

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. ST/22/2008

Arising out of Order-in-Original No. 18/S. Tax/Commissioner/07 dated 08.11.2007 passed by the Commissioner of Central Excise & Service Tax, JSR.

M/s TRF Ltd.

....Appellant (s)

Vs.

Commissioner of Central Excise & S. Tax, JSR.

...Respondent (s)

Appearance:

Shri Isha Chowshary, A. C. (AR) for the Appellant (s)

Shri S. Mukhopadhyay, Suptd. (AR) for the Respondent(s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 04.12.2018

Order No. FO/A/77329/2018

Per Shri P. K. Choudhary:

The instant appeal has been filed by the assessee, M/s. TRF Limited, against the adjudication order dated 08.11.2007 passed by the Ld. Commissioner whereby he has confirmed demand of service tax of Rs.31,68,613/- for the period from October, 2005 to September, 2006 under the category of 'Erection, Commissioning & Installation Services', alongwith equal amount of penalty under Section 76 and 78 of the Finance Act, 1994 and applicable interest.

2. Briefly stated, the facts of the case are that the assessee has rendered services for civil works, fabrication, testing & commissioning,

erection and installation in the capacity of a sub-contractor for which it has raised invoices to the main-contractor who has actually been awarded the project from the end clients. During the period in dispute, the appellant has entertained a view that since service tax has been paid by the main contractors on full contract value, they need not again charge and deposit service tax in as much as service tax stood paid on the entire value of contract. In the course of adjudication, they relied on Trade Notice no. 5/98-Service Tax dated 14.10.1998 issued by Indore Commissionerate as well as CBEC Circular no. 43/5/97-TRU dated 02.07.97, etc wherein it has been expressly stated that sub-contractors need not pay service tax in case the main contractor has paid the service tax on the whole amount. The Ld. Commissioner in para no. 16 of his impugned order while dealing with the aforesaid contentions of the appellant, rejected the plea on the ground that the services for 'Erection, Commissioning & Installation' has not been covered in the said circulars and therefore the dispensation provided therein could not be extended to the appellant.

3. The Ld. Consultant, Ms. Isha Chowdhary, CA, appearing for the appellant submitted that it is not in dispute that the main contractors for whom the appellant has undertaken the subject services have duly discharged service tax. In case the appellant is made liable to pay service tax, the same would lead to double taxation. She also submitted that the assessee entertained a bonafide belief all along, based on several Trade Notices and TRU Circulars that since the main contractors have already paid service tax, they being sub-contractors, do not have further liability to pay service tax. In support of her

contentions, she also relied on several decisions, in particular, the decision of the Delhi Bench of this Tribunal in the case of M/s Ramzan Beg Contractor vs. Commissioner of Central Excise, Bhopal 2017-TIOL-1935-CESTAT-DEL, wherein after relying on the decision of the Hon'ble Chhattisgarh High Court in the case of Sew Infrastructure Ltd. vs. Commissioner of Central Excise, Raipur 2015 (37) S.T.R. 984 (Chhattisgarh), the demand on sub-contractor has been held to be not sustainable when the service tax stood payable by the main contractor. She also relied on similar decision of Single Bench in case of Urvi Construction vs. CST, Ahmedabad 2010 (17) STR 302 (Tri-Ahm) which has been upheld by the Division Bench in BCC Developers and Promoters Pvt Ltd. vs. Commissioner of Central Excise, Jaipur 2017 (52) STR 22 (Tri-Del).

4. Apart from the above submissions, she also stated that the definition of taxable service under section 65(105)(zzd) in respect of 'Erection, Commission and Installation services' were amended only in Finance Act, 2008, w.e.f. 01.05.2008, to provide taxability in case service was rendered 'to any person' as against the 'customer'. In their case, the subject services were rendered by them in the capacity of sub - contractor to the main contractors before the aforesaid amendment and therefore, in any case, the liability to pay service tax did not arise in their case. She further contested the imposition of penalty in absence of any malafide intention to evade tax.

5. The Ld. Departmental Representative D.R. supported the findings of the Ld. Commissioner and contended that the appellant assessee could not be absolved from the service tax liability merely because the

main contractors had discharged service tax. He also contended that the appellant should have discharged the service tax on their own which could be availed as CENVAT Credit by the service recipients (main contractors) as per the law.

6. Heard both sides and perused the appeal records.

7. In the facts of the present case, the main contractors have already discharged service tax which is not in dispute in the proceedings. Certificates issued by the main contractors stating that they have discharged service tax also forms part of the appeal paper book. The only limited issue that remains to be decided is whether the appellant herein be saddled with service tax liability when the Revenue is not deprived, given the fact that tax stood collected by them, on the whole of the contract value including the consideration paid by the main contractor to the sub contractor i.e., the appellant in this case. On perusal of the decisions taken by the co-ordinate Benches in the case of M/s Ramzan Beg Contractor (Supra) as well as BCC Developers and Promoters Pvt Ltd. (Supra), the substantive law stands decided in favour of the assessee. The legal issue in hand also stood decided by the Hon'ble Chhattisgarh High Court in Sew Infrastructure Ltd. (Supra) as also relied by the co-ordinate Bench in above cases, which in our view, the same has to be respectfully followed in this case also.

8. Further, we also find that that the Hyderabad Bench of this Tribunal in case of Power Mech Projects Ltd. vs. Commissioner of Central Excise, Guntur 2017 (48) STR 165 (Tri-Hyd), wherein identical case was involved regarding the service tax liability in the category of Erection, Commissioning and Installation Services for the period April

2007 to March 2008 i.e. the period subsequent to material period impugned herein, the Tribunal after noting the fact that since main contractor had already discharged service tax liability, set aside the demand on the sub contractor. In view thereof, the legal position herein stands decided in favour of the appellant herein and against the Revenue.

9. The impugned demand of service tax, interest and penalty are therefore set aside by allowing the instant appeal with consequential relief as per law.

(Dictated and pronounced in the open court.)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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