

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH**

Dated: 29/12/2014

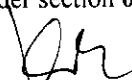
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/54804-54805/2014-CU[DB] dated 27/11/2014

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
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¹ ST/Stay/59903/2013	ST/59282/2013	Bagai Construction 16-a, uday Park NEW DELHI NEW DELHI-110002
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² ST/Stay/59904/2013	ST/59283/2013	Bagai Construction 16-a, uday Park NEW DELHI NEW DELHI-110049
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Name and Address of Respondent

³	C.S.T.-Service Tax - Delhi MG MARG... IP ESTATE, 17- B... IAEA HOUSE... I P ESTATE, DELHI-110002
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Other Appellants and Respondents as per Annexure

Copy To

4 Advocate(s) / Consultant(s):

**V. Lakshmi Kumaran
5, Jangpura Extension,
Link Road, New Delhi,
Delhi-110014**

5 Additional Party's Name & Address :

6 Bar Association, CESTAT, Delhi

7 Director Publications, Customs, Excise. I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

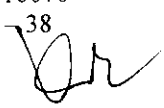
11 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

12 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

13 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

14 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

15 C.D.R. 16 Office Copy 17 Guard File


Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

PRINCIPAL BENCH

**Service Tax Stay Application No.ST/59903 &
59904/2013 in
Service Tax Appeal No.59282 & 59283/2013[CU. DB]**

[Arising out of Order-in-Appeal No. 123 & 124/S.Tax/D-II/13
dated 10.05.2013 passed by the Commissioner (Appeals),
Central Excise, Delhi-II, New Delhi]

For approval and signature:

**HON'BLE MR.JUSTICE G.RAGHURAM, PRESIDENT
HON'BLE MR. R.K.SINGH, MEMBER (TECHNICAL)**

1. Whether Press reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?
 3. Whether Their Lordships wish to see the fair copy of the Order?
 4. Whether Order is to be circulated to the Departmental authorities?
-

M/s. Bagai Construction

...Appellant

Vs.

CST, Delhi

... Respondent

Present for the Appellant : Shri Manish Gaur, Advocate

Present for the Respondent: Shri Govind Dixit, DR

**Coram: HON'BLE MR.JUSTICE G.RAGHURAM, PRESIDENT
HON'BLE MR. R.K.SINGH, MEMBER (TECHNICAL)**

Date of Hearing/Decision: 27.11.2014



2

FINAL ORDER NO. 54804-54805/2014

PER: R.K. SINGH

The appellants filed the stay application along with appeal against orders-in-appeal No.123-124/S.TAX D-II/13 dated 10.05.2013 which upheld the orders in original No. 9/SG/DI B-II 2012 dated 28.09.2012 (in terms of which service tax demand of Rs.2,12,173/- for the period 01.10.2009 to 31.03.2010 was confirmed alongwith interest and penalties under sections 77 and 78 of the Finance Act, 1994 and order in original No.10/SG Div-II/12 dated 28.12.2012 (in terms of which service tax demand of Rs.5,62,410/- for the period 01.04.2007 to 31.03.2008 alongwith interest and penalties under sections 77 and 78 ibid were confirmed).

2. The facts briefly stated are as under:-

The appellants have been providing various construction services in an on-going project and paid service tax prior to 01.06.2007 under commercial or industrial construction services, but from 01.06.2007 changed the classification under works contract service. For the period prior to 01.06.2007 they paid service tax on 33% of the gross amount and after 01.06.2007 they availed of the Works Contract (Composition Scheme for payment of service tax) Rules, 2007. The lower authorities held that the service provided by the appellants was



in the nature of completion and finishing service and, therefore, they were not entitled to benefit of Notification No.1/2006-ST and also that they were not legally allowed to change the classification of the ongoing project w.e.f. 01.06.2007 and consequently were not eligible to avail of the benefit of the Composition Scheme.

3. The appellants have contended that the services rendered by them were not merely completion and finishing services and involved transfer of property in goods. Further with the introduction of the works contract service w.e.f. 01.06.2007, their services were more appropriately classifiable under works contract service making them eligible for the Composition Scheme. They also stated that in any case they were wrongly denied the benefit of Notification No.12/2003-ST and also of the benefit of Rule 2 A of the Service Tax (Determination of Value) Rules, 2006.

4. The Ld. D.R. essentially supported the impugned orders.

5. We have considered the submissions of both sides. We find that essentially the lower adjudicating authorities have relied upon the CBEC Circular No.98/1/2008-ST dated 04.01.2008 which *interalia* held that in respect of ongoing projects under which the services had been classified under Errection, Commissioning or Installation Services (ECIS), Commercial or Industrial Construction Services (CICS) or Construction of Complex Service (CCS) as the case may be,



the appellants were ~~is~~ not entitled to change the classification for the purpose of payment of service tax on or after 01.06.2007 and they were not entitled to avail of the Composition Scheme.

6. In this regard, it needs to be appreciated that the services were being rendered under ongoing projects on a continuous basis. It was not that the entire service was rendered on the date of entering into the contract. Thus, the classification of the services has to be done in accordance with the provisions of section 65 (105) ibid and with the introduction of the new service w.e.f. 01.06.2007, if the service got more appropriately covered under the scope of works contract service, it will have to be classified there-under in terms of Section 65 A of the Finance Act 1994. To that extent the Board's Circular is devoid of correct appreciation of the legal provisions. It is claimed in the orders of the lower authorities that the said Board Circular has been upheld by the judgment of Andhra Pradesh High Court in the case of Nagarjuna Construction Company vs. Govt. of India - 2010 (19) STR 321 (A.P.). We have perused the said judgment of Andhra Pradesh High Court and find that nowhere the High Court has said that the classification of ongoing services cannot be changed to works contract service, if the service was more appropriately classified there-under; what the High Court has, however, upheld is the Board's clarification that in respect of



the ongoing projects where service tax had been paid earlier (prior to 01.06.2007), the benefit of the Composition Scheme is not available. Thus, the lower authorities are correct in holding that for such ongoing project the appellants were not eligible to avail of the Composition Scheme. The appellants have contended that they have all the required evidence to be eligible for the benefit of Notification No.12/2003 or the Provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Needless to say, however, that the onus remains on the appellants to demonstrate that they satisfy the conditions/requirements for the purpose of claiming the said benefit.

7. In the light of the foregoing, waiving the requirement of pre-deposit, we allow the appeals by way of remand to the original adjudicating authority with the direction that (i) the appellants should be allowed to classify their services as works contract service even in respect of ongoing projects w.e.f. 01.06.2007, provided that the services are more specifically covered there-under and not to deny such classification only on the ground that prior to 01.06.2007 in respect of some ongoing contracts the classification was elsewhere and (ii) thereafter for the relevant periods (i.e. prior to 01.06.2007 and w.e.f. 01.06.2007) the appellants should be allowed to make a claim for the benefit of any applicable notification (including Notification No.12/2003-ST) or the Provisions of Rule 2A of



the Service Tax (Determination of Value) Rules, 2006 and produce the necessary evidence in support of their claim. The appellants shall submit such evidence within a period of 4 weeks from the date of receipt of this order. The adjudicating authority shall thereafter pass the denovo order after affording the appellants an opportunity of being heard.



(JUSTICE G.RAGHURAM)
PRESIDENT



(R.K. SINGH)
MEMBER (TECHNICAL)

Anita