CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No.	Appellant(s)	Respondent(s)	Order-in-Original No.
ST/856/2009	R. Balarami Reddy	Commissioner of Service Tax, Hyderabad -ST	29/2009 dated 12.08.2009 passed by CCCE & ST, Hyderabad-II
ST/1711/2011	-do-	-do-	04/2011-Adjn. (ST) (Commr.) dated 21.03.2011 passed by CCCE & ST, Hyderabad-II

Appearance

Shri B. Venugopal, Advocate for the Appellant.

Shri Dass Thavanam, Superintendent/AR for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 05.07.2018
Date of Decision: 03.08.2018

FINAL ORDER No. A/30820-30821/2018

[Order per: M.V. Ravindran]

1. These two appeals are directed against Orders-in-Original No.29/2009 dated 12.08.2009 and 04/2011-Adjn. (ST) (Commr.) dated 21.03.2011. Since both the appeals are of the same appellant and raising the same issue, they are being disposed of by a common order.

2. The relevant facts that arise for consideration, after filtering out unnecessary details are in Appeal No.ST/856/2009, the demand is for the period April, 2007 to March, 2008 on the appellant and in another Appeal No.ST/1711/2011, the demand is for the period April, 2008 to March, 2009. The appellants herein are engaged in the services related to site formation, construction etc, and are registered with the Service Tax Department and the dispute in present cases relate to

(i) Work Order dated 08.12.2006 were construction of Ash dyke at Lanco Amarkantak Thermal Power Station (300MW), Korba, Chhattisgarh.

(ii) Work Order dated 13.04.2007 for site grading works at 2 x 507.5 MW Nagarjuna Thermal Power Project at Padubidri, Udipi District, Karnataka.

3. The Revenue Authorities issued two show cause notices on the allegations that for the period April and March, 2007, they have improperly discharged Service Tax less after availing abatement of 67% in terms of Notification No.01/2006 and from June, 2007 onwards, they have wrongly discharged Service Tax @ 2% availing benefit of Works Contract (composition scheme for payment of Service Tax) Rules, 2007 which is incorrect as the Works Order issued to appellant indicates they have to render the services under site formation and clearance, excavation and earth moving and demolition services; another allegation in the show cause notice are regarding the benefit wrongly claimed by the appellant in respect of the construction of roads under Notification No.17/2005 dated 07.06.2005. The adjudicating authority after following due process of law,

did not agree with the contentions of the appellant in respect of the demand of differential duty; accordingly Confirmed demands raised along with interest and imposed equivalent amounts of penalties.

4. Learned Counsel takes us through the Work Order issued by Lanco Infratech Ltd for the construction of thermal power station and specifically draws our attention to the bill of quantities mentioned in the agreement and submits that from the Serial No.6 to 17 of the said bill of quantities, appellant is required to perform various masonry works related to the construction of ash dyke in the said thermal power station. He would submit that for providing and laying of such various related construction activity, appellant is required to use their own material and transfer the same in the form of ash dyke to M/s Lanco Infratech Ltd. He would submit that this entire activity is perceived by appellant as being Works Contract. The claim of the appellant's counsel is that the contract value which has been entered into by the appellant, they have discharged the VAT on such activity and has considered the same as a Works Contract and hence, for the entire period from April, 2007 to March, 2009, the said contract needs to be looked into as Works Contract and as per the decision of the Supreme Court in the case of Larsen and Tubro Ltd [2015 (39) STR 913], the works contract cannot be vivisected to impost Service Tax. As regards the demand of Service Tax liability under site formation and clearance, excavation and earth moving and demolition for the Work Order issued on Nagarjuna thermal power project, it is his submission that the said activity is in preparation/earth work for the roads and benefit of Notification No.17/2005-ST would be applicable as it is in respect of construction of roads. Learned Counsel would take us through the said notification. He would further submit that in order

to buy peace, they have discharged the Service Tax liability and deposited the same during the hearing of stay application. It is his further submission that the Tribunal in the case of Shilpa Constructions Pvt Ltd [2010 (19) STR 830] has come to a conclusion that the construction of road within the commercial complex is to be considered as separate activities in the contract, benefit of Notification No.17/2005 as clarified by the Board by circular dated 27.07.2005 needs to be extended. He prays that impugned order be set aside.

5. Learned Departmental Representative reiterates the findings of the lower authorities and submits that the activity of construction of ash dyke is not a works contract and no material is supplied or transferred along with the ash dyke when handed over to Lanco Infratech Ltd. It is his submission that the benefit of notification availed by the appellant for the period April, 2007 to March, 2007 for discharge of tax liability on 67% of the value is incorrect as the said benefit is available only for maintenance and repair services and not for the site formation or works contract as the case may be. As regards the construction of roads as claimed by the appellant, it is his submission that the roads which are sought to be constructed is nothing but only preparation of sub-grade of excavation, filling of the same and compacted and is not road per se and it is only earth work for the roads. He submits that the benefit of Notification No.17/2005 extended to the activity of site formation for construction of road does not envisage this activity.

6. On careful consideration of the submissions made, we find that the issue/facts are stated correctly by both sides; it is whether differential service tax liability needs to be discharged by the appellant herein for the

period April, 2007 and May, 2007 without extending benefit of abatement of Notification No.01/2006 and for the subsequent period whether ash dyke constructed by the appellant would fall under the works contract services or site formation and clearance services. Addressing the first issue of the demand for the period April and May, 2007, we find that a contract which has been entered into by the appellant with Lanco Infratech Ltd seems to be a works contract. The contract entered discusses extensively as to the scope of work, contract value, taxes and duty and other work that needs to be completed under the said contract/works order indicating use of materials. In our view, the entire contract which has been entered into by the appellant with Lanco Infratech Ltd is nothing but a works contract and will remain so. If it is so, the law settled by the Apex Court in the case of Larsen and Tubro Ltd in respect of such kind of works contract is that they remain works contract pre and post 01.06.2007, would cover the issue in favour of appellant and demand of differential service tax liability for the period April and May, 2007 and after June, 2007 a works contract. The adjudicating authority in the case in hand has misdirected his finding to record that construction of ash dyke cannot be considered as works contract and benefit of the Works Contract (composition scheme for payment of Service Tax) Rules, 2007 cannot be extended. In our view, the factual position, on reading agreement and works order indicates that it is works contract; the impugned order holding otherwise is unsustainable. To that extent, we hold that the impugned order is liable to be set aside and we do so.

7. As regards the other demand raised in the impugned orders as to taxability of the services rendered by appellant, site formation activity of Nagarjuna Thermal Power Project at Padubidri, Udipi District, Karnataka, the

reading of the said contract indicates clearly that the entire contract is only for site formation and clearance, excavation and earth moving and demolition services. The bill of quantities enclosed in the said contract talks about tree cutting, site clearing and grubbing, earth work in excavation, earth work in filling, mechanical carriage (for carriage beyond the initial lead of 1.0 KM) and earth work for roads. The tax liability which has been sought and confirmed from the appellant is in respect of the earth work for roads executed by the appellant for the thermal power plant. We find that the arguments put forth by the Learned Counsel that these activities amounts to construction of roads and is covered by Notification No. 17/2005-ST is not on a firm footing. The detailed activity which is indicated in the said works order clearly states that appellant is required to undertake only the activity of earth work for roads, like preparation of sub-grade by excavation/filling to required level, consolidation with power road roller of 8-12 tonne capacity, compacted to 95%, proctor's density at OMC by mechanical device, dressing to camber, making good the undulation, etc., including all leads and lifts. The clarity of the work in the contract executed by the appellant would indicate that they had not constructed any road for the Nagarjuna Thermal Power Plant but had done all the earth work and the site formation. In our view, this activity of the appellant will not get covered under the category of construction of road as has been considered in Notification No.17/2005-ST dated 07.06.2005 which reads as under:

> *"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the site formation and clearance, excavation and earthmoving and demolition and such other similar activities, referred to in sub-clause (zzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person in the course of construction of*

roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, from the whole of service tax leviable thereon under section66 of the said Finance Act."

8. In our view, the findings recorded by the adjudicating authority on the confirmation of the demand of differential duty under this category are correct and does not require any interference. The demand of Rs.72,08,553/- along with interest is upheld. As regards penalty imposed on the appellant on this activity, we find that the issue of whether the activity would fall under the category of construction of road or otherwise is an issue of interpretation of Notification No. 17/2005-ST. In our view, the appellant could have entertained a bona fide belief that they are eligible for the benefit of Notification No.17/2005-ST. In view of this, the issue being question of interpretation, we hold that there is no reason to visit the appellant with penalties as is imposed by the adjudicating authority. The penalties imposed on the appellant under this head are set aside.

9. In view of the facts and circumstances of this case and for the foregoing reasons, we dispose the appeals as indicated herein above.

(Pronounced in the Open Court on 03.08.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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