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

Date of Hearing:17.01.2018
Date of Decision: 12.02.2018

Service Tax Appeals Nos.2566-2568/2012 (DB)

[Arising out of Order-in-Original No.94-96/GB/2012 dated 23.05.2012 passed by the Commissioner of Service Tax, New Delhi]

M/s. Skyline Engineering Contract (India) Pvt.Ltd. Appellant

Vs.

CST, New Delhi Respondent

Appearance:

Rep. by Shri A.K. Batra, C.A. for the appellant.
Rep. by Shri G.R. Singh, AR for the respondent.

Coram: Hon'ble Shri Justice (Dr.) Satish Chandra, President
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Orders Nos.50603-50605/2018

Per B. Ravichandran:

These three appeals involve common issue of service tax liability of the appellant. The appellant is a civil contractor engaged in providing various construction services. They are registered with the Department for payment of service tax under various categories. The officers of service tax conducted certain investigations in Feb. 2007 by verifying the books of accounts of the appellant. On completion of verification, proceedings were initiated against the appellant to demand and recover service tax from the appellant. Three such show cause notices have been issued covering the period 1.10.2004 to 30.09.2010. All the notices were decided by the common impugned order dated 23.05.2012. The Original Authority confirmed service tax liability of Rs.8,49,40,642/-. Service tax already paid was appropriated. He imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. Substantial demand of Rs.8.02 crores are for the period 1.6.2007 to 13.09.2009 due to denial of Works Contract Scheme for payment of service tax by the appellant. The remaining amount of demand is with reference to denial of cenvat credit for availing notification no.1/06 and tax liability as the value of the materials transferred during the execution of works contract.

2. Ld. Consultant appearing for the appellant submitted that the appellants have entered into a construction contract with M/s.Swami Build Tech. Pvt. Ltd. for construction of TDI Mall at Agra. The said contract is composite in nature involving supply of goods as well as provisions of service. Such contract can be levied to service tax only on the category of works contract service introduced we.f. 1.6.2007. Relying on the decision of the Hon'ble Supreme Court in the case of **Larsen & Toubron Ltd. – 2015 (39) STR 913 (SC),** ld. Consultant submitted that there can be no tax liability for this contract prior to 1.6.2007. On the issue regarding correct payment of service tax by the appellant after 1.6.2007 under works contract service, it is submitted that the appellants availed composition scheme under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.They have filed periodic ST-3 returns after availing such scheme and the benefit of the scheme cannot be denied to them as from the date of introduction of the works contract service they have been discharging service tax under Composition Scheme.

3. Regarding denial of cenvat credit of Rs.8.66 lakhs for the period 1.4.2007 to 31.05.2007, it is submitted that the demand is not sustainable as the contract is liable to be taxed under Works Contract Service only w.e.f. 1.6.2007. Contesting

the demand of Rs.27.06 lakhs, for the period 1.4.2006 to 31.03.2008, it is submitted that no service tax is payable on the materials supplied. From 1.6.2007, correct tax has been paid by availing Composition Scheme for Construction Contract Service. The demand for the period prior to 1.6.2007, in any case, is liable to be set aside in view of the decision of the Apex Court in **Larsen & Toubro Ltd. (supra)**.

4. Ld. Consultant submitted that the demand raised by show cause notice covering the period 1.10.2009 to 31.03.2010, there is no dispute on the tax liability of the appellant, which has been discharged under Works Contract Service. They are not contesting the tax liability. However, the appellant is contesting the imposition of interest and penalties as the same are not attracted in the present case.

5. Ld. Consultant submitted that the appellants have paid Rs.97,71,964/- under Works Contract Composition Scheme during the period 1.6.2007 to 30.09.2009. This amount has not been considered while deciding the dispute by the Original Authority. Evidence of challans in such payments were also submitted.

6. Ld.AR submitted that the contract under consideration is a ongoing contract and the appellant was subjected to service tax levy by the Original Authority. The claim of the appellant for discharging duty under Composite Scheme of 2007 cannot be accepted as this is a continuing contract executed prior to 1.6.2007 and the appellant did not opt for the scheme as per the requirement. Further, while arriving at the gross value for tax liability under works contract service, the

appellant should take into consideration all the amount including the value of materials supplied by the recipient of service.

7. We have considered the submission of both the sides and perused the appeal records.

8. We note that the allegations made against the appellant were several and varying for different periods under reference. The short payment of service tax has been worked out based on the ST-3 Returns and also referring to notifications applicable to the relevant period. The Original Authority inferred that reference to construction services should mean commercial or industrial construction service or construction of complex service as per the project. In our view, we find that the judicial pronouncements subsequent to the issue of the impugned order have direct application and relevance to decide the issue at hand.

9. First of all, we take into consideration the correct classification of the taxable service and effective date of tax liability on such service. We note that the services rendered by the appellant, which are subject to tax in the present proceedings, are of composite in nature involving transfer of goods as well as provision of service. The same is not in dispute. As such, the tax liability on such contracts will arise only w.e.f. 1.6.2007 as per the ratio laid down by the Hon'ble Supreme Court in **Larsen & Toubro Ltd.(supra)**. The Apex Court held that there is no machinery provision to collect tax on such composite services prior to 1.6.2007. Accordingly, it was held that the works contract service shall be liable to tax only w.e.f. 1.6.2007. Applying the said ratio, the appellant is liable to service tax only w.e.f. 1.6.2007.

10. The next issue for consideration is whether or not the appellant discharged service tax correctly by availing the composition scheme as per 2007 Rules. We note that the appellants discharged service tax at the composition rates w.e.f. 1.6.2007 and claimed to have filed regular returns indicating the availment of such scheme by them. We note that the Tribunal in **ABL Infrastructure Pvt. Ltd. - 2015 (38)STR 1185 (Tribunal-Mumbai)** held that the fact of service tax payment as reflected in the ST-3 returns filed after 1.6.2007 is sufficient enough to fulfil the conditions under Rule 3 of Works Contract Composition Scheme Rules, 2007. The Tribunal also noted that in absence of any specific form or procedure for option and the authority to whom such option has to be exercised, paying service tax at the composite rates in the return filed by the assessee is enough indication to show that they have opted for payment under such scheme. Though the present contract is an ongoing contract and the ld. AR relies on the decision of the Hon'ble Andhra Pradesh High Court in **Narayan Company Ltd. – 2010 (19)STR 321 (AP),** we note that there is no tax liability on such work contract prior to 1.6.2007 as clearly held by the Hon'ble Supreme Court in **Larsen & Toubro Ltd. (supra).** In such scenario, the tax liability fixed on an ongoing contract can arise only w.e.f. 1.6.2007 and the appellant can avail the composition scheme when such tax liability arises.

11. Regarding the penalties imposed on the demands raised for the period 1.10.2009 to 30.09.2010, we note that the allegation for this period is in continuation of the first show cause notice. The submission of the appellant is that they have discharged service tax liability under works contract service. There is no dispute with respect to service tax demand confirmed on these services.

Considering the question of interpretation and judicial pronouncements, which came much after the impugned order, we are inclined to set aside the penalties imposed on the appellant. Interest wherever applicable on delayed payment of service tax is statutorily requirement and has to be complied by the appellant.

12. We note that the impugned order had given finding on various factual conclusions based on ST-3 Returns and as claimed by the appellants. While we have decided the issue on merit as per the legal principle, it is open to the jurisdictional authorities to verify the actual payment of service tax in line with the above legal principle regarding tax liability of the appellant. The appellant shall provide all the required documents, for this verification that may be done by the jurisdictional authorities. The appeals filed by the appellant are disposed of in the above lines.

[Order pronounced on 12.02.2018]

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

Ckp.