CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 55892 & 56509 of 2013

(Arising out of Order-in-Original No. 12/S.Tax/D-I/2012 dated 03.12.2012 passed by the Commissioner of Service Tax, New Delhi)

DATE OF HEARING : 09.02.2017
DATE OF DECISION : 09.02.2017

M/s Jyoti Sarup Mittal …. Appellants
(Rep. by Sh. Atul Gupta, CA & Varun Gaba, Adv.)

VERSUS

CCE, Delhi-I …. Respondent
(Rep by Sh. Sanjay Jain, DR)

AND

CCE, Delhi-I …. Appellant
(Rep by Sh. Sanjay Jain, DR)

VERSUS

M/s Jyoti Sarup Mittal …. Respondents
(Rep. by Sh. Atul Gupta, CA & Varun Gaba, Adv.)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51870-51871/2017

PER JUSTICE (Dr.) SATISH CHANDRA :

Both the appeals - (i) A.No. ST/55892/2013 by the assessee-Appellants; and (ii) A.No. ST/56509/2013 by the Department are filed against the common order-in-original no. 12/S.Tax/D-I/2012 dated 31.10.2012 passed by the Commissioner of Service Tax, New Delhi.

2. The brief facts of the case are that, during the period under consideration (from the year 2005-06 to 2011-11), the assessee-Appellants were engaged in providing “Construction Services”. They were registered with the Service Tax Department vide Registration code DLI/ST/CNS/193/JMS/2004 dated 14.12.2004 for providing “Commercial or Industrial Construction Services”.

3. During the period under consideration, the assessee-Appellants has constructed (i) HPCL Cooperative Group Housing Society; (2) DDA Rohini; (3) Jiwaji University (B Wall Staff quarter); (4) Jiwaji University (Engg Hostel); (5) HEWO CGHS Panchkula; (6) Jiwaji University (Engg. College); (7) Gautam Budh University; (8) IIT Girls Hostel; (9) Jiwaji University (Zoology Botany); (10) NBRC Manesar (Hostel Block II & III); (11) Nuclear Power Corporation; (12) DDA Shastri Park, Baaratghar; (13) DMRC (Shahdara); (14) MP Warehousing & Logistics Corporation; (15) Karnataka State Small Ind. Dev. Corp. Ltd.; (16) Engineers India Ltd. (IT Building); (17) Gurgaon Tech Park; (18) NBRC Manesar; (19) IOCL Panipat; and (20) MCD Hastsal (Road & Drainage Work). The Department in the show cause notice has raised the demand of Rs. 10,65,75,899/- . However, by the impugned order the demand was dropped for Rs. 5,90,23,664/-. Thus, by the impugned order the demand for Rs. 4,75,52,235/- is sustained. Being aggrieved, both the sides have filed the cross appeals.

4. With this background, we have heard Shri Atul Kumar Gupta, Chartered Accountant and Shri Varun Gaba, learned counsel for the assessee-Appellants and Shri Sanjay Jain, learned DR for the Department. We have also perused the written submissions of the assessee-Appellants.

5. After hearing both sides, it appears that the assessee-Appellants have claimed the construction of the works contract and the Department has treated the same as "Commercial or Industrial Construction Services". It may be mentioned that Section 65(105)(zzzza) defines the "works contract service" and "works contract" as follows :

> *"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*
>
> *Explanation - For the purposes of this sub-clause, "works contract" means a contact wherein, -*
>
> *(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
>
> *(ii) such contract is for the purposes of carrying out, -*
>
> *(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*
>
> *(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*
>
> *(c) construction of a new residential complex or a part thereof; or*
>
> *(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*
>
> *(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"*

6. The issue has come up for consideration before this Tribunal in the case of **Harsh Constructions Pvt. Ltd. vs Commissioner of Central Excise & Customs, Nashik,** 2014 (35) STR 617 (Tri.-Mumbai), wherein it was observed that :

> *"5.2 From the above definitions, especially the underlined portions, it is crystal clear that for a construction to be levied to Service Tax, whether under 'commercial or industrial construction service' or under 'works contract service' the same has to be used for commerce or industry. The construction of colleges, Government hospitals or open university cannot be said to be commercial or industrial in nature. In other words, at the relevant time, the levy did not cover non-commercial or non-industrial construction (other than residential). Therefore, prima facie, there is merit in the contention of the appellant that they are not liable to Service Tax on the amount of Rs. 5,61,69,307/- received by them. If the department has still any doubt, they can call for the copy of the contract and approved plans for the said constructions to satisfy that they are non-commercial or non-industrial in nature, falling outside the purview of service tax levy and the appellant is also directed to submit all the relevant documents in this regard to the department."*

The Madras High Court in the case of **G. Ramamoorthi Constructions (I) P. Ltd. vs Comm. (ADJ), Coimbatore,** 215 (40) STR 632 (Mad.), has observed that the construction for the educational institutions is not under the clutches of Section 65(105)(ii)(b) of the Finance Act, 1994.

7. In the instant case, it appears that the entire construction services are meant for educational institutions or for the welfare of the State which are not commercial or industrial in nature. The Board Circular

No. 80/2004-ST dated 17.09.2004 clarifies the "Construction Services (commercial and industrial buildings or civil structures)" as under :

> *"13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax."*

It appears that the institutions, being established solely for educational, religious, charitable, health, sanitation etc., are exempted from the Service Tax, but, when the Government construction is used for commercial or industrial purposes like shops and houses etc., then the same is within the clutches of the Service Tax.

8. In view of the above, we uphold the impugned order giving benefit for the educational institutions and dismiss the appeal filed by the Department.

9. For sustaining the demand raised in the assessee/Appellants' appeal, we remand the matter to the original authority for examining the nature of each entity for which the construction was made whether the

same falls under the “Commercial or Industrial Construction Services” or not.

6. In the result, the appeal filed by the Department is dismissed and the appeal filed by the assessee-Appellants is allowed by way of remand.

(Dictated & pronounced in the open court)

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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