IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Decision: 8.2.2017

Appeal No. ST/56876/2013- DB

(Arising out of Order-in-Appeal No. 03(ST)/RPR-I/2013 dated 8.1.2013 passed by the Commissioner (Appeals), Customs & Central Excise, Raipur)

CCE, Raipur — Appellant

Vs.

M/s Sungrace Construction — Respondent

Appearance

Shri Ranjan Khanna, D.R. - for the appellant

None - for the respondent

CORAM:**Hon'ble Mr. Justice (Dr.) Satish Chandra, President**
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Final Order No. 50937/2017

Per Justice Dr. Satish Chandra:

The present appeal is filed by the department against the Order in Appeal No. 03/ST/2013 dated 8.1.2013.

2. The brief facts of the case are that the respondent during the period under consideration were engaged in providing the services to various parties including M/s Bharat Sanchar Nigam Ltd. The respondents were holding the registration on service tax under the category of "rent-a-cab scheme, operator service, and erection, commissioning or installation services". The department was of the

view that the respondent is liable to pay service tax on account of four contracts. But in the order in appeal, it was observed that the respondent never charged any service tax from their clients. Pertaining to the said services, the respondent had filed regularly ST-3 and deposited tax to the exchequer wherever it was due. Still not being satisfied, the department filed the present appeal.

3. With this background, we have heard Shri Ranjan Khanna, ld. DR who argued with tooth and nail. At the strength of written submissions, he submits that the respondent is liable to pay the service tax.

4. On the other hand, none appeared on behalf of the respondent nor any application of adjournment is on record.

5. From the record, it appears that the Commissioner (Appeals) in its impugned order has observed as under:-

> "I would therefore primarily hold that the activities undertaken by the appellant with respect to the Contracts awarded to them by M/s BSNL as well as M/s SECL do not fall under the category of 'site formation and clearance, excavation, earthmoving and demolition services' and secondarily I hold that the predominant nature of the work being Laying of Cables, the same should prevail for the purpose of the ascertaining the classification of the taxable nature of the entire activities of the appellant. I have thus also observed that the Board's clarification issued under Circular No. 123/5/2010-TRU dated 24.5.2010, being clarificatory in nature has full applicability in the appellant's case.

Further, I find from the records as well as from the discussion of the adjudicating authority that the appellant had obtained Service Tax Registration on 28.5.2004 under the category of 'rent-a-cab' and 'erection, commissioning or installation' service and have filed ST-3 returns for the period from April, 2006 to March 2010 along with tax paid challans for these two services only. It is worth noting here that on the date of registration, the services of 'site formation and clearance, excavation, earthmoving and demolition' had also not been brought under Tax net and thus the appellant's having obtained the registration under 'Erection and Commissioning' along with 'Rent-a-Cab's Services' prudently appears to be proper. The appellant had also contended that they had voluntarily paid service tax of Rs.44,90,967/- from 2007-08 to 2009-10 under the category of 'erection, commissioning or installation' service which however had not been accepted by the adjudicating authority on the grounds that the appellant had not furnished any contract wise bill/invoice details as to when such amounts were received and in which ST-3 return had they been reflected, in which month it had been paid and under which Challan. Owing to such alleged failings, the adjudicating authority had assigned the fact of the payment of the service tax by the appellant to be with respect to other 'erection and commissioning' services which do not have any relevance with the activities undertaken with respect to the contracts of M/s BSNL as well as M/s SECL. However, I observe that such conclusions could only have been drawn by the adjudicating authority, had the department substantially proved the existence of the fact of the rendering of 'Erection and Commissioning' Services. Rule 5A of the Service Tax Rules 1994 was inserted w.e.f. 28.12.2007, by Notification No. 45/2007-ST dated 28.12.2007 allowing access to the registered premises of the service providers, which incidentally was the time when the enquiries with the appellant were being conducted. If the appellant had failed to produce the requisite documents to scrutinize the propriety of the tax particulars already paid and reflected in their ST-3 returns, the allegation levelled against them that the tax so paid did not pertain to their services with respect of M/s BSNL and M/s SECL could have merited cognizance subject to its having been proved from the records of the appellant that could have been accessed even from their registered premises. The department had not made any effort in that respect and have merely alleged that the tax already paid by them pertained to some other 'Erection and Commissioning services' and the adjudicating authority have also failed to observe that allegations remain assertions without proof, until they are proved.

In the backdrop of the above, I do not find any reason to accept the Department's stand that the appellant had not discharged their Service Tax liabilities as had been alleged in the Notice and confirmed by the adjudicating authority. I am of the clear view that classification of a taxable service is determined based on the nature of service provided and that too the predominant part of the service if it comprises of multiple activities that could individually be discerned of having a taxable nature, whereas liability to pay service tax is related to receipt of consideration and it is due to this reason the adjudicating authority had observed the particulars of the taxable values as well as the taxes to be not concurring with the payments received by the appellant at different times under Contractual rates from M/s BSNL and M/s SECL. Moreover since the predominant nature of the services rendered by the appellant was 'Laying of Cables', I hold the order appealed against is not sustainable on merits."

From the above, it appears that the respondent was regularly filing ST-3 returns and wherever the tax was collected, the same was deposited honestly. The classification of a taxable service is determined, based on the nature of service provided and that too the predominant part of the service if it comprises of multiple activities that could individually be discerned of having a taxable nature.

6. By considering the facts and circumstances of the case, we find that the impugned order is reasonable. Therefore, there is no reason to interfere with the impugned order passed by the Commissioner (Appeals). Hence, we sustain the reasonable order passed by the Commissioner (Appeals).

7. In the result, the appeal filed by the department is dismissed,

(Dictated & pronounced in open Court)

(Ashok K. Arya)	(Justice Dr. Satish Chandra)
Member (Technical)	President

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