CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH-COURT NO. IV

Service Tax Appeal No. 54473 of 2014-DB

(Arising out of Order-in-Original No.JAI-EXCUS-001-COM-159-13-14 dated 13/05/2014 passed by Commissioner of Central Excise-I Jaipur)

M/s Aakriti Construction .... **Appellants**
121, Devi Nagar,
New Sanganer Road,
Sodala, Jaipur-302019

Versus

Commissioner of Central Excise &
Service Tax, Jaipur-I .... **Respondent**
New C R Building,
C- Scheme, Statue Circle,
Jaipur-302005

Appearance

Present for the appellant: Ms. Rinki Arora, Advocate

Present for the respondent: Shri R K Manjhi & Shri G R Singh, DRs

CORAM: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of hearing: 29.03.2019

Date of decision: 17.06.2019

Final Order No. 50776/2019

Per Bijay Kumar

1. This appeal is filed against the Order-in-Original No. JAI-EXCUS-001-COM-159-13-14 dated 13.05.2014 by which a demand of Rs. 2,09,26,826/- along with applicable interest and penalty under Section 78, at Rs. 100 per day and at Rs. 200 under Section 76 of Finance Act (hereinafter referred to as 'Act') on the appellant during period from

2005-06 to 2008-09. The order was passed pursuant to Show Cause Notice dated 19.10.2013.

2. Brief facts of the case are that the appellant is engaged in providing 'Commercial or Industrial Services' (CICS), 'Construction of Residential Complex Services' (CRCS) and 'Work Contract Services' (WCS). The Show Cause Notice was issued to the appellant on the allegation that the value of free supply of steels/cement was not being included by them in their gross amount charged for payment of service tax, and therefore, they were not eligible for benefit of Notification No. 15/2004-ST dated 10/09/2004 and 01/2006-ST dated 01/03/2006 in respect of abatement contained in these Notification. Further the Show Cause Notice also alleged that the Service Tax has not been paid by the appellant while constructing building for Jaipur National University and Bhagwan Mahavir Cancel Hospital and for construction of residential houses by some of their clients.

3. Learned Counsel for the appellant submits that the abatement under Notification No 15/2004-ST dated 10/09/2004 and 1/2006-ST dated 1/03/2006 regarding value of free supply of material received from their customer is no longer *res Integra* in view of Hon'ble Tribunal decision in case of **Bhayana Builders Pvt. Ltd. vs. CEE, 2013 (32) STR 49 (Tri- Del.)** affirmed by SC in **CCE, vs Bhayana Builder Pvt. Ltd. 2018 (10) GSTL 118 (SC).**

4. As regard to construction of building for Jaipur National University, Mahima Shiksha Samiti and Bhagwan Mahaveer Cancer Hospital the reliance was placed in terms of paragraph 13.2 of Circular No. 80/10/2004-ST dated 17.09.2004 which exempts institute established solely for the purposes of educational, religious charitable and

philanthropic. Further, the building house for educational purposes and recognized by educational institute cannot be categorised as commercial building even on account of the fact that if collected or the owner of building as commercial person. In support of the their averments ld. Advocate place reliance on following case laws;

(i) **Banna Ram Choudhary vs. CCE Final Order No. 53149 of 2017 dated 01.05.2017.**

(ii) **(ii) Modern Engineering Construction vs. CCE 2018-TIOL-3895-CESTAT-MAD.**

5. As regards construction of building for Bhagwan Mahavir Cancer Hospital the reliance was placed on the decision of following case laws;

(i) **Mordern Engeering Construction vs. CCE, 2018-TIOL-3895-CESTAT-MAD**

(ii) **Jatan Construction Pvt. Ltd. vs CCE, Final Order No. 58135/2017 dated 21.11.2017.**

(iii) **Manish Projects Pvt. Ltd. vs CCE, Final Order No. 70484/2019 dated 06.03.2019.**

6. And a certificate issued by the Director of Hospital stating that the hospital is not a commercial venture and established by charitable trust and exempt under Notification dated 17.09.2004(supra)

7. Regarding the construction of individual houses it is her submission that the individual house, which has been constructed by the appellant cannot be subject to service tax. In view of following decisions passed by the coordinate bench of this Tribunal;

- **(i)** **Macro Marvel Project Ltd. vs CCE, 2008 (12) STR 603 (Tri.-Chennai)** affirmed by SC in **2012 (25) STR J154**
- **(ii)** **CCE vs. Mall Enterprises-2016 (41) STR 119 (Tri.-Mumbai)**

8. The appellant has also annexed certificates stating that the houses that has been constructed is individual house and the appellant is not liable to pay service tax. Ld. Advocate also submitted that the entire demand is barred by limitation as the appellant were under the *bonafide* belief that construction work undertaken by them were commercial in nature and not liable to service tax in terms of Circular dated 17/09/2004 *(supra)* there was no *malafide* intention to evade the payment of tax. Hence extended period is not applicable. For this contention reliance was placed in **Bajranglal Shrimal Engineers and Construction vs. CCE 2017 (51) STR 273 (Tri.-Del.)** wherein it is held that a belief which emerges on the basis of circumstances available, leading the assessee not to pay the tax, is required to be held as a *bonafide* belief.

9. In view of above ld. Advocate finally concluded that the order passed by the ld. Adjudicating Authority is not sustainable and require to be set aside in appeal.

10. Ld. Departmental Representative supported the impugned order as per the findings indicated in paragraph 38 and 58 of the order. Accordingly, it was submitted that the impugned order be upheld in appeal.

11. We have heard the parties and considered the appeal records.

12. We have also seen the various case laws on the issue involved in the present appeal. Our finding is as under;

(i) Regarding the first submission about the abatement under Notification 15/2004 and 01/2006-ST we find that the issue has been settled in favour of the appellant by the decision of this Tribunal in case of **Bhayana Builders (supra)**

(ii) In respect of second issue in appeal regarding the construction building for Jaipur National University and Bhagwan Mahavir Cancer Hospital it is not in dispute that they are the educational institute recognized by the Government and is also charitable institute for health care services. Thus, the appellants have rightly placed reliance on the CBEC Circular dated 17/09/2004 which exempted the institute established for educational, religious charitable and philanthropic purposes. Our view gets support from the decisions of Bana Ram Choudhary case and in Modern **Engineering Construction case (supra).**

(iii) Regarding the construction of individual houses, the third issue we find that these houses have been built by the individuals, namely, Shri C Sharma, Uttam Chan Jain, Dr. Hemawati Gupta (Bansal) etc., for their personal use which is clearly excluded from the definition of Construction of Residential Complex Service under the Act. Our decision finds support from the case of **M/s Macro Marble Power Projects Ltd. and Mall India Pvt. Ltd. (Supra).**

(iv) Regarding the limitation which is the last issue raised in the appeal, we find that the appellant was under *bonafide* belief of non levy of service tax under the Act, as per the CBEC Circular dated 17/09/2004. There was no *malafide* intention to evade the payment of tax and hence the extended period is not invokable.

13. In view of above, we set aside the impugned order on merits as well as under limitation. The appellant will be entitled for consequential benefit as per law.

(Order pronounced on 17.06.2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

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