

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

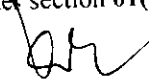
Dated: 31/12/2014

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/54802/2014-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
1 ST/Stay/60961/2013	ST/60105/2013	Ahluwalia Contrats I Ptd A-177 Pkhla Phase-i NEW DELHI NEW DELHI

Name and Address of
Respondent

2 C.C.-Delhi - I
GATE NO.2,C R BUILDING...I
P ESTATE,
DELHI-110109

Copy To

3 Advocate(s) / Consultant(s):

S. K. Sarwal & Co.
43, 1ST FLOOR, BHARAT
NAGAR,
NEW FRIENDS COLONY,
NEW DELHI-110065

4 Additional Party's Name & Address :

5 Bar Association, CESTAT, Delhi

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

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

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

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

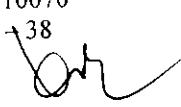
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

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

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

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


Asstt. Registrar(CUSTOMS Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

Date of Hearing : 27.11.2014

**No. ST/Stay/60961/2013 and ST/60105/2013-
CU(DB)**

[Arising out of Order-in-Original No. 16/ST/COMMR/DM/RTK/2013-14 dated 31.5.2013 passed by the Commissioner (Appeals), Central Excise, Rohtak]

For Approval & Signature :

**Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would 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?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Ahluwalia Contracts (India) Ltd.

Appellant

Vs.

CST, New Delhi

Respondent

Appearance:

Shri S.K. Sarwal, Advocate - for the Appellant

Ms. Suchitra Sharma, A.R. - for the Respondent
Shri Amresh Jain, A.R.

**Coram : Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

F. Order No. 54802/2014 Dated 27.11.2014

Per R.K. Singh :

The appellants have filed the stay application along with appeal against Order-in-Original No.16/ST/COMMR/DM/RTK/2013-14 dated 31.5.2013 in terms of which service tax demand of



Rs.30,59,07,287/- for the period April, 2010 to March, 2011 was confirmed along with interest, Cenvat credit amounting to Rs.49,25,935/- was disallowed and ordered to be recovered and the *suo moto* adjustment of service tax amounting to Rs.2,60,910/- was also disallowed. Penalties under Sections 76 and 77 were also imposed.

2. The appellants had been providing "Commercial or Industrial Construction Service" (CICS) and "Construction of Complex Service" (CCS) and availed of the benefit of Notification No.1/2006-ST claiming abatement of 67% and while availing of the Composition Scheme to pay service tax under Works Contract Service they had utilised Cenvat credit on inputs and input services. Further they also did not pay service tax on the construction services i.e., CICS and CCS rendered to DDA, BSNL and NDMC, Reliance, Dr. B.L Kapur Memorial Hospital project and Jassaram Hospital project on the ground that these were not commercial or industrial constructions and the construction of flats for DDA being for DDA's use were not liable to service tax under construction of complex service. The service tax (except the one related to DDA) was also not paid on the Karnataka Project and NSG Hqrs. Delhi on the ground that they were government/non-commercial project. The adjudicating authority disallowed the benefit of Notification No. 15/2004-ST,/18/2005-ST/



1/2006-ST on the ground that the value of the free supplies had not been included in the value for the purpose of claiming the abatement. The composition scheme benefit was disallowed on the ground that they had started taking the benefit of composition scheme in respect of projects which were on-going before 01.06.2007 and also because they had taken/utilised Cenvat credit on inputs and input services. As regards the construction service rendered to BSNL, NDMC, Reliance and Dr. B.L. Kapur Memorial Hospital, the adjudicating authority held that the buildings qualified to be commercial or industrial construction. As regards construction of residential buildings for DDA, as they were not meant for self use (i.e. for use of DDA or its employees) the service tax was leviable, held the adjudicating authority. The adjudicating authority also noted that the appellants had availed of the Cenvat credit amounting to Rs.49,25,935/- on inputs, input services and credit received from input service distributor and found "that the party has wrongly availed and utilised this inadmissible Cenvat credit towards discharging their service tax liability under Works Contract Service..." and so disallowed the said Cenvat credit. An amount of Rs.2,60,910/- which was *suo moto* adjusted by the appellants has been held to have been so done in violation of Rule 6(3A)(a) and 6(4)(B)(iii) of the Service Tax Rules, 2004 and so the said adjustment has also been disallowed by the adjudicating authority.



3. The appellants have contended that the denial of 67% abatement under Notifications No. 1/2006-ST on the ground that the value of free supplies had not been included is untenable in the light of the judgement of the Larger Bench in the case of *Bhayana Builders (P) Ltd. Vs. CST, Delhi [2013 (32) STR 49(Tri. - LB)]*. As regards the Cenvat credit of Rs.49,25,935/- it has been disallowed in a rather summary manner and that they have not taken any credit on inputs. As regards the buildings constructed for DDA, NDMC, Reliance, Dr. B.L. Kapur Memorial Hospital project and Jassaram Hospital project, the appellants stated that these being non-commercial constructions or constructions for charitable organisations or for DDA's residential purposes were not liable to service tax.

4. We have considered the submissions of both the sides. As regards disallowance of abatement of 67% under Notification Nos.15/2004-ST, 18/2005-ST and 1/2006-ST on the ground that the value of free supplies was not included in the gross amount charged, the Larger Bench of the Tribunal in the case of *Bhayana Builders, supra* has held that the value of free supplies by the service recipient to service provider is not required to be included in the gross



amount charged for the purpose of availing the benefit of the aforesaid Notifications.

5. Coming to the contentions of the appellants that from 01.06.2007, they only took credit of input services and paid service tax under composition scheme, which has been denied on the ground that they started availing of the compositional scheme for on-going contracts, we find that in the Show Cause Notice it is mentioned that they started availing of the input service credit with effect from 01.06.2007 (para 16 of the Show Cause Notice) while in the adjudication order it is stated that they took CENVAT credit of input and input services. In this regard, we find that for 67% abatement under the aforesaid Notifications (except Notification No.1/2006-ST) only credit of input and capital goods is not permissible. Thus there is variance between the Show Cause Notice and the adjudication order with regard to whether the appellants took CENVAT credit of only input services or both inputs and input services (and also capital goods) which needs to be reconciled. The adjudicating authority has stated that for the on-going projects, the classification could not be changed to Works Contract service with effect from 01.06.2007. In this regard, it is to state that the classification of a service depends upon its nature *vis-a-vis* the definitions of various services contained in Section 65 of the Finance Act, 1994. Thus, there is absolutely no



legal bar, indeed it is legally required, to re-classify the service if it gets more specifically cover under the new or newly carved out service. Thus, if the service rendered by the appellants more specifically gets cover under the definition "Works Contract" service w.e.f. 01.06.2007 then it will have to be classified thereunder. But even with the classification of the impugned service under works contract service w.e.f. 01.06.2007, the appellants will not be eligible for the compositional scheme to pay service tax under works contract service in respect of on-going projects for which service tax had been paid during the period prior to 01.06.2007. It has been so held upto the level of the Supreme Court in the case of *Nagarjuna Construction Co. Ltd. Vs. GoI [2012 (028) STR 0561 SC]*. However, that would not disqualify the appellants from claiming the benefit under Rule 2A of Service Tax (Determination of Value) Rules, 2006 or any other exemption Notification provided they satisfy the conditions and establish their eligibility.

6. As regards the contentions of the appellants that the flats made for Delhi Development Authority (DDA) were to be treated as meant for DDA's personal use, this contention is totally untenable because these flats were allotted to individuals and not meant for DDA or for its employees. Therefore, the service rendered with regard to construction of flats for DDA is taxable under CCS. The buildings



constructed for BSNL, Reliance or Municipal Corporation clearly satisfy the definition of "Commercial or Industrial Construction Service" (CICS). BSNL is a commercial organisation as is Reliance. Even the Municipal Corporation buildings are not outside the purview of commercial or industrial construction; indeed, many of its buildings are rented to various organisations. A claim has been made that the buildings made for the said hospitals is outside the purview of CICS on the ground that they were made for the charitable organisations. In this regard, there is no ambiguity that charitable organisation is not prevented from carrying out commercial activity; the only condition is that the profit so generated has to flow back into the organisation towards fulfilment of its charitable purposes. Thus, merely because the hospitals were constructed for the charitable organisations do not make the hospitals *per se* non-commercial. Indeed these hospitals are not non-commercial and charge the patients for the medical services.

7. It is seen that while disallowing the credit of Rs.49,25,935/-, the adjudicating authority has merely stated in para 91 of the adjudication order as under:-

"It is observed that the party has availed Cenvat Credit of inputs, Input Service and credit received from Input Service Distributor amounting to Rs.49,25,935/- (Rupees Forty Nine



Lakhs Twenty Five Thousand Nine Hundred Thirty Five only). I find that the party has wrongly availed and utilised this inadmissible Cenvat Credit towards discharging their Service Tax liability under Works Contract Service. The plea that they had a bonafide belief is misplaced. Hence, it is concluded that the Noticee had contravened the said provisions with the intention not to pay Service Tax at the appropriate time. Thus, the Show Cause Notice in the instance case, is correctly issued for demand and recovery of the said Cenvat Credit by invoking the provisions of Section 68 & 73 of the said Act read with Rule 6(1) & (2) of Service Tax Rules, 1994 ibid for contravention of the said provisions of the said Act and the Rules ibid with intent to evade payment of the said Service Tax."

It is evident from the above para that adjudicating authority has simply declared the impugned credit to be inadmissible without analysing as to how that is so.

8. While disallowing *suo moto* adjustment of Rs.2,60,910/-, the adjudicating authority has observed as under:-

"The party has made a suo moto adjustments of Rs.2,60,910/- (Rupees Two Lakhs Sixty Thousand Nine Hundred Ten only) during the months of April 2010 to Sept-2010 and Oct 2010 to March-2011 in violation of Rule 6(3A)(a) & 6(4)(B) (iii) of the Service Tax Rules, 2004. Thus, the Show Cause Notice in the instant case, is correctly issued for demand and recovery of said adjustment of Service Tax by invoking the provisions of Section 68 & 73 of the said Act read with Rule 6(1) & (2) of

Service Tax Rules, 1994 ibid for contravention of the said provisions of the said Act and the Rules ibid with intent to evade payment of the said Service Tax."

We notice that there is no elucidation as to how the said *suo moto* adjustment is in violation of the said Service Tax Rules.

9. In the light of the foregoing, we set aside the impugned order and remit the matter (waiving the requirement of pre-deposit) to the adjudicating authority for *de novo* adjudication *inter alia* on the following terms:-

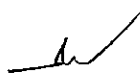
- i. Applicability of 67% abatement under Notification Nos.15/2004-ST, 18/2005-ST and 1/2006-ST should be reconsidered in the light of the decision of the Tribunal in the case of Bhayana Builders, *supra*.
- ii. While the composition scheme notified under Notification No.32/2007 is not available to the appellants in respect of on-going projects which commenced prior to 01.06.2007 and on which service tax was paid prior to that date in the wake of the decision in the case of Nagarjuna Constructions Co. Ltd., *supra*, the appellants should be allowed to make a claim for the benefit of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 or any other

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exemption Notification and if such a claim is made, the benefit claimed should be extended if the appellants are found to be eligible therefor.

- iii. As regards impugned credit of Rs.49,25,935/-, the issue should be reconsidered and clear reasons for its inadmissibility (or otherwise) should be recorded.
- iv. As regards disallowing of *suo moto* adjustment of Rs.2,60,910/- a clear finding is to be recorded as to how such adjustment is in violation of Rules 6(3)(A) and 4B of the Service Tax (Determination of Value) Rules, 2006, if it is so found.

11. Needless to say that before *de novo* adjudication, the appellant is to be given an opportunity of being heard.


(Justice G. Raghuram)
President


(R.K. Singh)
Member (Technical)

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