CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50397 OF 2017

(Arising out of Order-in-Appeal No. 138/ST/DLH/2016-17 dated 29.11.2016 passed by the Commissioner (Appeals-1), New Delhi)

M/s. Nirmal Engineers & Contractors **...Appellant**
A-8, Defence Colony,
New Delhi

Versus

The Commissioner (Appeals-I) **...Respondent**
Service Tax Commissionerate, Appeal-I Officer, Delhi
Room No. 208, 17B, IAEA House, M.G. Marg,
IP Estate, New Delhi-110002

APPEARANCE:

Shri A.K. Batra and Shri Akashdeep, Advocates for the appellant.
Shri Rajeev Kapoor, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 01.03.2023
Date of Decision: 10.07.2023

FINAL ORDER NO. 50855/2023

JUSTICE DILIP GUPTA:

M/s. Nirmal Engineers & Contractors[1], a proprietorship concern, has filed this appeal to assail the order dated 29.11.2016 passed by the Commissioner (Appeals-I), Service Tax, New Delhi [2] . The Commissioner has confirmed the demand of service tax under the proviso to section 73(1) of the Finance Act 1994[3] with interest and penalty and the amount of Rs. 4,62,212/- deposited by the appellant has also been appropriated.

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1. **the appellant**
2. **the Commissioner**
3. **the Finance Act**

2. The appellant, as a sub-contractor, was providing civil construction services to M/s. Larsen & Toubro Limited[4]. During the period in dispute from 2007-08 to 2011-12, the appellant was awarded miscellaneous civil construction works by L&T by work-orders which involved supply of goods and for fixing and finishing of tiles/granite/marbles. According to the appellant, as these work orders awarded by L&T comprise transfer of material as well as rendition of services, the same being composite in nature would be 'works contract services' and the appellant could pay service tax after availing the benefit of the composition scheme issued by a notification dated 22.05.2007. The appellant obtained service tax registration on 26.10.2012 for payment of service tax and paid service tax amounting to Rs. 4,62,212/- with interest amounting to Rs. 2,49,147/- after availing the benefit of the composition scheme.

3. An audit of L&T was conducted from 08.05.2009 to 12.05.2009 for the financial years 2007-08 to 2008-09. During the course of audit, it was observed that the appellant had rendered various construction activities to L&T which would be classifiable as 'commercial or industrial construction[5] and 'works contract services'[6].

4. A show cause notice dated 23.10.2012 was issued to the appellant proposing service tax demand of Rs. 16,72,645/- with interest under section 75 and penalties under sections 76, 77 & 78 of the Finance Act. The show cause notice also invoked the provisions of section 72 of the Finance Act while proposing the said demand. The summary of the demand proposed in the show cause notice is as follows:

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4. L & T
5. CICS
6. WCS

Period (F.Y.)	Gross Amount	ST Rate	Service Tax Payable
2007-08	11,86,431	12.36%	1,46,643
2008-09	17,79,647	12.36%	2,19,964
2009-10	26,69,470	10.30%	2,74,955
2010-11	40,04,205	10.30%	4,12,433
2011-12	60,06,307	10.30%	6,18,650

5. The appellant filed a reply to the show cause notice and stated that the department while proposing the service tax demand failed to specify the taxable category of services provided by the appellant under section 65(105) of the Finance Act. The appellant also contended that the extended period of limitation could not have been invoked.

6. The Additional Commissioner, by order dated 08.06.2016, confirmed the service tax demand amounting to Rs. 16,72,645/- with interest and penalties. The relevant findings of the Commissioner are as follows:

> "46. On perusal of the above mentioned documents I find that no work order pertaining to M/s. L&T Ltd. were supplied transaction with which are mooted here. These contract/work orders are also found by and large pertaining to the labour work and normal wear and tear in doing the finishing work. Thus, in absence of any documentary evidence it cannot be said that the Noticee rendered their services with material and tax should be levied under composite scheme.
>
> 48. Therefore, in absence of any concrete evidence the composite rate of tax scheme under work contract cannot be extended to the Noticee is my opinion.

7. The appellant filed an appeal before Commissioner (Appeals) contending that the adjudicating authority failed to give clear findings as to whether the services provided by the appellant would be

classifiable under WCS or CICS and the order made no attempt to determine the correct classification of the service provided by the appellant on 17.08.2016 but the contentions were rejected by the Commissioner (Appeals-I) by order dated 29.11.2016. The relevant findings recorded by the Commissioner (Appeals) are as follows:

> "8. …… I am of the opinion that under any given circumstances, as no option was exercised and the project in question is unable to throw light of any linkage between the amount received therein vis-à-vis the actual receipts shown in the balance Sheets, their effort of categorization of services under Work Contract Service cannot be allowed. Besides, the appellant have remained silent on the issue whether prior to the introduction of the composite scheme they were not engaged in similar activities specially when the status contract is defined as a running contract and it can be a part of the major work for which the work could have been started much earlier. The other work orders submitted by the party again do not justify as to how these are connected to Works Contract Service. Hence, the finding of the impugned order that the appellants were rendering taxable services of 'Commercial or Industrial Construction Service' seems to be correct and as such the question of classifying the said service under any other head does not arise. I therefore do not feel any intervene in the finding of the impugned order with regard to classification."

8. Shri A.K. Batra, learned counsel for the appellant assisted by Shri Akashdeep made the following submissions:

(i) The department has vaguely proposed demand without clearly specifying whether the services provided by the appellant falls under the category of 'WCS' or 'CICS'. Hence, the same is liable to be dropped;

(ii) The activity of the appellant clearly falls under the definition of 'Works Contract Services' however, the

department has erroneously confirmed the demand under the category of 'CICS';

(iii) The appellant has correctly availed the benefit of works contract composition scheme, 2007 for discharging its service tax liability on works contract services post 01.06.2007;

(iv) Even otherwise the appellant is eligible to avail benefit of rule 2A of the Service Tax (Department of Value) Rules, 2006;

(v) The impugned order failed to exclude the value of goods and material involved in the said contract from the value of taxable services;

(vi) The appellant is also eligible for availing the benefit of notification dated 20.06.2003 as it has all the documentary evidences for claiming the said exemption;

(vii) The demand proposed beyond 5 years liable to be dropped; and

(viii) The extended period would not have been invoked in the facts and circumstances of the case.

9. Shri Rajeev Kapoor, learned authorized representative appearing for the department, however, supported the impugned order and contended that it does not call for any interference in this appeal.

10. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

11. The first contention advanced by the learned counsel for the appellant is that the show cause notice was vague and did not even

specify whether the services provided by the appellant would fall under the category of WCS or CICS.

12. To examine this contention it would be appropriate to refer to the show cause notice dated 23.10.2012 that was issued to the appellant. The show cause notice after mentioning that the appellant as a sub-contractor had provided taxable services to L&T in respect of construction activities stated that the service could be classified as CICS or WCS. It thereafter mentioned:

> "Whereas as per audit report taxable services provided by the assessee during the period 2007-2008 amounted to Rs. 11,86,431/-. On this amount the assessee was liable to pay service tax amounting to Rs. 1,42,372/-, education cess amounting to Rs. 2,847/- and secondary education cess amounting to Rs. 1,424/- (collectively amounting to Rs. 1,46,643/- as per detail in Annexure 'A' attached."

13. It is, therefore, clear that the demand was proposed without specifying a particular taxable category in terms of section 65(105) of the Finance Act. The confirmation of demand on the basis of the aforesaid show cause notice, therefore, is not justified. In this connection reliance can be placed on the decision of the Delhi High Court in **Principal Commissioner, Service Tax, Delhi** vs. **Shubham Electricals**[7], wherein it was held:

> "6. As rightly pointed out by the CESTAT, the Department itself is unclear whether the service performed by the respondent was "management, maintenance or repair service" or "Erection, Installation and Commissioning Services". This vagueness goes to root of the matter. Therefore, the decision in Commissioner of

7. 2016 (42) S.T.R. J312 (Del.)

> Service Tax v. ITC Ltd. - 2014 (36) S.T.R. 481 (Del.) relied upon by Mr. Rahul Kaushik, learned counsel for the Department, is distinguishable on facts. Although, Mr. Kaushik referred to certain portions of the SCN as well as the Adjudication Order to make good the plea neither was vague, the Court is not inclined to agree. The appeal and the pending application are, accordingly, dismissed."

14. On a perusal of sample work orders submitted by the appellant it also transpires that work orders include the charge supply of goods and fixing and finishing of tiles/granite/marbles by L&T. The activity undertaken by the appellant, being composite in nature, shall, therefore, have to be classified as WCS for the reason that the Supreme Court in **L & T cited as 2015 (39) STR 913 (S.C.)** held that the composite contracts are rightly classifiable under 'work contract services'.

15. It has now to be examined whether the appellant has correctly availed the benefit of the composition scheme for discharging service tax liability on WCS for the period after 01.06.2007.

16. It has been contended by learned counsel for the appellant that because of ignorance the appellant had not obtained service tax registration, but after the issuance of the show cause notice the appellant consulted a Chartered Accountant who informed that since the services provided by the appellant are taxable it would have to discharge its service tax liability. The appellant was also informed that since the work orders are composite in nature the appellant would be eligible to avail the benefit of the composite scheme. It is, thereafter, that the appellant discharged service tax liability of Rs. 04,62,212/- with interest after availing the benefit of the scheme.

17. The impugned order holds that the option of paying tax under the composition scheme has to be exercised before payment of service tax.

18. Mere non-intimation about the option for paying service tax under the composition scheme is a procedural lapse and substantial benefit cannot be denied. In this connection, it would be pertinent to refer the decision of the Tribunal in **M/s. Areva T&D India Limited** vs. **Commissioner of Central Excise & Service Tax**[8], wherein it was held that non-intimation of availing the composition scheme is a condonable lapse and the payment of service tax under the composition scheme cannot be denied for WCS. The relevant observations of the Tribunal are as follows:

> "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.
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> 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.

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8. 2022 (59) G.S.T.L. 80 (Tri.-Chennai)

> 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.
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> 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."

19. The finding to the contrary record in the impugned order, therefore, cannot be sustained.

20. Learned counsel for the appellant also submitted that not only has the demand been confirmed for a period beyond 5 years but even otherwise the extended period of limitation could not have been invoked in the facts and circumstances of the case.

21. To examine this contention it would be necessary to bifurcate the demand into various periods and it is as follows:

Period Covered	Date of filling of Service Tax Return	Date up to which show cause notice can be served	Remarks
01.04.07 to 30.09.07	25.10.2007	25.04.2009	Beyond 5 years
01.10.07 to 31.03.08	25.04.2008	25.10.2009	Time barred
01.04.08 to 30.09.08	25.10.2008	25.04.2010	Time barred
01.10.08 to 31.03.09	25.04.2009	25.10.2010	Time barred
01.04.09 to 30.09.09	25.10.2009	25.04.2011	Time barred
01.10.09 to 31.03.10	25.04.2010	25.10.2011	Time barred
01.04.10 to 30.09.10	25.10.2010	25.04.2012	Time barred
01.10.10 to 31.03.11	25.04.2011	25.10.2012	Within Time

01.04.11 to 30.09.11	25.10.2011	25.04.2013	Within Time
01.10.11 to 31.03.12	25.04.2012	25.10.2013	Within Time

22. A perusal of the aforesaid chart would indicate that for the period 01.04.2007 to 30.09.2007 the demand is even beyond the period of 5 years. This amount comes to Rs. 73,321/-. For the period from 01.10.2007 to 25.10.2010 the demand is for the extended period of limitation. The demand for the period from 01.10.2010 to 31.03.2012 is within limitation. This demand comes to Rs. 09,07,352/.

23. Though much has been argued on behalf of the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the case, but it would not be necessary to decide this issue as the demand itself, for the reasons stated above, cannot be sustained.

24. The order dated 29.11.2016 passed by the Commissioner (Appeals) is, accordingly, set aside and the appeal is allowed.

(Order pronounced on **10.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya