

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX Appeal No. 50892 OF 2015

(Arising out of Order in Appeal No. JAI-EXCUS-001-COM-68-14-15 dated 29.12.2014 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur)

M/s. Ram Sewak Tiwari

A-3, Sunder Vihar,
Ram Nagar Extension, Sodala,
Jaipur

...Appellant

Versus

**Commissioner of Customs,
Central Excise & Central GST, Jaipur-I**

NCR Building,
C-Scheme, Jaipur-I

....Respondent

APPEARANCE:

Mr. Alok Kumar Kothari, Advocate for the appellant

Dr. Radhe Tallo, Authorised Representative for the Respondent

**CORAM : HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing: **24.3.2022**

Date of Decision: **10.05.2022**

FINAL ORDER No. 50405/2022

RACHNA GUPTA

1. The facts pertaining to the present appeal are that appellant M/s. Ram Sewak Tiwari is holding a service tax registration under the category of Maintenance or Repair Service, Erection, Commissioning and Installation Service and Works Contract Services. The Department observed that the appellant was

engaged in providing Erection, Commissioning and Installation Services relating to petrol pumps for Indian Oil Corporation (IOCL hereinafter) and have received the payment of Rs. 5,32,33,197/- from IOCL for the period from 27.8.2008 to 31.3.2013 on which the service tax of Rs.56,17,768/- was payable. But from the ST-3 returns of the appellant for the period August 2008 to March 2013 it was apparent that appellant has not paid the service tax. Accordingly, vide show cause notice no. 2844 dated 24.10.2013, the service tax of Rs. 57,17,768/- was proposed to be recovered from the appellant along with interest. The penalty was also proposed to be imposed on the appellant. The said proposal was initially confirmed vide order in original no. 68-14-15 dated 29.12.2014 Commissioner (Appeal) vide Order-in-Appeal number 001-68-14-15 dated 29.12.2014 partly allowed the appeal filed before him. The liability to pay service tax was confirmed, however, was held to be re-calculated after allowing the abatement of 67% in terms of the notification no. 1/2006 dated 1.3.2006 confining the demand of Rs.18,72,979/-. Penalty under section 77 and 78 was confirmed. However, the one under section 76 was waived of in terms of section 80 of the Service Tax Act. Still being aggrieved of the said order in appeal that the appellant has approached this Tribunal vide impugned appeal.

2. We have heard Mr. Alok Kumar Kothari, learned Advocate for the appellant and Dr. Radhe Tallo, Authorised representative for the respondent.

3. It is mentioned on behalf of the appellant that the issue involved in the present appeal stands already decided in favour of the appellant in the earlier proceedings against him for the period 2003-2008 vide final order dated 10.11.2017. Reliance has been placed on the decision of the Mumbai CESAT in the case of **Ajit India (P) Ltd. V Comm. Of Service Tax reported as 2018 (19) GSTL 659** and decision of this Tribunal Principal Bench in the case of **Bhawana Motors V Comm. Of Central Excise, Jaipur reported as 2012 (24) taxmann.com 92 (New Delhi CESTAT)** has been relied upon. Further, it is submitted that since the matter was already in the knowledge of the Department since the year 2003 that the extended period of limitation has wrongly been invoked. The order under challenge is prayed to be set aside and appeal is prayed to be allowed.

4. To rebut these submissions, learned DR has submitted that the services rendered by the appellant are that of Erection, Commissioning and Installation Services. It is submitted that appellant had not produced any documentary proof as that of VAT returns, in absence whereof, the nature of services has rightly been denied to be of that of Work Contract Service as is otherwise emphasised by the appellant. The abetment benefit under the notification no. 1/2006 has also been dealt with. However, the final order of 10.11.2017 has been acknowledged. While denying any infirmity in the order under challenge, appeal is prayed to be dismissed.

5. After hearing the rival contentions and perusing the records we observe and hold as follows:

The issue in the matter is about the classification as to: whether the services rendered by the appellant are that of Erection, Commissioning and Installation or are of the nature of Works Contract Services.

6. The appellant admittedly is registered for providing both above mentioned kinds of services. It is apparent from the impugned show cause notice that there has been the mention of definition of works contract as defined under section 65 B (54) of Service Tax Act. Still the services provided by appellant were alleged to be the services of Erection, Commissioning and Installation. The Adjudicating authority below have confirmed the said proposal by holding as follows:

"It is stated that the appellant has not provided copy of contract in respect of service provided at the three locations namely Losal, Kothon and Newai and therefore, I have no option but to classify the same under Erection, Commissioning and Installation service as alleged in the show cause notice and confirmed vide impugned order."

7. Thus the only reason for confirming the impugned demand is the non production of the requisite documents by the appellant. From the record, it is apparent that service tax returns have repeatedly been filed by the appellant for the period from 2008-09 to 2012-13, specifically mentioning the nature of services as that of works contract service. The appellant vide letter dated 9.7.2009 and 22.6.2011 has informed the Superintendent Range II Jaipur about opting to pay tax under Rule 3 of Work Contract

(Composition Scheme for Payment of Service Tax) Rules 2007 along with an undertaking for not taking the Cenvat Credit on duties or cess paid on the inputs used in or in relation to the said work contract. It is not the case of the Department that the said undertaking has been violated by the appellant. Further, we observe that it has specifically been mentioned since the stage of replying to the show cause notice till filing of the appeal before this Tribunal that the main activity undertaken by the appellants was appellants was installation of tanks, dispensing pumps and other equipments for setting up new petrol pump / retail outlet. The appellant had worked under various contracts where in the appellant executed various civil work and had installed the tanks, dispensing pumps. Every site of petrol pump is not necessarily to be completed by one contractor but various works are allocated to different contractor at one time. Further, even if the entire work is to be completed by single contractor it involves different nature of works which includes:

(a) Erection, Commissioning Or Installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators, or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects

8. Department has produced no document to falsify this submission of the appellant. From the appeal filed herein before this Tribunal, it is observed that the non submission of the requisite documents as that of contract, etc. was because of all documents being taken in possession by the Department at the time when anti-evasion had resumed the work contract vide resumption memo dated 23.9.2013 (the documents under the name of panchnama dated 23.9.2013 is found annexed in the file). From the said submission, and in view of the said document it is clear that work contracts, for want whereof the demand has been confirmed by Commissioner (A), were not in possession of appellant since September 2013, rather had been in Department's own possession. The production thereof was not possible for the appellant, whereas the Commissioner (A) had all opportunity to summon the said record instead of confirming the proposed demand for want of the said documents. From the submissions of

the appellant about the nature of the contract, and in absence of any evidence to falsify the same, we are of the opinion that the contracts awarded to the appellant, were in the nature of works contract services. Section 65B (54) of Service Tax Act, defines work contract as follows:

"Works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, improvement, renovation, alteration of any building or structure on land or for carrying out any other similar activity or a part thereof in relation to any building or structure on land"

9. Since the contracts are mentioned to be inclusive of installation of tanks, pumps / equipments, etc. the contracts are held to be in the nature of works contract only.

10. In appellants own case titled as **Ram Sewak Tiwari vs. CCE Service Tax Appeal no. 1367/2011 and 1189/2011** as was decided vide **final order no. 58096-58097/2017**, the similar contracts with the similar allegations as that of the present show cause notice were adjudicated and the nature of contracts was held as composite work orders for constructing petrol pumps / pump installations, etc. it was held in the said decision as follows:

"6. We note that similar type of contracts with reference to setting up of retail petrol pumps have come up on many occasions for decision before the Tribunal. It has been consistently held that these contracts are to be held liable for service tax under works contract service only. Considering the nature of contract in the present case also, we hold that these are to be taxed as works contract service w.e.f. 1.6.2007. We note that the impugned order split up the single contract only based on the bill rates and the detailed invoices raised. We find such bifurcation is not sustainable. The appellant carried out the composite work order though the bills are raised based on the completion of the work category-wise giving different account codes to various types of works. This by itself cannot be considered as different services provided to the clients. As such, we note that the appellants shall be liable to service tax only under works contract service w.e.f. 1.6.2007 in terms of the ratio laid down by the Hon'ble

Supreme Court in the case of Larsen & Toubro Ltd. reported in 2015 (39) S.T.R. 913 (SC) .

7. Regarding the abatement or composition available to the appellant, the same requires verification with supporting data to be submitted by the appellant. We find that in similar situation involving same set of facts, the Tribunal has set aside the penalties imposed on the appellant by invoking provisions of Section 80 of the Finance Act. In this connection, we refer to a recent decision in Final Order No.55921/2017 dated 18.08.2017 of the Tribunal.

8. In view of the above discussion and analysis, we hold that the appellants shall be liable to service tax under works contract service w.e.f. 1.6.2007. The quantification of their liability shall be determined by the Original Authority after examining the supporting documents. The abatement /composition claimed by the appellant shall be decided based on the evidences provided by the appellant. Penalties imposed are waived in terms of Section 80 of the Act. The demand shall be limited to the normal period in terms of Section 73 of the Act. The appeals by Revenue as well as assessee are disposed of in the above terms."

11. In another order of this Tribunal in the **Service Tax Appeal no. 60492/2013 titled as Satish Kumar and Co. vs. CCE & ST Jaipur-I** as was decided vide final order no. **52265/2018 dated 20.6.2018** it was held as follows:

"6. After hearing both sides and perusal of record we note that during the period of dispute i.e. 2006-11, the appellant has undertaken construction activity for various customers. It can be stated that the services rendered in the form of civil construction involves supply of various goods such as steel, cement etc which get consumed in the process of providing construction service. Such activities are evidently in the nature of Works Contract. The „Works Contract Service“ was included in the statute under Section 65 (105) (zzzza) w.e.f. 01/06/2007. In the wake of authoritative pronouncement by the Apex Court in the case of L&T Ltd. (supra), no Service Tax can be levied for the period up to 31/05/2007. Consequently, we set aside the demand of Service Tax up to 31/05/2007 in respect of all the civil contracts executed by the appellant.

7. We note that the various contracts executed by the appellant have been classified under „Commercial or Industrial Service“, „Construction of Complex Service“ or under „Works Contract Service“ (WCS). In the light of the L&T case, all such contracts are liable to be classified only under the category of „Works Contract Service“ and liability for Service Tax arises only w.e.f. 01/06/2007. We are of the view that Adjudicating Authority, at the time of passing the impugned order did not have the benefit of the decision of the Apex Court. Hence we consider it necessary to set aside the impugned order and remand the matter to the Adjudicating Authority for de novo decision in the light of the L&T case but there can be no Service Tax demand for the period upto 31/05/2007. The appellant has

claimed that even under WCS, they will be entitled to payment of Service Tax under the WCS Composition Scheme. On fulfillment of the conditions laid down in the above Scheme, the Tax liability of the appellant will need to be reworked and demanded after extending the benefit of the Composition Scheme for the period w.e.f. 01/06/2007. Non-fulfillment of exercising an option for payment of tax under the Composition Scheme cannot be held as a reason for denial of such concession as has been held by the Tribunal in the case of ABL Infrastructure Pvt. Ltd. vs. CCE, Nashik reported in 2015 (38) S.T.R. 1185 (Tri. Mumbai) and Bridge and Roof Co. (India) Ltd. vs. CCE, Jaipur reported in 2012 (27) S.T.R. 406 (Tri- Del.). Accordingly, we hold that subject to fulfillment of the conditions the service tax liability of the appellants is to be re-calculated based on the Composition Scheme."

12. In view of the entire above discussion, we are of the opinion that the services provided by the appellant since involve the goods also which are leviable to sales tax / VAT, the contracts in question are definitely in the nature of works contract. Even if those being the contracts for Erection, Commissioning and Installation service. Since, the property in goods is also involved in rendering the said services, the appellant was entitled for the benefit of abatement of 67% under notification no. 19 of 2013 dated 21.8.2003. The appellant was entitled for exemption of 67% or the gross amount charged as the same was including the value of the pumps, plants and other equipments, etc. Seen from any angle, there appears no liability of the appellant as was proposed vide the impugned show cause notice and as has been confirmed by Commissioner (A) who no doubt has been given the benefit of 67% abatement. The findings of Commissioner (Appeals) therefore are opined to rather be contradictory in nature.

13. The question of invoking the extended period of limitation also does not arise in the present case as apparently and admittedly appellant is a registered service provider and was

regularly submitting the ST-3 returns with no objection by the Department except for the impugned show cause notice, No suppression of facts or malafide intent to evade duty can be attributed to the appellant. Hence, no occasion for the Department to invoke the proviso of Section 73 of the Finance Act.

14. In view of the entire above discussion, the order under challenge is hereby set aside. Appeal stands allowed.

(Order pronounced in the open court on 10.05.2022)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Bhanu