IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING/DECISION : 14/02/2019.

Excise Appeal No. 52973 of 2015

[Arising out of the Order-in-Appeal No. BHO-EXCUS-002-APP-020-15-16 dated 16/04/2015 passed by The Commissioner (Appeals), Customs, Central Excise & Service Tax, Raipur.]

Shri Ram Maini Appellant

Versus

CCE & ST, Jabalpur Respondent

Appearance

Shri M.K. Sharma, C.A. – for the appellant.

Shri G.R. Singh, Authorized Representative (DR) – for the Respondent.

CORAM :**Hon'ble Shri Justice Dilip Gupta, President**
Hon'ble Shri V. Padmanabhan, Member (Technical)

Final Order No. 50277/2019 Dated : 14/02/2019

Per. V. Padmanabhan :-

The present appeal is directed against the order-in-appeal No. BHO-EXCUS-002-APP-020-15-16 dated 16 April 2015. The appellant (the partnership firm) was engaged in rendering construction activities. They were registered with the Department and were paying service tax under the category of Commercial or Industrial Construction Service (CICS) under Section 65 (105) (zzq) of the Finance Act, 1994. During the course of audit of the books of the appellant's account, the Departmental officers noticed that the appellant did not discharge the service tax for the construction activities undertaken for M/s D.S. Green Agro Tech. For the said party, the appellant carried out certain construction activities, such as, water tank. The department was of the view that such activity will fall within the Commercial or Industrial Construction Service and will be liable for payment of service tax. Accordingly, show cause notice dated 9 October 2013 was served upon the appellant. The show cause notice came to be decided by issue of order-in-original dated 29 May 2014 in which the Adjudicating Authority confirmed the proposal in the show cause notice and ordered payment of service tax amounting to Rs. 3,50,916/- alongwith interest. He also imposed penalties under Section 77 and 78 of the Finance Act, 1994. When the Original Authority's order was challenged before the Commissioner (Appeals), the impugned order was passed in which the original order was upheld. This order is under challenge in the present proceedings.

2. The appellant is represented by Shri M.K. Sharma, learned Consultant and Revenue is represented by Shri G.R. Singh.

3. Learned Consultant submitted that the demand for service tax was not justified. The arguments advanced are summarized below :-

(i) He submitted that the construction activities were undertaken for M/s D.S. Green Agro Tech, which was engaged in agricultural activities. He submitted that the definition of commercial or industrial construction service covered construction work only when such civil structures are to be used primarily in commerce or industry. He submitted that M/s D.S. Green Agro Tech was only engaged in agriculture and hence the activity will not fall within the definition of CICS ;

(ii) In the alternative, he submitted that the activity undertaken is more appropriately classifiable under the Works Contract Service (WCS) falling under Section 65 (105) (zzzza) of the Finance Act, 1994. He submitted that the Hon'ble Supreme Court in the case of **CCE & CUS, Kerala vs. Larsen & Toubro Ltd. – 2015 (39) S.T.R. 913 (S.C.)** held that any activity which is in the nature of a composite service involving supply of goods as well as providing service can be levied to service tax only under the category of WCS w.e.f. 01/06/2007, the date of its introduction. He submitted that the show cause notice has proposed demand of service tax under CICS and, as such, the demand cannot survive ;

(iii) He further submitted that the allegation of suppression is not sustainable against the appellant since they were under the bonafide belief that the agricultural activities cannot be considered as commercial or industrial activity.

4. The learned Departmental Representative justified the impugned order. He submitted that the activities of the recipient of service cannot be considered as non-commercial as has been opined by the lower authorities.

5. We have heard both the sides and perused the record.

6. The main reason cited by the appellant in resisting the levy of service tax under CICS is that the recipient of service i.e. M/s D.S. Green Agro Tech is engaged in agricultural activity and such activities cannot be considered as commerce or industrial activity. After perusal of the entire record, we find that there is no documentary evidence on record to indicate the exact nature of the activities undertaken by the service recipient. The lower authorities have held that such activities are towards commerce or industry. The Original Authority has recorded that the notice to whom the show cause notice was issued has failed to clarify the matter and have not produced any document evidencing the exact nature of the service provided. In view of above, we are unable to take a clear view as to the nature of the activity engaged in by M/s D.S. Green Agro Tech and consequently whether the construction activities undertaken will fall within CICS.

7. The claim of the appellant that the activities are appropriately classifiable under WCS also has not received consideration by both the authorities below who did not examine the claim of the appellant for WCS. Further, we note that the decision of Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd.** (supra), was pronounced only in May, 2015.

8. In view of above, we are of the view that the matter is required to be remanded to the Original Authority for considering the issue denovo. The appellant is directed to submit

documentary evidence to support his view that the activity undertaken by the service recipient is not in the nature of business or commerce. The Adjudicating Authority will also examine the other claims of the appellant for classification under WCS as well as the claim of time bar by the appellant.

9. Since, the issue is very old, the Original Authority is directed to finalize the matter in denovo adjudication within a period of three months from the date of receipt of this order. The appellant is given the liberty to produce additional documents to support his claims.

(Order dictated and pronounced in open court)

(Justice Dilip Gupta)
President

(V. Padmanabhan)
Member (Technical)

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