CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 51868 OF 2017

[Arising out of the Order-in-Appeal No.BHO-EXCUS-APP-57-17-18 dated 28.7.2017 passed by Commissioner (Appeals), GST, Customs & Central Excise, Bhopal (M.P.)]

Shri Abrar Beg **...Appellant**
House No. 272,
Civil Lines, Banda, Sagar
Madhya Pradesh – 470 335.

Versus

The Commissioner (Appeals),
GST, Customs and Central Excise, **....Respondent**
Bhagya Bhavan, 178, M.P. Nagar Zone – II,
Bhopal (M.P.).

APPEARANCE:

Shri Dhiraj Sivaya, Advocate for the appellant
Ms. Jaya Kumari, Learned authorised representative for the Respondent

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

FINAL ORDER NO. 55511/2024

DATE OF HEARING : 14.12.2023
DATE OF DECISION: 12.04.2024

P.V. SUBBA RAO

Shri Abrar Beg[1] filed this appeal to assail the order-in-appeal[2] dated 28.7.2017 passed by the Commissioner (Appeals), Bhopal whereby he rejected the appeal filed by the appellant and upheld the order-in-original[3] dated 22.12.2016 passed by the Additional Commissioner.

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1 **Appellant**
2 **Impugned order**
3 **OIO**

2. The appellant is an electrical contractor and erects, commissions and installs electrical poles for the State Government Electricity distribution company and local authorities. He has a service tax registration from the department under the category of erection, commissioning or installation service and works contract service. The services rendered by the appellant were exempted from service tax under Notification NO. 25/2012 (S.No. 12), dated 20.6.2012 but these services were chargeable to service tax if they were provided to State Government undertaking companies and corporations.

3. The preventive wing of the Commissionerate gathered intelligence that the appellant was neither paying service tax nor has been filing ST 3 returns and initiated investigation. It called for the income tax returns, bank statements, contracts which were awarded to the appellant for work. On examination, it appeared to the department that the appellant was awarded purely service contracts.

4. A Show Cause Notice[4] dated 21.4.2016 was issued by the Additional Commissioner demanding service tax of Rs. 10,12,080/- for the period October 2010 to March 2015 along with appropriate interest. It was also proposed to impose penalties on the appellant under section 77 and 78 of the Finance Act, 1994[5]. These proposals were confirmed in the OIO and upheld in the impugned order.

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4 SCN
5 Finance Act

Submissions on behalf of Appellant

5. Learned counsel for the appellant submits that the appellant's contention during the investigation, before the original authority and the Commissioner (Appeals) was that it was awarded contracts which included the use of materials and hence they fall under the category of Works Contracts as defined in section 65B(54) of the Finance Act and therefore it was required to pay service tax only on 20% of the value of the contracts which the appellant had paid as detailed in the chart at page 27 of the appeal.

6. Learned counsel produced before us 12 contracts issued to the appellant to support his contention that they were works contracts. He submitted that the entire case of the department is based on the premise that these contracts were purely service contracts and therefore, service tax had to be paid on the gross amounts received as seen from Form 26AS of the appellant. The contracts clearly indicate that they required the appellant to use materials to execute them. Hence, they were works contracts. Consequently, the demands cannot sustain nor can the interest and penalties.

Submissions on behalf of Revenue

7. Ms. Jaya Kumari, learned authorised representative for the Revenue also supports the contention that the issue to be decided is 'whether the contracts were Works contracts or contracts for purely service'. She strongly supports the impugned order that they were purely contracts for service

and therefore, the demands must sustain along with the interest and penalties.

Findings

8. We have considered the submissions on both sides and perused the records. Section 65B (54) as applicable during the relevant period defined works contracts as below:

> **Section 65B**
> (54) "Works Contract" means a contract wherein transfer of property of 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, maintenance, renovation, alteration of any moveable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

9. As per the above definition, "works contract" is one:

> (a) wherein there is transfer of property of goods involved in executing the contracts;
>
> (b) such transfer of property is leviable to tax as sale of goods; and
>
> (c) the contract is for one of the purposes indicated therein including erection, commissioning and installation.

10. Of the above, (c) is fulfilled in the contracts as according to both parties, the contracts were for erection, commissioning and installation. The two questions to be answered are whether there was transfer of property of goods in executing the contracts and if such transfer is leviable to tax as sale of goods.

11. On perusing the contracts, we find that they required the appellant to erect poles and for this purpose, dig pits, prepare concrete base as per specifications and install the poles. The appellant was not required to supply the poles but it was

required to provide the materials towards construction of the base. It also required the appellant to ensure that the quality of the materials used were as specified. Thus, there was use of materials in these contracts though not supply of poles themselves.

12. Clause (29A) was inserted in article 366 of the Constitution of India and it reads as follows:

> (29A) "**tax on the sale or purchase of goods" includes**—
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> **(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;**
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

13. Evidently, if any goods are used in executing a works contract, the property in them is transferred to the service recipient. For instance, if a contractor builds a house for a house-owner and the contract includes the bricks, cement, etc.

the contractor, in building the house, also transfers the property in them to the house-owner although he does not sell these goods to the house owner. Such transfers became chargeable to sales tax by State Governments after the insertion of clause 29A in article 366 of the Constitution of India. It is a different matter if sales tax is actually paid or not paid in any case- it depends on various other factors such as the legal provisions, exemptions, etc. under the State sales tax laws.

14. In this case, since the appellant was required to use cement and concrete as per the contracts, they squarely fall under the definition of works contracts under section 65B (54) of the Finance Act. Therefore, the SCN, the OIO and the impugned order were incorrect in assuming that they were not works contracts. The demand, interest and penalties in the impugned order therefore, cannot be sustained.

15. The appeal is allowed and the impugned order dated 28.07.2017 is set aside with consequential relief to the appellant.

(Order pronounced in open court on 12/04/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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