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

Date of Hearing/Decision:07.11.2017

Service Tax Appeals Nos.1788 /2011-DB

[Arising out of common Order-in-Original No.44/2011(ST)-COMM. Dated 15/16.09.2011 passed by the Commissioner –I, Customs, Central Excise and Service Tax, Jaipur]

M/s.Rishabh Construction Appellant

Vs.

CCE,Jaipur Respondent

Service Tax Appeal No.1812/2011 (DB)

CCE, Jaipur …Appellant

Vs.

M/s. Rishabh Construction …Respondent

Appearance:

Rep. by Ms. Rinky Arora, Advocate for the appellant.
Rep. by Shri S. Jain, DR for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order Nos.57809-57810/2017

Per B. Ravichandran:

These are two appeals against the same impugned order dated 16.09.2011 of Commissioner of central Excise, Jaipur. The appellant/assessee is engaged in construction activities. They are registered with the Department for payment of service tax. After completion of certain inquiry, the Department initiated proceedings against the appellant/assessee to demand and recover service tax not paid by the appellant/assessee in respect of 26 contracts executed by them. These are essentially contracts related construction buildings for various clients either for commercial or residential purposes. The case was adjudicated by the Original Authority, who confirmed service tax liability of Rs.30,09,973/- along with penalties under Section 76 and 78 of the Finance Act, 1994.

2. The appellant /assessee is aggrieved by the above order only to the limited extent on two points viz. :-

(a) They have paid service tax of Rs.15,14,220/-, prior to issue of show cause notice. They are not contesting the same and as such, prayed for waiver of penalty on such tax demand.

(b) Service tax liability of Rs.14,95,753/- is attributable towards tax liability confirmed on the value of materials, which were supplied free of cost by the recipient of service. This value is not to be considered for gross taxable value for works contract service.

3. Ld. Counsel for the appellant/assessee elaborated on these points and supported the impugned order on other points.

4. Ld. AR elaborating the grounds of appeal by the Revenue submitted that the Revenue is aggrieved by the impugned order on the two grounds :-

(a) One of the constructions carried out by the appellant/assessee is for CPWD with reference to building, residential units for CRPF. The finding of the Original Authority is incorrect. The service provider is the appellant/assessee and the recipient is CPWD. The building is not for personal use of CPWD. Hence, relying on the clarification dated 24.05.2010 of the Board, it is argued that the tax liability will arise on the appellant/assessee in respect of the said construction activities.

(b) The Original Authority erred in extending the benefit of the Composition Schemes to the works contract service rendered by the appellant/assessee. No option under Rule 3 of the 2007 Rules has been exercised and filed by the appellant/assessee. In absence of such specific option, the composition scheme cannot be extended to the appellant/assessee.

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

6. On the points raised by the appellant/assessee in their appeal, we note that they are not contesting the tax liability as confirmed by the Original Authority except for exclusion of the value of the free supply materials while arriving at the gross value for tax purposes. The Original Authority held that since these are composite works contract in terms of Rule 3 of Composition Scheme, the gross value should be considered for such composition as concessional rate is available only when the gross value is taken. In this connection, we note that the appellant/assessee relied on the decision of the Tribunal in the case of **Bhayana Builders (P) Ltd. – 2013 (32) STR 49 (Tribunal-LB).** Ld. AR contested the application of the said decision to the dispute in hand. We have examined the said decision. It is clear that the Tribunal examined the scope of Section 67 and recorded the following findings:-

> **"16.** In conclusion, we answer the reference as follows:
>
> (a) The value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider, would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act, 1994; and "

7. We also note that the reference to the Larger Bench was regarding abatement available under Notification no.15/2004-ST. The said notification has an explanation, which stated that the gross amount charged shall include the value of

the goods and materials supplied or provided or used by the provider of construction service for providing such service. On examining the scope of Section 67 as well as the said explanation of the notification, the Tribunal concluded that the items supplied free of costs by the recipient of service cannot be considered for addition in the value to arrive at the value for tax purposes. Accordingly, we hold that subject to verification of quantification of free supplied materials, based on the documents to be submitted by the appellant/assessee, such exclusion is to be considered and allowed.

8. On the second point raised by the assessee/appellant regarding the penalty, we note that the tax liability on the composite works contract was discharged wherever liable prior to issue of show cause notice and as such, the proceedings would have been concluded. However, since the issue involved was with reference to multiple contracts of different nature, the case was examined and detailed order was passed by the Original Authority, accepting some of the contention of the appellant and rejecting the others. In view of the facts and circumstances of the case, we find that this is a fit case for waiver of penalty by invoking Section 80. Accordingly, penalties imposed on the appellant/assessee are set aside.

9. Considering the appeal by the Revenue, we note that the two points of grievance raised are recorded above.

10. On the first issue, regarding the personal use of the building by the recipient of service, we note that simile set of facts came for consideration before the Tribunal in **Khurana Engg. Ltd. – 2011 (21)STR 115 (Tribunal-Ahmd.)**. The Tribunal in fact examined the clarification on 24.05.2010 issued by the Board and arrived at the conclusion that the tax liability shall not apply to the building, which

is for the personal use of Income Tax Department. The ratio is applicable to the facts of the present case.

11. On the second issue, regarding eligibility of the appellant /assessee for composition scheme, we note that the appellant /assessee pleaded that the finding of the Original Authority is to the effect that payment of concessional rate of duty itself should be construed as exercising option. Reliance was placed on the decision of the Tribunal in the case of **ABL Infrastructure Pvt. Ltd. – 2015 (38) STR 1185 (Tribunal-Mumbai)**. However, ld. AR objected to the finding of the Original Authority on the ground that the appellant /assessee could not pay concessional rate of duty as per composition scheme in the absence of a proper intimation in terms of Rule 3 and he also relied on the ratio relied upon by the Hon'ble Supreme Court in **Nagarjuna Construction Co.Ltd. – 2012 (28) STR 561 (SC).** We note that the said decision of the Hon'ble Apex Court was considered by the Tribunal in **ABL Infrastructure Pvt. Ltd (supra).** It is clear that the facts of the present case with reference to each one of the taxable contract are to be verified regarding the period involved as well as the facts of payment of concessional duty in respect of the whole of the contract etc. This requires verification of the basic documents to be supplied by the appellant/assessee.

12. In view of the above discussion and analysis, we note that the Original Authority may require factual verification of two aspects viz. quantum of exclusion with reference to free supply materials from the taxable value in terms of the ratio of the decision of the Tribunal in the case of **Bhayana Builders P. Ltd. (supra)** and the eligibility of the appellant /assessee for composition scheme applying the ratio of the Apex Court decision in **Nagarjuna Construction Co.**

Ltd. (supra) as well as the decision of Tribunal in the case of **ABL Infrastructure Pvt. Ltd.** (supra). Except for this limited remand, the other aspects pleaded by the appellant/assessee are admitted and allowed. The Revenue's appeal is disposed of in the above terms.

[Order dictated & pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.