IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 00033 of 2011

(Arising out of Order-in-Original No. LTUC/314/2010-(C) dated 14.10.2010 passed by the Commissioner of Central Excise & Service Tax, Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai – 600 101)

M/s. Areva T & D India Limited **: Appellant**
19/1, G.S.T. Road, Pallavaram,
Chennai – 600 043

VERSUS

The Commissioner of Central Excise & Service Tax **: Respondent**
Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension, Chennai – 600 101

APPEARANCE:

Shri Joseph Prabakar, Advocate for the Appellant

Shri Vikas Jhajharia, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 42354 / 2021

DATE OF HEARING: 28.09.2021

DATE OF DECISION: **01.10.2021**

Order : Per Hon'ble Ms. Sulekha Beevi C.S.

The above appeal was earlier disposed of by this Tribunal vide Final Order No. 41709 of 2018 dated 01.06.2018. In the said order, the Tribunal held as under:

> *"8. In view of above discussions, we pass the following order:-*
>
> *i) Order denying abatement under Notification No. 1/2006-ST dated 01.03.2006 is set aside and abatement allowed.*
>
> *ii) <u>Regarding assessment under Works Contract service, matter remanded to the adjudicating authority</u>."*

(Emphasis added)

2. The appellant filed an application for rectification of mistake in regard to the second issue which was remanded by the Tribunal. The application for rectification of mistake was dismissed. One of the contentions raised by the appellant in the said application was that although the Tribunal has passed the above Final Order, the co-ordinate Bench of the Tribunal in the case of *M/s. Vaishno Associates v. C.C.E. & S.T., Jaipur-I* reported in *2018-VIL-217-CESTAT-DEL-ST* had held that the non-intimation to the Department in order to pay Service Tax on Works Contract Services under the composition scheme was only a procedural infraction, which can be condoned. Aggrieved by the rejection of its application for rectification of mistake, the appellant filed Civil Miscellaneous Appeal No. 2032 of 2019 before the Hon'ble High Court of Madras and vide judgement dated 06.12.2019, the Hon'ble High Court was pleased to remand the matter to the Tribunal. The relevant paragraphs are as under:

> *"10. We do not find anything in the order of the learned Tribunal, which could deny the benefit of the Composition Scheme to the Assessee and therefore, the order of remand passed by the learned Tribunal on 01.06.2018 directing the Assessee to go for regular assessment instead of Composition Scheme merely because the option*

was not conveyed to the Department on the part of the Assessee in writing, even though the Revenue had not prescribed any format for the same, could not be a valid ground to deny the benefit to the Assessee. If a previously rendered judgment of the same Tribunal authored by the same Member was brought to the notice of the learned Tribunal by way of a Rectification Application, it was all the more duty of the learned Members of the Tribunal to have rectified their mistake in their order dated 01.06.2018 by applying their previously rendered judgment in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 rendered on 06.03.2018 to the case of the present assessee.

11. The failure on the part of the learned Tribunal to do so resulted in miscarriage of justice and unnecessary litigation brought before this Court firstly in the form of writ petition, which upon the objection raised from the side of the Revenue, which also cannot be appreciated much, had to be converted into a regular appeal under the provisions of Section 35G of the Act.

12. Therefore, we are inclined to allow the present appeal of the Assessee and set aside the order of the learned Tribunal to the extent of paragraph 8(ii) of the impugned order quoted above dated 01.06.2018. Consequently, the entire ROM dated 07.08.2018 is also set aside. We remit back the matter to the learned Tribunal with a request to pass fresh orders in accordance with law. No costs."

3.1 Today when the matter came up for hearing, Learned Counsel Shri Joseph Prabkar appeared and argued for the appellant. He adverted to paragraph 37 of the impugned order and submitted that the benefit of paying reduced tax under the composition scheme was not extended to the appellant for the reason that the appellant had not exercised the option to avail the composition scheme, by intimating to the Department.

3.2 He relied upon the decision in the case of *M/s. Vaishno Associates (supra)* to argue that the very same issue was considered by the Tribunal and it was held that the benefit of payment of Service Tax under the composition scheme for Works Contract Service cannot be denied merely on the ground of failure to file intimation to the Department prior to payment of Service Tax. The said decision was followed by the Tribunal in the case of *M/s. Kunnel Engineers and Contractors Pvt. Ltd. v. C.C.E. & S.T., Cochin* reported in *2020-VIL-294-CESTAT-BLR-ST* where, in paragraph 7, the Tribunal held as under:

> *"7. The next issue that arise for consideration is with regard <u>to demand raised for the reason that the appellant did not intimate the Department about their intention to opt for payment of service tax under composition scheme under WCS</u>. The Tribunal vide Final order No.50871/2018 dt. 06/03/2018 in the case of Vaishno Associates Vs. CCE [2018-TIOL-1486-CESTAT-DEL] had occasion to consider this issue and held that for sole reason of not filing the intimation opting to pay service tax under WCS, the demand cannot sustain. Similar view was taken in Bridge & Roof Co. Ltd. Vs. CCE, Jaipur [2018-TIOL-30-CESTAT-DEL]. Further in the cases of ABL Infrastructure Ltd. cited supra and Mehta Plast Corporation cited supra also, it has been held by the Tribunal that substantial benefit cannot be denied for procedural deficiency of delay in opting for WCS."*

(Emphasis added)

The Learned Counsel for the appellant prayed that the appellant may be allowed to pay Service Tax under reduced rate as per the composition scheme.

4.1 The Learned Authorized Representative Shri Vikas Jhajharia appeared for the Department. He adverted to paragraphs 25 to 38 of the impugned order. It is submitted by him that to be eligible for the said scheme, the contract should fit into the definition of Works Contract as provided under clause (zzzza) of Section 65(105) of the Finance Act, 1994. That it is clear from the definition of Works Contract and also from the conditions of the composition scheme that the contract should involve transfer of property in goods, leviable to Sales Tax/VAT and there should be an element of services also; the taxable value should be the gross amount received for the works contract excluding the Sales Tax/VAT paid. That this means that the value of equipment supplied should form part of the taxable value and the taxpayer has to exercise such option prior to payment of Service Tax. That the option so exercised shall be applicable for the entire works contract and cannot be altered in between before the completion of the works contract. The works contract also includes, in its scope, erection, commissioning and installation of equipments, whether pre-fabricated or otherwise and turnkey projects. That in the present case, even though separate contracts have been entered by the appellant for supply portion, erection portion and civil works portion, the entire contract is a turnkey project/composite contract involving design, engineering, supply, erection, commissioning and installation of equipment or sub-stations. That thus, by giving a separate contract agreement for the civil works portion alone, the turnkey project/composite contract cannot be separated.

4.2 Learned Authorized Representative for the Department adverted to paragraph 27 of the impugned order to submit that the Commissioner has discussed that <u>the appellant has vivisected the service portion itself and classified one portion under erection and commissioning and the other portion as works contract and availed concessional rate under the composition scheme without fulfilling the conditions mentioned for availing the same, viz. by not including the value of plant and machinery supplied. So also, that the appellant did not exercise the</u>

option to the Department for the scheme prior to payment of Service Tax or seeking registration under Works Contract. That in paragraph 28, it is noted by the Commissioner that the taxpayer has already discharged Service Tax at full rate on erection work and they are liable to discharge Service Tax in the same manner for the civil works portion also.

4.3 Pointing to the discussions in paragraph 38, Learned Authorized Representative for the Department submitted that the appellant had made a plea that the demand would only be Rs.41,40,449/- as against Rs.1,55,85,808/- proposed in the notice. That the Tribunal had remanded the matter in the earlier round of litigation for clarity in determining the taxable value on which the appellant would be liable to pay Service Tax under composition scheme.

5. Heard both sides.

6. At the outset, it is made clear that the Learned Counsel for the appellant has put forward argument only as to the rejection of the claim of the appellant for payment of Service Tax under the composition scheme. It is argued by him that the appellant ought to have been allowed to discharge Service Tax under the composition scheme for Works Contract and that the non-intimation to the Department prior to payment of Service Tax has to be considered as a procedural infraction.

7.1 In paragraph 37 of the impugned order, the Adjudicating Authority has noted that the appellant is not eligible to avail the composition scheme as the appellant has not exercised the option to avail the composition scheme by intimating to the Department. The above issue stands covered by the decisions of the Tribunal in the cases of *M/s. Vaishno Associates (supra)* as well as *M/s. Kunnel Engineers and Contractors (supra)*. We therefore have no hesitation to hold that the non-intimation of availing the composition scheme is only a condonable lapse and that appellant has to be allowed to pay Service Tax under the composition scheme for Works Contract Services.

7.2 We make it clear that we do not interfere with the taxable value mentioned in the Annexure to the Show Cause Notice dated 20.10.2009. The appellant is liable to pay Service Tax on such taxable value, however, at the reduced rate under the composition scheme.

8. In the result, the impugned order is modified to the extent of allowing the appellant to pay the Service Tax under the composition scheme, as discussed above. The issue is found in favour of the appellant.

9. The appeal is disposed of in the above terms with consequential benefits, if any.

(Order pronounced in the open court on **01.10.2021**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Sdd