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

<u>COURT-IV</u>

Date of hearing/decision: 13.12.2017

Appeal No. ST/56833/2013- [DB]
[Arising out of the Order-in-Original No. 25/S. Tax/D-I/2013 dated 10/01/2013 passed by the Commissioner, Central Excise, New Delhi.]

BCC Developers & Promoters Pvt. Ltd. … Appellant

Vs.

CST, Delhi …Respondent

Appearance:
Present Shri B.L. Narsimhan & Rachit Jain, Advocate for the appellant
Present Shri Amresh Jain, AR for the respondent

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

<u>FINAL ORDER No. 58644/2017</u>

<u>Per B.Ravichandran</u>

1. The present appeal is against the order dated 10/01/2013 of Commissioner, Central Excise, Delhi-I. The brief facts of the case are that the appellants are engaged in construction activities. They have entered into an agreement with M/s IOC for construction of expansion project of Panipat Refinery Township mainly consisting of residential units. In pursuance of said contract, the appellants executed civil construction work for IOC. Similarly, in pursuance of a contract with Jamia Milia Islamia University, New Delhi the appellant constructed a practice venue for Common Wealth Games, 2010. These two activities were subject matter of dispute in the present appeal. On the first issue, the impugned order held that irrespective of tax liability of such activities the appellants have to pay an amount of Rs. 5,51,33,267/- in terms of Section 73 A of Finance Act, 1994 as the appellants collected this much amount representing Service Tax in terms of the agreement with IOC. On the second issue Service Tax liability of Rs. 61,13,867/- was confirmed under Works Contract Service. Various penalties were also imposed. There is also a third issue regarding liability of the appellant for an interest amount of Rs. 6,79,414/- for delayed payment of Service Tax on construction of residential complexes in Noida.

2. The Ld. Counsel appearing for the appellant contested all the three issues. He submitted on the following lines.

a. The appellant entered into an agreement with IOC for expansion project of township of Panipat. The contract stipulated as a standard clause that "the contract value is inclusive of all taxes and duties, including Service Tax". The whole dispute is revolving on such terms used in the contract. Impugned order holds that such term will attract the provision of Section 73A (2) of the Act. The Ld. Counsel submitted that they have not collected any amount representing Service Tax in any manner from their client. Relying on various judicial orders by the Tribunal and High Court, the Ld. Counsel emphasized that the confirmation made in the impugned order under Section 73A (2) is purely on presumption. The legal position is that they have not represented and collected any money in any manner representing Service Tax and there can be no liability under Section 73A at all.

b. He further submitted that they regularly raised RA bills during the course of the execution of the said contract. Each one of the bill is verified by the recipient for accounts and payment. The check list clearly records that no Service Tax was claimed by the contractor from IOC. This will show that they have not represented any amount as Service Tax and the recipient of service is fully aware that they are not paying any amount representing Service Tax to the appellant.

c. On the second issue regarding construction of stadium/ practice venue for Common Wealth Games at JMI University, New Delhi he submitted that the sports facility developed specifically for practicing for Common Wealth Games cannot be considered as a commercial construction. Even after Common Wealth Games, the venue/stadium is intended and used only for sports activities. Collection of some membership fee or usage fee by itself will not make the constructed stadium as a commercial building. He referred to certain decided cases in similar set of facts, to support his submissions.

d. Regarding interest demand he submitted that they have already discharged Service Tax, which is in any case not liable for payment. The construction by them is 30 number of independent duplex houses at Noida. The Original Authority held that there could have been common facilities like water supply etc by the Noida authorities and accordingly held it to be taxable under 'construction of residential complex service'. The Ld. Counsel submitted that these are independent residential units and have no common facilities within the approved layout for such complex. The existence of such common facilities in any manner within the approved layout is a legal pre requirement to confirm the Service Tax liability under the said tax entry. The municipal authorities of Noida providing water supply does not make the existence of common facility within the approved layout. However, they are not contesting the already paid tax. Since the tax itself is not payable, the interest question for delay will not arise.

3. The Ld. AR strongly contested the submission of the appellant. He submitted mainly on the following lines.

a. The provision of Section 72 A (2) readwith Section 73 A (6) makes it very clear that when the contractual terms indicate the consideration to the inclusive of Service Tax the amount collected in pursuance of such contract shall necessarily be considered as with Service Tax.

b. The Original Authority arrived at the conclusion based on the terms of the contract and it is for the appellant to establish categorically that they did not represent and collect any amount towards Service Tax in order to avoid the liability under Section 73 A.

c. Commenting on the case laws relied upon by the appellant he submitted that the present contract did not specify that "Service Tax, if any". In other words, taxes payable including Service Tax is stipulated in the contract giving a clear indication that Service Tax amount is very much part and parcel of the consideration collected by the appellant from the client.

4. We have heard both the sides and perused the case records. On the first issue we have examined the provision of Section 73A:-

> ***73A** (1). Any person who is liable to pay service tax under the provisions of this Chapter or the rules made there under, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of*

this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
(2)Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2)and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

(5) The amount paid to the credit of the Central Government under sub-section (1) or sub- section (2) or sub-section (4) shall be adjusted against the service tax payable by the person on finalization of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

(6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of
the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.

5. Specific provision invoked in the present case is Section 73A (2). The revenue contented that the terms of the contract clearly stipulate that Service Tax is included in the consideration. We note that the plain reading of the sub-section (2) of Section 73 A makes it clear that any person who has collected any amount, which is not required to be collected, from any other person, in any manner *as representing Service Tax,* such person shall forthwith pay the amount so collected to the credit of Central Government. The question now for decision is whether or not the appellant collected any amount representing Service Tax. While we note that the Service Tax can be collected in any manner but it should be representing or equated to a Service Tax by direct evidence. In this connection, we refer to the decision of the Tribunal in the case of ***Prabhu Dayal Kanojiya V/s Commissioner of Central Excise, Jaipur (2014-TIOL-1279-CESTAT-DEL)*** wherein the Tribunal observed as below:-

> *5. Section 73 A of the Act enumerates provisions for liability to remit service tax collected by a person. Sub-section (2) of this provision enacts: where any person, who has collected any amount, which is not required to be collected, from any other person, in any manner, as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government. On a true and fair construction of this provision, the legislative intent is clear. The conditions precedent for ordering any person to remit (an amount collected as service tax, which is not required to be so collected), is a*
> *finding of fact that the person had in fact collected an amount towards service tax even though no service tax liability arises under the transaction qua which such section is made. This finding of fact must be recorded by the Revenue. The liability to remit service tax under Section 73 A(2) does not arise on the basis of a mere permission in an agreement that the liability to compensate/reimburse to service tax liability of the service provider, is on the service recipient. A factual*
> *finding that a person has collected service taxis a condition precedent for passing an order under Section 73A(2) read with sub-section (4) thereof. Sub- section (4) specifically enjoins that an order should be passed under this provision only after considering the representation, if any, made by the person on whom the notice is served under sub-section (3) and to determine the amount due from such person, not being in excess of the amount specified in the notice. Sub-section (3) of Section 73(A) requires a notice to be issued to show cause why the amount, as specified in the notice, in respect of a liability arising under Section 1 and 2, should not be paid by the Noticee to the credit the Central Government.*

6. Examining the similar situations with reference to sales tax, the Hon'ble Bombay High Court in the case of ***Mather & Platt Ltd. 1985 (53) STC 104*** observed that so long as the purchaser is not led to believe that the amount charged to him is the amount which the seller would be liable to pay as tax to the Government when he is not liable to pay it there would be no contravention of Seciton 46 (2). Section 46 (2) of Bombay Sales Tax Act, 1959 prohibited any person collecting any amount of tax in certain cases. The dispute was whether some surcharge collected by the dealer while selling the goods can be construed as a sales tax to attract the prohibition. The ratio is that the amount which is collected from the client should be relatable or referred to or identified as Service Tax in a manner where both parties will understand unambiguously that the said amount is nothing but a tax collected in some manner.

7. The emphasis of the Revenue is on the terms of contract which stipulated the contract consideration shall include Service Tax. In the present case the appellant did not discharge any Service Tax. In fact, they had all along had a view that no Service Tax is liable to be paid. In such situation it is noted that the present proceedings regarding application of Section 73A (2) is substantially based on inference with no supporting evidence. In this connection the Ld. AR emphasized that it is for the appellant to establish categorically they did not collect any amount representing Service Tax. We note that the appellant did establish that they have not collected any amount in any manner representing Service Tax. The existence of clause in the contract to the effect that it will include Service Tax by itself will not give any inference that such Service Tax has been collected from the client. The checklist for RA bills makes it clear that the recipient is also not recognizing any payment in any manner which can be attributed Service Tax.

8. We further note that the Tribunal in ***CIMMCO Ltd. V/s Collector of Central Excise, Jaipur [1999 (107) ELT 246 (Tribunal)]*** were examining a similar situation with reference to refund which was rejected on the ground of unjust enrichment, observed that :-

> *The expression "Rates are inclusive of all duties and taxes" have to be understood as applicable to only duties or taxes which are payable. In the present matter there is no case of the department that excisable goods have come into existence at the hand of the appellant and that such duties were leviable and therefore, they should have been taken to have been provided for when the lump sum price was quoted.*

Further the Tribunal in ***Himatsingka Seide Ltd. V.s CC, Bangalore [2005 (191) ELT 885 (Tri.-Bang.)]*** held as below:-

> *In the present case also, the sale price, no doubt, includes all statutory levies payable. That means, after some time the seller should not come to the buyer for extra amounts on the plea that further duty has to be paid to the Department. The presumption that the sale price includes duty erroneously paid in excess has no basis. More precisely, the sale price includes only the duty payable. In these circumstances, there is no question of unjust enrichment. We allow the appeal with consequential relief.*

9. In view of the above discussion and reading closely the provisions of Section 73A along with the findings in the impugned order we are of the considered view that the provisions of Section 73A has no application to the facts of the present case. Accordingly, the demand in terms of Section 73A (2) will not survive.

10. On the second issue we note that the practice venue for the Common Wealth Games cannot be considered as a commercial building. The said stadium or facility is mainly used for sports activities. This is not disputed. The impugned order held against the appellant only on the ground that fee/ charges are collected for admission into the stadium. We note that collection of fee and charges for use of the stadium does not make the stadium as a commercial building. In this connection we refer to ***B.G. Shirke Construction Technology Pvt. Ltd. V/s CCE, Pune-II [2014 (33) STR 77 (Tri. Mumbai)]*** where a similar situation of construction of sports complex came up for decision before the Tribunal. The Tribunal held that merely because some amount is charged for using the facility will not make the facility as commercial or industrial construction. Accordingly, the tax liability was held non-sustainable. In the present case also we find that the sports facility constructed by the appellant cannot be considered as a commercial construction liable to Service Tax.

11. On the third issue regarding interest liability of the appellant on the Service Tax liability with reference to construction of independent duplex houses, we note that the appellants have a strong case on merit. However, as noted earlier they are not contesting now the merits of the case only on the basis that they have already discharged and not interested in pursuing the dispute. However, they are disputing their interest liability on the ground that Service Tax itself is not payable. We note that the liability to Service Tax was upheld by the impugned order only on the ground that certain common facilities appeared to have been shared between the dwelling units. On careful consideration of the impugned order we note that the water supply made by Noida Municipal Authority is the main instance quoted for concluding the fact that common facilities are being shared. As held by the Tribunal in ***Hari Narain Khandelwal V/s CCE & ST, Jaipur-I [2017 (5) TMI 897-CESTAT, New Delhi]*** the common facility for tax entry under residential complex service should be within the premises of the approved layout where such activities are carried out.

Availability of common facilities like street light, sewage line, park, common water supply from the civic authorities per se will not make the independent residential units as part of residential complexes. In the present case there is no evidence of existence of any common facilities for various independent houses which are within the approved layout available only to the said complex. In such situation, the tax liability may not arise. However, having already collected and paid the tax, the appellants are not disputing on merit. We note that since the Tax liability may not stand there can be no question of interest payment on such non-existing tax liability.

12. In view of the above discussion and analysis the impugned order is set aside and the appeal is allowed.

[Order dictated and pronounced in the open court]

(S.K.Mohanty)
Member (Judicial)

(B.Ravichandran)
Member (Technical)

Rekha