(4) To inspect the industries, IETPs and CETPs at periodic intervals with or without prior notice and report to this Court on the progress made.

The said Committee also submitted the reports from time to time. The High Court has passed the impugned order after considering the aforesaid reports also.

22. In *Indian Council for Enviro-Legal Action v. Union of India*, this Court ruled that once the industrial activities carried out are found to be hazardous or inherently dangerous, the person carrying on such activities are liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying out his industrial or commercial activities. Therefore, the polluting industries are absolutely liable to compensate for the harm caused by it to villagers or other affected persons of the area, to the soil and to the underground water and hence, the industry is bound to take all necessary measures to prevent degradation of environment and also to remove sludge and other pollutants lying in the affected area. As the liability of the polluter is absolute for harm to the environment it extends not only to the victims of pollution but also to meet the cost of restoring the pollution-free environment.”

5.5 The Id. counsel has relied upon these paragraphs to contend that the ETPs were constructed for the purpose of preventing the pollution, for protection of health of the public and for restoring pollution free environment. That therefore being in public interest, the construction of ETP will not fall under the category of commercial construction. We cannot find much merit in this argument put forward by the Id. counsel for the appellant. The individual dying units formed various

associations viz. M/s. Andipalayam CETP, M/s. Veerapandi CETP and M/s. Mannarval CETP. These associations were formed to construct the CETPs,, who awarded the contract to main contractor M/s. Enkem Engineers (P) Ltd. who sub-contracted to appellant and also undertook directly. The construction of CETPS is thus under the behest of the association thus formed. Merely because the contract is awarded by this association, it cannot be said that the CETP is for public interest or for non-commercial purpose. The Id. counsel has adverted our attention to the objectives contained in the Memorandum of Understanding of these associations. It is seen stated that the object of the association is to develop CETP for chemically treating and processing dyeing effluents, sewage waters from commercial establishments, factories, lodge houses, restaurants, residential houses, cinema houses and complexes as per the Pollution Control Board norms. Though CETP takes care of effluents not only of the factories, it can be seen that the said treatment plant is used in a major sense for treatment of effluents of commercial establishments, lodge, restaurants etc. The primary use of this construction of CEPT is therefore for commerce, industry. The Id. counsel has placed reliance on the decision in the case of Green Environment Services Co.op Society Ltd. (supra). In the said case, the petitioner society had contested the demand on two

grounds (i) on mutuality (ii) that object of the society is in the nature of public interest. In para 9 of the said judgment, it was observed as under:-

“Having heard the learned counsel for the parties and having regard to the aforesaid aspects, it does appear to the Court that the petitioner-Society has been established with the aid and assistance of the Central Government and the State Government and the petitioner-Society is engaged in the activity of ensuring a safe and cleaner environment by undertaking treatment of industrial effluents and industrial waste materials. This activity for ensuring protection of the environment is certainly an activity in public interest.”

5.6 The Hon'ble Court in the above case has only given liberty to the petitioner society to make suitable representation for granting exemption from payment of service tax. The above decision in our view does not assist the appellant. The Hon'ble Court in para 9 of the above case was considering the object of the petitioner's society and held that such activity is in public interest. In the case before us, the Association has not undertaken the construction of ETP. The Association awarded the contract to appellant and others. Thus, the demand has not been raised on the society / association. The service tax demand is on the appellant who is a contractor. Further, the ETP cannot be considered as non-commercial one, since the ultimate beneficiary is the dyeing units who are the polluters. The Hon'ble Court has directed to set up ETP basing on the principle 'polluter pays'. The factories have pooled their funds to construct these ETP. Of course, they have been granted subsidy by the Government and also exemption in excise duty

and customs duty. But no exemption of service tax has been granted. Therefore, the contention that CETP is not installed for commercial purpose and therefore would not fall within Commercial or Industrial Construction Service is not tenable. We also do not find any merit in the argument of the Id. counsel that Board Circular No.80/2004-ST dated 17.9.2004 is in support of the appellant and that construction does not fall within the category of commercial construction. We find the issue against the appellant.

5.7 We have already set aside the demand prior to 1.6.2007. The demand for the period from 1.6.2007 to 30.9.2008 is sustainable for the reasons discussed above. The appellant is liable to pay service tax for this period along with interest.

5.8 The Id. counsel has argued on the ground of limitation also. However, since the appellant has not taken registration or paid the service tax even after being pointed out by the department, it is seen that the adjudicating authority has confirmed the demand for extended period also, as discussed in para 31.1. of the impugned order, which in our view does not require interference. However, with regard to the penalty imposed, we are of the view that the issue as to whether the said construction would fall within the category of commercial purpose being interpretational in nature, the argument of the Id. counsel that the penalties are unwarranted is not without

substance. It is also noted that the construction was given exemption from excise duty as well as customs duty. The appellants contend that they were under bonafide belief that the said services are in public interest and of non-commercial nature. The issue being interpretational one, we are of the opinion that the penalty imposed requires to be set aside, which we hereby do.

6. In the result, the impugned order is modified to the extent of setting aside the demand prior to 1.6.2007 and penalty imposed under section 78 of the Act without disturbing the demand of service tax for the period from 1.6.2007 to 30.9.2008. The appeal is partly allowed in above terms, with consequential relief, if any.

(Pronounced in open court on 18.06.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex