IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH
COURT NO. IV

Service Tax Appeal No. 52277 of 2016

[Arising out of the Order-in-Appeal No. BHO-EXCUS-001-APP-062-16-17 dated 04/05/2016 passed by The Commissioner (Appeals – I), Central Excise, Customs & Service Tax, Bhopal (M.P.)]

M/s P.N. Nayak, Proprietor **Appellant**
C/o Parma Nanadnayak,
House No. 33-A, Ratnagiri,
Raisen Road, Bhopal
Madhya Pradesh – 462 021.

VERSUS

The Commissioner of Central Goods Service Tax, **Respondent**
178, Bhagya Bhavan, M.P. Nagar Zone – II,
Bhopal, Madhya Pradesh.

Appearance

Shri Kaushal Rathi, Advocate – for the appellant.

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

CORAM : **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Mrs. Rachna Gupta, Member (Judicial)

Final Order No. 53598/2018 Dated : 19/12/2018

DATE OF HEARING/DECISION : 19/12/2018.

C.L. MAHAR :-

The brief facts of the case are that the appellant are engaged in providing construction services in respect of commercial industrial building and civil structures and work contract service. The officers during the course of scrutiny of the financial accounts of the appellant have observed that the gross receipt for the relevant period of the appellant were at Rs.

5,28,09,515/-, however, it was observed that the taxable value declared by the appellant in their ST-3 return were only Rs. 1,18,08,479/-. After necessary enquiries, a show cause notice dated 2 May 2014 was issued to the appellant, whereunder service tax amounting to Rs. 11,87,507/- was demanded from the appellant for the period 2012-2013 by invoking the provisions of Section 73 (1) of the Finance Act, 1994, the penal provision under Section 76 were also been invoked. The matter was adjudicated vide order dated 29 April 2015 by the learned Joint Commissioner, whereunder the demand of service tax had been confirmed and a penalty under Section 76 was also been imposed on the appellant, interest under Section 75 had also been confirmed. The appellant have preferred an appeal before Commissioner (Appeals), who decided the matter vide his order No. 219/ST/2015 dated 04 May 2016 and the learned Commissioner (Appeals) has endorsed the findings of the order-in-original in his order.

2. The learned Advocate appearing for the appellant have submitted that they have entered into a contract with M/s Devi Shakuntala Thakral Charitable Foundation for construction of college building. The services of construction of college building, are exempted from payment of service tax vide Board Circular No. 80/10/2004-ST dated 17 September 2004. It has been the contention of the learned advocate that activity of commercial or industrial construction undertaken by him were not for any business or commerce it was for a charitable institution, who are engaged in providing college education to needy and deprived students. It has further been added that the Commissioner (Appeals) has rejected their claim of exemption from payment of the service tax without giving any reason except that the completion certificate of the college building submitted by them was dated 16 March 2015 and, therefore, it has been held that the appellant should have paid the service tax as the exemption to non-commercial institutions has been done away with by the

Finance Act, 1994 w.e.f. 1 July 2012. It has further been argued that the second component of service tax demand pertains to the receipt for the financial year 2012-2013 for the construction work undertaken by the appellant for M/s Central Warehousing Corporation. It has further been argued that the contract for construction of godown for Central Warehousing Corporation was a composite contract involving not only the element of the service but also the transfer of the property in execution of such contract as per the terms of the contract and in view of Hon'ble Supreme Court judgment in the case of **Commissioner of Central Excise & Customs, Kerala vs. Larsen & Toubro** reported in **2015 (39) S.T.R. 913 (S.C.)**, the activity where the transfer of the property as well as service element are involved is classifiable as a work contract service and as per the Notification No. 30/2012-ST dated 20 June 2012 and as the appellant being an individual service provider, the 50% of the total service tax liability need to be paid by the recipient of the service. It has been the contention that because of the ignorance, the appellant have paid the full amount of the service tax after availment of abatement under commercial or industrial construction service without availing the benefit of Notification No. 30/2012-ST dated 20 June 2012. It has further been added that taking the full value of the contract, the 50% of the service tax comes to Rs. 6,29,872/- while the appellant have already deposited an amount of Rs. 9,15,107/- and, therefore, it has been claimed by the learned Advocate that there is no short payment of service tax in their case and the 50% of service tax due on the work contract service provided by them to M/s Central Warehousing Corporation need to be recovered from the service recipient.

3. The learned Advocate has also submitted that the appellant is entitled for the benefit of the cum tax price for arriving at the tax liability. It has further been added that Commissioner (Appeals) have denied them the benefit of Notification No. 30/2012-ST dated 20 June 2012 without giving any valid reason

and their claim has been rejected only because by ignorance under which they have classified their service under the category of commercial or industrial construction service though in fact the service provided by them falls under the category of work contract service and on which as being an individual service provider the 50% of the service tax was to be paid by the corporate body namely M/s Central Warehousing Corporation.

4. We have also heard learned Departmental Representative who has reiterated the findings as given in the order-in-appeal.

5. Having heard both the sides and on perusal of the appeal record, we find that primarily there are two issues before us to decide ; firstly, whether the service tax has wrongly been demanded on the amount received by the appellant for providing a construction service to M/s Devi Shakuntala Thakral Charitable Foundation for construction of college building; secondly, whether it is a fact that appellant have provided work contract service to M/s Central Warehousing Corporation and Industrial Rail Warehousing Company after 01 July 2012 and as per the provisions of Notification No. 30/2012 dated 20 June 2012 whether the appellant was only liable to pay 50% of service tax due on the services provided by them to above-mentioned cooperate bodies.

6. With regard to the issue at No. 1 above, we find that the tax invoices issued by the appellant to M/s Devi Shakuntala Thakral Charitable Foundation for construction of college building are all dated before 01 July 2012, we also find that as per the provision of point of taxation Rule 11, the date of invoice is relevant for application of the service tax liability as the completion of the service has been before 01 April 2012 when the new service tax regime has come into operation and invoices has raised much before 01 July 2012. We hold that the Board’s Circular No. 80/10/2004-ST dated 17 September 2004 is applicable in this case, where it has been provided that :-

> "13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax".
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> It is very much clear in para 13.2 of the said circular that, **constructions service which are for the use of organizations or institutions being established solely for educational are not taxable, being non-commercial in nature**,"

7. In view of above, we hold that scope of applicability of the service tax with regard to the construction service for charitable institution, education institution, as mentioned above, have been exempted since there is no denying of the fact that the construction undertaken by the appellant was of a education institution, therefore, we hold that the service provided by the appellant to M/s Devi Shakuntala Thakral Charitable Foundation was not taxable.

8. Coming to the second issue, it is a matter of record that the construction activity undertaken by the appellant involved both supply of the goods as well as supply of the labour and services and, therefore, as per the definition of the work contract service and as held by Hon'ble Apex Court in the case of **Commissioner of Central Excise & Customs, Kerala vs. Larsen & Toubro** reported in **2015 (39) S.T.R. 913 (S.C.)**, the activity of the appellant is rightly classifiable under the category of the work contract service as per the provisions of Section 65 (105) (zzzza). The Notification No. 30/2012 dated 20 June 2012 provides that when any individual, or Hindu undivided family or partnership firms provides a work contract service to a registered

body cooperate, the service tax payable by the provider of the service will be 50% and the balance 50% of the service tax need to be paid by the recipient of the service. The relevant extract of the notification are reproduced here below :-

> "It is also submitted before your honour that w.e.f. 1 July 2012, as per Sl. No. 9 and condition no. (v) of the Notification No. 30/2012-ST the appellant is liable to pay only 50% of the total service tax liability for the invoices raised to M/s Central Warehousing Corporation and Central Railside Warehousing Company Limited. The relevant extract of Notification No. 30/2012 is reproduced hereunder :
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> (v) provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or supply of manpower for any purpose or service portion in execution of works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory;
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> The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely :-
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> TABLE

Sl. No.	**Description of a service**	**Percentage of service tax payable by the person providing service**	**Percentage of service tax payable by the person receiving the service**
1.	in respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business	Nil	100%
2.	in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Nil	100%
3.	in respect of services provided or agreed to be provided by way of sponsorship	Nil	100%
4.	in respect of services provided or agreed to be provided by an arbitral tribunal	Nil	100%
5.	in respect of services	Nil	100%

	provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services		
6.	in respect of services provided or agreed to be provided by Government or local authority by way of support services excluding,- (1) renting of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994	Nil	100%
7.	(a) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on abated value to any person who is not engaged in the similar line of business (b) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non abated value to any person who is not engaged in the similar line of business	Nil 60%	100% 40%
8.	in respect of services provided or agreed to be provided by way of supply of manpower for any purpose	25%	75 %
9.	in respect of services provided or agreed to be provided in service portion in execution of works contract	50%	50%
10.	in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	Nil	100%

Explanation-I. - The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.

Explanation-II. - In works contract services, where both service provider and service recipient is the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per choice, independent of valuation method adopted by the provider of service.

9. In view of above, we are of view that the construction activity undertaken by the appellant for M/s CWC and others is rightly classifiable under work contract service. It can also be seen that the appellant have provided the work contract service to a registered cooperate bodies namely; Central Warehousing Corporation and M/s Central Railside Warehousing Company Limited and since the appellant is an individual service provider, the liability for payment of 50% of the service tax on work contract service certainly falls on the service recipient. As stated in the preceding paras, it has been claimed by the appellant that he has already paid more than 50% of the service tax on the service provided by them to the cooperate bodies, as mentioned above.

10. In view of above, we find that prima facie there is no service tax liability emerges on the appellant on both the above-mentioned counts and, therefore, we find that the order-in-appeal is without any merit and, therefore, we set aside the same.

11. The appeal is allowed.

(Operative part of the order pronounced in open court.)

(C.L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

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