(In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No. ST/60458/2013 & 50357/2014
(Arising out of Order-in-Original No.71/AKM/CST(Adj)/2013 dated 09.10.2013 passed by Commissioner of Service Tax (Adj), New Delhi and 42 to 43/ST/Commr/DM/RTK/2013-14 dated 30.8.2013 passed by the Commissioner, CE, Rohtak)

M/s Airef Engineers Pvt Ltd …Appellant

Vs

CST Delhi …Respondent

Appearance:
Present for the Appellant : Shri P.K. Sahu, Advocate
Present for the Respondent : Shri Amresh Jain, DR

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

Date of hearing: 02.11.2017
Date of decision: 29.11.2017

Final Order No.58111-58112/2017

Per B. Ravichandran,

These two appeals are involving common dispute regarding service tax liability of the appellant on various contracts executed by the appellant mainly for Ministry of Defence. The period of dispute is 2006-07 to 2011-12. The original authority confirmed service tax liability of Rs.87,78,10,858.00. The tax liability was confirmed under works contract service with applicable rate under composition scheme. For the period prior to 01.06.2007, the appellants were held liable for service tax under erection commissioning or installation, commercial or industrial construction service and construction of complex service. The service tax was calculated on the gross value based on the available records. The original authority also imposed penalties under various sections of Finance Act, 1994.

2. The ld Counsel appearing for the appellant submitted that the original order dated 30.08.2013 considered income figures from Profit and Loss Account plus amount of advances from balance-sheets. For the year 2011-12, estimated taxable value has been taken in place of actual accounts. He further contended that demand of Rs.2.61 crores, which is covered in the earlier proceedings, was again included in the second proceedings. The works contract service is not liable to service tax prior to 01.06.2007. The rate applicable to the works contract composition should be as per the date of execution of contract and not based on the date of receipt of consideration. The ld Counsel contended that the same contract has been subjected to different rates and classification under various tax entries. There is no identification or quantification of tax liability for proper computation contract-wise, year-wise.

3. It is further pleaded that the appellants have filed reconciliation between Profit & Loss Account and Service Tax returns for the years 2006-07 to 2010-11. The same has not been considered. The composite works contracts have been vivisected for classification and to levy service tax at different rates. This is not legally tenable. The rate applicable for tax liability should be the date of rendering service. As such the date of execution of works contracts should be considered for applying the composition rate. In the absence of mechanism to

bifurcate the services provided during a given period date-wise in pursuance of a single contract, there cannot be enhancement of rate of composition for the same contract. It is further contended that Rule 3(3) of Works Contract Composition Rules, 2007 should be applied as per the rate when the option is exercised. The rate cannot be varied thereafter. In other words, the composition rate of 2 % prevailing at the date of commencement of contract should remand valid for the entire contract and cannot be varied mid-way. The appellants have also contested the application of Section 73A in the present case. They have not received any service tax from the client which they have not paid to the Government. The price being of inclusive of tax does not mean they have collected service tax. On all these grounds, the ld Counsel submitted that the impugned orders are not sustainable both on facts and on law.

4. The ld AR reiterated the finding of the lower authority. He submitted that all through-out the proceedings, the appellants did not come forward with full particulars with supporting evidence. In the name of official secrecy for contracts with the Defence Ministry, the appellants did not cooperate with the department. In the absence of supporting evidence like details of contracts, payment schedule, actual receipts, the adjudicating authority is put to difficulty in examining all the contentions of the appellant. The appellants made various submissions but failed to provide supporting documentary evidence. This has been recorded by original authority.

5. We have heard both sides and perused appeal record. As noted above, as part of the submissions by the ld Counsel for the appellant, we find that there is an element of lack of clarity in various issues dealt with in the impugned orders. First of all, there is a dispute regarding quantification of taxable value itself. The Revenue proceeded to consider income figures in Profit and Loss Account. We hold that the same is not supported by legal provisions. The taxable value in terms of Section 67 of the Finance Act has to be arrived at based on clear documentary evidence. No doubt, such documentary evidences are to be submitted by the appellants as a provider of service. They are obliged by law to provide such data.

6. The second aspect is that the services rendered by appellant are all claimed to be composite in nature. This has been substantially admitted by the original authorities also. We note that as per the ratio laid-down by the Hon'ble Supreme Court in Larsen & Toubro Limited 2015 (39) STR 913 SC, no service tax liability arises in respect of such composite works contracts for the period prior to 01.06.2007. We also note that when the contracts are determined to be works contracts, then the question of taxing such contracts to the full gross value is not legally tenable. The applicability of abatement or composition scheme for such contracts should be examined with supporting evidence. In the present case, the lower authority has allowed the composition scheme for the appellant in respect of works contract service post 01.06.2007. Here, a further dispute arose with reference to rate of duty applicable for such composition in respect of the same contract spread-over many years. The rate of duty for composition was increased

from 2% to 4%. From 01.03.2008, the appellant contested that the revised rate after enhancement is not applicable to continuing works contract in the absence of machinery for such split-up value for applying the said enhanced rate. We are not in agreement with such proposition. Though the option for composition exercise for a particular contract is for the whole contract, the Revenue cannot be denied increased rate of duty applicable to the said contract. The case laws relied upon by the appellant and the submissions made regarding a promissory estoppel are not relevant to the facts of the present case. While composition scheme is to be applied for the whole contract, there is no legal bar for the Revenue to collect the enhanced rate of composition when the Government has amended the rate. The relevant date for calculating the tax liability shall be the date of provision of service. Accordingly, based on such relevant date, the tax rate has to be applied and calculated. There can be no estoppel against tax rate revision. We are not in agreement with the proposition that the rate as applicable at the time of commencement of works contract services should be applied for the whole contract. There is no legal support for such proposition.

7. On careful consideration of the impugned orders and the submissions made by the appellants, we are of the considered view that the impugned orders suffer from various infirmities attributable to factual appreciation and quantification. The tax liability of composite works contract is to be determined in line with the decision of Hon'ble Supreme Court in Larsen & Toubro Limited (supra). The tax liability on such contract will arise only with effect from 01.06.2007. The quantification on taxable value should be based on the actual

receipts of consideration by the appellant. There can be no levy of service tax on composite works contract for the period prior to 01.06.2007.

8. The above discussion clearly indicates that the impugned orders cannot be sustained in the present form. Accordingly, these orders are set-aside and the matter is remanded back to the original authority for a combined decision of all the notices which were considered and decided in the impugned orders. The appellant shall be given adequate opportunity to defend their case with all supporting documentary evidences. We also direct the appellant to provide all documents to enable the adjudicating authority to arrive at a duly analyzed and reasoned decision. The appeals are allowed by way of remand.

(Pronounced in Court on 29.11.2017)

(S.K. Mohanty) Member (Judicial)	(B. Ravichandran) Member(Technical)

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