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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.76007 of 2014

(Arising out of Order-in-Original No.93/Comm/ST/KOL/2013-14 dated 31.03.2014 passed by Commissioner of Service Tax, Kolkata.)

M/s. Harisons Industries
(Hastings Chambers, 7C, Kiran Shankar Roy Road, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(Kendriya Udpad Shulk Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107, West Bengal.)

<u>APPEARANCE</u>

Shri Sourabh Bagaria & Shri Indranil Banerjee, Advocates for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75793/2021

DATE OF HEARING : 26 August 2021
DATE OF DECISION : 03 December 2021

P.K. CHOUDHARY :

The instant appeal has been filed by the Appellant, M/s Harison Industries, against the Order-in-Original dated 31.03.2014 passed by the learned Commissioner, Service Tax, Kolkata whereby the demand of service tax of Rs.1,93,01,617/- along with interest has been confirmed and penalties have been imposed against the Appellant in relation to the period from 2007-08 to 2011-12 (hereinafter "Relevant Period") under various provisions of the Finance Act 1994 (hereinafter "Finance Act"). The Appellant has also challenged the recovery of Rs.33.73 Lakhs deposited during the course of adjudication proceedings and the direction in the impugned order for appropriation of Rs.5,81,346/- already paid as interest and has sought refund of the said amounts. The impugned order has dropped the demand of CENVAT Credit of Rs.87,07,072/- and the said issue has attained finality as the department has not filed any appeal against the said issue.

2. Briefly stated, the facts of the case are that the Appellant is a proprietary concern and is engaged in providing horizontal directional drilling (HDD) services enabling laying of cables and / or pipelines and works contract services for laying of pipelines/cables etc. During the Relevant Period the Appellant was registered with the Service Tax department under the category of “Works Contract Services”, “Site Preparation and Clearance Services” and “Commercial or Industrial Construction Services” vide service tax code No. AAVPB6401FST001. The main activity of the Appellant is to undertake turnkey contracts for laying pipelines/cables which include excavation, laying, construction, joining work.

3. Proceedings were initiated by the Department by issuing Show Cause Notice (SCN) dated 17.10.2012 wherein it was alleged that the Appellant’s activities relating to Horizontal Directional Drilling (HDD) works were appropriately classifiable under ‘Site Preparation & Clearance Service’ in terms of Section 65(105)(zzza) of the Finance Act read with Section 65(97a) thereof, whereas, the Appellant had classified the same as ‘Works Contract Service’ in terms of Section 65(105)(zzzza) of the Finance Act and discharged service tax accordingly. Based on the said purported classification, the department sought to deny the benefit of lower rate of tax vide Notification No. 32/2007 dated 22.05.2007 relating to Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

4. The said SCN also alleged that while the Appellant's primary revenue accrued from HDD service, certain income also accrued from pipeline construction charge pertaining to F.Y. 2007-08 which was classifiable under ' Commercial or Industrial Construction Service' in terms of Section 65(105)(zzq) of the Finance Act read with Section 65(25b) thereof and the said income had purportedly not been shown in the relevant Service Tax Returns under the appropriate head of classification and relevant tax thereon was not paid by the Appellant. Thirdly, it was alleged that for the F.Y. 2008-09 and 2009-10, the Appellant had provided 'machinery on hire' to customers and it was reasonable to infer that such income was in relation to 'supply of tangible goods for use without transferring right of possession & effective control of such machinery' classifiable under 'Supply of Tangible Goods Service' in terms of Section 65(105)(zzzzj) of the Finance Act and appropriate Service tax demandable from the appellant in this regard.

5. The said SCN also proposed to confirm demand against irregular Cenvat Credit to the tune of Rs.87,07,072/- which was dropped by the adjudication order and the same has attained finality as the department has not filed any appeal against the same.

6. Shri Saurabh Bagaria and Shri Indranil Banerjee, learned Advocates appeared for the Appellant and Shri Aniruddha Roy, learned Authorized Representative appeared for the Respondent.

7. The learned Advocate for the Appellant submitted that in respect of the first allegation pertaining to demand in relation to Site Preparation & Clearance Service, the Commissioner of Service Tax had examined the entire facts and thereafter rendered findings in favour of the Appellant vis-à-vis demand under the category of Site Preparation & Clearance Service. At paragraph 3.9 of the impugned order it has

been specifically observed that "… *As the work of the assessee is in conformity with the scope of Works Contract Services I find that the allegation of mis-classification doesn't survive*…." . The said findings have attained finality. However, the Commissioner acted beyond jurisdiction by failing to drop the related demand, travelling beyond the scope of SCN and holding that the Appellant had discharged its tax liability under the Works Contract Composite Scheme without exercising the appropriate option thereunder. It was submitted that it is settled law that the Show Cause Notice is the foundation of any proceeding. If there is no invocation of a provision in the Show Cause Notice, it would not be open to the adjudicating authority to invoke the said provision at a later stage. In this regard reliance was placed on the following decisions:-

(a) Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. Reported in 2007 (215) ELT 489 (SC);

(b) Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd. Reported in 2006 (201) ELT 513 (SC);

(c) Commissioner of Central Excise, Bhubaneshwar – I v. Champdany Industries Ltd. Reported in 2009 (241)ELT 481 (SC);

8. The learned Advocate for the Appellant further submitted that even otherwise, the Commissioner ought to have appreciated that the Appellant's purported failure to exercise option under the aforesaid "Works Contract Composite Scheme" prior to payment of service tax was, at best, a procedural irregularity. The Appellant could not have been denied substantive benefit of payment under the aforesaid Scheme simply because of such procedural non-compliance. The said procedural irregularity, if any, ought to have been condoned and the demand pertaining to Site Preparation & Clearance Service should have been dropped in its entirety. There was no specific format or application prescribed either in the statute or by any circular issued by the Board, under which the option has to be exercised. Thus, non-filing of specific declaration before opting for the scheme is to be considered

as a mere procedural lapse, for which the substantive right provided under the statute for payment of composition tax cannot be whittled down. In this regard, the following decisions were relied upon by the Learned Advocate :-

i. Harsh Constructions Pvt. Ltd. v. Commissioner of Central Excise, Nashik reported in 2020 (37) GSTL 217 (T);
ii. Alstom T & D India v. Commissioner of Central Excise, Chennai reported in 2020 (34) GSTL 521 (T);
iii. GE T & D India Ltd. v. Commissioner of Central Excise & Service Tax, Chennai reported in 2020 (34) GSTl 176 (Mad.)
iv. Mehta Plast Corporation v. Commissioner of Central Excise, Jaipur reported in 2016 (44) STR 651(T)

9. It was further submitted that Rule 3 the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 does not require the tax payer to formally intimate the Revenue of its exercise of option for payment under the said Rules of 2007 / Scheme, where the tax payer chooses to discharge its liability in accordance with the said Rues of 2007 / Scheme. Besides, there was no specific format or application prescribed either under the Finance Act or by any Circular issued by the Board for purposes of exercising an option in terms of the above Rules of 2007 / Scheme.

10. As regards the demand of Rs.53,06,663/- confirmed in relation to Commercial & Industrial Construction service, it was submitted by the Learned Advocate for the Appellant that the adjudicating authority had completely overlooked that the pipeline construction charges for Rs.4,29,34,169/-, on which the said appropriate tax was duly computed, had been reflected in the relevant service tax returns for FY 2007-08 under the category of ‘Site Preparation & Clearance Services’. Service tax liability having already been determined and discharged on the said sum of Rs.4,29,34,169/- at full rate, there cannot arise any question of further including the said amount and paying service tax of

Rs.53,06,663/- under the category of 'Commercial & Industrial Construction service'.

11. In relation to the demand of Rs.43,355/- as service tax towards "Supply of tangible Goods Service", the Appellant vehemently denied and disputed its liability. It was stated that the Appellant had never given its machinery on hire or for use to Customers / clients for FY 2008 - 09 and 2009 - 10, as alleged in the SCN or at all. The income aggregating to Rs. 4,14,000/-, on which the above service tax liability has been calculated, does not fall within the purview of Section 65(105)(zzzzj) of the Finance Act. On the other hand, the said income was in the nature of demurrage charges collected by the Appellant for failure of its customers / clients to grant clearance for work within the stipulated time. The nomenclature of 'Machinery hire' or 'Hire Charges Received' used in the Appellant's audited financial statements, in disregard of the actual transactions between the Appellant and its customers / clients, cannot be understood as conclusive proof of the Revenue's allegations. As no taxable service was rendered by the Appellant within the meaning of Section 65(105)(zzzzj) of the Finance Act, the question of paying service tax under the head 'Supply of Tangible Goods Service' cannot and does not arise. The Revenue ought not to have proceeded on the basis of assumptions and presumptions in order to confirm the purported service tax of Rs. 43,355/- which related to non-taxable income of the Appellant. Accordingly, the said demand of Rs.43,355/-, referred to in paragraph 2(c) herein, lacks any legal support and ought to be declared unsustainable.

12. The learned Advocate for the Appellant contested the invocation of extended period and confirmation of penalties. It was submitted that the issues in the present case mainly relate to classification of the Appellant's services and involve interpretation of various statutory provisions and there is no scope for establishing *mala fide* intent or suppression on the part of the Appellant. Attention was invited to the fact that the very demands confirmed against the Appellant are based upon comparison of documents such as the appellant's work orders,

contracts, audited financial statements, service tax returns etc. Further, the Appellant's submissions relating to classification of Horizontal Directional Drilling (HDD) works under Works Contract service have been accepted in the impugned order and the even the demand of Rs. 87,07,072/- on irregular availment and / or utilization of Cenvat credit has been dropped.

13. The learned Authorized Representative for the respondent Revenue reiterated the findings made by the learned Commissioner and justified the impugned order. He submitted that it was obligatory on the part of the Adjudicating authority to discuss and decide all legal consequences that follow his decision. It was submitted that after the Appellant's classification claim was accepted by the adjudicating authority, the Appellant had to bear the legal consequences which was to follow the procedure as stated in the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. It was submitted that to avail the said scheme, "exercising option" was mandatory. He relied upon decision of the Hon'ble Andhra Pradesh High Court in the case of Nagarjuna Construction Co. vs. GOI reported in (2010) 19 STR 321 (AP). The said judgement was affirmed by the Hon'ble Supreme Court reported in (2012) 28 STR 561 (SC). The learned Authorized Representative also disputed the non-availment of CENVAT on inputs by the Appellant.

14. On the second issue, the learned Authorized Representative submitted that Appellant has not effectively furnished its reply on the said issue. It was submitted that the calculation furnished by the appellant during the course of hearing was not before the Commissioner. On the third issue and on the issue of limitation, the learned Authorized Representative reiterated the findings made by the learned Commissioner and justified the impugned order.

15. Heard both sides through video conferencing and perused the appeal records. Written submissions filed by the parties have also been considered. The CA certificate and affidavit submitted by the Appellant have also been considered.

16. In the instant case the learned Commissioner has accepted the subject services as 'Works Contract Services' and has rendered findings in favour of the Appellant on the said classification issue. At paragraph 3.9 of the impugned order it has been specifically observed that " … *As the work of the assessee is in conformity with the scope of Works Contract services I find that the allegation of mis-classification doesn't survive* …..". The said findings have attained finality.

17. The subject SCN only raised a classification dispute alleging that the Appellant's activities relating to Horizontal Directional Drilling (HDD) works were appropriately classifiable under 'Site Preparation & Clearance Service' and not 'Works Contract Service'. The SCN never alleged that the Appellant failed to fulfill any of the conditions of Notification No. 32/2007 dated 22.05.2007 relating to Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. This aspect is also not disputed by the Learned Authorized Representative for the Respondent Revenue. It is settled law that the Show Cause Notice is the foundation in the matter of levy and recovery of duty, penalty and interest and if there is no invocation of a provision in the Show Cause Notice, it would not be open to the adjudicating authority to invoke the said provision later on. The Hon'ble Supreme Court in Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. Reported in 2007 (215) ELT 489 (SC) held :-

> *"However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule*."

18. In the case of Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd. reported in 2006 (201) ELT 513 (SC) the Hon'ble Supreme court held as follows :-

> "*These grounds did not find mention in the show cause notice as well. The Department cannot be travel beyond the show cause notice.*"

19. We find that learned Commissioner has erred in adjudicating the issues not raised in the SCN. Further it cannot be said, as contended by the learned Authorized Representative, that issue of non-fulfillment of the conditions of Notification No.32/2007 dated 22.05.2007 relating to Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was consequential to the classification issue. The issue of non-fulfillment of the conditions of Notification No.32/2007 is a separate and distinct issue and there has to be a specific allegation regarding the same considering the facts and circumstances of a particular case. This has indisputably not been done in the instant case.

20. The reliance placed by the learned Authorized Representative for the Revenue upon decision of the Hon'ble Andhra Pradesh High Court in the case of Nagarjuna Construction Co (Supra) is also misconceived. In that case the issue was whether the petitioner therein, in relation to the ongoing works being executed and in respect of which it had paid service tax prior to 01-06-2007, could claim benefits under the composition scheme. It was in that context that the Hon'ble High court and Hon'ble Supreme Court rendered its findings. In the present case the option has been exercised prior to payment of tax. However no formal intimation has been given. This Tribunal in the case of Harsh Constructions Pvt. Ltd. v Commissioner of Central Excise, Nashik reported in 2020 (37) GSTL 217 (T) held as follows :-

> "***3.*** *On perusal of the relevant ST-3 returns available in the case file, we find that the appellant had exercised the option for availing the Composition Scheme inasmuch as it had declared the tax payable at 4%. Since, the appellant has specifically mentioned about the rate prescribed under the Composition Scheme, the same should be considered as compliance in terms of Rules, 2007 regarding availment of the option for the Composition Scheme. Besides, we also find that no specific format or application has been prescribed either in the statue or by any circular issued by the Board, under which the option*

has to be exercised. Thus, non filing of specific declaration before opting for the scheme is to be considered as a mere procedural lapse, for which the substantive right provided under the statue for payment of composition tax cannot be whittled down. Further, we also find that though the appellant had availed the cenvat credit of service tax paid on the input services, but the same was reversed and the reversal particulars were duly reflected in the period ST-3 returns. Hence, we are of the considered view that the adjudged demands confirmed on the appellant cannot be sustained."

21. The facts of the instant case are similar to the aforesaid case and we are inclined to follow the said decision. We have also perused the CA certificate and affidavit submitted by the Appellant and observe that the Appellant has not availed CENVAT credit in inputs during the relevant period in relation to the Work Contract Services. Thus, the above demand pertaining to Site Preparation & Clearance Service cannot be sustained and is set aside.

22. On the second issue relating to the pipeline construction charges for Rs.4,29,34,169/-, on which appropriate tax was duly computed, we find that the same had been reflected in the relevant service tax returns for FY 2007-08 under the category of 'Site Preparation & Clearance Services'. There cannot arise any question of further including the said amount and paying service tax of Rs.53,06,663/- under the category of 'Commercial & Industrial Construction Service'. The said position is borne out from the documents annexed in the appeal paper book and is further supported by the CA certificate. Hence, we hold that the demand of Rs.53,06,663/- in relation to pipeline construction charges cannot be sustained and is set aside.

23. On the third issue relating to the demand of Rs.43,355/- as service tax towards 'Supply of Tangible Goods Service', we find that the department has adduced no evidence to show how the subject service falls under the head 'Supply of Tangible Goods Service' within the meaning of Section 65 (105) (zzzzj) of the Finance Act. The said

demand is based on presumptions and assumptions and is unsustainable in law and hence set aside.

24. On the issue of limitation, we find that the impugned issues relate to pure questions of law and classification. The learned Commissioner has also held in favour of the Appellant on the said classification issue and also on another issue relating to CENVAT credit. The SCN raised legal issues based upon comparison of documents such as the appellant's work orders, contracts, audited financial statements, service tax returns. In the said facts and circumstances, allegation of suppression of facts with the intention to evade payment of tax cannot be upheld and as such extended period of limitation cannot be invoked.

25. In view of the above, the Appeal is allowed on the above terms. The penalties imposed are also set aside. The Appellant is entitled to consequential refund of duties and interest deposited during the course of the instant proceeding.

(Order pronounced in the open court on 03 December 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJU)
MEMBER (TECHNICAL)

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