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

Division Bench

Court – I

Service Tax Appeal No. 1988 of 2012

(Arising out of Order-in-Original No. 46/2012-S.Tax (Commr) dt.30.03.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Guntur)

Raghava Estates & Properties Ltd
D.No.64-9-2, SBH Complex, Kanuru Subbaiah Buildings, Patamata Lanka, Vijayawada, Andhra Pradesh – 520 010 **......Appellant**

VERSUS

Commissioner of Central Tax Guntur
PB No.331, CR Building, Kannavarithota, Guntur, Andhra Pradesh – 522 004 **......Respondent**

and

Service Tax Appeal No. 2090 of 2012

(Arising out of Order-in-Original No. 46/2012-S.Tax (Commr) dt.30.03.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Guntur)

Commissioner of Central Tax Guntur
PB No.331, CR Building, Kannavarithota, Guntur, Andhra Pradesh – 522 004 **......Appellant**

VERSUS

Raghava Estates
D.No.64-9-2, SBH Complex, Kanuru Subbaiah Buildings, Patamata Lanka, Vijayawada, Andhra Pradesh – 520 010 **......Respondent**

Appearance
Shri C.S. Srinivas, Consultant for the Appellant.
Shri Pradeep Saxena, Pr. Commissioner, Shri V.R. Pavan Kumar & Shri B. Sangameshwar Rao, ARs for the Respondent.

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

FINAL ORDER No. A/30360-30361/2024

Date of Hearing: 21.08.2024
Date of Decision: 28.08.2024

[Order per: R. MURALIDHAR]

The Appellant is engaged in Construction of Residential Property services. A Show Cause Notice was issued on 24.10.2011 for the period 2006-07 to 2010-11. The demand was made under the category of 'Construction of Complex Service' for the period 01.04.2007 to 31.05.2007. For the period 01.06.2007 to 31.03.2011, the demand was made under the category of 'Works Contract Service'. After due process, the Adjudicating Authority has held that the Service Tax is payable under the category of 'Construction of complex service' for the period 31.05.2007 to 01.06.2007. For the period 01.06.2007 to 31.03.2011 also the Adjudicating Authority once again held that they do not fall under the category of 'Works Contract service' but the same would be taxable under the category of 'Construction of complex service'. Being aggrieved, the Appellant is before the Tribunal.

2. The Revenue has filed an Appeal against the impugned order passed by the Adjudicating Authority on the ground that Commissioner has erred in classifying the service under the category of 'Construction of complex service' instead of classifying the same under 'Works Contract service' after 01.06.2007. Both the Appeals have been taken up together for disposal.

3. Learned Consultant appearing on behalf of the Appellant submits that the Adjudicating Authority has traversed beyond the scope of SCN. While the SCN was issued for the period 01.06.2007 to 31.03.2011 demanding the Service Tax under the category of 'Works Contract Service', the Adjudicating Authority has confirmed the demand under the category of 'Construction of complex service'.

4. Learned Consultant relies on the following case laws:-

a) P.K. Agarwalla Vs Commissioner of Central Excise & Service Tax, Kolkata [2024 (8) TMI 716 – CESTAT Kolkata]

b) KPR Fertilizers Ltd Vs Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam-II [2023 (384) ELT 216 (Tri-Hyd)]

5. He submits that in these cases, it has been held that the confirmation of demand cannot be under any other category other than what has been specified in the SCN. If such an attempt is made then it would amount to

traversing beyond the scope of SCN. Holding this, the Tribunals have held that demands cannot be legally sustained.

6. Without prejudice to their submissions, he further submits that it has been held time and again by the Tribunals that Service Tax is not payable under the category of 'Construction of complex service' till 30.06.2010. He cites the case law of Modi Ventures Vs Commissioner of Central Tax, Secunderabad-GST [Final Order No.30882/2020 dt.03.03.2020 (Tri-Hyd)], wherein this Bench has held that the Service Tax on 'Construction of complex service' would be applicable only after 01.07.2010. Accordingly, he submits that the smaller portion of confirmed demand for the period 01.04.2007 to 31.05.2007 as well as erroneously confirmed demand for the period till 01.07.2010 is required to be set aside even on this count. In view of these submissions, he prays that the Appeal may be allowed on merits.

7. Raising the issue of time bar, the learned Consultant submits that the SCN was issued on 24.10.2011 for the period 2006-07 to 2010-11. It is on record that the Appellants were registered with the Central Excise Department and obtained Service Tax Registration number and they were filing their Service Tax Returns on time. The SCN also relied on the VAT Returns, which shows that Appellants are also properly filing their VAT Returns. Since all these details were in the public domain and they have been relied upon in the SCN, it will go on to show that there has been no suppression on the part of the Appellant. He further submits that the Board had to clarify time and again about the Service Tax liability on 'Construction of complex service' and it has been finally clarified that no Service Tax would be payable on this service till 30.06.2010. These matters were being litigated at various levels and Tribunals and the Hon'ble High Courts had to intervene to hold that no Service Tax is payable till 30.06.2010. Considering all these facts, the allegation of suppression cannot be sustained. Accordingly, he submits that the confirmed demand for the extended period is required to be set aside even on account of limitation.

8. In respect of the Appeal filed by the Revenue, he submits that the very Appeal filed by the Revenue would show that the Adjudicating Authority has erred in confirming the demand under the heading of 'Construction of complex service' instead of classifying under the category of 'Works Contract

service'. He submits that the Department cannot rectify the error by filing such an Appeal before the Tribunal. He prays that the Department's Appeal may be dismissed.

9. Learned AR submits that the Adjudicating Authority has confirmed the demand under the category of 'Construction of complex service' while the SCN was issued under the category of 'Works Contract service'. Only because of such an Order, the Revenue has come up on Appeal before the Tribunal. He submits that the Tribunal should take into account that the Appellant himself has been claiming their services to be under the category of 'Works Contract service'. Therefore, the error committed by the Adjudicating Authority should now be rectified and the Tribunal may hold that the correct classification of the services would be under 'Works Contract service'. After this, the matter may be remanded to the Adjudicating Authority for quantifying the demand after considering the fact that Tribunals and Hon'ble High Courts have been consistently holding that no Service Tax is payable under whichever category for such services till 30.06.2010. He makes further written submissions about the abatement allowed by the Adjudicating Authority while confirming the demand.

10. Heard both sides and perused the Appeal papers, synopsis and other documentary evidence placed before us.

11. The following extracts of the SCN would be relevant:-

> *"5.2.3 In view of the same, it appears that the services rendered by REL to their clients, <u>prior to 01.06.2007 are classifiable under 'Construction of Complex service' and subsequent to 01.06.2007 as 'Works Contract service'</u>.*
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> *5.4.2 In view of the aforementioned reasons, the service tax and cess liabilities of REL had been calculated <u>on the taxable value under the composition scheme for Works Contract for the period from 01.06.2007 onwards. Hence, the service tax is payable at the rate of 2% for the period up to 28.02.2008 and at the rate of 4% from 01.03.2008 onwards, on the works undertaken by REL</u>."*

12. The above allegations in the SCN would go to show that the demand was being made under the category of 'Construction of Complex service' for the period 01.04.2007 to 31.05.2007. For the period 01.06.2007 to 31.03.2011, the demand was made under the category of 'Works Contract service'. The rate of tax (2% & 4%) for quantifying the demand is the one that is applicable to Works Contract service. Coming to the Order-in-Original, it would be relevant to go through the following finding of the Adjudicating Authority:-

> *"15. Having been found that the services rendered by the assessee were of construction of complex service, prior to 01.06.2007, now I come to the taxability, the value and the rate of tax etc. Being the service covered under Notification No.1/2006-ST, dt.01.03.2006, abatement under the said Notification has to be given for the assessment of service tax. To that extent, the tax liability under Construction of complex service needs revision for the respective period from 2006-07 to 2007-08 (up to 05/2007). SO far as the period from 01.06.2007 to 31.03.2011, the question before me is whether the service tax liability on the noticee shall be under the Works Contract service or under Construction of Residential Complex service. If the service tax liability were to be decided under the Works Contract service, the facts of the case shall have to be essentially in tune with what has been specified under sub-rule (3) of Rule 3 of Works Contract (Composition scheme for payment of Service Tax) Rules, 2007. In the instant case, the assessee has obtained registration for the provision of Works Contract service and Renting of Immovable Property service. <u>The assessee also paid service tax in the year 2008 by self-assessment under Works Contract service. It is the proposal of the detecting officer in the show cause notice that such payment of service tax, albeit, belatedly, under Works Contract services denotes the assessee's option referred to in the Composition Scheme, enunciated under the Works Contract service. This proposition cannot anymore be held as good in as much as the said proposition is contrary to the clearly defined terms of the Composition Scheme. Therefore, the service rendered by the noticee has to be classified within the facts available on record for</u>*

<u>the purpose of levy of service tax. It is on record that the assessee has undertaken Residential Projects; executed them to an extent and thereafter sold them to the prospective buyers</u>. As stated supra, in Padmanabhapuram Colony, the noticee provided construction service to the buyers of independent Housing Units whereas semi-finished flats were sold to the buyers in Anand Vihar, Sivasadan and Prakritivihar and provided finishing services to the said buyers for a consideration decided mutually. <u>These factors would establish unequivocally that the services rendered by the noticee in this case amounts to the Construction of Residential Complex service as defined in Sec. 65(91a) read with Sec. 65(105)(zzzh) of the Finance Act, 1994 and the service rendered in this case is accordingly treated as Construction of Residential Complex service and the service tax liability thereon has to be determined. Further, the provisions under Notification No.1/2006-ST are required to be applied for calculation of the service tax liability</u>. However, this is allowed subject to the assessee's compliance with reference to the conditions specified under the above said Notification, in so far as non-availment of cenvat credit is concerned."

13. A careful reading of the above finding would clarify that the Adjudicating Authority has confirmed the demand under the category of 'Construction of Residential Complex service' not only for the period 01.04.2007 to 31.05.2007 but also for the subsequent period 01.06.2007 to 31.03.2011.

14. While the SCN demanded the Service Tax under the category of 'Works Contract service' for the period 01.06.2007 to 31.03.2011, the Adjudicating Authority has confirmed the demand under the different category i.e., under the category of 'Construction of Residential Complex service' and has also given some justification to come to this conclusion. This would amount to traversing beyond the scope of SCN. This will also amount to non-following of principles of natural justice. The Appellant was never put to notice that the demand is going to be confirmed under the category of 'Construction of complex service'. They were issued notice seeking as to why the demand should not be confirmed under the category

of 'Works Contract service'. Therefore, they are defending the demand made under the category of Works Contract, without taking any defence on account of Construction of Complex service. Hence, we take the view that the Appellant was not put to notice before the Adjudicating Authority had confirmed the demand under the category of 'Construction of Residential Complex service'. We find that in the case of M/s P.K. Agarwalla Vs CCE & ST, Kolkata (cited supra), the Kolkata Bench of this Tribunal has held as under:-

> *"8. As in this case, <u>Show Cause Notice proposes to demand of Service Tax under the "Mining Service" which the Adjudicating Authority has held that the demand is not sustainable under Section 65(105)(zzzy) of the Finance Act, 1994 which means that the activity undertaken by the Appellant does not fall under "Mining Services". But the Adjudicating Authority has gone beyond the scope of the Show Cause Notice by holding that the activity undertaken by the Appellants falls under Section 65(105)(zr) of the FA, 1994 which is beyond the scope of the Show Cause Notice</u>.*
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> *9. In that circumstances, <u>we hold that demand proposed in the Show Cause Notice under "Mining Service" and confirmed under "Cargo Handling Service". Therefore, the impugned order is not sustainable in the eyes of law which is beyond the scope of Show Cause Notice. Accordingly, impugned order is set aside</u>." (Emphasis supplied)*

15. In the case of KPR Fertilizers Ltd Vs CCCE & ST, Visakhapatnam-II (cited supra), the Hyderabad Bench of this Tribunal has held as under:-

> *"10. <u>He submits that although the proposal in the show cause notice and the confirmation in the impugned order is classifying the goods as plant growth regulators which apparently is not correct</u> considering the nature of the goods manufactured, they cannot be classified under CETH 3105 as well. <u>Therefore, the appropriate heading is CETH 3824 as chemical products not elsewhere specified or included</u>.*

11. On a specific query from the bench as to whether this was the proposal in the show cause notice, learned Authorized Representative for the Revenue submits that it is not so but he asserts that it is necessary that the Tribunal indicates the correct classification of the goods in question even if such classification was not mentioned in the show cause notice or in the impugned order.

12. Rebutting these submissions, learned counsel for the appellant submits that neither the Tribunal nor the Original Authority could have gone beyond the show cause notice which has only proposed classification of the products manufactured by them as plant growth regulators, which is clearly not sustainable. If the proposal is to classify their goods under a different heading an appropriate show cause notice must be issued before any adjudication.

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15. We have considered the arguments on both sides and perused the records. Clearly, macronutrients, micronutrients and plant growth regulators are three distinct known to agricultural experts, as known in the market and as clarified by the CBEC. The show cause notice proposed to classify the micronutrients manufactured by the appellant as plant growth regulators. Learned Authorized Representative for the Revenue also admits that such classification is not sustainable. Therefore, the impugned order upholding such classification and demanding differential duty cannot be sustained and needs to be set aside." (Emphasis supplied)

16. In the case of Modi Ventures Vs CCT, Secunderabad (cited supra), the Hyderabad Bench of this Tribunal has held as under:-

"7. Thus, as far as service tax under "construction of complex services" is concerned, prior to 01.07.2010 (when the explanation was inserted), no tax could be levied. This was also clarified by the CBEC in Circular No. 108/2/2009/ST dated 29.01.2009. The question before the Tribunal Principal Bench in the case of Krishna

Homes Vs CCE Bhopal [2014 (34) STR 881(Tri-Del)] was whether this limitation on taxation prior to 01.07.2010 also extends to cases where such services were rendered not as "construction of complex services" but as "works contract services" and it was answered in affirmative.

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(v) After 1-7-2010, Service Tax is chargeable under the head of 'construction of complex services' if it is service simpliciter and under 'works contract service' if it is a composite works contract unless it is for personal use of the service recipient.

8. The decision of the Principal bench of the Tribunal in the case of Krishna Homes (supra) was followed by various other benches including this Bench in several cases. We find no reason to take a different view in this case. Accordingly, we hold that no service tax could be charged from the appellant in respect of the services rendered by them as works contract services for the period 01.06.2007 to 01.07.2010." (Emphasis supplied)

17. We find that in respect of the facts of the present case, the ratio laid down in the above Tribunals decisions is squarely applicable. Therefore, we hold that the confirmed demand is not legally sustainable since the demand was confirmed under the category of 'Construction of Residential Complex service' while the SCN was issued under the category of 'Works Contract service'. The Tribunals have also been holding that no Service Tax is payable till 01.07.2010 irrespective of the category under which the service may fall. Therefore, we allow the Appellant's Appeal on merits.

18. Coming to the argument of the Appellant in respect of time bar, we find force in the same. First of all, the Appellant was properly registered with the Department and they have been filing their Returns regularly. Their ST3 Returns are one of the relied upon documents while issuing the SCN. Further, the VAT Returns have been referred to in the SCN, which shows that they have filed their VAT Returns regularly. Thus, all the data with regard to their turnover was very much being shown in the Returns. Further, in order to clarify the issue as to whether 'Construction of Residential

Complex service' would be taxable or not, CBIC had issued various circulars between the period 2006 and 2012. Only much later, in 2010 it emerged that no Service Tax would be required to be paid till 01.07.2010. All the matters prior to this were being litigated at various levels. Hence, it can also be said to be as an issue of interpretation. In such circumstances, the Appellant cannot be fastened with the allegation of suppression. Accordingly, we set aside the confirmed demand for the extended period on account of time bar also.

19. Coming to the Appeal filed by the Revenue, we have held that the Adjudicating Authority has grossly erred in confirming the demand under different classification without the Appellant being subjected to issue of Show Cause on the count that for the period 01.07.2010 to 31.03.2011 they are liable to pay Service Tax under the category of Construction of Complex service. Thus, the Order becomes *void ab initio*. Revenue cannot be permitted to overturn such void and legally non-sustainable Order by filing an Appeal. The Appeal filed by the Revenue itself confirms that the Adjudicating Authority has erred in resorting to a different classification while confirming the demand. Entertaining the Appeal of the Revenue would mean that legally non-sustainable Order is being revived by Tribunal for which we have no inclination to do so. Accordingly, we dismiss the Appeal filed by the Revenue.

20. Both the Appeals are disposed of thus.

(Pronounced in the Open Court on 28.08.2024)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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