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

Date of Hearing: 18.07.2018
Date of Decision: 31.07.2018

Appeal No. ST/53443/2015-CU[DB]

[Arising out of Order-in-Appeal No. 165(SLM)ST/JPR/2015 dated 14.05.2015 passed by the Commissioner (Appeals), Central Excise, Jaipur]

CCE, Jaipur …Appellant

Vs.

M/s Height Consultants …Respondent

Appearance:
Represented by Shri R.K. Manjhi, DR for the Appellant.
Represented by Shri Madhusudhan, Advocate for the Respondent.

Coram:
Hon'ble Mr. C.L. Mahar, Member (Technical)
Hon'ble Mrs. Rachna Gupta, Member (Judicial)

Final Order No. 52656/2018 dated 31.07.2018

Per Rachna Gupta:

The appellants herein are registered under Service Tax for providing commercial or industrial construction service with effect from 29.05.2007 and are discharging their liability since October 2007 by claiming abatement under Notification No. 01.2006 dated 01.03.2006. During an audit, it is observed that the appellant, even prior to the said registration were engaged in construction services, but have not discharged the liability for the period with effect from April 2005 to September 2009. A demand, accordingly, has been levied vide a Show Cause Notice dated 08.10.2010. In addition, the benefit of abatement under the said Notification has been denied to the appellant by the department with effect from 16.06.2005. The demand of the said Show Cause Notice was confirmed by Additional Commissioner vide her Order No. V(H)Adj-I/ST/181/2010/162 dated 10.04.2013. In an appeal thereof, the Commissioner (Appeals) vide Order No. APPL/JPR-I/ST/JP/140/V/2013/332 dated 14.05.2015 has modified the original order thereby dropping the demand with respect to construction service as rendered by the appellant with respect to the work undertaken for Awas Vikas Sansthan Limited of Government of Rajasthan, under which they have constructed hospitals, Ambedkar Peeth, etc., as being non-commercial in nature. Abatement under Notification No. 1/2006-ST has also been allowed. The demand in this respect is proportionately reduced. The work in respect of residential premises is denied to be covered under the definition of "commercial or industrial construction services". The demand thereof has also proportionately been dropped. The demand qua construction of complex service and erection commissioning and installation services where work is awarded with material since being service of work contract being introduced with effect from 01.06.2007 only, has also been dropped. However, penalties under Section 76 and 78 have been confirmed. Aggrieved of this order, the department has preferred an appeal to the Tribunal.

2. We have heard Shri G.R. Singh, learned DR for the department and Shri Madhusudan, learned Advocate for the respondent.

3. Learned appellant/DR has impressed upon that Commissioner (Appeals) has erred in modifying the Order-in-Original in respect of the base period after 01.06.2007 holding that there was no Show Cause Notice under Work Contract Service. On the basis of admitted facts that the assessee himself has taken registration under the category of Commercial or Industrial Construction Services on 29.05.2007 and discharged the Service Tax liability under the same category. It is also impressed upon that erection commissioning and installation, commercial and industrial construction and constriction of residential complex services were notified taxable services even prior to 01.06.2007, the date on which the Works Contract Service got introduced. It is also submitted that the value of transfer of property and goods involved in the execution of such contracts is leviable to VAT as sale of goods, but it does not mean that construction service or commercial or industrial construction service in execution of such contracts is not leviable to tax. The order is also challenged for allowing the benefit of

abatement under Notification 1/2006-ST. With the mention that post construction completion and finishing services are specifically included in the Commercial or Industrial Construction Services due to which the benefit should not have been allowed. It is alleged that benefit of Section 80 of the Finance Act has also wrongly been extended by Commissioner (Appeals) in favour of the appellant. The case law relied upon for the purpose is alleged to be not applicable to the facts of the present case. Also, Commissioner (Appeals) himself has observed the suppression of facts on part of the assessee/respondent with an intent to evade the due Service Tax. The question of dropping penalty as under Section 77 is also alleged to suffer infirmity. Appeal is, therefore, prayed to be rejected.

4. While rebutting these arguments, learned Counsel for respondent/assessee has submitted that the respondents are providing commercial construction services only in few of the cases. For rest of the cases, they are either providing such services for the Government, which are exempted from tax liability, or for the residential units/complexes, which do not fall under the category for which the impugned Show Cause Notice has been issued. Further, it is submitted that since the services provided to non-government entity is along with the material hence the abatement benefit has rightly been extended in their

favour. Rest of the constructions are since on behalf of the Government, the demand thereof has rightly been dropped. While relying upon the case of M/s Kone Elevators India Pvt Ltd vs. CST (2007) 10 STT 133 (Tri.-Chennai), it is submitted that if VAT has been paid on the value of goods involved in the contract of construction, the Service Tax is not payable on that value, i.e., the material used in rendering services cannot be included in assessable value for the purpose of Service Tax. Another adjudication of Tribunal-Chennai in Super Transports Pvt. Ltd. vs. CCE 2008 (13) STT 94 has been relied upon. Appeal is, accordingly, prayed to be dismissed.

5. After hearing both the parties at length and perusing the record, we are of the considered opinion as follows:

(i) Admittedly, the assessee/respondent is engaged in construction work for M/s Awas Vikas Sansthan (AVS) and for M/s Jaipur Vidyut Viteran Nigam Ltd (JVVNL), which is under Government of Rajasthan.

(ii) Works done by the appellant also includes:

(a) Providing & fixing of partly openable/ partly fixed as per design & drawing structural glazing using semi unitized systems, using section of Jindal/ Hindalco/ Mahaveer make of main and single glass shutter section as per drawing & design etc.

(b) Providing & fixing Aluminium composite panel make wonder Alu boards of different thickness, Aluminium skin both side of approved shade duly fixed 2x1 Aluminium tube of 16 guage fixed with S.S. screws, fastners and fitted the gap with Dow Corning weather sealant waker made and related M.S. Work.

(c) Providing & fixing of powder coating aluminium door partition and window with SMM plan Glass.

(d) Fixing in true horizontal suspended Gypsum Board false ceiling used 12MM thick sheet fixed to GI frame work in company system all joint filed with paper & leveled with gypsum putty to a smooth seamless ceiling complete with cutting of light etc. (only labour)

6. The moot question of consideration is as to whether all such activities of the assessee/respondent can be categorized as Commercial or Industrial Construction Services. For the purpose the definition of Commercial or Industrial Construction Services thereof is important.

7. As per Section 65(25B) whose scope was extended with effect from 16.06.2005, the commercial or industrial construction services means:

(a) Construction of a new building or civil Structure or a part thereof or

(b) Construction of pipeline or conduit:

(c) ***Completion and finishing services such as plastering painting, floor and wall tiling was covering and well papering and metal joinery and carpentry fencing and tailing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure: or***

(d) Repair, alteration, renovation or restoration of or similar services in relation to building or civil structure, pipeline or conduit which is –

(i) Used or to be used primarily for or

(ii) Occupied, or to be occupied, primarily with or

(iii) Engaged, or to be engaged primarily in commerce or industry, or work intended for commerce or industry, but does not include such services provide in respect of roads, airport,

railways, transport terminals, bridges tunnels and dams.

8. Perusal of definition makes it clear that the services rendered by the appellant will fall under Sub-clause C thereof. Since the material is also provided by the service provider, the case of the appellant as far as completion and finishing services as detailed above are concerned, it stands clearly covered under Item No. 5 of the Table given in Notification No. 1/2006-ST dated 01.03.2006. For this reason, we hold that the Commissioner (Appeals) has rightly extended the benefit of this notification. Further, admittedly, the Contracts were inclusive of material, hence the total value of one contract which amounts to transfer of property was to be excluded.

9. The other construction services which are residential in nature, the phraseology itself takes that Contract out of the definition of Commercial and Industrial Construction. Hence, levying the demand for the said construction under the head of it being commercial is, therefore, not at all sustainable. Levy has rightly been done away.

10. We, therefore, find no infirmity in the order under challenge.

11. Now, coming to the plea that all services of the appellant are not commercial in nature, we observe that admittedly assessee/respondent is constructing Ambedkar

Peeth, a programme under Government of Rajasthan for M/s AVS and is also rendering services to a PSU, i.e., Jaipur Vidyut Vitran Nigam Limited (JVVNL) both being the authorities under Government of Rajasthan in services rendered to them will clearly be out of the ambit of the above definition of Commercial and Industrial Construction. Resultantly, any demand raised for these constructions under Commercial or Industrial Construction Services is not sustainable. We, therefore, opine that Commissioner (Appeals) has rightly done away the said demand.

12. As far as the plea of suppression of facts is concerned, we opine that Commissioner (Appeals) has rightly concluded that since the assessee/respondent has not filed the Service Tax return in the form ST3 in the manner and frequency required under Service Tax Rules, 1994 and has also failed to pay the due Service Tax, the same amounts to the deliberate suppression of facts. Otherwise also, the law requires assessee itself to determine the classification of service and to pay tax on self assessment basis. Since the assessee/respondent has failed to act accordingly, the penalty under Section 76 and 78 have rightly been confirmed against the respondent. We also do not find any infirmity with the order where the penalty under Section 77 has been done away as being not warranted in view of the penalties imposed under Section 76 and 78. As a result of

entire above discussion, no alleged irregularity or error is observed in the findings of the Commissioner (Appeals) in the order under challenge. The modifications, as ordered therein qua the demand of the Show Cause Notice and Order-in-Original, however, confirming the penalty under Section 76 & 78 of Central Excise Act, are accordingly hereby upheld. Appeal, therefore, stands rejected.

[Pronounced in open court on 31.07.2018]

(Rachna Gupta) Member (Judicial)	(C.L. Mahar) Member (Technical)

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