CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD
REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 30165 of 2016

(Arising out of **Order-in-Original** No.HYD-EXCUS-001-COM-036-15-16 dated 30.10.2015 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

Commissioner of Central Tax .. **APPELLANT**
Secunderabad - GST
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

VERSUS

M/s Blue Star Ltd., .. **RESPONDENT**
1-10-60 to 64, 4th Floor,
Ashoka Raghupathi Chambers,
S P Road, Begumpet,
Hyderabad,
Telangana – 500 003.

APPEARANCE:
Shri Ayyam Perumal, Special Counsel for the Appellant.
Ms R. Radhika Chandrashekar, Advocate for the Respondent.

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

FINAL ORDER No. A/30284/2024

Date of Hearing:25.01.2024
Date of Decision:25.01.2024

[ORDER PER: ANIL CHOUDHARY]

This appeal is filed by Revenue against the impugned Order-in-Original passed by the Commissioner dropping the proposed demand(s) in part.

2. The respondent assessee is registered with the department and inter-alia providing services of Works Contract Service, erection commissioning and installation service, maintenance or repair service and various other services. The respondent maintained proper books of accounts and regularly filed the service tax returns and have discharged the service tax under the respective categories. The Revenue during the verification of the financial records found some apparent discrepancies or short payment of service tax as follows: –

i) Alleged non-payment of service tax on mobilisation advance received.

ii) Alleged short payment of service tax on the reconciliation of values shown in books of accounts with that declared in ST3 returns (this includes supplies made to SEZ).

iii) Alleged short payment of service tax on GTA (as service recipient).

iv) Alleged non-payment of service tax, on deferred and unbilled revenue (under erection, commissioning or installation service).

v) Alleged non-payment of service tax on additional revenue (under works contract service).

Sl. No.	Allegations of non-payment/short payment	SCN-1-(76/2013 dt. 18.10.2013 2008-09 to 2011-12)	SCN-2-(79/2014 dt. 19.05.2014 2012-13	SCN-3 (41/2015 dt. 0.04.2015 2013-14	Total
1.	On mobilization advances received	29,18,336	---	---	29,18,336
2.	Difference between trial balance and ST3	51,68,77,665	9,62,31,142	7,132,02,760	68,44,11,567
3.	On GTA as service recipient	21,25,195	---	---	21,25,195
4.	On deferred & unbilled revenue under EC or IS	14,30,232	7,09,532	8,52,151	29,91,916
5.	On additional revenue (under works contract service)	3,30,83,979	1,91,17,368	59,88,596	5,81,89,943
	Total	55,64,35,407	11,60,58,043	7,81,43,507	75,06,36,957

All the aforementioned 3 show cause notices have been adjudicated vide common impugned Order-in-Original.

3. Learned Special Counsel appearing for Revenue inter-alia urges: –

So far the 1st issue of non-payment of service tax on mobilisation advance, it was alleged in the SCN that respondent assessee have not discharged service tax of Rs.29,18,336/- during the period 2011–12 except the payment of Rs.8,39,433/-. The contention of the assessee is that this demand relates to the value of materials, the assessee had produced few invoices in support of their contention showing that the advances were received towards material cost. The conclusion of Adjudicating Authority that – no investigation was made whether the said amounts are pertaining to materials or service is not correct, since it was the duty of the assessee to come with clean hands that the demand of Rs. 29,18,336/- pertains towards materials with documentary proof such as bills raised on the customers. Only because they paid service tax on few invoices for advances received, on service portion cannot be taken as conclusive with respect to other invoices that were raised only for material cost. Thus the dropping of demand is not correct.

4. Opposing this ground Learned Counsel for the respondent assessee submits that appellant had received mobilisation advance for the service portion also on which they have discharged service tax, they had produced evidence to this effect that service tax has been paid on the mobilisation advance portion attributable to the service portion. So far the portion of advance is related to material component the adjudicating authority have dropped the demand. It is contended that mobilisation advances were received mainly for mobilisation of materials and not for any services provided or to be provided, since provision of service did not require mobilisation. Accordingly prior to 01.04.2011 service tax is not attracted on such advances received towards material portion. They had enclosed the statement showing service portion in the mobilisation advances on which they have discharged service tax and in support thereof had enclosed statement and copies of invoices raised for mobilisation advance.

5. The Learned Commissioner on examining the evidence produced found force in the contentions of the assessee. It took notice that service tax has admittedly been paid on the service portion in the mobilisation advances. The Learned Commissioner also examined some of the invoices for advance which were only for the cost of materials, wherein the description of invoice it was mentioned value of items delivery at site – 30% initial advance received adjusted. Thus there is no error in the finding of the Learned Commissioner.

6. Considering the rival submissions on the 1st issue we find that there is no dispute that the mobilisation advances in respect of Works Contract which is a composite contract involving supply of both materials and labour/service. We find Learned Commissioner have examined the issue and also taken notice that the appellant have admittedly deposited an amount of Rs. 8,39,433/- towards service tax on the service element in the mobilisation advances. The Learned Commissioner have categorically

recorded the finding that some of the invoices for mobilisation advance are towards material supplied only. Further recorded that from the sample invoices produced, evidently the assessee have deposited the service tax on the service portion. Further the Learned Commissioner took notice that the demand was only on the difference in the income received under the mobilisation advance and the ST3 returns and no investigation was made whether the said amounts pertains to material or services. Further took notice that the assessee have been able to segregated/identify the material portion and the service portion with respect to the receipts as mobilisation advance, and admittedly service tax is already discharged on the service portion, he was pleased to drop the demand.

7. We find no error in the findings of the Learned Commissioner on this issue and accordingly we reject this ground.

8. The 2nd ground urged in short payment of service tax on the alleged difference between trial balance and ST3 returns. Learned Special Counsel for Revenue urges that on reconciliation of taxable values of works contract service, maintenance or repair service and ECIS in the profit and loss account with the amount declared the ST3 return, there was apparent short payment of service tax during the financial years 2008-09 to 2013–14.

9. As per the explanation appended to Section 67 of the Act it is evident that payment of VAT or sales tax shall be taken as the value of property in goods transferred in the execution of works contract for determination of value of service portion in the execution of works contract. During the relevant period no evidences are forthcoming evidencing the payment of VAT or sales tax on the value of materials. Thus the conclusion of the Adjudicating Authority is not correct and the same has to be set aside.

10. Assailing this ground Learned Counsel for the respondent assessee urges – the show cause notices proposed to demand service tax without even prima facie examining the books of accounts and the method of accounting followed by the assessee. A bald allegation that there was a short payment of service tax on reconciliation of taxable value as per profit and loss account of the assessee with the amount declared in the ST3 returns filed.

11. The SCN proposed to demand service tax with respect to the following: –

i) value in the relevant ledgers presenting consideration towards supply of materials

ii) demand of service tax on the services provided to SEZs units, which is an exempted service.

12. For the period April 2008 to June 2011 the Department has calculated the service income on accrual basis, whereas service tax liability during the said period was on receipt basis. The SCN proposed to levy service tax by taking the entire amount shown in the profit and loss account, considering the same as the value of services rendered, without appreciating the fact that the figures were inclusive of value of materials and that service tax have already been discharged on the value of service. In terms of Section 67 the value of taxable service shall be the gross amount charged by the service provider for taxable service provided or to be provided. Further in terms of Sub Section (3) to Section 67, service tax can be levied only on amounts received towards taxable services when the invoices clearly show breakup of material and labour component and when VAT or sales tax is paid on the material portion and also reflected in the VAT/GST returns, service tax cannot be demanded on the material component. Further as per Rule 2A of Service Tax Determination of Value Rules, 2006, gross amount charged for the works contract shall not include value-added or sales tax paid or payable for transfer of property in goods involved. Further Notification No. 12/2003 dated 20.06.2003 provides for an exemption from payment of service tax on value of materials sold by the service provider to the recipient of service.

13. Before the Adjudicating Authority the respondent had filed detailed invoice wise segregation of cost of materials involved under each invoice, service element and the amount of service tax payable. After taking into consideration all the materials placed before him Commissioner have held that the demand raised vide SCN with regard to payment of service tax on the materials involved is not enforceable, further he specifically observed that the respondent was paying VAT/sales tax on the value of materials which have been clearly identified.

14. Reliance is placed on the ruling of the Apex Court in Imagic Creative Private Limited Vs Commissioner of Commercial Taxes [2008 (9) STR 337 (S.C.)] wherein it is held that service tax and sales tax are mutually exclusive. Further relies on the ruling of the Apex Court in Safety Retreading

Co. (P) Limited Vs Commissioner of Central Excise, Salem [2017 (48) STR 97 (S.C.)] where it has been held that the assessee is liable to pay service tax only on the service component and not liable to pay service tax on the total amount for tyre retreading which included value of materials/goods that have been used and sold in the execution of the contract.

15. Having considered the rival contentions, we find that there is no challenge to the finding of fact recorded by the Commissioner. Accordingly, we do not find any merit in this ground and we disallow the same.

16. We also find that in the impugned order the Learned Commissioner observed that the assessee have already furnished the details of services rendered to SEZs developer/units along with the purchase order and the relevant documents and that the same have been perused. Further observed that the assessee produced the relevant forms and there is no dispute regarding the provision of service to SEZs units/developer. Further that denial of benefit of exemption by relying upon procedural requirement of notification would be against the provisions laid down in the SEZs act. Exemption cannot be denied on the ground that form A–1 and A–2 have not been produced. reliance is placed on the ruling of the Hon'ble High Court of Andhra Pradesh and Telangana [2019 (31) GSTL 596 AP] wherein it has been held that denial of benefit of exemption by relying upon procedural requirement of notification would be against the provisions laid down in the SEZs Act.

17. The 3rd ground raised by revenue with respect to non-payment of GTA service tax as the recipient of service. Learned Special Counsel urges that on reconciliation of the taxable value of GTA service as per profit and loss account with that of declared value in ST3 returns for the period 2008–09 to 2011–12, there appeared to be short payment of fees Rs.21,25,195/-. It is urged that the adjudicating authority have held that the differential Value were accounted for at various other locations of the assessee and on which service tax was already discharged on accrual basis. Whereas in para-22.4 of the impugned order details of freight expenses as per trial balance, freight expenses relating to other locations, freight expenses pertaining to Secunderabad Centre and values adopted in ST3 returns and the difference are reflected. Whether service tax was paid by other locations was not made available for scrutiny during adjudication. What was done was random

verification of the documents chosen and produced by the assessee. Does the differential tax have been wrongly dropped.

18. The Learned Counsel for the respondent assessee urges that Learned Commissioner upon examination of the facts particularly that till the financial year 2008–09 appellant had not adopted SAP in their accounting system and they have discharge service tax on accrual basis for GTA. Further observed that from the financial year 2009–10 assessee had changed their accounting system to SAP and were paying service tax on GTA on payment basis, that is only when they paid the transporter. As such some of the bills pertaining to last quarter were actually issued in the 1st quarter of the next financial year and as such there was some difference on reconciliation. The learned Commissioner found no error in accounts maintained by the appellant and was pleased to drop the demand conforming a small amount of Rs.63,161/- for the year 2009–10 and Rs. 42,538/- of the year 2010–11 respectively.

19. Having considered the rival contentions, we find that the Learned Commissioner have after examining the accounts and the vouchers in details have dropped the substantial part of the proposed demand. Further such finding of fact is not disputed in the grounds of appeal. Accordingly we reject this ground also against the Revenue.

20. The next ground No. 4 and 5 is with regard to demand of service tax on deferred and unbilled revenue under ECIS and works contract service. The special counsel for revenue urges that during the period 2008-09 to 2011 – 12 on reconciliation of profit and loss account with ST3 return, it appeared that the assessee have excluded an amount of Rs.1,38,85,749/- (service tax Rs.14,30,232/-). Similarly there was short payment of service tax for the financial years 2012–13 and 2013–14 also. Deferred revenue is, in accrual accounting, money received for goods or services which have not been delivered. According to the revenue recognition principal, it is recorded as the liability until delivery is made at which time it is recognized as the revenue. The Adjudicating Authority have simply accepted the explanation put forth by the assessee without verifying any documentary proof. The assessee was not asked to produce any documentary proof in the defence and hence the dropping of the demand is bad in law.

21. Assailing the ground, Learned Counsel for the assessee urges that the additional revenue had been recognised in the books of account as accounting adjustment, but neither it was a consideration for service

provided nor it was the payment received against any service provided, and therefore no service tax is leviable on the said amount. For the period prior to 01.04.2011 service tax was discharged on receipt basis on the total bill/received. An amount that the accounts reflected under accounting head as additional revenue is only a book adjustment for which they had neither raised any invoice not received any consideration. It is further urged that accounting for works contract is as per the procedure laid down in Accounting Standard – 7 issued by the Institute of chartered accountants of India. Service tax have been duly paid by the respondent as and when invoice has been raised on completion of an event/service in accordance with law prescribed in clause (i) of the proviso to Rule 3 of point of Taxation Rules, 2011 or on receipt of advance from customers.

22. Further urges in respect of deferred revenue in case of AMC the revenue for the contract is recognised based on the percentage of contract Completed during a particular financial year. However the invoices may be raised on the customer in advance at the start of the contract or at the beginning of each quarter depending on the terms. The actual revenue that is recognised may be less than the revenue billed to the customer. Such differential revenue is recognised under the head deferred revenue. Similarly with respect to unbilled revenue in case of AMC, the revenue for contract was recognised based on the percentage of contract Completed during a particular financial year. However invoices may be raised on the customer at the end of the contract or at the end of each quarter depending upon the terms of the agreement. It is only recognised in the books of account as an accounting adjustment and no payment was received against the same nor any invoice was raised on the customers. It is further urged that the income reflected in the books of accounts under dispute are only notional in nature and the respondent assessee have not received any income not raised any invoice nor completed the provision of service. As such service tax cannot be demanded on such notional revenue. Accordingly supports the findings of the Commissioner in the impugned order.

23. We find that the Learned Commissioner examined the issue in detail and observed that the respondent assessee is maintaining their books under SAP and as per AS–7 model/standard for construction activity-WCS as prescribed by ICAI. As per the accounting standard, respondent on the basis of percentage of work completed as per the agreement with the customer, have calculated the additional revenue. Thus basing on the volume of work

done, as per terms of each individual contract, the assessee raised invoices and discharged service tax on the same. The difference in the bills raised to the volume of work done, was calculated as per the norms prescribed under the accounting standard prescribed. Learned Commissioner have categorically observed – I find that the deferred revenue is recognised in the books of account as an accounting adjustment but there is no payment received against the same nor any invoice was raised on the customer. Hence no service tax was liable to be paid on such book adjustment. Further observed – similar is the case with unbilled revenue as it was recognised in the books of account as an accounting adjustment but there was no payment received against the same nor any invoice was raised on the customer. Accordingly it was held that no service tax was liable to be paid on such book adjustment.

24. We find that there is no error or impropriety in the findings recorded by the Learned Commissioner. Accordingly we reject this ground also raised by the Revenue.

25. In view of our aforementioned findings and observations, we find no merits in this appeal by Revenue and accordingly we dismiss the appeal. The impugned order in original is upheld.

(Operative part of this Order was pronounced
in court on conclusion of the hearing)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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