IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Service Tax Appeal No. 56656 of 2013

[Arising out of the Order-in-Appeal No. 20 (RDN) ST/JPR-1/2013 dated 07.02.2013 passed by Commissioner of Central Excise (Appeals), Jaipur I**].**

M/s. Global Build Estate Projects Pvt. Ltd. 11-17, Gautam Marg, Shyam Nagar, Jaipur — Appellants

Vs.

Commissioner of Central Excise, Jaipur I — Respondent

Appearance:

Shri Himanshu Bansal & Ms Rinki Arora, Advocates for the Appellants
Shri Sanjay Jain, AR for the Respondent

CORAM:

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

Date of Hearing /Decision: 09.10.2018

FINAL ORDER No. 53576 /2018

Per C L Mahar:

The brief facts of the matter are that during the course of Audit of the appellants record, it was observed by the department that the assessee had received an amount of Rs. 24,48,500/- and Rs. 74,45,500/- on 17.12.2007 as an advance under a contract for providing construction services to M/s. Benzer Agencies Ltd., Jaipur. On being asked by the Audit party, whether they have deposited the service tax amount under the construction services on the advance amount received by them from the service recipient, it was informed by the appellant that they have already deposited service tax at the rate of 2.06 % availing the benefit of Notification No. 32/2007 dated 22.05.2007 by availing the benefit of composition scheme for work contract service. The Department is of the view that as per the requirement of Notification No. 32/2007 dated 22.05.2007, the appellant should have informed the Department prior to availing the benefit of composition scheme under the Work contract services for paying the service tax at the reduced rate @ 2.06% rather than paying the normal service tax at the rate @ 12.36 %. On the basis of above, a show cause notice dated 3.9.2010 came to be issued to the appellant wherein a differential amount of service tax amounting to Rs.1,97,556/- has been demanded under section 73(1) of Finance Act 1994. Penal provisions under section 76 and 78 were also invoked. The show cause notice was adjudicated vide order-in-original dated 01.07.2011 whereunder the learned Commissioner has confirmed all the charges as invoked in the show cause notice. The appellant approached the Commissioner (Appeals). However, no relief was provided by the Commissioner (Appeals) vide his order dated 07.02.2013 and the appellant are before us against the above impugned Order-in-Appeal.

2. It is a matter of record that the appellant have provided a composite work contract which involve supply of material as well as service component while discharging the construction of office cum shopping mall at Jaipur. As per the definition provided under section 65 (105)(zzzza), the service provided by the appellant falls under the category of work contract service. It is also matter of record that in case the assessee provided work contract service, they are entitled for the benefit of Notification No. 32/2007-ST dated 22.05.2007 which provides a reduced rate of service tax for the activities involving a composite work contract. The only lapse on the part of the assessee as alleged by the department is that before availing the benefit of notification No. 32/2007, the appellant should have informed the Department before paying service tax at the reduced rate of 2.06% and before filing the service tax return.

3. It has been the contention of the learned advocate appearing for the appellant that they are registered with the VAT department for work contract service which also included the composite work contract service. It has further been argued that notification only stipulates that assessee has to inform the department but it does not require any permission from the department for availing the composite scheme for work contract wherein the reduced rate of service tax has been provided. Since they have paid the required composite work contract service tax

and shown it in their Service Tax return to the Department, it is presumed that compliance of notification has also been made with the filing of service tax return.

4. We have heard both the sides.

5. The short issue before us for consideration is whether not filing of prior intimation before availing the benefit of Notification No. 32/2007 dated 22.05.2007 can be considered as a serious violation of service tax law amounting to non-payment of appropriate amount of service tax. We feel that there is no denying of the fact that the work contract entered by the assessee as stated above involves supply of goods as well as service component and therefore, the activity undertaken by them was rightly classifiable under the work contract service. Since Notification No. 32/2007 is available to the service providers who are providing services of composite work contract, all the substantial benefit of Notification No. 32/2007 cannot be denied only on the ground that the assessee has not intimated the Department prior to deposit of service tax and filing of service tax return under the composite scheme for work contract. This has also been decided by this Tribunal in the case of M/s. Vaishno Associates vs. CCE & ST, Jaipur I [Final Order No. ST/A/50871/2018-CU(DB) dated 06.03.2018, wherein it has been held that benefit of reduced rate of service tax under the Work Contract Composite scheme cannot be denied to the appellant only because they have not informed the Department prior to filing of service tax return and

also payment of service tax under the Composite Scheme. Relevant extract of the above mentioned decision are extracted hereinbelow:

> "***6. The activity carried out by the appellant is in the nature of Erection, Commissioning or Installation and for the disputed period i.e. 2008-09 to 2009-10, the activity will also be covered under the category of Works Contract Service (WCS) which was introduced in the statute w.e.f. 01/06/2007. Under the WCS, the benefit of payment of Service Tax under the Composition Scheme was notified vide Notification No. 32/2007 ST dated 22/05/2007. The notification provides that the service provider is required to opt for payment of Service Tax under the Composition Rules prior to payment of Service Tax in respect of the Works Contract. But on perusal of the record of the present case we note that the appellant has opted for such Composition Scheme after they started making payment of Service Tax under the Works Contract Scheme. For the sole reason for failure to file the intimation prior to payment of Service Tax under WCS, the Adjudicating Authority has denied the benefit of Composition Scheme.***
>
> ***7. We have gone through Tribunal decision cited by the Ld. Counsel for the assessee. In the case of ABL Infrastructure Pvt. Ltd. (supra) where a similar issue was considered by the Tribunal. The Tribunal observed in the above case as follows:-***
>
> > ***" 6.3. Having viewed that the appellant have executed the new contract w.e.f. 5-6-2007 and the activity is eligible to be classified as a Works Contract Service, we may now examine whether they are eligible for paying duty at the lower rate under the Works Contract***

(Composition Scheme for Payment of Service Tax) Rules, 2007. The objection of Revenue is that the appellant has fulfilled the condition of Rules. The convenience, Rule 3 is extracted below:-

> *" The provider to taxable service who opts to pay tax under the Rule shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works 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."*

The above Rule requires that the provider who opts to pay tax under the Rule shall exercise such option prior to payment of Service Tax. We find force in the appellant's contention that the fact they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-09-2007, the substantial benefit cannot be denied for procedural deficiency of delay in opting for Works Contract Service by a specific declaration under Rule 3. More so, whe no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme. Reliance is placed on the case of Bridge and Roof Company (supra), wherein it was held as under:-

> *"After hearing both sides, duly represented by Shri Bipin Garg, learned Advocate appearing for the appellant and Shri K.K. Jaiswal, learned AR*

> *appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract. However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."*

We have also seen Board's Circular and the judgment of Nagarjuna Construction (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 1-6-2007 and after 1-6-2007. In the present case, we have held above that the appellant was executing work in a new contract from 5- 6-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax. "

7. By following the decision of the Tribunal in the above case we conclude that there is no justification for denying the benefit of payment of Service Tax under the Works Contract Composition Scheme. In view of the above discussion the impugned order cannot be sustained in its present form. We set aside the impugned order and remand the matter to the Adjudicating Authority for deciding the issue de novo after extending the benefit of the Works Contract Composition Scheme and requantify the Service Tax payable thereon.

***8. He will decide the issue of penalties also accordingly*.”

6. Following the above decision of this Tribunal, we hold that the impugned order-in-appeal is without any merit. Same is hereby set aside and appeal is allowed.

(operative part of the order pronounced in open Court)

(Rachna Gupta)
Member (Judicial)

(C L Mahar)
Member (Technical)

ss