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

BENCH-DB

COURT –IV

Service Tax Appeal No. ST/57880/2013-CU [DB]

[Arising out of Order-in-Original No.07/2013-ST-COMMR dated 01.03.2013 passed by the Commissioner, Central Excise, Jaipur-I]

M/s. G.N. Buildev Pvt. Ltd. …Appellant

Vs.

C.C.E., Jaipur-I … Respondent

Present for the Appellant : Mr.A.K. Prasad, Advocate
Present for the Respondent: Mr.R.K. Maji, D.R.

Coram: HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 05.02.2019

FINAL ORDER NO. 50232/2019

PER: V.PADMANABHAN

The present appeal is against the Order-in-Original No.7/2013 dated 25.02.2013. The Adjudicating order confirmed the service tax demand of Rs.60,45,479/- besides, interest under Section 75 and penalties under Sections 76 & 78 of the Finance Act, 1994. The appellant was engaged in construction activity and was registered with the Service Tax Department for providing the services of Commercial or

Industrial Construction as well as of Construction of Residential Complex Service defined under Section 65 (25b) as well as Section 65 (91a) of the Finance Act, 1994, read with Sections 65 (zzq) and 65 (105) (zzzh) thereof. The appellant was filing ST-3 returns periodically for the taxable services rendered under the above categories. The dispute covers the period 2006-07 to 2010-11. The Departmental Officers, during the course of audit of the appellant records, noticed that the appellant was discharging the Service Tax liability under the categories registered, after availing the benefit of exemption under Notification No.1/06-ST dated 01.03.2006. The Sl. No.7 of the above Notification provided for abatement of 67% of the gross amount received and the appellant remitted tax on the balance 33%.

2. With effect from 01.06.2007, the Finance Act, 1994 introduced the Section 65 (105) (zzzza) for the service "Works Contract Service". The Departmental officers formed the opinion that the services rendered by the appellant would be classifiable under Works Contract Service (WCS) after its introduction w.e.f 01.06.2007. The appellant was requested to provide various contracts/ work orders/ agreements of the orders executed by them. After perusal of the agreements submitted, the Department issued show cause notice dated 21.10.2011 in which it was proposed to deny the benefit of abatement claimed by the appellant under Notification No.1/2006 ibid for the reason that the appellants did not

submit for examination all the agreements under which service was provided. After taking the preliminary view that the service provided would be under WCS w.e.f. 01.06.2007, demand for service tax was raised without allowing the benefit of the Composition Scheme under Works Contract "Composition Scheme" for payment of Service Tax) Rules 2007.

3. After the due process of adjudication the adjudicating authority issued the impugned order. After examination of the submissions made by the appellant, the adjudicating authority concluded that the appellant will not be liable for payment of service tax to the extent of Rs.44,21,213/- which was the service tax demanded, for the services provided to educational institutions. The balance amount of service tax amounting to Rs.60,45,479/- was ordered to be paid. This order is under challenge in the present appeal.

4. The appellant is represented by Shri A.K.Prasad, ld. Advocate and Revenue is represented by Shri. R.K. Maji, ld. D.R.

5. The arguments advanced on behalf of the appellant are summarized below:-

The ld. Advocate submitted that the activity undertaken by the appellant was in the form of construction services, which involved both the supply of goods and providing the service. As such, services rightly classifiable under the works contract service under section 65 (105) (zzzza) of the Act, w.e.f. 01.06.2007. He submitted that the services provided, for which service tax was discharged under the category of Commercial or Industrial Construction Service, will not be liable to payment of any service tax for the period prior to 01.06.2007, in view of the decision of the Hon'ble Supreme Court in the case of **Larsen & Toubro reported in 2015 (39) STR 913 – (SC)** in which the Apex Court has laid down the ratio that any composite service in the nature of WCS can be levied to service tax only w.e.f. 01.06.2007 that too under WCS category only. Hence, he submitted that the demand prior to that date is liable to set aside.

6. He specifically drew our attention to the fact that the appellant was registered with the Department for providing services under Commercial or Industrial and residential complex services. Further, he submitted that the appellant was filing ST-3 returns periodically in which they have reported that they were paying service tax under the above category after availing the benefit of abatement under Notification 1/2006. In view of the above, he submitted that the Department was not entitled to charge the appellant on the ground of suppression. As such, he said that the benefit of time bar is to be extended to the appellant. Further, he submitted that the levy of service tax under WCS was also the subject matter of several disputes which came to be concluded only with the issue of the judgment of Apex Court in the case

of **L & T**. Consequently, he asserted that no demand will survive for the period beyond the normal time limit.

7. In respect of the demand, covered within the normal time limit, he submitted that the appellant will be entitled to the benefit of the Works Contract Composition Scheme. He submitted that the adjudicating authority has declined to extent the benefit of the Composition Scheme by taking the view that the appellant did not file the option to claim the benefit as per the Rule 3 of the Composition Rules. He further argued that the stand of the Department that the appellant’s services were to be classified under WCS, came to be known to the appellant only with the issue of show cause notice and hence in reply to show cause notice they have claimed the benefit of the Composition Scheme. In any case, he submitted that for the procedural violation of not submission of option, the substantial benefit of the composition scheme cannot be denied. In this connection he relied on several decisions including **ABL Infrastructure Pvt. Ltd. vs. CCE, Nasik reported in 2015 (38) STR 1185 (Tri. Mum.)** as well as **Satish Kumar and Company vs. CCE & ST, Jaipur-I reported in 2018 (6) TMI 1085.** He submitted that if the benefit of the composition scheme is extended to the appellant, no demand of service tax may survive. He also submitted that if any demand survives, the same is to be worked out with the cum-tax benefit.

8. Ld. D.R while justifying the order conceded that after the decision of the Apex Court in the case of **L & T**, (supra), the demand for the period prior to 01.06.2007 will not survive. However, he submitted that the appellant had failed to submit all the relevant contracts for verification to the Departmental officers. In the absence of verification of the contract, he submitted that the demand raised for the period subsequent to 01.06.2007 is liable to be upheld.

9. We have heard both the sides at length and perused the record.

10. The appellant has admittedly provided construction services. After perusal of some of the contracts whose copies were submitted by the appellant, the adjudicating authority himself has recorded the conclusion that the services provided by the appellant will be classifiable under the category of Works Contract Service w.e.f. 01.06.2007. In view of the decision of the Hon'ble Apex Court in the case of **L & T** (Supra), the demand of service tax for the period prior to 01.06.2007 is liable to be set aside.

10.1. Next we examine the claim of the appellant that the demand beyond the normal period of limitation under section 73 of the Finance Act is liable to be set aside on the ground of time bar. It is on record that the appellant was already registered with the Department for providing various services. They have also been filing ST-3 returns periodically in which they have declared the value of services provided and the fact that they were paying the Service tax under the category of commercial or industrial construction services, after availing the benefit of the Notification No.01/2006. The Department appears to have taken the view that the activities are more appropriately classifiable under the category of Works Contract Service, only during the course of audit of the records. As such, we find force in the argument of the appellant saying that there is no ground for alleging suppression. Further, we note that the assessment of the services in which the contracts are composite in nature came to be finally settled only by the Hon'ble Supreme Court in the case of **L & T.** The adjudicating authority obviously did not have the benefit of the decision of the Apex Court while passing the order in the year 2013. As such, we set aside the demand on the ground of time bar for the period beyond the normal time limit.

10.2 We now examine the claim of the appellant that they will be entitled to the benefit of Works Contract Service (Composition Scheme), after classification of the activities of the appellant under the WCS. The reason cited by the adjudicating authority for not allowing the Composition Scheme is that the appellant has failed to fulfil the requirement of Rule 3 of the Composition Rules. Rule 3 ibid specifies that the service provider is required to opt for payment of service tax under the Composition Rules by exercising such option in respect of a works contract prior to payment of service tax in respect of the said contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

11. Admittedly, the appellant has not exercised such an option until filing the reply to the show cause notice. But the question to be decided is whether non-fulfilment of the conditions of Rule 3 will render the appellant ineligible for the benefit of the Composition Scheme. The appellant has cited several decisions to support his stand that they will still be eligible for the benefit particularly in view of the decisions of the Tribunal in the case of **ABL Infrastructure Pvt. Ltd. vs. CCE, Nasik reported in 2015 (38) STR 1185 (Tri. Mum.)** as well as **Bridge and Roof Co. (India) Ltd. vs. CCE, Jaipur reported in 2012 (27) STR 406 (Tri.-Del.).** The thrust of the above decisions is to the effect that the non-exercise of the option for payment of tax under the Composition Scheme cannot be held as a reason to deny the benefit of the competition scheme since it is in the form of only a procedural requirement. As such, we hold that the appellant will be entitled to the Composition Scheme subject to fulfilment of the other conditions. The service tax liability of the appellant is required to be re-calculated after extending the benefit of Composition Scheme and after allowing them the cum-duty benefit as held by Hon'ble Supreme Court in the decision in the case of **2009 (14) STR J49 (S.C.).**

12. In the result, we order as follows:-

(1) We set aside the demand for service tax beyond the normal period of limitation.

(2) For the demand of Service Tax falling within the normal time limit, the services, already classified by the adjudicating authority under WCS, will be entitled to the benefit of the Composition Scheme. The demand, if any, is to be re-calculated with cum-tax benefit and the appellant will be entitled to the consequential benefit if any.

13. The appeal is disposed of in the above terms.

[Dictated and Pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(V.PADMANABHAN)
MEMBER (TECHNICAL)

Anita