CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 14.02.2017
Date of pronouncement: 02.03.2017

Service Tax Appeal No. 605 of 2011

(Arising out of order- in-appeal No. 13(DKV)ST/JPR-I/2011 dated 11/20.01.2011 passed by the Commissioner (Appeals), Central Excise, Jaipur).

M/s R. K. Enterprises Appellant

Vs.

CCE, Jaipur-I Respondent

Appearance:

Ms. Rinky Arora, Advocate for the appellant
Sh. Sanjay Jain, AR for the Respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

F. O. No. 52064/ 2017

Per: **V. Padmanabhan**:

The present appeal is directed against the order-in-original No. 13/2011 dated 11/20.01.2011. The appellant is engaged in providing the services of construction of commercial, industrial and residential complex covered under Chapter –V of the Finance Act, 1994. The dispute pertains to payment of service tax for the period 10.09.2004 to 31.08.2007 during which the appellant executed construction work relating to educational institutions, namely M/s Global Institution of Technology, Jaipur, M/s Kalyan Foundation Charitable Trust, Jaipur and M/s Arvind Bharti Vidyalya Samiti, Kota, but did not pay service tax on the value of service provided to these institutes. Revenue took the view that the above institutes who were educational institutions, were charging very high fee and hence they were established for profit and hence cannot be termed as Charitable Institutions. Accordingly, show cause notice dated 04.09.2008 was issued and the demand of service tax to the extent of Rs.13,20,796/- was confirmed against the appellant alongwith an order for payment of interest and levy of penalties under various Sections of the Finance Act, 1994. The order-in-original dated 22.01.2010 was challenged before the Commissioner (Appeals) who vide his impugned order upheld the demand of service tax. Hence, the present appeal.

2. With the above background, we have heard Ms. Rinky Arora, ld. Advocate for the appellant as well as Sh. Sanjay Jain, ld. AR for the Revenue.

3. The demand for service tax has been opposed by the appellant on the following grounds.:

(i) The service has been rendered by the appellant to educational institutions. These educational institutions are registered under Section 12AA of the Income Tax Act as Charitable Institutions and the MOA entered into by the appellant with the three educational institutions indicate that they are not commercial institutions. Accordingly, they have submitted that the service rendered cannot be considered as commercial construction and hence no service tax is leviable.

(ii) The demand has also been assailed on the ground of time bar. The appellant submits that in the show cause notice there is no allegation of suppression of facts or wilful mis-statement with an intention to evade payment of service tax and therefore the extended period cannot be invoked.

(iii) They also relied upon the decision of the Tribunal in Final Order No. 50072/2016 dated 01.01.2016 which is on similar facts.

4. Ld. Advocate for the appellant reiterated the above grounds and further submitted that no service tax can be demanded in respect of construction activity for the period prior to 01.06.2007 in the light of the decision of the Hon'ble Supreme Court in the case of ***CCE vs. Larsen & Toubro Ltd – 2015 – TIOL-187-SC-ST*** since the activity of construction was in the nature of works contract.

5. Ld. AR appearing for the Revenue supported the order of the authorities below. He submitted that the activity undertaken by the appellant is covered under the category of Commercial or Industrial Construction (CIC) service. He also relied upon the Board Circular No. 80/10/2004-ST dated 17.09.2004 which has clarified that service tax would be leviable under the category of CIC in cases where the building or civil structure is used for primarily commerce or industry. In the present case, the educational institutions for which the construction activity has been undertaken are clearly not in the nature of charitable or philanthropic as can be seen from the fees being charged. Accordingly, he prayed that the order may be upheld.

6. We have considered the submissions made by both sides. The nature of activity undertaken by the appellant is construction of civil structures. The demand for service tax has been raised under the category of "commercial or industrial construction service" under Section 65(25b). It is pertinent to mention that the Hon'ble Supreme Court in the case of ***Larson & Toubro Limited*** (supra) has clearly laid-down that no service tax is leviable for the period prior to 01.06.2007 in respect of activities which are in the nature of

works contract. Works contract as a separate service was included in the statute only from 01.06.2007. The nature of the activity carried out by the appellant definitely involves service alongwith supply of materials required for construction. Accordingly, the activity would be rightly covered under the category of works contract from 01.06.2007. As per the decision of the Apex Court referred above no service tax can be levied for the period upto 31.05.2007. For the period from 01.06.2007 the activity will be covered within the definition of works contract and service tax will be leviable thereon.

7. The decision of the Apex Court in the case of Larsen & Toubro Limited (supra) was not available to the lower authorities at the material time when the impugned order was passed. Consequently, we consider it necessary to remand the issue to the original adjudicating authority for denovo decision, in the light of the pronouncement of law by the Hon'ble Supreme Court on this subject. We make it clear that there can be no levy of service tax upto 31.05.2007 and for the subsequent period the activity will be classifiable under "Works Contract Service". The matter is remanded for re-quantification of the demand involved under "Works Contract Service" for the period from 01.06.2007 onwards. Additional evidence, if necessary, may be admitted as per law.

(Pronounced on 02/03/2017).

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Pant