IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –IV

Service Tax Appeal No.ST/55053-55055/2013-CU [DB]

[Arising out of Order-in-Original No.163-165/GB/2012 dated 28.09.2012 passed by the Commissioner of Service Tax, New Delhi]

M/s. ANS Constructions Ltd. …Appellant

Vs.

C.S.T., Delhi … Respondent

Service Tax Appeal No.ST/56536/2013-CU [DB]

[Arising out of Order-in-Appeal No.268(RDN)ST/JPR-I 2012 dated 20.12.2012 passed by the Commissioner (Appeals), Central Excise & Customs, Jaipur-I]

C.S.T., Delhi …Appellant

Vs.

M/s. ANS Constructions Ltd. … Respondent

Present for the Appellant : Mr.Jitin Singhal, Advocate &
Mr. Jatin Mahajan, Advocate
Present for the Respondent: Ms. Neha Garg, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing / Decision : 01/11/2017

FINAL ORDER NO. 57674-57677/2017

PER: B.RAVICHANDRAN

Appeal Nos. ST/55053-55055/2013-CU [DB]

These first 3 appeals are on common dispute against common impugned order dated 28.09.2012 of Commissioner, Service Tax, New Delhi. These appeals are by appellants assessees. The fourth appeal by Revenue is dealt with later in this order.

2. The appellants are engaged in construction activities and are registered with the Department for payment of Service Tax under Commercial or Industrial Construction Service. The dispute in the present appeals relates to the Service Tax liability of the appellant for various activities undertaken by them during the period 2008-09 to 2010-11. The original authority confirmed Service Tax liabilities of total amount of Rs.1,97,34,850/-. He also imposed penalties under Section 76, 77 & 78 of Finance Act, 1994.

3. The ld. Counsel for the appellant submitted that the dispute relates to various activities undertaken by them. Substantial amount of Service Tax was confirmed with reference to their activity of production and supply of readymix concrete (RMC) to their clients for use in the construction. He submitted that they are not involved in any construction activity and are only producing and selling RMC to the clients in their site.

4. Service Tax liability on construction of Hostel for Medical College, Mandia built in pursuance of agreement with Karnataka Government is also contested on the ground that the same is not a Commercial Construction. Similarly, construction of apartment complex for Army personnel cannot be taxed either as a commercial or industrial construction or

residential complex service. Ld. Counsel also contested the tax liability for landscaping horticultural works and also construction of parking facilities for Municipal Corporation, Jalandhar. He submitted, these cannot be considered as commercial activities liable to Service Tax under any category. A liability of Rs. 5,91,495/- is admitted as due to re-conciliation error resulting in short payment. The ld. Counsel contested the invocation of extended period on the ground that there is no examination or finding in this regard in the impugned order. Further, considering the nature of activities undertaken by them, there can be no allegation of suppression on their part. On the same reason the appellant also pleaded for setting aside the penalties imposed on them and also for extending benefit of Section 67 (2) for recalculation of tax liability, if any.

5. Ld. A.R. reiterated the findings of the original authority. She submitted that regarding claim of the appellant with reference to construction of Medical College Hostel, the fact requires verification as apparently the quantum of consideration received are to be tallied with the agreement amount. In the absence of such clarity, the exemption, if any, available to such construction activity cannot be extended to other receipts. Regarding landscaping horticultural works, he submitted that the decision of the Tribunal in the appellant's own case is not applicable to the present period as the work undertaken by the appellant with reference to movable or immovable property is liable to be taxed after the amendment in a tax entry. Similarly, the appellants are liable to pay

Service Tax on the construction activity of parking facility for Municipal Corporation, Jalandhar and this is purely a commercial activity.

6. We have heard both the sides and perused the appeal records. On the first issue regarding Service Tax liability with reference to the activity of the appellant of production and supply of RMC, we note that the impugned order examined the scope of activity and held that since, they are engaging equipments of construction, the activities are in relation to construction of commercial building. Accordingly, the appellants were held liable to tax. We note that the appellants are engaged in production and supply of RMC. Necessarily such production and supply at site requires the equipments relevant to the same. Considering the nature of RMC, the same are to be supplied and used immediately. Use of equipments for due delivery of RMC in the required site in a manner as required by the client, will not make the supplier of RMC as a person engaged in commercial construction of building. We note that the Tribunal in the case of Vikram Readymix Concrete Pvt. Ltd. – 2015… (42) STR 866 (Tri.-Delhi), following the decision in GMC Concrete Mixing Pvt.Ltd. 2012 (25) STR 357 (Tri.) held that supply of RMC and carrying out auxiliary and incidental activities of boring, pumping and laying of concrete cannot be considered for tax liability under construction service. Accordingly, we hold that the impugned order confirming the tax liability is not sustainable.

7. The appellants constructed Hostel for Medical College in Mandia. Admittedly, such construction cannot be put to tax liability under commercial or industrial construction service. However, certain amount is held to be liable to Service Tax by the original authority, in view of the submission made by the appellant to indicate that they have received the amount in two different financial years. Though the ld. Counsel for the appellant submitted that this is only a typographical error in their written submission, we find that the facts requires verification with basic documents. The same may be done by the Original Authority to satisfy, whether consideration, as claimed by the appellant for exclusion, are all relatable to such construction of Medical College Hostel only.

8. We note that the appellants liability for construction of apartments for Army cannot be sustained. The Tribunal in earlier cases involving similar construction activities for Army personnel held that the same cannot be subjected to Service Tax. We refer to the recent decision in the case of Sugantha Construction Pvt. Ltd. vide Final Order No. 57351/2017 dated 25.10.2017. In any case, we also note that the construction of apartments is for the personal use of the staff of Army. The impugned order did not classify the service under construction of complex service. Proposal in the notice was to tax all consideration under commercial or industrial construction service. Admittedly, the appellants have produced documentary evidence in this regard before us only. The same can be scrutinized by the original authority for

exclusion from the tax liability, in view of the observation made alone.

9. The appellants contested the tax liability with reference to landscaping horticultural work. They relied on the decision of the Tribunal in their own case – 2010 (17) STR 549 (Tri. Del.). We note that the Tribunal was dealing with the period prior to amendment of the tax entry with reference to management, maintenance and repair service. We note that subsequent to the amendment in the tax entry with effect from 16.06.2005 any service with reference to movable or immovable property is liable to tax. The ld. Counsel contested the tax liability on the ground that they are not maintaining any immovable property. Managing plant and grooming garden cannot be considered as maintenance or repair service. We are not in agreement with the proposition of the appellant in this regard. The appellants are managing and maintaining gardens and undertaking various activities. The activities are covered by Clause (a) and (b) of Section 65 (64) of the Finance Act, 1994, which talks about management of properties immovable or not and maintenance or repair of properties immovable or not. Considering the wide scope of tax entry, we find that the appellants shall be liable to tax for their activities of managing and maintaining gardens and horticultural activities with reference to such gardens.

10. The appellants also contested their tax liability with reference to construction of parking at Narender Cinema and Nehru Garden for Municipal Corporation, Jalandhar. We are

not in agreement with the submissions of the appellants with reference to the claim that these properties are of non-commercial nature. Apparently, the parking lots are used for commercial purpose and it cannot be considered as a non-commercial activity. The Service Tax liability of the appellant on this is upheld.

11. The appellants contested the demand for extended period. We note that impugned order did not at all discuss the sustainability of demand for extended period with any reasons. Further, we also note that considering the nature of services as above and also the issues of interpretation involved including supply of RMC mix, maintenance of gardens, work executed for Jalandar Municipality and Karnataka Government, we hold that there can be no case for invoking extended period in such situation. Accordingly, demand wherever sustainable shall be limited to the normal period only. On the same reason, penalties imposed on the appellants are also set aside.

12. In view of the discussion and analysis, we note that the Service Tax liability on the activities of supply of RMC, construction of hostel for medical college and construction of apartments for Army are not liable to Service Tax. The appellants shall be liable to pay service tax for landscaping horticultural work and construction of parking facilities. These are to be examined for quantification within the normal period. To this limited extent, the original authority shall re-examine the issue and quantify the tax liability. The appeals are disposed of in the above terms.

Appeal No. ST/56536/2013-CU [DB]

13. There is a fourth appeal involving one of the above disputes, filed by the Revenue. In this appeal, Revenue is aggrieved by the order dated 20.12.2012 of Commissioner (Appeals), Jaipur-I. The Commissioner dropped the demand against the appellant with reference to their activities of horticultural service holding the same as not liable to tax under management, maintenance and repair service for the period 1st Jan., 2007 to 30th June, 2007. He relied on the decision of the Tribunal in appellant's own case (supra). As we have already noted that the Tribunal was examining the tax entry prior to amendment which dealt with only immovable property. We have held appellant liable to service tax for such activities post amendment. We hold that the impugned order is liable to be set aside and accordingly. We set aside the same and restore the original order. However, there is no ground for imposing penalty in view of the facts and circumstances. Except for setting aside the penalties, the original order is restored and the Appeal by Revenue is allowed.

[Dictated and pronounced in the open Court]

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita