CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>NEW DELHI</u>

PRINCIPAL BENCH - COURT NO. I

Service Tax Appeal No. 1114 of 2011

[Arising out of the Order in Appeal – 128/ST/D-II/2011, dated -15/03/2011 passed by Commissioner (Appeals), Central Excise, Delhi- II, New Delhi]

Commissioner of Service Tax, Delhi **...... Appellant**
17-B, I.P. Estate,
IAEA House,
New Delhi

Versus

Bhavna Construction Co. **...... Respondent**
WZ-9, 2nd Floor, Sant Nagar Extn.
Delhi- 110019

APPEARANCE:
Shri Rajeev Kapoor, Authorised Representative for the Department
Shri A.K. Prasad and Ms. Surbhi Sinha, Advocates for the Respondent

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

<u>FINAL ORDER NO. 51654/ 2023</u>

Date of Hearing/Decision: December 01, 2023

JUSTICE DILIP GUPTA

This appeal had earlier been decided by the Tribunal by order dated 05.01.2017. Out of the three issues raised by the department in the appeal, two were decided against the department and on the issue as to whether the respondent would be entitled to the benefit of cum tax value, the Tribunal decided the issue in favour of the department holding that "Respondent have not produced evidence to the effect that the considerations received were inclusive of service tax." This part of the order of the Tribunal was assailed by the respondent before the Supreme Court and by judgment and order dated 24.01.2023, the Supreme Court partly allowed the appeal and remanded the matter to the Tribunal for a fresh adjudication of this issue after taking into consideration the relevant material/documents as may be produced by the parties. The part of the judgment of the Supreme Court relevant for the purpose of this appeal is reproduced below:

> "5. The short question that falls for consideration is whether the appellant possesses requisite supporting evidence to establish that the considerations received by it were inclusive of service tax. Learned counsel for the appellant submits that sufficient documentary evidence fortifying its plea(s) was produced before the Commissioner (Appeals) as well as the Adjudicating authority and given an opportunity, the appellant is ready and willing to produce such evidence for Tribunal's consideration as well.
>
> 6. Learned counsel for the respondent-revenue could not oppose this reasonable offer made on behalf of the appellant.
>
> 7. In view of this, we allow these appeals in part and set aside the impugned order dated 5th January, 2017 of the Tribunal in so far as it pertains to question no. (c), and remit the case to the Tribunal for fresh adjudication of the said question, after taking into consideration the relevant material/documents produced by the parties. as may be produced by the parties.
>
> 8. The parties are directed to appear before the Tribunal on 14th March, 2023.
>
> 9. It is clarified that we have not expressed any opinion on merits on questions no. (c)."

2. This is how the matter has again come up before the Tribunal.

3. Pursuant to the order passed by the Supreme Court, the respondent has filed Miscellaneous Application No. 50285 of 2023 on 28.04.2023 to bring on record certain documents mentioned in paragraph 8 of this application. This paragraph is as follows:

> "(i) Copy of Tender Document for construction of dwelling units at Patiala, Punjab. Reference is made to page 10 of the Tender documents which contains the Special Conditions for the tender. Special Condition No. 10 clearly states that "rates quoted shall be deemed to be for the finished work to be measured at site. Tenderer must include in their rates all taxes applicable on the date of submission of tender levied by

> the Central Government or any State Government or local authority, if applicable. No separate claim in respect of the above shall be entertained by the developer." (ANNEXURE-4)
>
> The Paper Book along with the appeal filed before the Commissioner of Central Excise (Appeals). Special reference is made to Annexure-6 to the paper book which refers to a letter dated 07-06-2010 submitted before the adjudicating authority during the course of adjudicating proceedings. The said letter dated 07-06-2010 also enclosed a copy of the Special Conditions of the Tender Documents. ANNEXURE-5
>
> Letter dated 07-06-2010 addressed to the adjudicating authority (the Additional Commissioner) in reply to show cause notice dated 07-04-2010 in the instant proceedings.ANNEXURE-6
>
> Sample copies of bills raised by M/s. Bhavna Construction Coon the service recipient [Pavani Buildwell (P) Ltd.] which show that the amounts billed were inclusive of service tax payable. ANNEXURE-7"

4. A perusal of paragraph 5 of the order passed by the Supreme Court indicates that the learned counsel appearing for the appellant before the Supreme Court had submitted that sufficient documentary evidence was produced before the Commissioner (Appeals) as well as Adjudicating Authority and given an opportunity the appellant would produce **such** evidence for the consideration of the Tribunal as well. It is in view of the aforesaid statement made by the learned counsel for the appellant that the Supreme Court observed in paragraph 7 that the Tribunal shall decide the matter afresh after taking into consideration the relevant materials/documents as may be produced by the parties.

5. It is clear that such evidence as was produced by the respondent in this appeal before the Adjudicating Authority and the Commissioner (Appeals) was required to be brought on record.

6. Shri A.K. Prasad learned counsel assisted by Ms. Surbhi Sinha, appearing for the respondent pointed out that what was filed before the Adjudicating Authority and the Commissioner (Appeals) were copy of the tender documents and the letter dated 07.06.2010 submitted to the adjudicating authority. Learned counsel submitted that the tender documents for construction of the dwelling units would amply demonstrate that the rates quoted shall be deemed to be for the finished work to be measured at site and that the Tenderer must include in their rates taxes levied by the Central Government or any State Government or local authority as applicable on the date of submission and no separate claim shall be entertained by the developer.

7. In view of the order passed by the Supreme Court, only the documents mentioned at serial nos.(i), (ii) & (iii) of the application are being considered and not the documents at serial no. (iv).

8. This appeal has been filed by the Department raising the following three issues :

(a) The gross amount received during the year 2005-06 towards rendering service had not been properly recoded in the impugned order.

(b) The valuation of taxable service should be based on gross amount including the value of free of cost material supplied by the recipient of service; and

(c) Benefit of cum-tax value cannot be extended as the respondent did not produce any supporting evidence to the effect that the consideration received were inclusive of service tax.

9. The Tribunal had earlier in the order dated January 05, 2017 not accepted the first two contentions raised by the department, but the third contention was accepted by the Tribunal holding:

> "5. Regarding the issue of allowing cum-tax benefit, we note that the respondent have not produced evidence to the effect that the considerations received were inclusive of service tax. In order to consider the amount received as inclusive of service tax in terms of Section 67(2) of the Finance Act, 1994, it is necessary to show that the gross amount charged by a service provider is inclusive of service tax payable. In absence of such evidence, cum-tax benefit cannot be extended."

10. It is against this part of the order of the Tribunal that the respondent had preferred an appeal before the Supreme Court and the Supreme Court has remanded the matter to the Tribunal for a fresh consideration of this issue after taking into consideration the relevant materials/documents produced by the parties.

11. At this stage, it would be useful to reproduce the finding recorded by the Commissioner (Appeals) in the order dated March 15, 2011 which had been assailed by the Department before the Tribunal. The finding recorded by the Commissioner (Appeals) is as follows:

> "I find that since the appellant has received gross amount of Rs. 9,10,96,473/- i.e inclusive of service tax and VAT during the period 2006-07 to 2008-09, I rely upon the case laws viz. M/s Rajmahal Hotel v/s CCE, Jaipur 2006 (4) STR 370 (Tri-Delhi), Bahgawati Security Services v/s CCE 2006 (3) STR 762 (Tri-Del) and extend the benefit of cum-duty to the appellant. From the perusal of ST-3 returns for the period 2006-07 to 2008-09 I find that the appellant has correctly discharged their Service Tax liability. Thus, the orders passed by the adjudicating authority have no basis and same have been passed only on presumptions. In view of the above, I set aside the orders passed by the adjudicating authority and allow the appeal of the appellant."

12. Learned counsel for the applicant has placed reliance upon the tender documents, and particularly to Special Condition no. 10 which provides that the rates quoted shall be deemed to be for the finished work to be measured at site and that the tenderer must include in the rates all taxes applicable on the date of submission of tender that are levied by the Central Government or the State Government or local authority and no separate claim for the taxes shall be entertained by the developer.

13. It is not in dispute that this tender document was filed by the respondent before the adjudicating authority. It is also not in dispute that the letter dated June 07, 2010 which was also filed before the adjudicating authority also enclosed a copy of the Special Conditions of the tender documents. Condition no. 10 to the Special Conditions is reproduced below:

> "10. The rates quoted in the tender shall include all charges for labour, double scaffolding, centering, materials, water and electric charges, temporary plumbing, hire for any tools and plants including dumpy level, theodolite, statutory field testing equipments, etc., sheds for materials, marking out and clearing of site, as mentioned in the specifications. Rates quoted shall be deemed to be for the finished work to be measured at site. Tenderer must include in their rates all taxes applicable on the date of submission of tender levied by the Central Government or any State Government or local authority, if applicable. No separate claim in respect of the above shall be entertained by the Developer."

14. It is apparent from the said condition that the service tax was to be included in the rates quoted by the respondent in the tender document. It is for this reason that the Commissioner (Appeals) in the order dated March 15, 2011 had recorded that the appellant had received the gross amount inclusive of service tax and VAT during the

period 2006-07 to 2008-09 and so the benefit of cum-tax was required to be given.

15. It is, therefore, not possible to accept the contention of the Department that as the respondent is not entitled to the benefit of cum-tax value, the appeal filed by the Department assailing the finding should be allowed.

16. In view of the fact that the respondent is entitled to the benefit of cum-tax value, the appeal filed by the Department will have to be dismissed as earlier the other two grounds raised in the appeal had not found favour of the Tribunal.

17. The appeal is, accordingly, dismissed.

(Dictated and Pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Diksha