

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

**ST/Misc./41704/2017 and ST/639/2011**

(Arising out of Order-in-Original No. 20/2011 dated 16.9.2011 passed by the Commissioner of Central Excise, Chennai - III)

M/s. Raj Kishor Constructions

Appellant

Vs.

Commissioner of GST & Central Excise  
Chennai South

Respondent

Appearance

Shri M.A. Mudimannan, Advocate for the Appellant  
Shri K. Veerabhadra Reddy, ADC (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 / Decision: **17.12.2018**

Final Order No. **43140 / 2018**

**Per Bench**

The appellant is a proprietary concern engaged in providing site formation services which are in the nature of leveling the ground and excavation of earth with the help of excavators etc. They were registered with the service tax department. During the course of audit of accounts, it was noticed that they had not paid service tax on services rendered as sub-contractor during the period from 16.6.2005 to December 2008 under "Site Formation and Clearance Services".

It was also noticed that they have wrongly availed abatement under Notification No. 15/2004-ST dated 1.9.2004 order under Notification No. 1/2006ST dated 1.3.2006 claiming the activity to be under works contract service, thereby appellant had short-paid service tax. The appellant had not paid service tax on supply of excavator and other equipment along with operators / drivers on hire basis under the category of supply of tangible goods. They had not deposited the service tax collected from their customers and also had delayed the payment of service tax for which no interest was paid by them. Show cause notice dated 5.4.2010 was issued to the appellant for the period from 16.6.2005 to 31.12.2008 for demanding service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand, short-payment of service tax on site formation services and also disallowed the abatement availed by the appellant under Notification No. 1/2006. Penalty was also imposed on the appellant. Aggrieved by such order, the appellant is now before the Tribunal.

2. On behalf of the appellant, Id. counsel Shri M.A. Mudimannan submitted that the site formation services were rendered by the appellant as a sub-contractor and since the main contractor has discharged the service tax on the very same activities (contracts), the appellant is not liable to pay service tax under this category. With regard to the wrong availment of 67% abatement as per Notification No.15/2004

(1/2006), the Id. counsel fairly conceded that the activity does not fall under works contract service and the appellant on the wrong belief that site formation services are in the nature of works contract service and is eligible for abatement had availed the same. It is argued by him, in any case, that the appellant had rendered the services in respect of SEZ development activities and therefore the demand cannot sustain. It is also argued by him that the appellant had disclosed the abatement availed by them in their ST-3 returns and for this reason, the demand raised invoking extended period is without any factual basis. The appellant had no intention to evade payment of service tax and this is very much clear from their act of disclosing the availment of abatement in their ST-3 returns. Such wrong availment of abatement was only on the bonafide belief that they are eligible for abatement as they believed that services would come in the nature of works contract service. With regard to the work related to roads constructed by them, he argued that the service tax in respect of construction of roads is exempted as per Notification 17/2005-ST dated 16.6.2005. The roads having been constructed within the SEZ area is used as common / public roads and therefore is eligible for this benefit. He furnished the calculation with regard to demand raised as per the impugned order as well as in the show cause notice and argued that there are errors in the quantification and the appellant would be able to clarify these if

given a chance by remanding the matter to the adjudicating authority.

3. The Id. AR Shri K. Veerabhadra Reddy supported the findings in the impugned order. Countering the argument of the Id. counsel for the appellant regarding the discharge of service tax liability by the main contractor, it is submitted by the Id. AR that the appellant has not produced any proof that the main contractor has discharged the service tax. Regarding the availment of abatement, he submitted that the appellants have deliberately availed the abatement to which they are not entitled and therefore it is a clear violation of provisions of law. The contention of the appellant that they have rendered the construction of road work within the SEZ was not raised by them before the adjudicating authority and therefore such a contention cannot be accepted at this stage. In any case, the said plea has to be verified by the adjudicating authority.

4. Heard both sides.

5. The period of dispute is from 16.6.2005 to December 2008. The demand on site formation and clearance services is defended by the appellant contending that the main contractor has discharged the service tax liability entirely. This aspect has to be looked into by the adjudicating authority. On perusal of the quantification of the demand also, we find that there are certain discrepancies to the quantification which needs to be rectified by the clarifications that has to be produced by the appellants. The appellant is also contending that the activities of

construction of roads are exempted from service tax as these services were provided for development of SEZ. All these aspects, whether the construction activity with regard to site formation or construction of roads are rendered within SEZ area has to be looked into by the adjudicating authority. The appellant has requested for further chance to furnish documents with regard to the discharge of service tax by the main contractor as well as the construction activities done within the SEZ area. For these reasons, we find that the matter requires to be remanded to the adjudicating authority. The demand with respect of wrong availment of abatement also can be looked into afresh by the adjudicating authority who shall consider the issue of penalty on this score also.

6. With the above directions, the impugned order is entirely set aside and the appeal is remanded to the adjudicating authority to consider the issues afresh.

7. The application filed by Revenue for change of cause title is allowed.

(Operative portion of the order was  
pronounced in open court)

**(Madhu Mohan Damodhar)**  
Member (Technical)

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

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