CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 1508 of 2010

(Arising out of order-in-original No. 38/RDN/2010 dated 28.07.2010 passed by the Commissioner of Service Tax, New Delhi)

DATE OF HEARING : 15.02.2017
DATE OF DECISION :15.02.2017

M/s Jai Jai Ram Singh …. Appellants
(Rep by Sh. B.L. Narsimhan, Adv)

VERSUS

CST, Delhi …. Respondent
(Rep. by Dr. Neha Garg, DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 51892/2017

PER JUSTICE (Dr) SATISH CHANDRA:

The present appeal is filed by the assessee-Appellants against the order-in-original no. 38/RDN/2010 dated 28.07.2010 passed by the Commissioner of Service Tax, New Delhi. The period in dispute is 10.09.2004 to 30.09.2008.

2. The brief facts of the case are that, the assessee-Appellants are engaged in the business of construction of residential and commercial buildings. The nature of work varies

from contract to contract. From the impugned order, it appears that the first grievance of the assessee-Appellants is pertaining to the free of cost material provided by the service receiver. The Department has included the cost in the works contract, but the assessee/Appellants claimed that the same cannot be included because the material was supplied without any cost.

3. After hearing Shri B.L. Narsimhan, learned counsel for the assessee/Appellants and Dr. Neha Garg, learned DR for the Department and on perusal of record, it appears that an identical issue has come up before the Larger Bench of this Tribunal in the case of **Bhayana Builders (P) Ltd. vs Commissioner of Service Tax, Delhi,** 2013 (32) STR 49 (Tri.-LB) as well as in the case of **Om Construction vs CCE,** Final Order No. 50697/2017 dated 06.02.2017, wherein the free material supplied by the service receiver was not included in the cost of the works contract.

4. By following the ratio laid down by this Tribunal (supra), we set aside the impugned order in this regard and allow the claim of the assessee/Appellants.

5. The next grievance is pertaining to ongoing contract as on 01.06.2007. The lower authorities have not allowed the assessee/Appellants to switch to 'Works Contract' for the reason that they were following the Composition Scheme for Payment of Service Tax Rules, 2007.

6. After hearing both sides, it appears that the issue has come up for consideration before this Tribunal in the case of **Bagai Construction vs Commissioner,** 2014-TIOL-3094-CESTAT-DEL and **Ahluwalia Contracts (I) Ltd. vs Commissioner of Central Excise,** 2015 (38) STR 33 (Tri.-Del), wherein the Tribunal has remanded the matter to the adjudicating authority for *de novo* adjudication *inter alia* with the following directions :

> *"5. In the light of the foregoing we allow the appeal by way of remand of the case to the primary adjudicating authority for de novo adjudication inter alia with the following directions :*
>
> *(1) With effect from 1-6-2007 the classification of the service rendered will be determined in accordance with the definitions of various services and if the classification is determined to be under works contract service, the benefit of Composition Scheme will not be available in respect of such contracts which commenced prior to 1-6-2007;*
>
> *(2) If the appellants claim the benefit of Rule 2A of the Service Tax (Determination of Value Rules), 2006 or any other applicable exemption notification, the same should be considered on merit.*
>
> *(3) The benefit of Notification No. 1/2006-S.T. if otherwise available should not be denied on the ground that Cenvat credit of input services has been taken.*
>
> *The appellants shall be given an opportunity of being heard before de novo adjudication."*

The Hon'ble Allahabad High Court uphold the same as reported in 2016 (41) STR J261 (Alld.)

7. By following the aforesaid decisions (supra), we remand the matter to the adjudicating authority for *de novo*

adjudication with the same direction (supra). This ground is allowed by way of remand.

8. The next grievance of the assessee/Appellants is pertaining to the denial of exemption to the services provided to the SEZ Unit.

9. After hearing both sides, it appears that the exemption under Notification No. 4/2004-ST dated 31.03.2004 requires the approval of the SEZ developer/unit. The said approval was submitted by the assessee-Appellants, but the lower authorities have not taken any cognizance. During the course of arguments, the learned counsel for the assessee-Appellants submits that the same can be again produced before the adjudicating authority.

10. Hence, we set aside the impugned order and remand the issue to the adjudicating authority to examine the said approval on merits and decide the issue afresh after providing a reasonable opportunity to the assessee-Appellants of being heard and adducing the necessary evidence, if any, as per law.

11. In the result, the appeal filed by the assessee-Appellants stands disposed of in the above terms.

(Dictated and pronounced in the open court)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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