

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

Division Bench - Court No. – I

Service Tax Appeal No. 30734 of 2018

(Arising out of order-in-appeal No. HYD-SVTAX-HYC-APP-11-18-19 (APP-I) dated 16.05.2018 passed by the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad).

M/s Krishi Constructions Pvt. Limited

Appellant

D-73, Ground Floor, Madhuranagar, S. R. Nagar
Hyderabad – 500038, TELANGANA STATE.

VERSUS

Commissioner of Central Tax

Respondent

Opp. L.B. Stadium Road
Basheer Bagh, Hyderabad -500004.

APPEARANCE:

Shri Ch. Nageswara Rao, Advocate for the appellant

Shri B. Guna Ranjan, (Supdt.) Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. A/30922/2020

DATE OF HEARING: 03.03.2020

DATE OF DECISION: 22.09.2020

ANIL CHOUDHARY:

The appellant is registered with the Service Tax Department and engaged in the business of civil construction classifiable under 'Works Contract Services'. During verification of the records and accounts maintained by the appellant and on reconciliation with the ST-3 returns filed by the appellant, it appeared that the appellant had not paid service tax on some part of their turnover during the period 2011-12 to 2014-15 particularly in respect of service provided to organisations like Andhra Pradesh Power Generation Corporation (AP GENCO), Andhra

Pradesh Tourism Development Corporation (APTDC), etc. It further appeared that in respect of service rendered to the aforementioned organisations under Notification No. 25/2012-ST the aforementioned recipient(s) did not fall under the category of Government/ local authority/ Government authority. As such, on this account, the appellant is liable to pay service tax of Rs.97,63,710/-, provided without payment of tax. Further, it appeared that during the period 2010-11, the appellant had provided taxable service/ site formation services to GTL Limited on receipt of consideration, but have not paid service tax of Rs.63,973/-. It was further observed that during the period 2011-12 to 2013-14, appellant entered into 'development agreement' with landlords for 'construction of residential complex' services, but had not paid appropriate service tax amounting to Rs.5,55,458/- by not including the value of constructed area handed over to the land owner, while they discharged service tax liability on the flats falling under the share of the appellant (as builder), which they sold to individual buyers etc.

2. The show cause notice dated 09.12.2016 was issued invoking the extended period of limitation proposing to demand service tax as follows:-

Head	Amount (Rs)	Remarks
Works Contract Service	97,63,710/-	Exemption not available, Notification No. 25/2012-ST.
Site Formation and clearance of earth and demolition	63,973/-	Short payment
Construction of residential flats	5,55,458/-	Short payment
Total	Rs.1,03,83,141/-	

alongwith proposal to impose penalty under Section 78 on the aforementioned demands.

3. The show cause notice was adjudicated on contest and the aforementioned demands were confirmed alongwith penalty of Rs.1,03,83,141/- under Section 78 of the Act and further penalty of Rs.10,000/- under Section 77(2) of the Finance Act, 1994.

4. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who was pleased to dismiss the appeal in part upholding the order-in-original, but was pleased to reduce the penalty under Section 78 to 50%.

5. Being Aggrieved, the appellant is before this Tribunal.

6. As regards the first issue regarding the demand of Rs.97,63,710/- under 'Works Contract Service', the question for determination is whether the appellant has provided service to Government/ local authority/ Government authority as per the exemption Notification No. 25/2012-ST. Learned Commissioner has observed that the service receivers are the following:-

Sl. No.	Name of the entity to which Services were rendered by the appellant	Whether entity was established by an Act of Parliament or State Legislature.
1	A.P. Power Generation Corporation Limited (A.P. Genco)	A. P. State Electricity Reforms Act, 1998.
2	A. P. Tourism Development Corporation (APTDC)	A. P. State Reorganisation Act, 2014, Framed board.
3	Andhra Pradesh Health, Medical Services & Infrastructure Development Corporation (APHMSIDC)	A. P. Public Societies Act, 1930.
4	Andhra Pradesh Industrial Infrastructure Corporation (APIIC)	Established by Government of Andhra Pradesh vide GO No. 831 dated 10.09.1973.

5	Andhra Pradesh State Police Housing Corporation (APSPHC)	Established by Government of Andhra Pradesh vide GO No. 678 dated 24.04.1991.
6	Andhra Pradesh State Irrigation Development Corporation (APSIDC)	Validated vide Sec. 101 of the Act.
7	Andhra Pradesh Educational and Welfare Infrastructure Development Corporation (APEWIDC)	A.P. Infrastructure Development Act, 2001.
8	Andhra Pradesh State Housing Corporation Limited (APSPHC)	A. P. Housing Board Act, 1956.

7. Heard the parties and perused the records.

8. Learned Commissioner further observed - that these organisations are incorporated under various Acts passed by the State of Andhra Pradesh, with intention to promote development of the concerned sector, in para 5.2 of the impugned order. He further goes to observe that - on consideration of the State organisation, I find that such organisation cannot claim to be State or Central Government in terms of clause (8) & (60) of Section 3 of the General Clauses Act, 1897, or local authority in terms of Clause 31 of Section 65B of the Finance Act, 1994. Therefore, there is no legal merit in the claim of the appellant that the service provided by them were to Government or local authority, and hence exemption is not available to them.

9. For further appreciation, we take notice of Sl. No. 12 of Notification No. 25/2012-ST which is as follows:-

"12. Services provided to Government, a local authority or a Governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-

(a) a civil structure or any other original work meant predominantly for use other than for commerce, industry, or any other business or profession;"

10. Further, 'Governmental Authority' have been defined in definition clause 2(s)-

"Governmental authority means a Board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under Article 243W of the Constitution."

11. The said clause 2(s) have been substituted by Notification No. 2/2014-ST w.e.f. 30.01.2014, which is as follows:-

"In the said notification, in the paragraph 2, for clause(s), the following shall be substituted, namely:-

'(s) "governmental authority" means an authority or a board or any other body;

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by Government,

with 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution;'

11. Learned Authorised Representative appearing for the Revenue submits that the appellant instead of establishing as to how they are eligible for the subject exemption, have simply claimed that since Government reimbursed them the service tax paid by them, after 01.04.2015 (when the exemption was withdrawn), indicates that the State Government is the service recipient, prior to 01.04.2015, there is no tax liability. Reliance is placed on the ruling of the Apex Court in the case of **Dilip Kumar & Company -2018 (361) ELT 577 (SC)** wherein it has been held that the exemption notification should be interpreted strictly and burden of proving applicability / eligibility would be on the assessee who claims the benefit. Just because the State Government have considered the request of the contractors like the appellant and reimbursed the tax amount *per se*, would not conclusively indicate that the State Government is a service recipient. Learned AR further urges

that the substitution of definition 2(s) in the said notification, has got only prospective effect.

12. Having considered the rival contentions on this issue, we find that admittedly all the companies / Corporations have been established by the Government of Andhra Pradesh under the various Acts and /or 'Government order', as aforementioned and thus we hold that the appellant has provided service to Governmental authority. Evidently all the service recipients have been set up by the State Government, and are directly under the control of the various Ministries of the State Government. Thus, the service recipients are covered under sub clause (i) of clause (5), of the definition of the term 'Govt. Authority', in Notification No. 25/2012-ST as amended by Notification No. 2/2014-ST (by way of substitution). Accordingly, we hold that the appellant is entitled to exemption under Notification No. 25/2012-ST, and the demand of Rs.97,63,710/- is set aside.

13. The second issue with regard to liability of service tax on the flats constructed and allocated to the land owner under the development agreement. Learned Counsel urges that admittedly after construction of the residential complex under the development agreement jointly with the land owner, the appellant have part of allocated constructed area to the land owner, after receipt of completion certificate dated 01.11.2013. Further, the appellant as builder have developed the land of the owner as residential complex, on principal to principal basis. There is no element of service provider and service receiver. There is no consideration defined in the builders / development agreement for any

service. Thus, the transaction goes out of the purview of service tax. Reliance is placed on the ruling of Delhi Bench of this Tribunal in the case of **Bairathi Developers Pvt. Limited -2016 (43) STR 455 (Tri. Delhi)**. Learned Counsel further urges that the Court below has relied upon Circular No. 151/2/2012-ST dated 10.02.2012 which was issued analysing the provisions as existing prior to 01.07.2012. It is further urged that there is no merit in relying on the Circular dated 10.02.2012, as the said circular clarified as regards point of taxation and valuation. Further, there have been change in the method of taxation of service tax w.e.f. 01.07.2012, under the negative list regime. Learned Counsel also emphasises that no service tax is demanded from the appellant, on his share of flats, under the same development agreement, which the appellant sold on or after 01.11.2013 (after issue of occupation certificate).

14. Learned Authorised Representative for the Revenue relies on the finding of the Court below in the impugned order and further urges that appellant is misinterpreting the provision by equating handing over the constructed area to the land owner, after receipt of the completion certificate, as the date of sale of subject flats.

15. Having considered the rival contentions, we find that the construction of flats under the 'development agreement' with the land owner by the appellant is on principal to principal basis. In such transaction, there is neither any element of service provided to the land owner, nor any element of sale. Accordingly, we hold that service tax is

not imposable on this transaction and accordingly set aside the demand of Rs. 5,55,458/-.

16. As regards the third issue of demand of Rs.63,973/- on the allegation of non payment of service tax on 'trenching works' done for GTL Limited, the leaned Counsel urges that the Court below failed to appreciate the fact that the said demand is for services rendered during the period 2010-11 whereas the show cause notice have been issued on 09.12.2016. The demand is even beyond the extended period of limitation as per the provisions of Section 73 of the Finance Act, 1994. Reliance is placed by the Court below on Rule 9 of Point of Taxation Rules, 2011, is also of no use as Rule 9 clearly state that service for which provision is completed on or before 30th day of June, 2011 or whether the invoices issued and/or issued upto 30th June, 2011, the Point of Taxation Rules, shall, at the option of tax payer, be the date on which the payment is received or made. The Court below has erred in not referring to the option of the tax payer, while referring to Rule 9. Admittedly, in the facts of the present case provision of service was completed before 30.06.2011 and the invoices were also issued till that date. Thus, it is the option of the tax payer to treat the date of receipt of payment as the taxable event or not. Admittedly, the appellant in the present case has already booked the receipt/ income in the financial year 2010-11 and therefore there is no question of carry forward of the taxable event beyond 31.03.2011. Thus, the impugned demand is admittedly beyond the extended period of limitation, there has been no exercise of option as such by the appellant. Learned AR for the

Revenue further urges that the return for the period April, 2011 to September, 2011 was filed on 12.12.2011, which is the relevant date to recon time, in terms of Section 73(6) of the Finance Act. Thus, the show cause notice was issued well within five years time limit specified under Section 73(4) *ibid*. He further urges that in fact tax, has to be demanded as on 01.04.2011 but for the provision of Rule 9 *ibid*, it is demanded based on the date of receipt.

17. Having considered the rival contentions on this issue, we find that appellant has already provided the service as well as raised the invoice before 30.06.2011. Further, admittedly appellant have not given the option for payment of tax as per the date of receipt of consideration. Thus, we hold that demand of tax, relying of Rule 11 of Point of Taxation Rules is bad. Accordingly, we set aside the demand of Rs.63,973/-.

18. As we have allowed all the grounds in favour of the appellant- assessee, the penalties imposed are also set aside. Thus, the appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefits, in accordance with law.

(Pronounced on 22.09.2020).

(Anil Choudhary)
Member (Judicial)

(P. Venkata Subba Rao)
Member (Technical)