CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 51334 of 2017

(Arising out of Order-in-Original No. ALW-EXCUS-O-I-O-COM-113/16-17 dated 30.03.2017 passed by the Commissioner, Central Excise & Service Tax, Commissionerate, Jaipur)

M/s Zuberi Engineering Company **...Appellant**
204-206, Anukama Tower 1st, Near
Raymond Show Room MI Road
Jaipur-302001.

VERSUS

The Commissioner, Central Excise & Service Tax, **...Respondent**
Commissionerate, Jaipur

APPEARANCE:

Shri Jatin Mahajan, Advocate for the Appellant
Shri S.K. Meena, Authorised Representative for the Department

CORAM:

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

Date of Hearing: 19.10.2023
Date of Decision: 20.03.2024

FINAL ORDER No. 55441/2024

JUSTICE DILIP GUPTA:

M/s. Zuberi Engineering Company[1] seeks the quashing of the order dated 29.03.2017 passed by the Commissioner confirming the demand of service tax with interest and penalty.

2. The appellant is engaged in providing, amongst others, works contract service. A show cause notice dated 20.02.2015 was issued to the appellant alleging that the appellant had availed the benefit of Works Contract (Composition Scheme for Payment of Service Tax)

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1. the appellant

Rules, 2007[2] without first exercising the option required under rule 3(3) of the Composition Scheme for the period between 01.10.2009 to 30.06.2014 and suo moto paid service tax at the rate of 4.12 percent instead of at the rate of 10.30 percent as required under rule 2A of the Service Tax (Determination of Value) Rules 2006[3]. The appellant was, therefore, called upon to show cause why service tax of Rs. 8,82,94,759/- should not be recovered from the appellant under the proviso to section 73 (1) of the Finance Act, 1994[4] with interest and penalty.

3. The appellant filed a detailed reply to the show cause notice pointing out it was entitled to the benefit under the Composition Scheme and also pointed out that there was no requirement of separately filing any intimation to the department for payment of service tax under the Composition Scheme and the fact that the appellant deposited service tax at the rate of 4.12 percent and submitted the returns on the basis of the Composition Scheme was sufficient intimation contemplated under rule 3(3).

4. The Commissioner, however, did not accept the contention advanced by the appellant. The Commissioner found that though the show cause notice had referred to nine work orders in respect of which the appellant had not submitted prior intimation for availing the benefit of the Composition Scheme, but as the appellant had submitted declarations in respect of five work orders the demand of Rs. 8,82,94,759/- stood reduced to Rs. 73,27,280/-. In respect of these four work orders, the Commissioner found that the appellant had not exercised option for availing the benefit for the Composition

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2. the Composition Scheme
3. the 2006 Rules
4. the Finance Act

Scheme and so the appellant was liable to pay service tax with interest and penalty. The Commissioner also found as a fact that the extended period of limitation was correctly invoked.

5. Shri Jatin Majan, learned counsel appearing for the appellant submitted that as the appellant had deposited service tax at the rate of 4.12 percent in accordance of the Composition Scheme and submitted the returns, it should be treated that the appellant had complied with rule 3(3) of the Composition Scheme. Learned counsel also pointed out that there is no requirement of separately filing any intimation in writing to the department for payment of service tax under the Composition Scheme. In support of this contention, learned counsel placed reliance upon a decision of the Calcutta High Court in **Larsen & Toubro Ltd.** vs. **Assistant Commissioner, Service Tax Commissionerate, Division-III, Kolkata**[5] and decisions of the Tribunal in **ABL Infrastructure Pvt. Ltd.** vs. **Commissioner of C. Ex., Nashik**[6] and **CCE, Jaipur-I** vs. **Zuberi Engineering Company**[7].

6. Learned authorised representative appearing for the department, however, supported the impugned order and placed reliance upon the decision of the Andhra Pradesh High Court in **Nagarjuna Construction Company Ltd.** vs. **Government of India**[8].

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

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5. (2023) 2 Centax 327 (Cal.)
6. 2015 (38) S.T.R. 1185 (Tri. – Mumbai)
7. Service Tax Appeal No. 34 of 2012 and Service Tax Appeal No. 129 of 2012 decided on 08.11.2017
8. 2010 (19) S.T.R. 321 (A.P.)

8. The appellant had opted to pay service tax under rule 3(3) of the Composition Scheme instead of making payment of service tax under rule 2A of the 2006 Rules.

9. The issue that arises for consideration in this appeal is whether there is a requirement of first formally informing the department in writing that the appellant is exercising the option to pay service tax under the Composition Scheme.

10. This issue was examined by a Division Bench of the Tribunal in **ABL Infrastructure** and in connection with rule 3(3) of the Composition Scheme, the Bench observed:

> "The above Rule requires that the provider who opts to pay tax under the Rule shall exercise such option prior to payment of Service Tax. **We find force in the appellant's contention that the fact that they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-9-2007, the substantial benefit cannot be denied for procedural deficiency of delay in opting for Works Contract Service by a specific declaration under Rule 3. More so, when no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme.** Reliance is placed on the case of Bridge and Roof Company (supra), wherein it was held as under:-
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> > "After hearing both sides, duly represented by Shri Bipin Garg, learned Advocate appearing for the appellant and Shri K.K. Jaiswal, learned AR appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract.

> However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."
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> **We have also seen Board's Circular and the judgment of Nagarjuna Construction (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 1-6-2007 and after 1-6-2007. In the present case, we have held above that the appellant was executing work in a new contract from 5-6-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax."**
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> **(emphasis supplied)**

11. Subsequently, a Division Bench of the Tribunal in **Zuberi Engineering Company**, after referring to the decisions of the Tribunal in **ABL Infrastructure** and **Nagarjuna Construction Company**, observed as follows:

> "6. For the tax liability post 01/06/2007 under works contract service, we note that the eligibility of the appellant/assessee to pay tax after availing the composition scheme is under dispute. The appellant/assessee supports the finding of the Original Authority. The Revenue is contesting the concession only on the ground that due option has not been exercised before the commencement of payment of tax on each of the contracts. The said condition being statutory requirement has to be followed strictly. **In this connection, we note that the issue with reference to exercising option to pay concessional duty under composition scheme has been examined by this Tribunal in ABL Infrastructure Pvt. Ltd. vs. CCE, Nashik – 2015 (38) S.T.R. 1185**

> **(Tri. – Mumbai). The said decision examined various decided cases alongwith legal principles, including the ratio of the decision in Nagarjuna Construction Co. Ltd. (supra) and held that when the appellant/assessee did not pay any tax on such works contract service and starts paying tax after availing concession, such payment of tax under the scheme should be construed as exercising the option.** We note that the facts in respect of each one of the contracts now under contest requires verification with original documents. Accordingly, the matter has to go back to the Original Authority to apply the above ratio and to give a final finding regarding eligibility of the appellant/ assessee for such composition in respect of works contract service, post 01/06/2007."
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> **(emphasis supplied)**

12. The Calcutta High Court in **Larsen & Toubro** also examined the issue and observed as follows:

> "10. Thus, Rule 3(1) of the scheme gives an option to the person liable to pay service tax to discharge his service tax liability in terms of the scheme by paying an amount equivalent to 2% of the gross amount charged for the works contract. Sub-rule (3) of Rule 3 states that a person who opts to pay service tax under the composition scheme shall exercise such option prior to payment of service tax and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract. **The argument of the department is that the option to pay service tax under the composition scheme shall be exercised prior to the payment of service tax and the appellant having not exercised the option prior to 26-3-2008 is required to pay service tax at the rate of 4% and not 2%.** The department further proceeds to state that this short-payment is intentional to evade payment of duty and therefore extended period of limitation can be invoked. The cardinal principle of interpretation has taught us to read the rule in its entirety to ascertain the true meaning and intention of the legislation. If that be so sub-rule

(3) of Rule 3 of the scheme cannot be read in isolation. It is required to be read in conjunction with sub-rule (1) of Rule 3.

11. **Sub-rule (1) of Rule 3 is substantive portion of the rule which provides for an option to be exercised by the person liable to pay service tax.** By virtue of the said rule, the person liable to pay service tax has an option to discharge the liability by paying the amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66 of the Act**. On a reading of sub-rule (1) of Rule 3 shows that the option exercisable by this person liable to pay service tax is exercised by paying service tax at the 2% instead of rates specified in Section 66.** Sub-rule (3) of Rule 3 states that the provider of the taxable service who opts to pay service tax under the composition scheme shall exercise such option prior to the payment of service tax. **If Rule 3(1) and (3) and read in conjunction and harmoniously, the intention of the scheme is to give an option to the provider of taxable service to discharge his service tax liability by paying an amount equivalent to 2%. This being the substantive part of the scheme, sub-rule (3) which is a machinery provision has to give life to the substantive part of the rule namely Rule 3(1) and that would mean that the option shall be exercised by paying the amount equivalent to 2% of the gross amount charged for the works contract.** It is the submission of the Learned Senior Standing Counsel that the crucial words in sub-rule (3) of Rule 3 is "opts" and "prior to payment of service tax". Thus, the department would contend that the option has to be exercised by the provider of taxable service prior to the payment of service tax. If that be so the rule should provide in what manner the provider of taxable service has to exercise such option. **Admittedly no procedure has been laid down under the rule and there is no statutory form for exercise of such option.** This has been held so by Learned Single Bench, against which the revenue are not on appeal. **In the absence of statutory format can the department be heard to say that the**

option should be exercised in a particular fashion and cannot be by conduct, that is by paying the service tax equivalent to 2% of the gross amount charged for the works contract.”

(emphasis supplied)

13. After referring to the decisions of the Madras High Court in **T. Azhakesan** vs. **State Tax Officer and Others**[9] and **GE T and N India Limited** vs. **Commissioner of Central Excise and Service Tax Payer Unit, Chennai**[10] and also the decision of the Tribunal in **ABL Infrastructure**, the Calcutta High Court in **Larsen & Toubro** further held as follows:

> “15. xxxxxxxx. **Thus, it can be safely held that the payment of tax under the composition scheme upon notification of the scheme vide a Notification No. 32 of 2007, dated 26-5-2007 by filing the return and paying tax at the compounded rate of 2% is sufficient compliance of exercise of option under the scheme and** therefore the subject contracts for which tax had been remitted by the appellant at the rate of 2% is permissible and acceptable under law.”
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> **(emphasis supplied)**

14. The Calcutta High Court also distinguished the decision of the Supreme Court in **Nagarjuna Construction Company Limited vs. Government of India**[11] observed as follows:

> “17. Mr. Maiti, Learned Senior Standing Counsel appearing for the revenue referred to the decision of the Hon’ble Supreme Court in Nagarjuna Constructions Company Limited v. Government of India [2012 (28) S.T.R. 561 (S.C.)] for the proposition that the appellant having failed to exercise the option prior to the payment of tax is not entitled to the benefit of the composition scheme at 2%. On this aspect, we have already interpreted Rule 3(1) and (3) of the

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9. 2021 SCC Online Mad 10505
10. 2020 (34) GSTL 176 (Mad.)
11. 2012 (28) STR 561 (SC)

> composition scheme and given our reasons as to how there has been compliance of the rule and in the absence of any statutory form for exercise of option, the filing of the return, mentioning the relevant notification number and payment of tax at the compounded rate is sufficient compliance of exercise of option under the scheme. **That apart, we note the facts in Nagarjuna Constructions to be entirely different. Since the appellant therein had already paid the taxes and did not opt to pay the service tax under the composition scheme but later sought for such a benefit which was negatived. Therefore, the said decision is inapplicable to the facts and circumstances of the case on hand."**
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> **(emphasis supplied)**

15. The decisions of the Tribunal and the Supreme Court in **Nagarjuna Construction** which have been relied upon by the learned authorised representative of the department have been distinguished in the aforesaid decisions.

16. In view of the aforesaid decisions of the Tribunal and judgment of the Calcutta High Court, it has to be held that payment of service tax contemplated under the Composition Scheme and filing the return would be sufficient compliance of exercising the option under the Composition Scheme.

17. The impugned order dated 29.03.2017 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on **20.03.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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