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

Division Bench

Court – I

Service Tax Appeal No. 30920 of 2016

(Arising out of OIO No. HYD-SVTAX-000-COM-007-16-17 dt.18.05.2016 passed by Commissioner of Service Tax, Hyderabad)

Commissioner of Central Tax
Medchal - GST ......**Appellant**
GST Bhavan, LB Stadium Road,
Basheerbagh, Hyderabad – 500 004

VERSUS

Hi-Rise Projects
Block No. 615 & 616, Swarnajayanthi
Commercial Complex, Ameerpet, SR Nagar, ...**Respondent**
Hyderabad, Telangana – 500 338

Appearance

Shri Pradeep Saxena & Shri B. Sangameshwar Rao, ARs for the Appellant.
None for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30085/2024

Date of Hearing: 23.01.2024
Date of Decision: 28.02.2024

[Order per: A.K. JYOTISHI]

This Appeal is filed by Revenue being aggrieved with Order-in-Original No. HYD-SVTAX-000-COM-007-16-17 dated 18.05.2016 passed by the Commissioner dropping the demand, except for demand of service tax of Rs.1,66,251/- under 'Goods Transport Agency' (GTA) service in respect of Respondent/Assessee - M/s Hi-Rise Projects.

2. The Adjudicating Authority has dropped the demand of Rs.39,80,030/- against the Assessee under 'Construction of Residential Complex Service' (CRCS) for the period from 01.10.2006 to 31.05.2007 and Rs.8,74,10,198/- under 'Works Contract Service' (WCS) for the period from 01.06.2007 to 31.03.2010. In their grounds of Appeal, Revenue has relied on certain Board Circulars viz., Circular No. 128/10/2010-ST dt.24.08.2010 for their averment that the Commissioner has wrongly considered the service as falling under

CRCS and not under WCS during the relevant period. Revenue has also relied on certain case laws in support of the fact that the services under CRCS have been brought under the umbrella of WCS with effect from 01.06.2007, as has been held in the case of Alstom Projects India Pvt Ltd vs CST [2011 (23) STR 489 (Tri-Del)] as well as in the case of NCC Ltd vs GOI [2010 (19) STR 321 (AP)].

3. Revenue has also relied on the fact that notwithstanding the fact that explanation was added with effect from 01.07.2010 to the definition of CRCS, the service to be provided is taxable in terms of Sec 65(105)(zzzza) as clarified by the Board vide their Circular DOF No. 334/1/2010-TRU dt.26.02.2010.

4. In brief, the SCN was issued to the Assessee based on certain data available in the Balance Sheet, received from Income Tax department. The Assessee was engaged in construction/development works in four ventures/ projects viz., (i) Hi-Rise Paradise, (ii) KVR Paradise, (iii) Hi-Rise Meadows & (iv) Hi-Rise Chalapathy Residency, which the department considered as falling under CRCS for the period from 01.10.2006 to 31.05.2007. There is no dispute that the activities were correctly falling under the CRCS head during the relevant period in terms of Sec 65(91a). For the period June 2007 to March 2010, department, relying on the clarification given by the Board vide Circular No.128/10/2010-ST dt.24.08.2010 felt that, despite part of service being classified under different head prior to 01.06.2007, the activity would fall under WCS for the period post 01.06.2007, as the same covers the activity more specifically and therefore, in terms of provisions of Sec 65A, WCS would be the more appropriate classification for the activities for the same services provided post 01.06.2007.

5. The main issue to be decided in the case is whether the activities/services, being provided by the Respondent to the service recipient, were falling under CRCS or WCS or otherwise, during the material period. Post judgment in the case of CCE & C, Kerala vs Larsen & Toubro Ltd [2015 (39) STR 913 (SC)], CRCS would not be the appropriate classification as this was in the nature of indivisible composite contract and therefore, would be more in the nature of WCS, and since there was no appropriate head i.e., WCS, available prior to 01.06.2007, the demand for this period would fall on this ground itself. In fact, the Board has also clarified vide Circular No. 151/2/2012-ST dt.10.02.2012, that for the period prior to 01.07.2010, construction service provided by the builder/developer will not be taxable in terms of earlier Board

Circular No. 108/02/2009-ST dt.29.01.2009. In other words, there would be no liability.

6. The next issue would be as to when SCN has proposed demand under WCS post 01.06.2007, whether that demand will still sustain or otherwise. In this regard, the first issue would be whether the department can change the classification suo moto than what has been proposed in the SCN or otherwise. In this case, the SCN has proposed CRCS for the period up to 01.06.2007 but for the same activity, the services have been considered as WCS for the period post 01.06.2007. The rationality is that while services of CRCS continue to be specified service even beyond 01.06.2007, in view of the clear definition of WCS, it will be more appropriately classified under WCS as compared to CRCS, having recourse to Sec 65A.

7. There is no doubt that there has not been any change in the nature of service being provided pre or post 01.06.2007. What has changed is that there has been insertion of new category of service i.e., WCS. Therefore, what is to be seen is whether there is possibility of classification under more than one head of service for the purpose of classification, can department switch to another head of classification or there is bar from changing the classification, once having classified under one head. It is obvious that prior to 01.06.2007, there was no scope for deciding the classification, in view of the fact that CRCS was appropriately covering the activity in terms of its definition and in fact, in terms of Notification, there was a provision for exclusion of value of material involved in providing that service, so that only the service portion is charged to service tax. However, post 01.06.2007, the situation has changed where two different services heads are now available in respect of indivisible composite contract, which is not being denied by either side.

8. The Commissioner has examined this aspect in OIO, specifically in Para 51.6, wherein relying on the provisions under Sec 65A(2), which relates to manner in which classification is to be effected when, prima facie, service is classifiable under two or more sub-clauses of clause (105) of Sec 65. He found that SCN has not elaborated upon the reason for changing classification from CRCS to WCS and held that even otherwise, the most specific description for the activity would be CRCS rather than WCS, since the basic activity of Assessee is in relation to construction of flats/apartments/villas as builder/developer. Commissioner has also relied on Sec 65A to the effect that when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall

be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration and since CRCS occurs first to WCS i.e., sub-clause (zzzza), on this ground also it is classifiable under CRCS rather than WCS.

9. For the ease of reference, the definition of WCS under Sec 65(105)(zzzza) is reproduced below:

> "'*Works contract', for the purposes of section 65(105)(zzzza), means a contract wherein,-*
>
> *(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
>
> *(ii) such contract is for the purposes of carrying out,—*
>
> *(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*
>
> *(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*
>
> *(c) construction of a new residential complex or a part thereof; or*
>
> *(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*
>
> *(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"*

10. This service will include any contract where transfer of property in goods is involved and which is leviable to tax as sale of goods and it is for the purpose of carrying out, inter alia, construction of new residential complex or a part thereof. Juxtaposing this with the definition of CRCS as long as services are in relation to residential complex, it will cover the said service. It is to be understood in this context that this could be even a service simpliciter where no material is involved or transfer of property in goods is not involved. However, it is not in dispute that there was transfer of property in goods involved in the nature of activities and the contract entered by the Respondent with the service recipients. However, in view of the L& T judgment (supra), this would have been in the nature of WCS and since WCS was not a specified service, there was no case for levy of service tax. For the period post 01.06.2007, it is obvious that the definition of WCS covers it more specifically as compared to the CRCS and therefore, by applying principle of classification under Sec 65A, the most

specific entry for the nature of service would have been WCS and not CRCS, which existed post 2007 also. Thus, to that extent the Commissioner has not appreciated the true nature of transaction and the scope of Sec 65A and there is no bar in changing classification, especially, in cases where there is scope for classifying it more appropriately under a different classification, post introduction of the levy. Sec 65A, cannot be applied only at the threshold but it can also be applied in the event of any change in classification due to change in definition of existing service or introduction of new services, unless otherwise barred by the Act itself.

11. Therefore, once the service is rightly covered under WCS post 01.06.2007, the next question is whether they will be entitled for exemption under Circular No.151/2/2012-ST dt.10.02.2012. Learned AR has vehemently opposed that Board Circular clarifying that no taxability on construction service for the period prior to 01.07.2010, would only be applicable in respect of construction services falling under clauses (zzq) & (zzzh) of Sec 65(105) and not in respect of WCS. Therefore, there is no exemption from service tax for WCS, which is the appropriate classification.

12. We find that this issue has been decided by this Tribunal in favour of the Assessee in the precedent orders in the case of (i) Krishna Homes vs CCE, Bhopal [2014 (34) STR 881 (Tri-Del)], followed in (ii) Pragati Edifice, holding that though classifiable under WCS, no tax is payable for the period prior to 01.07.2010.

13. Accordingly, there being no merit in the Appeal of Revenue, we dismiss it.

14. Appeal dismissed.

(Pronounced in the Open Court on 28.02.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

Veda