CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. III

SERVICE TAX APPEAL NO. 57867 OF 2013

[Arising out of the Order-in-Original No. 57/ST/COMMR/DM/RTK/2012-13 dated 30/03/2013 passed by Commissioner of Central Excise, Rohtak.]

M/s Bansal Construction Co., **...Appellant**
44, Shanti Kunj, Church Road, Vasant Kunj,
New Delhi – 110 070.

Versus

Commissioner of Central Excise, Rohtak, **...Respondent**
SCO 6, Sector – 1,
Rohtak (Haryana).

APPEARANCE:
Shri Rajesh Jain and Ms. Tanya Saraswat, Advocates for the appellant.
Shri Sanjeev Kumar Ray, Authorized Representative for the Department

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 56021/2024

DATE OF HEARING : 29.05.2024
DATE OF DECISION: 12.07.2024

P.V. SUBBA RAO

M/s. Bansal Construction Co., New Delhi[1] filed this appeal to assail the order-in-original dated 31.03.2013[2] passed by the Commissioner of Central Excise, Rohtak whereby he confirmed demand of service tax of Rs. 1,46,32,446/- under proviso to section 73 (1) of the Finance Act, 1994[3] invoking extended period

1. **Appellant**
2. **Impugned order**
3. **Finance Act**

of limitation along with interest under section 75 of the Finance Act. He also imposed penalty of Rs. 5,000/- under section 77 and penalty equal to the amount of service tax under section 78 of the Finance Act, 1994. He further held that provision of section 72 of the Finance Act, 1994 i.e. "best judgment assessment" was rightly invoked in that case.

2. The appellant was providing taxable services but it had not registered with the service tax department. It provided services to some service providers including M/s Brahamputra Infrastructure Ltd.[4] The records of BIL were audited and it was found that the appellant had provided services to BIL exceeding Rs. 10 lakhs as a sub-contractor but had not paid service tax. The department sent a letter dated 31.10.10 to the appellant asking for several details, including, if they were registered with the service tax department and if so, the details of the returns filed and service tax paid. This was followed by some communication between the appellant and the department and thereafter the appellant obtained service tax registration on 26.02.2011 for providing services of "Construction of commercial and industrial buildings and civil structures" and "works contract services". Thereafter, copies of the balance sheet and P&L accounts of the appellant were obtained and its service tax liability for the period 2006-2007 to 2010-2011 was calculated. It was found that the appellant had received an amount of Rs. 14,48,37,733/- during this period on which service tax of Rs.

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4. BIL

1,61,90,058/- (including cesses) was demanded from the appellant as per the best judgment assessment under section 72. A show cause notice[5] dated 19.10.2011 was issued to the appellant which culminated in the issue of the impugned order.

3. Aggrieved, the appellant filed this appeal on the following grounds :-

(1) One of the services rendered by the appellant was widening of roads which is covered under "construction of roads" for the Delhi Development Authority[6] and it was outside the ambit of service tax ;

(2) The service in relation to "construction of roads" was wrongly classified as "construction of complex services" and the work orders which they had received from DDA show that they were not for construction of any complex;

(3) The appellant's work orders included use of material. Therefore, this activity falls under the head of "Work Contract Service" as defined under section 65 (105) (zzzza) w.e.f. 01.06.2007 which also excludes roads ;

(4) The benefit of Notification No. 1/2006-ST dated 01.03.2006 and Notification No. 12/2003-ST should be allowed to the appellant if service tax is charged ;

(5) The SCN is barred by limitation as there is no evidence of fraud or collusion or willful mis-statement or

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5. SCN
6. DDA

suppression of facts or violation of act or rules with an intent to evade payment of service tax. The appellant was under the bonafide belief that it was not liable to pay any service tax on any of the services rendered by it and, therefore, it had not paid service tax at all. On being pointed out by the department, it had paid service tax on such services which were not exempted ;

(6) As per section 73 (3) of the Finance Act, where the service tax has been paid voluntarily along with interest no demand should be issued under section 73 at all by the department ;

(7) For this reason, no penalties should also have been imposed on the appellant.

4. As far as the details of the works undertaken by the appellant are concerned, learned counsel for the appellant presented the details before us in the form of Annexures giving work order wise details along with copies of work orders. The total payment received for all the work orders for all types of work is as follow :-

<u>Annexure – G</u>

<u>G. Composite Chart for All the years Reflecting receipt of payment year wise.</u>

Payment year	Construction/ Restoration of Road for DDA (Rs.) **A.**	Construction of additional facilities @ Mega houses for DDA (community hall, shopping centre) (Rs.) **B.**	Construction of boundary wall for DD Land/Park (Rs.) **C.**	Construction of Metro Station and Car Parking for DDA (Rs.) **D.**	Construction and maintenance of swimming poo for DDA (Rs.) **E.**	Work done for BIL (Rs.) **F.**	Total (Rs.)
2006-2007	28,10,103/- 33,17,232/-	5,59,399/-	60,36,031/-	97,66,352/-	14,95,177/-		2,40,04,294/-
2007-	1,52,34,672/-		6,25,072/-	4,18,241/-			2,50,81,374/-

2008	29,15,220/- 58,88,169/-						
2008-2009	34,99,640/- 84,43,266/- 59,646/- 6,07,579/- 9,16,585/-		52,82,379/- 26,71,991/-				2,14,81,086/-
2009-2010	10,80,866/- 62,86,080/- 15,56,161/-	10,75,329/- 97,89,832/-	41,15,806/- 59,09,830/-			41,05,850/-	3,39,19,754/-
2010-2011		1,64,58,692/- 90,59,616/- 2,02,39,211/- 56,58,641/- 22,07,348/-	89,10,953/-	59,65,621/-		2,64,294/-	6,87,64,376/-
Total	5,26,15,219/-	6,50,48,068/-	3,35,72,062/-	1,61,50,214/-	14,95,177/-	43,70,144/-	17,32,50,884/-

5. As can be seen six types of activities were undertaken by the appellant as follows :-

(i) **Construction/restoration of roads for DDA:** Learned counsel for the appellant submits that the DDA had issued to it various work orders from time to time for construction of or restoration of roads. It is his submission that all these orders included the use of the necessary material and no material was supplied by the DDA. He, therefore, submits that w.e.f. 01.06.2007 all these services were covered under the definition of that “works contract service” as they involved providing services as well as transfer or deemed transfer of materials involved therein. Such works contracts are covered under section 65 (105) (zzzza) of the Finance Act. However, this charging section excludes services rendered with respect to laying of roads. He further submits that section 25 (b) of the Finance Act also excludes services rendered in construction of roads from the ambit of tax. This section reads as follows :-

"Commercial or industrial construction" means — (a) construction of a new building or a civil structure or a part thereof; or (b) construction of pipeline or conduit; or (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or (d)repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is — (i) used, or to be used, primarily for; or (ii) occupied, or to be occupied, primarily with; or (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, **but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams**;

He, therefore, submits that no service tax is payable on these amounts and the appellant had not paid any service tax for that reason.

(ii) **Construction of additional facilities @ mega houses for DDA which included community hall and shopping centre:** Learned counsel for the appellant submits that the appellant paid the service tax on the amounts received.

(iii) **Construction of boundary wall for DDA land/park** : This involved five work orders for construction of boundary wall or a portion of it around district park, DDA land, etc. He submits that demand of service tax was confirmed on the amounts received under the head "commercial or industrial construction service". It is not sustainable for the reason that none of these were commercial projects and they were merely parks under the property of DDA which needed construction of boundary wall. Therefore, the appellant had not paid service tax on these amounts as it was not payable.

(iv) **Construction of Metro Station and Car Parking for DDA** : This involved construction of two wheelers/car parking, pedestrian plaza/walkway and construction for Metro Station No. 2 in Dwarka Phase II. Learned counsel submits that this construction is in the nature of public work and was not "commercial or industrial construction" and, therefore, no service tax is payable and hence it was not paid.

(v) **Construction and maintenance of swimming pool for DDA** : Learned counsel for the appellant submits that the appellant had paid service tax on this amount.

(vi) **Work done for BIL** : Learned counsel for the appellant submits that the appellant had undertaken earth work excavation and other work for M/s BIL as a sub-contractor. Appellant has already paid service tax on the amounts received for the purpose.

6. Learned counsel for the appellant submits that since the appellant had already paid service tax, as applicable, even before the SCN was issued, no SCN should have been issued as per section 73 (3) of the Finance Act. He further submits that the impugned order be set aside and this appeal may be allowed with consequential relief.

7. Learned authorized representative for the revenue submits that the appellant had provided taxable services but had not even registered with the service tax department. It had not filed any ST-3 returns. Audit of M/s BIL revealed that the appellant had provided services, but did not pay service tax, as applicable. This resulted in further investigation which revealed the total extent of the services rendered by the appellant and the amount received by it. As the details of the services rendered by it were not available "best judgment assessment" was resorted to under section 72 of the Finance Act. Therefore, the demands were confirmed as per this judgment.

8. Learned authorized representative further submits that the appellant cannot plead ignorance as the reason for not getting registered and not paying service tax. Ignorance of law is not an excuse. Clearly, the appellant had violated the provisions of Finance Act and the Service Tax Rules in not obtaining service tax registration and not assessing the service tax payable and further not paying the service tax. The appellant had also not filed the service tax returns.

9. Only after the investigation was completed had the appellant obtained registration. Therefore, violation of Act or Rules with an intent to evade payment of service tax is self-evident in this case. Therefore, extended period of limitation under section 73 was correctly invoked in this case.

10. As far as the provision of section 73 (3) is concerned, this is subject to section 73 (4). In other words, any case which is covered by section 73 (4) will not be covered by section 73 (3). In other words if the service tax is not paid or short paid by reason of fraud or collusion or willful mis-statement or suppression of facts or violation of provision of Act or Rules with an intent to evade payment of service tax, such cases are not covered by any section 73 (3). SCN has to be issued in such cases as has been correctly done in this case. For the same reason, the penalty under section 78 was also correctly imposed upon the appellant.

11. As far as the payment of service tax is concerned, if the appellant had paid any service tax and can produce challans to that effect, the same can be adjusted against the confirmed demand.

12. We have considered the submissions from both sides and perused the records.

13. Of the six types of services rendered by the appellant, the following services are clearly not commercial in nature and therefore get excluded from the ambit of service tax :

(a) Construction of roads for DDA ;

(b) Construction of boundary wall for DDA land or park ;

(c) Construction of car parking for Metro Station.

14. The appellant claimed that it had already paid service tax on the remaining three services viz., (a) construction of additional facilities namely community hall, shopping centre etc. for DDA, (b) the swimming pool for DDA and (c) the work undertaken as sub-contractor of M/s BIL. These amounts, however, were not appropriated towards the confirmed demand by the Commissioner in the impugned order, which is an error.

15. As far as the appellant's contention that it was covered by section 73 (3) of the Finance Act is concerned, we find that this section is subject to section 73 (4). In other words, in those cases which are covered under section 73 (4), section 73 (3) would not apply. These are cases where the duty was not paid or short paid by reason of fraud or collusion or willful mis-statement or suppression of facts or violation of the Acts or Rules with an intent to evade payment of duty. The appellant's contention is that none of these elements were present in their case. The facts of the case, however, show that the appellant had not obtained service tax registration, had not disclosed the taxable services which it had rendered to the department. It had also not filed any service tax returns. The activities of the appellant came to light only when M/s BIL was audited by the officers which revealed that the appellant had provided taxable services. Thereafter, Revenue sought further details from the appellant and as per best judgment assessment, issued the SCN demanding service tax invoking extended period as it had violated the provisions of Service Tax Rules and Finance Act inasmuch as it had neither

disclosed to the department that it was rendering taxable services nor had it obtained service tax registration nor did it pay any service tax until after the investigation. The submission of the learned counsel for the appellant is that though the appellant violated the provisions of Finance Act and Service Tax Rules, it had no intent to evade payment of service tax. His submission is that the appellant was told by some consultant that it need not pay service tax and therefore based on that advice it had not obtained service tax registration and had not paid service tax.

16. We find that the intent can only be infered from the facts of the case. In this case, the violation of the Act or Rules is evident and it also evident that as a result the appellant had not paid service tax which it had to pay. The plea that it's consultant had advised it not to pay service tax and, therefore, it had no intent to evade cannot be accepted. If this is accepted as a ground, anybody rendering taxable services and not paying tax can simply take the plea that some consultant had advised him not to pay service tax and not take registration and service tax. We, therefore, find that the intent to evade is self-evident in this case. The appellant was waiting for the service tax department to discover its activity and knock at its door. It had not taken registration and it had not paid any service tax until this happened. We, therefore, find that the appellant's case clearly covered by section 73 (4) and is not covered by section 73 (3). We find in the provisions related to invoking extended period of limitation under section 73 and imposition of penalty under

section 78 are identical to the provisions of section 73 (4). We, therefore, find no reason to take a different view in this regard to the extended period of limitation or imposition of penalty under section 78.

17. In view of the above findings, we set aside the demand partly to the extent of service tax demanded on the following services :

(i) Construction/restoration of roads for DDA ;

(ii) Construction of boundary wall for DDA land/park ;

(iii) Construction of Metro Station and car parking for DDA.

18. We uphold the rest of the demand of service tax. The amounts already paid by the appellant as service tax need to be appropriated against the remaining part of the demand.

19. Interest will be payable as appropriate and any amounts of interest already paid shall be adjusted towards it. Penalty imposed under section 78 of the Finance Act needs to be recomputed accordingly.

20. The appeal is partly allowed and the impugned order is partly set aside and partly remanded, as below :-

(a) The demand of service tax on construction/restoration of roads for DDA, construction of boundary walls for DDA land/park and construction of Metro Station and car parking for DDA are set aside and rest of the demand is upheld.

(b) Any amount of service tax already paid shall be appropriated towards the service tax recomputed, as above.

(c) Interest shall be payable as appropriate under section 75 and any amount of interest paid shall be appropriated against the interest.

(d) The penalty of Rs. 5,000/- imposed under section 77 is upheld.

(e) The penalty imposed under section 78 shall be as per the amount of service tax re-calculated, as above.

21. The matter is remanded to the original authority for passing a denovo order for computation, as above.

(Order pronounced in open court on 12/07/2024.)

(BINU TAMTA)
MEMBER (JUDICIAL)

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

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