IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing/Order: 5.7.2018

Appeal No. ST/211/2009-DB

(Arising out of Order-in-Original No. COMMR/BBSR-I/ST-03/2009 dated 22.5.2009 passed by the Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I)

M/s Gayatri Projects Ltd. Appellant

Vs.

CCE & ST, Bhubaneswar Respondent

Appeal No. ST/212/2009-DB

(Arising out of Order-in-Original No. COMMR/BBSR-I/ST-03/2009 dated 22.5.2009 passed by the Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I)

CCE & ST, Bhubaneswar Appellant

Vs.

M/s Gayatri Projects Ltd. Respondent

Appearance

Shri G. Natarajan, Advocate - for the appellant - assessee

Shri K. Choudhari, AR - for the respondent - Revenue

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No.FO/76638-76639/2018

Per Bijay Kumar :

This order disposes of the two above referred appeals one filed by the appellant-assessee (ST/211/09) and other filed by the

Revenue (ST/212/09) arising out of the common Order-in-Original No. COMMR/BBSR-I/ST-03/2009 dated 22.5.2009 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar against M/s Gayatri Projects Ltd (appellant-assessee). Revenue is in appeal against the portion of demand dropped by the adjudicating authority and the appellant – assessee is in appeal against the amount confirmed by the adjudicating authority in the impugned order.

2. The appellant M/s Gayatri Projects Ltd. have been awarded the work of “Expansion of Ash Pond and “2nd Expansion of Red Mud Pond” by M/s National Aluminium Company Limited (NALCO). A show cause notice was issued to the appellant-assessee by the department demanding service tax to the extent of Rs. 1,27,90,928/- under commercial or industrial construction service (CICS) for the period from 10.9.2004 to 31.3.2008 by invoking the extended period of demand. The demand has been made after extending 67% of abatement from value, as per Notification No. 15/2004-ST dated 10.9.204 (up to 28.2.2006) and as per S. No. 7 of Notification No. 1/2006-ST dated 1.3.2006. The scope of work involved supply of all materials required for the work by the appellant. It is the contention of the appellant that initially they had paid the service tax to the extent of Rs. 2,30,318/- on 5.11.2005, thereafter as per the advise of NALCO they were not to make payment of service tax as the same is

in respect to dam and therefore not liable to service tax. After the due process of law, Commissioner has held in view of exchange of correspondence by the appellant that there is no suppression of fact involved in the case and therefore confirmed the demand of service tax for the normal period i.e. October, 2007 to March, 2008 along with applicable interest and penalty under Section 76 and 77 and dropped the rest of the demand. Against this background, the appellant and the Revenue have filed appeals before this Hon'ble Tribunal.

3. We have heard ld. Advocate for the appellant and ld. AR for Revenue and also perused the appeal records.

4. The ld. Advocate on behalf of the appellant has submitted that the subject work executed by the appellant also involved the transfer of property in various goods for which the VAT has been paid. The appellant had also taken the benefit of abatement of 67% of value and same has been allowed by the department while quantifying the service tax demand, which itself proves the incidence of the transfer of property in the goods has taken place while executing the contract. It was also further submitted that in view of Supreme Court judgment in the case of ***CCE Kerala Vs. Larsen & Toubro*** – 2015 (39) STR 913 (SC), wherein it has held that provisions of

Section 65(105)9g), 65(105(zzd), 65(105)(zzh), 65(105)(zzq) and 65(105(zzzh) were not sufficient for levy of service tax on indivisible composite work contract prior to 1.6.2007. The said decision of Hon'ble Supreme Court has been followed in a catena of cases, such as:

(i) ***Balaji Builders Vs. CCE, Jaipur*** – 2017 (6) GSTL 59 (Tri.-Del.);

(ii) ***Ircon International Ltd. Ltd. Vs. CCE, Delhi*** – 2017 (5) GSTL 221 (Tri.-Del.);

(iii) ***CST, New Delhi Vs. Ghandharva Infrastructure Projects Ltd.*** – 2017 (6) GSTL 431 (Tri.-Del.);

(iv) ***Engineers India Technical Services Vs. CCE & ST, Raipur*** – 2017 (6) GSTL 259 (Chatt.);

(v) ***Madhukar Mittal Vs. CCE*** – 2017 (4) GSTL 412 (Chan.).

Hence the demand prior to 31.5.2007 under CICS is not sustainable. It was also further submitted that pure service contract are only covered under CICS and confirming a demand under CICS post 1.6.2017, in respect of composite contract undertaken by the appellant is not at all sustainable for which the reliance was placed on the following decisions:

(i) ***URC Construction Pvt. Ltd. Vs. CCE*** – 2017 (50) STR 147 (Tri.-Chennai);

(ii) ***Mantri Developers Pvt. Ltd. Vs. CCE*** – 2014 (36) STR 944 (Tri.-Bang.);

(iii) ***Skyway Infra Projects Pvt. Ltd. Vs. CCE*** – 2018-TIOL-360-CESTAT-Mum.;

(iv) ***Srishti Constructions Vs. CCE*** – 2018-TIOL-337-CESTAT, Chd,

(v) ***CST Vs. Swadeshi Construction Company*** – 2018-TIOL-1096-CESTAT, Del.

In view of above, ld. Advocate submitted that even demand post 1.6.2017 is not sustainable. It was also contended and agreed that although the above plea was not taken earlier by the appellant, however, being a question of law, the same could be raised at this stage as well, and for which the reliance was placed on the following decisions :

(i) ***ACCE Vs. Ramdev Tobaco Co.*** – 1991 (51) ELT 631 (SC);

(ii) ***Shonan Siddhart JV Vs. CCE*** – 2017 (51) STR 64 Mum.;

(iii) ***JCG Associates Vs. CCE*** – 2009 (15) STR 50 Bang.;

(iv) ***CC Vs. Hotline CPT Ltd.*** – 2005 (179) ELT 313 (Tri.-Del.).

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The ld. Advocate also submitted that the subject work was carried out by the appellant in relation to construction of dam is also outside the scope of service tax under CICS as per the definition of said service under Section 65(25b) of the Act. On the point of limitation, it was stated that as the service tax is not payable, there is no question of time bar. The Commissioner has given detailed finding as to how the extended period cannot be invoked in the case at hand and, therefore, the same does not call for any interference.

5. The ld. DR has reiterated the grounds contained in the appeal memorandum and stated that the impugned order passed by the adjudicating authority is not proper and correct to the extent of dropped portion of demand by the adjudicating authority.

6. We have heard the parties and gone through the appeal papers. The issue involved in this case is regarding raising of height and upgradation of the ash pond by the appellant for M/s NALCO. It is on record that the appellant has paid the service tax to the extent of Rs. 2,17,741/- initially but on advise of their client i.e. NALCO they stopped the payment of service tax on being told that the proposed work is within the ambit of definition of dam, which covers pond and services have been relatable to water resources and therefore the service would not come under the category of commercial or industrial construction service. The appellant contention is that the scope of work includes supply of material along with provisions of service in construction raising height of the ash pond, the situation being so, the activity would come under work contract service, which is not leviable to service tax prior to 1.6.2007 in view of the Hon'ble Supreme Court decision in the case of ***L&T*** (supra) also period subsequent to 1.6.2007 this issue is part of the work contract service and not CICS. As the demand raised under the CICS, the

same is not sustainable and, therefore, the assessee appellant contention that they are not leviable to service tax is required to be upheld in view of various decisions referred above. After going through the various case laws cited by the appellant assessee, the issue is settled in their favour. For the brevity, we do not wish to reiterate the ratio laid down in these judgements but held categorically that the demand against the appellant assessee is not sustainable.

7. In view of above, we set aside the impugned order and allow the appeal filed by the appellant. As per the departmental appeal is concerned in view of the aforementioned reasons the same is dismissed.

(Pronounced in Court)

Sd/ Sd/

(P.K. Choudhary) (Bijay Kumar)
Member (Judicial) Member (Technical)