CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.40100 of 2015

(Arising out of Order-in-Appeal No.139/2014 (TRY-ST) dt. 13.10.2014 passed by Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirappalli-620 001)

M/s.Nathan Construction .... **Appellant**
Prop: S. Sridharan
No.3, Viswas Nagar, Tharanallur
Tirhcy 620 008.

VERSUS

The Commissioner of CGST & Central Excise ... **Respondent**
No.1, Williams Road,
Cantonment
Trichy 620 001.

APPEARANCE :

Shri M.N. Bharathi, Advocate, for the Appellant
Shri Harendra Singh Pal, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40563/2024

DATE OF HEARING : 28.05.2024
DATE OF DECISION : 28.05.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is a proprietorship concern owned by Shri S. Sritharan and are registered with the Service tax Commissionerate under the category of Commercial or Industrial Construction Services. On intelligence gathered by the officers of Anti-evasion, Tiruchirapalli Commissionerate, the premises of the appellant was visited by officers of the department and accounts were noted. On scrutiny of documents furnished by the appellant, it was noted that the appellant had rendered services in relation to supply and installation of electrical devices and wiring work for mobile phone towers of telecom companies. It appeared that these services fall under the category of Erection, Commissioning and Installation services for the period upto 1.6.2007. Since the scope of the work involved supply of materials as well as rendition of services the same would fall under the category of "Works Contracts Service" with effect from 01.06.2007 onwards. The appellant though received consideration for such services had not discharged any service tax during the disputed period from 01.10.2005 to 31.12.2010. Show cause notice dt. 08.04.2011 was issued to the appellant proposing to recover service tax under the category of 'Erection, Commissioning and Installation Services' till 01.06.2007 and under the category of 'Works Contracts Services' w.e.f. 01.06.2007 till 31.12.2010. After due process of law, the original authority confirmed the demand of service tax, interest and imposed penalties. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. The Ld. Counsel Shri M.N. Bharathi appeared and argued for the appellant. It is submitted that the demand for the period upto 1.6.2007 cannot sustain for the reason that the Hon'ble Supreme Court in the case of *Commissioner of C.Ex & Cus., Kerala Vs Larsen & Toubro Ltd*. – 2015 (39) S.T.R 913 (SC) has held that the composite contracts involving use of materials as well as rendition of services can be subject to levy of service tax only under the category of 'Works Contracts Service' (WCS). It is prayed that the demand for the period prior to 1.6.2007 may be set aside.

2.2 With regard to the demand under WCS, the learned counsel submitted that the appellant has not collected any service tax from the client. During the relevant period, there was much confusion as to levy of service tax under WCS and litigations were pending before various forums. The issue as to whether the construction services which are composite in nature is subject to levy of service tax under WCS had travelled upto the Apex Court and was settled by the decision in the case of *L&T Ltd.* (supra). The issue being doubtful during the relevant period, the appellant had not paid service tax. The demand is raised invoking the extended period without any basis.

2.3 Ld. Counsel adverted to para-14 of the SCN and submitted that there is no allegation in the SCN that the appellant willfully suppressed facts. It is merely stated that the appellant failed to pay service tax with intention to evade payment of service tax. When there is no allegation in the SCN that the appellant had indulged in any positive act or willful suppression with intent to evade tax, the demand raised invoking the extended period cannot sustain. To support this argument, the learned counsel relied upon the decision of the Hon'ble Apex Court in the case of *Kaur & Singh Vs Collector of Central Excise, New Delhi* – 1997 (94) E.L.T. 289 (SC). The Counsel also relied upon the decision of Hon'ble Supreme Court in *Cosmic Dye Chemical Vs CCE Bombay* – 1995 (75) ELT 721 (SC). It is submitted that the said decision was followed by the Tribunal in the case of *Hospitech Management Consultants Pvt. Ltd. Vs CST New Delhi* – (2023) 7 Centax 134 (Tri.-Del.) to set aside the demand. The Ld. Counsel prayed that the demand raised invoking the extended period may be set aside.

3.1 Ld. A.R Shri Harendra Singh Pal appeared for the Department. The finding in the impugned order was reiterated.

3.2. The Ld. A.R argued that the non-payment of service tax would not have come to light but for the verification done by the department. Therefore, the demand raised invoking the extended period is legal and proper. He prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issues that arise for consideration are -

(1) whether the demand raised under 'Erection, Commissioning or Installation Services' for the period upto 1.6.2007 is legal and proper.

(2) whether the demand raised under WCS for the period from 1.6.2007 till 31.12.2010 is legal and proper.

(3) whether the demand raised invoking the extended period is sustainable or not.

6. The first issue is with regard to the demand of service tax raised for the period upto 1.6.2007 under the category of 'Erection, Commissioning and Installation Services' (ECIS). The definition of ECIS reads as under :

> *"Erection, Commissioning or Installation" means any service provided by a commissioning and installation agency, in relation to,*
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> *(i) erection, commissioning or installation of plant, machinery, equipment or structures whether pre-fabricated or otherwise; or*
>
> *(ii) installation of*
>
> *(a) electrical and electronic devices, including wirings or fittings thereof or*
>
> *(b) plumbing, drain laying or other installations for transport of fluids; or*
>
> *(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or*
>
> *(d) thermal insulation, sound insulation, fire proofing or water proofing; or*
>
> *(e) lift and escalator, fire escape staircases or travelators; or*
>
> *(f) such other similar services;"*

The works executed by the appellant during the relevant period involves composite contracts using materials as well as rendition of services. For this reason, the demand raised under ECIS cannot sustain and the demand has to be made under WCS only. The decision of the Hon'ble Apex Court in the cae of L&T (supra) has held that the demand in the case of construction services which involves ue of materials as well as rendering of services can be made only under WCS and cannot be demanded under any other heading prior to

1.6.2007. For these reasons, the demand raised prior to 1.6.2007 is set aside entirely.

7. The second issue is with regard to the demand of service tax made under WCS. The services rendered by the appellant being composite contracts, the demand raised by the department under WCS is in accordance with law. We do not think that the said demand requires any interference. On merits, this issue is held in favour of the Department and against the appellant.

8. Ld. Counsel has put forward arguments on limitation also. The demand under WCS for the period after 01.06.2007 has been raised invoking the extended period. On perusal of the SCN, apart from a vague allegation that the appellant has not paid service tax so as to evade payment of service tax, there is no allegation of suppression of facts. It is stated in the impugned order that the appellant has not filed returns and not paid any service tax. However, the appellant has obtained service tax registration during the relevant period. The issue as to the payment of service tax under WCS Was under litigation and the matter had travelled upto the Hon'ble Apex Court. The issue was purely interpretational in nature. Further, more in the present case, the SCN does not allege any positive act of suppression of facts against the appellant. The entire figures have been taken from the accounts maintained by the appellant to raise the demand. This itself would establish that the appellant has not indulged in any positive act of suppression.

9. The Hon'ble Apex Court in the case of *Kaur & Singh* (supra) observed as under :

> "**2.** The assessee was issued a notice dated 10th December, 1981, to show cause why a penalty should not be imposed upon it under Rule 9(2) of the Central Excise Rules, 1944, and why Central Excise duty should not be collected from it on goods cleared without payment of the same during the year 1980-81. The notice, it is common ground, was issued after the expiration of the period of six months. It could, therefore, have been issued only upon the basis that the assessee was guilty of fraud or of collusion or of wilful mis-statement or suppression of facts or of contravention of the provisions of the Act or the Rules with intent to evade payment of Excise duty; this because, by the time the show cause notice was issued, Rule 9(2) had been amended to incorporate therein the period specified in Section 11A of the Act. The show cause notice does not set out any particulars in respect of fraud or collusion or wilful mis-statement or suppression of facts or contravention with intention to evade the payment of Excise duty. Not only does it not give any such particulars, it does not even make a bare allegation.
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> **3.** This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See *Collector of Central Excise* v. *H.M.M. Limited,* 1995 (76) E.L.T. 497 and *Raj Bahadur Narayan Singh Sugar Mills Limited* v. *Union of India*, 1996 (88) E.L.T. 24].
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> **4.** The appeal is allowed and the order of the Tribunal under appeal is set aside. The bank guarantee given by the appellant pursuant to the order dated 4th April, 1986, as varied by the order dated 1st September, 1986, shall stand discharged. Any payment or deposit made by the appellant pursuant to these orders shall be refunded."

10. The Hon'ble Supreme Court's decision in the case of *Cosmic Dye Chemical Vs CCE Bombay* – 1995 (75) ELT 721 (SC) was relied upon by the Tribunal in the case of *Hospitech Management Consultants Pvt. Ltd.* (supra) and therefore set aside the demand.

11. After appreciating the facts and following the decisions cited (supra), we are of the considered view that the demand raised under WCS after 01.06.2007 invoking the extended period cannot sustain. The issue on limitation is answered in favour of the appellant and against the Department.

12. From the foregoing, the impugned order is modified as under :

(1) The demand raised for the period upto 1.6.2007 under Erection and Installation Service is set aside entirely.

(2) The demand raised under Works Contracts Service for the period after 01.06.2007 on merits is upheld. However, the demand under WCS after 01.06.2007 for the extended period is set aside entirely. The demand for the normal period is upheld along with interest. However, the penalties are set aside for the normal period for the reasons discussed on the issue of limitation.

13. The appeal is partly allowed with consequential reliefs, if any.

(Order dictated and pronounced in the open court)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)

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