IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:17.04.2017
Date of Decision: 25/04/2017

Service Tax Appeals Nos.58243/2013, 50268/2014 &54149/2014

[Arising out of common Order-in-Original No.14/2013(ST) dated 21.03.2013 in Appeals Nos.58243 and 54149/2014 and Order-in-Original No.21/2013 –ST dated 4.4.2013 in Appeal No.50268/2014,passed by the Commissioner, Central Excise, Jaipur

Service Tax Appeal No.58243/2013 & 50268/2014

M/s. Balaji Builders — Appellants

Vs.

CCE, Jaipur-I — Respondent

Service Tax Appeal No.54149/2014

CCE,Jaipur-I — Appellant

Vs.

M/s.Balaji Builders — Respondent

Appearance:
Rep. by Shri Gaurav Gupta, CA for the party.
Rep. by Shri Sanjay Jain, DR for the Department.

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Fi nal Order Nos.53082-53084/2017

Per B. Ravichandran:

These three appeals are involving similar issues and hence are taken up together for disposal. Order dated 19.03.2014 of Commissioner of Central Excise Jaipur-I is subject matter of two appeals - one by the appellant /assessee and another by the Revenue. The period involved is from 1.10.2005 to 31.03.2010.

The third appeal is by the appellant/assessee against order dated 21.10.2013 of Commissioner of Central Excise, Jaipur-I.

2. The brief facts of the case are that the appellants/assessee were engaged in construction activities and were registered with the Service Tax Department under various taxable categories viz. “Commercial or Industrial Construction Service”, “Construction of Complex Service” and “Works Contract Service”. Certain inquiries were conducted by the officers of the Department in September, 2010 with reference to non-payment of service tax by the appellant/assessee. On completion of the inquiry a show cause notice dated 25.02.2011 was issued to the appellant/assessee to demand service tax not paid/short paid amounting to Rs.1,08,95,209/-. The case was adjudicated . The Original Authority confirmed the service tax liability of Rs.79,89,747/- and he also imposed equal amount of penalty under Section 78 of the Finance Act, 1994 and further penalties under Section 76 and 77 of the Act. The Commissioner dropped the demand of Rs.29,05,462/- mainly with reference to an exclusion of value of free supply materials . The appellant/assessee is in appeal contesting the service tax demand in excess of an amount of Rs.41,25,343/- already paid by them, before adjudication of the case. The Revenue contested the non-inclusion of free supply materials while calculating the gross value resulting in dropping the demand of Rs.14,71,869/-.

3. Ld. Counsel for the appellant submitted that the appellants are not contesting the demand of service tax of Rs.41,25,343/- which was not paid in time because of shortage of funds. However, they are contesting the imposition of penalty equal to this amount. Similarly regarding non-payment of service tax on the value of TDS

made by the recipient of service, the appellants have deposited an amount of Rs.2,32,661/- and are not contesting the tax liability. However, penalty imposed equal to this liability in terms of Section 78 is being contested. Further, the demand for differential service tax with reference to building cess, labour amount amounting to Rs.15,398/- and Rs.33,669/- are not being contested.

4. On merit, the appellants are contesting the service tax liability on retention money. It is submitted that service recipient have retained certain amount of contract as per terms of the tendered documents towards performance guarantee. The said amount is released later as and when the performance guarantee period is over. The ld. Counsel submitted that as and when the retention money is released to the appellant/assessee, they have paid service tax applicable. They have submitted a detailed chart of retention money on which service tax has been paid upon its realization, in the later period. The confirmation of service tax on such retention money has been wrongly made by the Original Authority only on the ground that in their books of accounts they have credited the party account. The ld. Counsel submitted that when a debit entry is based on in the party retention money account, this means the money is still realisable. The service tax demand for Rs.22,06,855/- is not liable to be paid. It does not mean that on transfer of amount of retention money from regular account to retention money account it is a realized amount.

5. Ld. Counsel submitted that the appellant/assessee, during the relevant period, received mobilization advances from service recipient. During the material time, the appellant/assessee were discharging service tax under the category of “Commercial & Industrial Construction Service” claiming abatement of 67% in

taxable value in terms of notification no.1/06 dated 1.3.2006. The Original Authority classified the service under the “works contract service” and did not allow either abatement or composition. There can be no service tax levy at full rate of 10.30% on full gross value on such contracts involving supply of materials also.

6. The appellants contested the confirmation of service tax levy of Rs.54,331/- in respect of construction of yard in the railway terminal. It is claimed that the Original Authority wrongly held that a container yard development is not to be considered as work relating to railways. The ld. Counsel submitted that the term “railway” as defined under Section 2 of the Railways Act is very broad. The siding yard/container yard for transportation of the goods/containers is very much part of the railways. It is the nature of construction, which is essential for consideration and not whether the same is completed through another main contractor.

7. The appellant/assessee contested the disallowance of abatement in taxable value in respect of receipts from M/s. The Learning Education Curve Ltd. The service tax cannot be demanded on the total receipts. Abatement in terms of notification no.1/06-ST is to be considered.

8. Ld. Counsel also contested the demand on the ground of limitation. The period involved is from 1.10.2005 to 31.03.2010 and the show cause notice was issued on 25.02.2011. The service tax liability in respect of composite works contract has been a subject matter of various litigations. The Hon’ble Supreme Court in the case of **Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC)** decided on 20.08.2015 finally held that indivisible composite works contract are not liable to service tax prior to 1.6.2007. As such, the service tax liability of the appellant in respect of various contracts, which are composite in nature for the period prior to

1.6.2007 itself is not tenable. Further, the appellants were registered with the Department and were discharging tax under the category of “Commercial or Industrial Construction Service” availing abatement in terms of notification no.1/06. The non-includability of value of free supply items for extending the abatement has been decided by the Tribunal in the case of **Bhayana Builders (P) Ltd. – 2013 (32) STR 49 (Tribunal-LB).** As such, considering the factual background, ld. Counsel submitted that there can be no question of suppression or intention to evade payment of duty when the issue involved is one of the interpretation of statute. Accordingly, it is pleaded that penalties imposed and the demand for extended period may be set aside.

9. Appeal No.ST/50268/2014 is by the appellant/assessee against confirmation of service tax demand of Rs.4,20,46,501/- by Commissioner of Central Excise-I, Jaipur vide his order dated 18.10.2013. The Original Authority held that during the period 1.4.2011 to 31.03.2012 the appellants/assessee wrongly classified the services rendered by them under “commercial or industrial construction service” and paid service tax claiming the abatement in terms of notification no1/06-ST. All the projects and contracts executed by the appellant /assese were involving transfer of property in goods on which the appellant /assese were paying VAT/WCT. In such situation, the correct classification of the services rendered would be works contract service for which abatement under notification no.1/06-ST is not available. The Original Authority held that the appellants /assese has not opted for composition scheme under works contract service in respect of most of the contracts and also provisions of Rule 2A of Valuation Rules applicable to Works Contract Service would not be extended to the appellant in absence of supporting evidences regarding value of materials

supplied in the execution of the work contract. Accordingly, the Original Authority confirmed the service tax liability without allowing any abatement or composition scheme. He also imposed penalty under Section 76 of the Finance Act, 1994.

10. Ld. Counsel submitted that having admitted that the contract executed by the appellant/assessee are all in the nature of works contract involving supply of materials, the Original Authority should have considered their claim either for composition scheme or for the provisions for Rule 2 A of the Valuation Rules. Under no circumstances, service tax can be levied and collected on the gross value of works contract service. The same will be against the statutory as well as constitutional provisions of taxing works contract.

11. Ld. AR submitted that Revenue is in appeal against order dated 19.03.2013 only to the limited extent of contesting exclusion of value of free supply items, thereby dropping demand for service tax of Rs.14,71,869/- by the Original Authority. He submitted that the gross value in terms of the Section 67 of the Finance Act read with Rule 3(1) of the Works Contract (Composition Scheme for payment of service tax) Rules 2007, makes it clear that the value for service tax should include all receipts. In the present case, in fact there is no free supply of materials. As for the supply of materials by the recipient of service, the appellant/assessee made a credit entry in their ledger. This means that the said value is part of gross amount charged by the assessee for the works contract. Regarding the grounds of appeal raised by the appellant/assessee, ld. AR reiterated the findings recorded by the lower authorities in both the orders.

12. We have heard both the sides and perused the appeal records.

13. We consider first the appeals filed against the impugned order dated 19.03.2013. There are two main issues contested by the appellants/assesses. The Original Authority confirmed service tax demand on retention money. The Original Authority held that the retention money has been shown as security deposit account by the appellant/assessee. We note that the Original Authority solely went by the ledger entries without appreciating the accounting procedure followed by the appellant/assessee. It is apparent that when a debit entry is passed for retention money, the same remains still releasable. The said amount is transferred from regular account and shown as a security deposit with a recipient of service. Admittedly, the appellant/assessee is liable to service tax as and when the retention money is released to them. The appellant/assessee has also not contested such proposition. In fact, they have submitted a chart showing release details of retention money on which service tax has been paid later by them. This requires verification by the jurisdictional officer. Subject to such verification of the assertion made by the appellant, we find that there is no legal merit in confirming service tax liability on the retention money and kept by the service recipient in whatever manner.

14. The mobilisation advance received in case of works contract service is liable to service tax. This aspect is not contested by the appellant/assessee. The point of dispute is that during the material time, they were discharging service tax under the category of "commercial or industrial construction service" claiming abatement in terms of notification no.1/06 dated 1.3.2006. The Original Authority reclassified the services under "works contract service". He also denied the abatement claimed by the appellant as not applicable to the works contract service. The fact remains that service tax cannot be levied and collected on the whole gross value of works

contract service. Such action will be not only against the statutory provisions of Finance Act, 1994 but also against the Constitutional mandate with reference to taxability of works contract service. The Hon'ble Supreme Court examined the scope and leviability of the service tax under works contract service in **Larsen & Toubro Ltd.(supra)**. The admitted legal position is that service tax levy under Finance Act, 1994 can be only with reference to service portion of the works contract service, which is composite in nature involving transfer of goods in property and rendering of service. The Original Authority by denying the composition scheme as well as facility of Rule 2 A of Service Tax (Determination of Value) Rules, 2006, has confirmed the tax liability on the gross value of the contract. We find such confirmation is not legally sustainable. The taxable value for service tax in respect of work contract has to be arrived at by applying the provisions of either composite scheme or Rule 2 A of the Valuation Rules. For this, the appellant /assessee should submit supporting evidences to satisfy the conditions as stipulated by the said rules.

15. An amount of Rs.54,331/-towards service tax liability has been confirmed in respect of works executed by the appellant/assesse for construction of yard in the railway terminal. We note that the said work is in relation to development of container yard and another relied work (Green Field Rail linked terminal). We hold that the works contract service excludes works in respect of roads, airports, railways, transport terminals, etc. The scope of work involved in developing the container yard linked to railways will fall under the category of "transport terminals" if not under general categories of "railways". We find that the reasoning adopted by the Original Authority is not legally sustainable.

Accordingly, service tax liability with reference to the said work in relation to development of container yards is not sustainable.

16. Regarding the appeal by Revenue against non-inclusion of value of materials supplied by recipient of service, we note that the decision of Tribunal in **Bhayana Builders (P) Ltd. (supra)** may have relevance. Since we are proposing to remand the case to original authority for a fresh decision, this issue also can be examined by him.

17. In respect of appeal file by the appellant/assessee against order dated 21/10/2017 of Commissioner of Central Excise Jaipur, we note that the original order confirmed service tax liabilities of rupees 4,20,46,501. The period involve is from 1/04.2011 to 31/03/2012. It is seen that appellant/assessee were paying service tax on these projects classifying the same under “commercial or industrial construction service”. They have availed the abatement in terms of notification number 1/06-ST. It was held by the original authority that all projects/contracts executed by the appellant/assessee involved transfer of the property in goods where the appellant/assessee were paying VAT/ST. Accordingly, the service rendered by the appellant/assessee were reclassified under works contract service. There is no dispute on these factual issues. However, the differential demand of service tax arose due to denial of abatement under notification 1/06-ST by the Original Authority on the ground that the said notification is not applicable contract service. While we find that the classification of service is not in dispute, it is clear that service tax cannot be levied and collected on the gross, total value of works contract when admittedly, there is also transfer of goods in property. Provisions of work contract composition scheme as well as Rule 2 A of Service Tax Valuation

Rules are specifically made applicable to the works contract service, subject to fulfillment of various conditions so that the tax liability can be restricted only to the service portion of the contract. Admittedly, no service tax can be levied on sale of goods or transfer of goods in property. In fact, the Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd. (supra)** held that prior to 1.6.2007 there is no machinery provisions for levy and assessment of service tax on indivisible works contract. The ratio of the decision is that the Finance Act, 1994 authorizes levy of service tax only for service rendered. Keeping this in view, we find that the decision of the Original Authority to confirm service tax liability on works contract on the whole value is not legally sustainable. We find that the eligibility of the appellant/assessee either for the composition or for valuation under Rule 2 A of the Valuation Rules are to be examined afresh for a decision by the Original Authority. As such, we set aside the order dated 21.10.2013 and remanded the matter back to the Original Authority for a fresh decision. The impugned order dated 19.03.2013 is also set aside to the extent of denial of composition scheme or the provisions of Rule 2 A in respect of works contract service as discussed above. The matter has to go back to the Original Authority for a decision.

18. Accordingly, the appeals by assessee as well as Revenue are allowed by way of remand to limited extend as discussed above.

[Order pronounced on 25.04.2017]

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

Ckp.