

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench - Court – I

Service Tax appeal No. ST/22517/2014

(Arising out of Order-in-Original No. HYD-EXCUS-003-COM-06-14-15, dated 29.04.2014
passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-III
Commissionerate)

Vishwanath Projects Limited

401, 3-5-874/A, R.K.Vipanchi Estate,
HYDERABAD – 500 016.
Telangana

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APPELLANT

Vs

Commissioner of Service Tax,

Hyderabad Service Tax,
11-5-423/1/A, Sitaram Prasad Towers,
Red Hills,
HYDERABAD – 500 004.
Telangana

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RESPONDENT

APPEARANCE

S/Shri Sudhakar, G.S & Venkata Prasad P, Chartered Accountants for the Appellant.
Shri V.R. Pawan Kumar, Supdt./AR for the Respondent

Coram: Hon'ble Mr. S.K. MOHANTY, MEMBER (JUDICIAL)

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

FINAL ORDER No. A/31050/2019

Date of hearing: 09.08.2019
Date of decision: 11.11.2019

[ORDER PER: Mr. P. VENKATA SUBBA RAO]

1. This appeal is filed against Order-in-Original No. HYD-EXCUS-003-COM-06-14-15, dated 29.04.2014. The facts of the case are that the appellant herein is registered with Central Excise Department as a Service Tax provider under the service categories of 'Works Contract Service', 'Goods Transport Agency' and 'Erection and Commissioning Services'. During the verification of their accounts by Revenue it was

found that they had undertaken the works of execution of some works on which they have not discharged the service tax appropriately. It was also observed that the appellant had received advances from their customers and had not discharged the service tax on such advances. In terms of Section 65(105), taxable service includes the services 'to be provided' and hence the service tax had to be paid on the advances also. Thirdly, it was also found that the appellant had paid some amounts towards "goods transport agency" service on which they were supposed to discharge the service tax liability under reverse charge mechanism which they have not done. Accordingly, a show cause notice was issued calling upon the appellants to explain:-

- (a) Why an amount of Rs. 1,07,12,000/- should not be demanded as Service Tax from them under "Erection, Commissioning or Installation Services".
- (b) An amount of Rs. 27,63,20,528/- should not be demanded from them as Service Tax under "Works Contract Service"
- (c) An amount of Rs. 96,79,347/- should not be demanded from them as Service Tax under "Site Formation & Clearance Service" .
- (d) An amount of Rs. 5,94,425/- should not be demanded from them as Service Tax under "Transport of Goods by Road service" under Reverse Charge Mechanism.
- (e) An amount of Rs.81,39,131/- of irregularly availed CENVAT Credit should not be recovered from them under Section 73 of Finance Act, 1994 read with Rule 14 of CCR 2014.
- (f) Interest as applicable on the above should not be demanded.
- (g) Why penalty should not be imposed on them under sections 77 & 78 of the Finance Act, 1994.

2. After following due process, the original authority has confirmed the following only:

- i) Service Tax of Rs. 1,07,12,000/- under the category of "Erection, Commissioning and Installation Service".
- ii) An amount of Rs. 5,94,425/- under the category of "Goods Transport Agency Service" of which Rs. 3,34,653/- already paid by the appellant has been adjusted.
- iii) Interest under section 75 as above and also on delayed payment of service tax on advances received by them.
- iv) Imposed a penalty of Rs. 1,11,13,425/- under section 78 of the Finance Act, 1994.
- v) Imposed a penalty of Rs. 5,000/- under section 77 of Finance Act, 1994.

3. Aggrieved by this order, the present appeal has been filed by the appellant.

4. Ld. Counsel for the appellant submits that in the impugned order there was a demand only on three counts – (i) under the head "Erection, Commissioning or Installation Service" with respect to the project which they have undertaken for construction of floodlighting along the Indo-Bangladesh Border, (ii) Demand of mobilization advance which they have received from their clients which was subsequently adjusted in the final bill and (iii) service tax under reverse charge mechanism on the freight paid to the vendors under GTA services. He further submits that in all cases, extended period of limitation was invoked and penalties were imposed.

5. As far as the first demand under "Erection, Commissioning or Installation Service" is concerned, he would take us to the show cause notice and the impugned order to assert that the construction of floodlighting along the Indo-Bangladesh Border in the State of Tripura was given to them by M/s Coastal Projects Private Limited on back to back contract basis. M/s Coastal Projects Private Limited had got this award from the Ministry of Home Affairs, Government of India and they had further sub-contracted the same work to the appellants. A copy of the contract awarded to them is very clear that they were paid a consolidated amount for supply of various equipments as well as their installation and commissioning. There is no separate contract for the service part of it and no separate contract for transfer of goods. Therefore, the entire contract is in the nature of "Works Contract Service". Works Contract Service, as has been held by the Hon'ble Apex Court in the case of Larsen & Toubro Limited [2015(39)S.T.R. 913 (S.C.)] is a separate specie of contract as known in the commerce and it cannot be equated either with a contract for supply of goods or a contract for provision of service simpliciter. Therefore the Hon'ble Supreme Court held that the charge for works contracts comes only w.e.f. 01.06.2007 when "Works Contract Service" has been inserted in Section 65(105). Prior to this date, it was not chargeable at all. Although the present period is post 01.06.2007, the charge on this account can only be done under the Works Contract Service, it cannot be done under some other heading. Merely because the works contract service has been made a taxable category post 01.06.2007, it does not automatically mean that it can also be charged under any other head after this date. It is a well settled principle that if a service is taxable under one or more categories, the appropriate category as per law has to be selected. As far as the composite work service is concerned, there is only one category in the service tax provision under which it can be charged. For this reason alone, the demand of service tax on Erection, Commissioning or Installation service on this composite works contract does not sustain

and needs to be set aside. Charging a works contract under Erection, Commissioning or Installation Service falls beyond the scope of the law. He relied on the following case laws:

- a. Mahakoshal Beverages Pvt. Ltd. [2014(33)S.T.R 616 (Kar.)
- b. R.K. Construction [2016(41)S.T.R.879 (Tri.-Mumbai).
- c. Sai Teja Constructions [2019(7)TMI 575 (CESTAT-Hyderabad).

6. He also argued that the floodlighting along the Indo-Bangladesh Border is essentially linked to transmission and distribution of electricity and hence is exempted vide notification No. 45/2010-ST, dt. 20.07.2010 and Notification No. 11/2010-ST, dt. 27.02.2010. He relied on the following case laws:

- i) Shree Ganesh Enterprises vs. CCE [2014(35)S.T.R 348 (Tri.-Bang.)
- ii) Sterling Transformers vs. CCE [2014(35)S.T.R (Tri.-Bang.)
- iii) Noida Power Co. Ltd. vs. CCE [2014(33)S.T.R 383 (Tri.-Del.)
- iv) CCE vs. Sri Rajyalakshmi Cement Products [2017(52)S.T.R 309 (Tri.-Hyd.)
- v) CCE vs. Dhanwate Engineering works [2015-TIOL-1447-CESTAT-MUM.]
- vi) Kedar Constructions vs. CCE [2015(37)S.T.R 631 (Tri.-Mumbai).

7. Thirdly, he would argue that even if it is assumed that service is taxable, the material value involved in the execution of the contract needs to be excluded in terms of Notification No. 12/2003-ST, dated 20.06.2003 and the demand has been confirmed on the entire value of contract including the goods. As far as the demand of service tax on the freight charges is concerned, the appellant submits that the demand was made based on the amounts indicated in their own books of accounts as they have been paid

towards "goods transport services". The total demand was Rs. 5,94,425/- of which they have paid an amount of Rs. 3,34,653/-. As far as the remaining amount of Goods Transport Agency Services is concerned, he would submit that this amount was not paid by them to any Goods Transport Agency but was only reimbursed by them to their suppliers towards transportation of goods. The actual service of "goods transport agency" was availed by their suppliers and not by them. Therefore, the liability, if any, under Reverse Charge Mechanism lies on their suppliers and not on them. He further argued that the vehicle owners are operators who merely hire the vehicles and do not issue any consignment note and do not get covered by the Goods Transport Agency Service also. As far as the interest on service tax liability on the mobilization advances received by them is concerned, he would submit that these are in the nature of mobilization advances and not in the nature of advance payment for the services. He would submit that the distinction between the two is when they get mobilization advance they have to either pay interest on the mobilization advance or submit a bank guarantee which is not done in advance payments. In their case, they have submitted a bank guarantee and interest was also charged by their customers and therefore this is nothing but a sort of loan given to them and not the payment made in advance for the services rendered. The amount was thereafter adjusted at the time of final settlement of bills and the service tax was duly paid. The case of the Revenue is that the appellant should have discharged the service tax as soon as they receive mobilization advances on the ground that it is an advance payment for the services. However, considering that they have given a bank guarantee and have also paid interest to their customers, the amounts received can only be considered as mobilization advances and there cannot be any service tax liability on such advances. He relies on the following case laws:

- i) GJF Construction Company Limited vs. CCE, Hyderabad [2018(8)TMI 323 – CESTAT-Hyderabad].

ii) Thermax Instrumental Limited vs. CCE [2015(12)TMI 12222-CESTAT-Mumbai]

8. He also argued that there is no justification to invoke the extended period of limitation and they had no intention to evade payment of service tax as the entire contract which they have executed is towards an MHA project of floodlighting along the Indo Bangladesh Border which has been subcontracted to them. They would gain nothing by avoiding service tax on such projects. Hence Mens rea is evidently absent and there is no case to invoke extended period of limitation.

9. Ld. DR, on the other hand, reiterates the assertions of the lower authority and asserts that from the extract of costs in the contract it is evident that there are components of supply of materials as well as provision of Erection, Commissioning or Installation Service. The appellant should have submitted the break up of two components which they did not do and hence the demand has been raised on the entire amount of contract. Had the appellant provided the break up of the service component, the demand would have raised on the components only. He would assert that the contract itself appears to be vivisected into two components namely supply of materials and provision of service and if the contract is vivisected, demand can correctly be raised for the ECIS. In the reply to the show cause notice, the appellant themselves have argued that the contract is divisible and they cannot now take a contradictory stand. Therefore, the demand is not hit by ratio of the judgment of Hon'ble Apex Court in the case of Larsen & Toubro (supra). The appellant is eligible for exemption on the material component in terms of Notification No. 12/2003-ST, dated 20.06.2003 and Notification No. 01/2006-ST, dt. 01.03.2006 which they could have claimed by providing the break of the two components – supply of goods and services.

10. As regards the Goods Transport Agency Services, he would submit that it is on record that they have availed the services of Goods Transport Agency and paid the amount for the services. This amount was not disclosed in their returns but was discovered from their books of accounts. The appellant paid part of service tax and declined to pay rest of it on the ground that the amount was paid by them to their suppliers who had availed the GTA services and not to any Goods Transport Agency itself. However, they have not produced any documents to substantiate this assertion and therefore the demand was confirmed on this ground.

11. As far as the interest payable on mobilization advances is concerned, he would assert that the appellant has received the payment for the services in advance and had not discharged the service tax liability on that date and therefore the interest on delay payment of service tax is correctly demanded.

12. On the question of limitation of time, he would assert that the appellant had not disclosed these details in their ST-3 returns and the matter came to light only when the department had conducted investigation.

13. We have considered the arguments on both sides to decide the issues. As far as the demand on the project for construction of floodlighting around Indo Bangladesh Border in the State of Tripura is concerned, it is evident from the records before us that the project was awarded by Ministry of Home Affairs to M/s Coastal Projects Private Limited, A Government of India Enterprise, who have further subcontracted the same to the appellant on back to back basis. The scope of work indicated in the contract is as follows:

"Annexure-1: Scope of work:

2. Flood-lighting along Indo-Bangladesh Border in the state of Tripura between B.P.No. 2254/eRI to 2265

3. *Scope of work: M/s Coastal Projects Pvt. Ltd. Limited is responsible for the following works:*

Section:A	Main control panel & FPBs
Section:B	11 KV PPVC/A CABLE SUPPLY
Section:C	Laying of MV Cable
Section:D	Pole & Pole Erection
Section:E	Luminaire & Lamp Supply
Section:F	Earthing
Section:G	D.G.Set with Room
Section:H	Safety Equipment
Section:I	Operation and Maintenance
Section:J	Providing PVC/HDPE
Section:K	Junction Box

4. *M/s Viswanath Projects Ltd. shall carry out works as per the specifications and drawings and also as per the instructions of the Engineer, NPCC.*
5. *Drawing approvals, permissions, Inspections will be done by M/s Viswanath Projects Limited as required to complete the above mentioned sub-stations.*
6. *M/s Viswanath Projects Limited will make all arrangements at his own cost for proper security and safety of all materials purchased and supplied by NPCC materials and also available at site until they are commissioned and handedover.*
7. *Insurance coverage will be done by M/s Coastal Projects Pvt. Ltd., Hyderabad. VPL will take work man compensation insurance for their labour working for above mentioned sub-stations or locations.*
8. *M/s Viswanath Projects Limited is wholly responsible for the consequences of misbehaviour or misconduct of staff at site or outside when they are working for the project.*
9. *All measurements will be considered after they are certified by site in charge of M/s Coastal Projects Pvt. Ltd., Hyderabad and also department Engineer of NPCC.*
10. *Reconciliation of Materials will be made based on actual issues and consumption as per the norms set by standards. All excess consumption or damages will be deducted at actual landing cost of the said items from running bills. Reconciliation statement have to be attached with the running bills duly certified by site-incharge of M/s Coastal Projects Pvt. Ltd.*
11. *Period of completion is the essence of contract. The total work shall be completed before 28.02.2011 positively in full shape. Commissioning of major*

equipment like control panel, FPBs etc. to be completed immediately after their arrival at site.

- 12. In case if there is any delay in route approvals of lines, erection of poles and stringing of lines shall be immediately brought to the notice of the headquarters of M/s Coastal Projects Pvt. Ltd., Hyderabad in writing, so that we take appropriate action to complete it.*
- (13) If there is no work at site for a week time, M/s Vishwanath Projects, Hyderabad is authorized to take appropriate action which it deems fit.*
- (14) Prices: Prices mentioned in the schedule of price (Annexure-II) are FIRM through the contract.*
- (15) Any extra or additional items as required by NPCC have to be executed by M/s Vishwanath Projects Limited as per the agreement conditions.*
- (16) Payment terms: All the payments will be made against the Bills raised/submitted to NPCC after deduction of all applicable taxes. M/s Vishwanath Projects Limited are eligible to get 96.65% of the cheque amount received from NPCC.*

DEDUCTIONS:

- 17. Applicable taxes will be deducted at source from the running account bills. Variations in statutory levies by the Government on the day of payment will be to the sub-contractor account i.e. T.D S and Service Taxes as per the applicable rates.*
- 18. M/s Vishwanath Projects Limited will prepare bills for above stated works, pursue with department till payments are received. They will bear all expenses related to billing and other formalities required to do."*

14. The payments for these works were indicated as follows:

COASTAL PROJECTS PVT. LTD.		
(A. GOVT. OF INDIA ENTERPRISE)		
ABSTRACT OF COST		
Construction of Flood Lighting Along INDO-BANGLADESH Border in the State of Tripura		
PKG. No. UDAIFL-XIII		
From BP No. 2254/3RI to 2265		
Sl. No.	DESCRIPTION	Length 29.49 K.M
		AMOUNT
SECTION A	Main Control Panel & FPB's	29,70,899.04
SECTION B	1.1 KV PPVC/A CABLE – SUPPLY	4,03,68,418.03
SECTION C	LAYINT OF MV CABLE	1,38,83,763.03
SECTION D	POLE & POLE ERRECTION	95,59,542.89
SECTION E	LUMINAIRE & LAMP SUPPLY	93,41,683.17
SECTION F	EARTHING	52,09,478.47
SECTION G	D.G. SET WITH ROOM	1,93,00,917.48
SECTION H	SAFETY EQUIPMENT	1,93,097.52
SECTION I	OPERATION AND MAINTENANCE	43,14,643.20
SECTION J	PROVIDING PVC/HDPE CORRUGATED	7,62,270.26

	PIPE FOR CABLE PROTECTION	
SECTION K	JUNCTION BOX	2,17,728.00
	ESTIMATED COST OF ALL ABOVE ITEMS	10,61,22,441.10
	OFFER OF THE AGENCY	
	(In words.....Percentage) ABOVE/BELOW/AT PAR THE ESTIMATED COST OF ALL ABOVE ITEMS	
	TOTAL OFFER	
	AMOUNT IN FIGURE	10,61,22,441.00

15. A plain reading of the above shows that the contract involved both supply of material and installation and commissioning of the equipment with no clear demarcation/vivisection between the service component and the material component thereof. We, therefore, do not agree with Ld. DR that the contract can be vivisected, in this case and the demand has been raised on the entire value of the contract including the material part of it because the appellant failed to provide the break up. Had there been a break up of the material and the service components in the contract itself, the demand would have been raised on the service component ignoring the material. There is nothing on record which is placed before us which shows that there are two different contracts or a single contract with two separate distinct components for supply of material and rendition of services. In view of the above, we find that the contract in question is a composite works contract. Composite works Contract involve both rendition of service and deemed sale/sale of the materials used in rendering such services. The Hon.’ble Apex Court has observed in the case of Larsen & Toubro (supra) that works contract is a separate specie of contract known to the trade and commerce distinct from a contract for supply of goods or a contract for supply of services. In view of the above, we have no hesitation in concluding that the contract in question is a composite works contract and could have been taxed only under the head of “Works Contract Services” post 01.06.2007. It is not in dispute that the entire period in

question is post 01.06.2007. Therefore, the demand if any could have been raised under the Works Contract Service. The demand in this case has been made under Erection, Commissioning and Installation Service. ECIS does not include the contract where transfer of materials is involved. Since the demand has been raised under ECIS and the nature of contract does not fall under this category, the demand on this head it has to fail. Accordingly, the demand is set aside to this extent on this ground alone.

16. Ld. Counsel has also argued that since the floodlighting along the Indo Bangladesh Border also involves transmission and distribution of electricity, it should be treated as exempted under Notification No. 45/2010-ST, dt. 20.07.2010 and 11/2010-ST, dt. 27.02.2010. This argument, however, is not correct. Evidently, from a bare perusal of the contract, it is evident that the purpose of the contract is for providing floodlighting along the Indo Bangladesh Border in the State of Tripura and NOT for transmission and distribution of electricity. Merely because electricity is used in the flood lighting, it does not a project for transmission and distribution of electricity. If this logic is accepted, there could hardly be any service which is rendered by any service provider without use of electricity in some form and for this purpose being connected to the power grid. It could be as simple as connecting computers, running the air conditioners, providing lighting or fans all of which are essential for rendition of services. Merely because they are connected to a grid, the service does not become transmission and distribution of electricity.

17. The appellant also argued against invocation of the extended period of limitation but we do not find it necessary to go into the question of limitation since it is found that the demand is not sustainable on merit itself being in the nature of Works

Contract Service and being charged under Erection, Commissioning and Installation Service,

18. As far as the service tax on Goods Transport Agency Service is concerned, the demand has been computed on the freight expenses incurred by the appellant during various years as seen from their books of accounts, as follows:

PERIOD	Freight Expenses	25% taxable value	ST payable	ST paid	Service Tax short paid
2007-08	2240290	560072	69225	0	69225
2008-09	7124968	1781242	220161	0	220161
2009-10	6610969	1652742	170232	0	170232
2010-11	10992318	2748079	283052	148245	134807
Total					594425

19. Of the above amount, the appellant have conceded and paid service tax amounting to Rs. 3,34,653/- . The remaining amount of freight paid, according to the appellant, was paid to their vendors towards freight. The vendors in turn had availed the services of GTAs and paid them. In other words the appellants claim that they have only reimbursed to their vendors for the goods transport agencies services which they had paid. The department’s contention is that they have not produced any evidence to substantiate this fact.

20. It is seen from the show cause notice that the entire demand was raised only based on the records of the appellant indicating the freight expenses incurred by them. The department has no other evidence to show that the appellant had availed the services of GTA operators. Having accepted the appellants records, as far as the total freight expenses incurred are concerned, the department seems to reject their contention that part of the freight was towards the payments made to their vendors and

not to GTA operators. We find such a position untenable. Either the department accepts the assessee's records and their statements or it should provide an alternative evidence. Having accepted the assessee's records that amounts have been paid towards goods transport, the department cannot reject the contention that a part of it was paid directly to their vendors and in the absence of any evidence to the contrary. In view of the above, we find that the contention of the department is not sustainable and the demand on this ground must also fail.

21. Regarding the third issue of demand of interest on the delayed payment of service tax on the amounts received as mobilization advances, it is the case of the department that an amount has been paid as advance towards rendition of service and service tax should have been paid as soon as the amount has been received. It is the case of the appellant that it is not an advance for rendition of service but is in the nature of mobilization advance which is backed by bank guarantee and on such an advance they have paid interest to their customers. Therefore, it is nothing but a secured loan which has no nexus to the service provider. The amount so received is a mobilization advance which has been adjusted against total bill, on which they have discharged full amount of service tax. We find that the question of taxability on mobilization advances has been well settled and this Bench in the case of GJF Construction Company Limited vs. CCE, Hyderabad (supra) and CESTAT Mumbai in the case of Thermax Instrumental Limited vs. CCE (supra) held that mobilization advance received by the assessee is not chargeable to service tax, if it is in the nature of an advance. On this ground, the demand under this head also needs to fail.

22. Since we find that the demand on all three accounts is not sustainable, interest and penalties also needs to be set aside.

23. In view of the above, we find that the impugned order needs to be set aside and appeal should be allowed and we do so.

24. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in open Court on _____)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Vrg