

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Service Tax Appeal No. ST/53041/2018 [SM]

[Arising out of Order-in-Appeal No. 123-SJ-ST-JPR-2018 dated 27/06/2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur-I]

Siwal Infracon Pvt Ltd	Vs.	...Appellant
C.C.E. & S.T., Jaipur-I		...Respondent

Present for the Appellant : Ms. Asmita A Nayak &
Mr. R.K. Ranjan, Advocates

Present for the Respondent: Mr. P. R. Gupta , DR

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 03.12.2018

FINAL ORDER NO. 53385/2018

PER: RACHNA GUPTA

Present Appeal has been preferred against the Order of Commissioner(Appeals) bearing No. 123 dated 27.06.2018. The appellant herein is engaged in providing Works Construction Services. During the course of audit of the appellant, the Department observed that the appellant received certain amount on account of mobilisation advances from the service recipient M/s Today Homes Infrastructure Ltd. but have failed to discharge the service tax liability on these advances at the time of receipt. It was also observed that the appellant subsequently adjusted the said advance in running bills issued and paid service tax at that later stage. Resultantly, Department alleged that since still there is an unadjusted part of the mobilisation advance for the year 2012-13

and 2013-14, the appellant was alleged to have short paid the service tax. Resultantly, a Show Cause Notice No. 238 dated 08.02.2016 was served upon the appellant proposing the recovery of Rs. 18,14,860/- on account of the alleged short payment of service tax alongwith the interest at the appropriate rate and proportionate penalty. The said proposal was initially confirmed by Joint Commissioner vide his Order bearing No. 99 dated 19.10.2016. Being aggrieved, an Appeal was preferred before Commissioner(Appeals) who vide the Order under challenge has upheld the said Order rejecting the appellants Appeals. Resultantly, Appeal is before this Tribunal.

2. I have heard Ms. Asmita Nayak, Ld. Advocate for the appellant and Mr. P. R. Gupta, Ld. DR for the Department.

3. It is submitted on behalf of the appellant that though there was an agreement of the appellant with its service provider M/s Today Homes Infrastructure Ltd. to provide the Construction Services in the nature of Works Contract Service however the agreed services could not be provided and there had been a settlement agreement between the two vide which the service provider and the receiver agreed for finalisation of the initial agreement with the payment only to the extent to which the services were provided however the amount of one crore as was paid by the recipient on account of mobilisation amount since was already withdrawn by him, the amount of running bills to the extent of 15 lakhs got adjusted and the balance of 85 lakhs was acknowledged to have been returned to the recipient.

3.1 Ld. Counsel has impressed upon the letter dated 11.09.2015 vide which the appellant informed Union Bank of India (the guarantor) about the withdrawal of said Rs. 1Cr. vide five bank guarantees of Rs. 20 lakh each of mobilisation amount and the bank has acknowledged returning the said amount in favour of M/s Today Homes Infrastructure Ltd. It is submitted that on the said amount the liability which comes to the extent of Rs 4,20,240/- therefore is not the taxable amount and the total liability of the appellant for the amount received for whatever part services were provided, i.e., an amount of Rs. 13,94,620/- has already been paid alongwith the interest. She has impressed upon that same has been acknowledged by the adjudicating authority below.

3.2 It is further impressed upon that Ld. Commissioner(Appeals)while rejecting the Appeal has mentioned that the agreement of settlement as is impressed upon to do away appellant's liability bears no date, despite that the affidavit of appellant's Director was duly brought to his notice vide which the Director has deposed the date of agreement as 29.03.2013. The Order under challenge is alleged to have been passed in ignorance of true facts of law. Finally relying upon the Board's Circular B1/6/2005 dated 27.07.2005 Ld. Counsel has prayed for the Order under challenge to be set aside and Appeal to be allowed.

4. Ld. DR while rebutting these arguments has justified the Order under challenge. Specific emphasis on para 8.3 thereof has been made submitted that the demand of service tax amounting to Rs. 4,20,240/- has been confirmed on the ground that the service tax has not been paid on mobilisation advance received during the year 2012-13 from the service recipient. The Commissioner(Appeals) has

been specific enough while holding that there has been no documentary evidence even in the form of the correspondence between the appellant and M/s Today Homes Infrastructure which may prove that the work order has been cancelled by M/s Today Homes Infrastructure Ltd. Resultantly, the appellant's argument that they have no liability against Rs. 85,00,000/- received by them as mobilisation amount does not hold good in the facts of the case. The Order under challenge is therefore correct; Appeal is prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, I observe and hold as:

Initially there was an agreement between the appellant and M/s Today Homes Infrastructure Ltd for providing construction services to the latter in the form of works contract service. In addition to the cost of services to be provided, an amount of Rs 1Cr was agreed to be paid by service recipient to the provider i.e. to the appellant as mobilisation amount. The same was provided in the form of 5 bank guarantees of Rs. 20 lakh each. Also, there is another agreement dated nil which was executed by the service recipient in favour of the appellant. It appears therefrom that it was for an amicable settlement between them for full and final payments of work done by the appellant as the entire scope of the said work contract could not be executed by the service provider. Perusal thereof recites the acknowledgment of withdrawal of the entire mobilisation amount by the service recipient. The said recitals stands corroborated from the acknowledgment of Union Bank of India as has been brought to my notice with respect to the letter of the appellant written to the bank. In addition, this agreement clarifies that for the services provided since the amount of Rs. 15

lakhs has already been adjusted by the appellant from the mobilisation amount. Balance of Rs. 46,70,555/- towards services rendered was agreed to be paid by the service recipient to the appellant.

6. The Department is not disputing that the liability of appellant is for Rs. 15 lakhs (already adjusted) plus Rs. 46,70,555/-. However, Department is alleging the short levy on account of the discharge of liability qua the remaining 85 lakh of the withdrawn mobilisation amount. It is also an admitted fact that liability of Rs. 13,94,622/- alongwith the interest has already been paid and that Rs. 4,20,240/- as demanded is the liability qua the said 85 lakhs. Commissioner(Appeals) while confirming the said liability towards Rs. 85 lakhs, of the service provider has ignored, despite acknowledging, the withdrawal thereof as subsequent event.

7. The said settlement agreement though has been acknowledged however has been refused to be admissible for want of the date of the said agreement. Date of issue of stamp paper for the said agreement is considered towards alleged malafide on part of the appellant with respect to the adjustment of Rs. 8,42,873/- post said agreement. The affidavit of the appellant's Director deposing the date of said agreement as 29.03.2013 has not been considered by Commissioner(Appeals). Irrespective thereof the fact remains is that the adjustment was towards the services provided as the entire amount of Rs. 1Cr of mobilisation charges was encashed by the service recipient. This Tribunal has already decided the issue of withdrawal of advance money in the case of **C.C.E. Bhavnagar Vs. Madhvi Procon Pvt. Ltd 2015 (38) STR 74 (Tri.-Ahmd.)** holding:

Taxability – Service Tax not payable when no service provided – Advance amount received under the contract for providing service – Service Tax paid on such advance contract – Contract terminated and no service provided – Customer recovered back the amount from service provided by encashing bank guarantee – Assessee entitled to refund of advance Service Tax paid as no services provided and payment is to be treated as a deposit and not payment of tax – Provisions of Section 11B of Central Excise Act, 1944 as extended to Service Tax inapplicable

And also the Circular as relied upon by the appellant para 27.2 thereof clarifies:

27.2 However, when advance payment is received for a service which is non taxable at the time of receipt of payment but becomes taxable during the course of provision of service, such payments would have to be apportioned appropriately between the two periods and that part of service provided on or after the service becomes taxable service, is only liable for service tax. Similarly, when payment is received in advance for services to be provided by subsequently the services are not actually provided, then in such cases service tax paid is liable to be refunded.

8. Seeing in view of the said settled provision of law, I hold that Commissioner(Appeals) has committed an error while ignoring the relevant piece of evidence as that of agreement just for want of date thereupon. He also ignored the affidavit in this respect and even the bank acknowledgement corroborating the subsequent event of withdrawal of the entire mobilisation amount of Rs. 1Cr., however with adjustment of Rs. 15 lakhs. Thus, the amount of Rs. 85 lakh cannot be the part of the taxable value. Resultantly, the Order under challenge is hereby set aside and Appeal stands allowed.

[Dictated and pronounced in the open Court]

**(RACHNA GUPTA)
MEMBER (JUDICIAL)**

D.J.