

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

COURT-IV

Date of hearing/decision: 01.12.2017

Appeal No. ST/971/2011 & ST/50648/2014- [DB]

[Arising out of the Order-in-Original No. JAI-EXCUS-001-COM-060-13-14 dated 17/10/2013 & 99 (DKV) ST/JPR-I/2011 dated 24/03/2011 passed by the Commissioner of Central Excise and Service Tax-Jaipur-I]

Bridge & Roof Company (I) Ltd.

... Appellant

Vs.

CCE, Jaipur

...Respondent

Appearance:

Present Shri Tarun Chatterjee, Advocate for the appellant

Present Shri Ranjan Khanna, AR for the respondent

Coram: Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. B. Ravichandran, Member (Technical)

FINAL ORDER No. 58254-58255/2017

Per B.Ravichandran

- 1.** These two appeals are on common dispute and are accordingly taken up together. The appellants are engaged in providing Construction Services/ Erection Commissioning or installation Services in perusance to a contract with M/s BHEL for a power project. The said contract was entered into on 15/12/2006. From January, 2007 the appellants were registered with the department and discharged Service Tax under the category of Commercial or Industrial Construction Service. After introduction of 'Works Contract Service' w.e.f. 01/06/2007 they started paying Service Tax categorizing the service under Works Contract Service and availing composition rate as per Works

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Contract (Composition Scheme For Payment of Service Tax) Rules, 2007. The revenue objected to the said payment on the ground that the appellant cannot change the classification of service, midway. The Composition scheme will not be available to an ongoing contract on which service tax has been paid prior to 01/06/2007 under a different classification. The plea of the appellant that even if the work executed by the appellant is considered as 'Commercial or Industrial Construction Service'; they should be eligible for abatement under Notification No. 1/2006- ST was also not accepted by Revenue. Proceedings initiated against the appellant resulted in two orders confirming differential Service Tax liability. Penalties were also imposed on the appellant.

- 2.** The Ld. Counsel for the appellant submitted that the demands in the proceedings cover the period 01/07/2007 to 31/03/2011. The demand arose mainly on the ground of denial of Composition scheme for Works Contract as availed by the appellant. He submitted that the contract under which they have executed the work for BHEL is of composite nature, involving supply of goods as well as provision of service. This is an admitted fact. Such contracts are liable to Service Tax only w.e.f. 01/06/2007 in terms of the law laid down by the Hon'ble Supreme Court in *Larsen and Tubro Ltd.* 2015 (39) STR 913 (SC) It is further submitted that after the introduction of Works Contract Service w.e.f. 01.06.2007 the appellants have

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discharged due service tax under such category after availing the composition scheme in terms of 2007 Rules. They are eligible for availing the said rules. They have not availed any credit on any of the inputs used for providing service. There is no bar in availing credit of Service Tax paid on input services under 2007 Rules.

3. Regarding the dispute with reference to correct rate of duty applicable for Composition scheme during 01/03/2008 to 31/03/2008 the LD. Counsel submitted that though the impugned order mentions about difference in rate between 2 per cent to 4 per cent, the quantification has been made taking 12 per cent as the rate. He admitted that the changed rate of duty for composition scheme after enhancement to 4 per cent is rightly due and they did discharge the same. This can be verified by the authorities.

4. Regarding exercising the option under 2007 Rules, he submitted that with the introduction of Works Contract Service with reference to an ongoing contract they have started paying Service Tax availing the composition rate. For this contract, tax liability arises only w.e.f 01/06/2007 as such for the Work Contract they have not paid tax without Composition scheme and they have followed the scheme for the whole project after 01/06/2007. Their payment of 2 per cent as per composition scheme w.e.f 01/06/2007 itself should be considered as a due option as no prescribed format or methodology has been

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stipulated under 2007 Rules. He relied on various decided cases in support of these above contentions.

- 5.** The Ld. AR supported the findings of the Original Authorities. He submitted that the Composition scheme is available only in terms of 2007 Rules. It is clear that the service provider has to opt for the scheme and should follow the scheme for the whole of the contract. When the appellant have paid Service Tax for this contract on a different classification prior to 01/06/2007, they are not permitted to switch over to the Composition scheme post 01/06/2007.
- 6.** We have heard both sides and perused the appeal records. The main point of dispute is the appellant's eligibility to tax as per the composition scheme under Rules, 2007. In terms of decision of Hon'ble Supreme Court in *Larsen and Tubro*, (supra) composite Work Contract are not liable to Service Tax prior to 01/06/2007 as there was no machinery provision for identifying this service portion or for quantification of tax. Admittedly, the appellants are liable to Service Tax for the work executed in pursuance of the impugned contract only w.e.f. 01/06/2007 as such any payment of Service Tax prior to 01/06/2007 will not bar the appellants from following the procedure as available under 2007 Rules. Admittedly, separate letter of intimation was not filed for availing the said scheme. However, we note that from the date of introduction of works contract service the appellants have started discharging service tax at the rate of 2

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per cent availing the procedure under 2007 Rules. The Tribunal in the case of ***ABL Infrastructure Pvt. Ltd., 2015 (38) STR 1185 (Tri.Mumbai)*** held that when the appellants started paying tax under Works Contract Service availing the Composition scheme and reflected the rate in statutory returns ST-3 filed before the Department the same should satisfy the condition of exercising option. The Tribunal recorded that the substantial benefit cannot be denied for procedural deficiency if any. No format has been prescribed for making/exercising an option nor it has been specified as to whom the option must be addressed. The Tribunal recorded that the fact of paying Service Tax at the composition rate in the returns filed by them is enough indication to show that they have opted for payment under Works Contract Composition Scheme. The Tribunal relied on the decision in the present appellant's own case 2012 (27) STR 406 (Tribunal).

- 7.** Following the ratio as mentioned in the above Tribunal's decision, we find the appellants are entitled for Composition Scheme in the present case. It is also noted that the appellants have not availed any credit on inputs which will bar them from availing the said scheme. Availing credit of input services is not barred by the scheme. Accordingly, we find that the objection against the appellant availing the composition scheme is not sustainable.

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8. With reference to correct rate of duty to be followed under the Composition scheme we note that there is no dispute that the appellants have to discharge Service Tax either at 2 per cent or at 4 per cent depending on the effective rate of duty applicable during the period of providing service. The appellant are not contesting this issue. Any short payments because of adopting lower rate are to be verified by the jurisdictional authorities for correct quantification.

9. In view of above discussion and analyses we set aside the impugned order and allow the appeals.

[Order dictated and pronounced in the open court]

(S.K.Mohanty)
Member (Judicial)

(B.Ravichandran)
Member (Technical)

Rekha