IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Service Tax Appeal No.77 of 2011

(Arising out of Order-in-Original No.72/Commr./ST/BOL/2010 dated 01.12.2010 passed by Commissioner of Central Excise, Bolpur)

Mr.Hari Har Yadav
Cinema Road, Durgapur-713213

Appellant

VERSUS

Commissioner of Central Excise, Bolpur
Nanoor Chandidas Road, SIAN,Dist.-Birbhum, Bolpur, W.B.- 731204

Respondent

Appearance:

Shri Kartik Kurmy, Advocate for the Appellant
Shri S.Mukhopadhyay, Authorised Representative for the Respondent

WITH

Service Tax Appeal No.82 of 2011

(Arising out of Order-in-Original No.72/Commr./ST/BOL/2010 dated 01.12.2010 passed by Commissioner of Central Excise, Bolpur)

Commissioner of Central Excise, Bolpur
Nanoor Chandidas Road, SIAN,Dist.-Birbhum, Bolpur, W.B.- 731204

Appellant

VERSUS

Mr.Hari Har Yadav
Cinema Road, Durgapur-713213

Respondent

Appearance:

Shri S.Mukhopadhyay, Authorised Representative for the Respondent
Shri Kartik Kurmy, Advocate for the Appellant

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75209-75210/2022

DATE OF HEARING : 07.12.2021
DATE OF PRONOUNCEMENT : 18 APRIL 2022

Service Tax Appeal No.77 & 82/2011

Per P.K.Choudhary :

These appeals are directed against the Order-in-Original dated 01.12.2010 passed by the Ld. Commissioner of Central Excise and Service Tax, Bolpur, whereby he has confirmed the service tax demand of Rs.93,08,292/- as proposed in the Show Cause Notice dated 21.10.2009 and the remaining demand of Rs.23,99,730/- has been dropped. The period in dispute is from April 2004 to March 2008. Both the Assessee and the Department are in appeal. Since the issues arise out of the common adjudication order dated 01.12.2010, both the appeals are taken up for disposal by this common order.

2.1 Briefly stated, the facts of the case are that, the assessee is engaged in providing Civil Construction services and is registered with the Service Tax Department under the categories of Goods Transport Services, Commercial or Industrial Construction Services, Manpower Recruitment Agency Services and Maintenance and Repair Service. During the period in dispute, the assessee has undertaken various construction services, e.g. construction and maintenance of road, construction services for railway projects, construction of hospital buildings, etc.

2.2 The Ld. Commissioner has dropped the demand of Rs.23,99,730/- (out of the total demand of Rs.1,17,08,022/-) in respect of construction activities undertaken for construction of drain for Durgapur Municipal Corporation, construction of road, repair and maintenance of road for the period upto 15.06.2005, improvement of level crossing for railways for the period upto 15.06.2005, repair and maintenance of ITI boundary wall for schools by holding them to be used for non-commercial purpose. Against the demand dropped by the Ld. Commissioner as above, the Revenue is in appeal before us.

2.3 The Ld. Commissioner has upheld the demand of Rs.93,08,292/- on cleaning services, repair and maintenance services of road w.e.f. 16.06.2005, improvement of level crossing for railways for the period from 16.06.2005 under repair and maintenance services, etc. without providing the break-up of the tax amount. The same is under challenge in the appeal filed by the Appellant assessee.

3. Heard Sri Kartik Kurmy, Advocate for the assessee and Sri S. Mukhopadhyay, Departmental Representative for the Revenue through video conferencing and perused the appeal records.

4. The Ld. Advocate for the assessee made several submissions including the following:

(i) The demand has been raised in the category of Cleaning Services and Erection, Commissioning and Installation services which were never proposed in the SCN and therefore, the impugned order travels beyond the allegations in the SCN.

(ii) Since no break-up of the tax amount demand has been provided in the impugned order, the same is bad in law.

(iii) Activities for repair and maintenance of road has been subsequently exempted vide Notification no. 24/2009 dated 27.07.2009 retrospectively for the period from 16.06.2005 onwards. He also submitted that the activities for improvement of infrastructural efficiency at level crossings of railways cannot be classified under the category of maintenance management or repair services. He relied on the clarifications issued vide Circular no. B1/6/2005-TRU dated 27.07.2005 that the maintenance is to keep a machine in good condition by periodically checking and servicing and that while repair is a one time activity, maintenance is a continuous process of which repair may be incidental or ancillary. In maintenance or repair service, existing condition is maintained or restored. However, in the instant case, the appellant has undertaken the act of improvement of infrastructure efficiency which cannot be said to be a maintenance or repair service and therefore, the classification adopted in the impugned order is not correct.

(iv) Demand has been illegally raised on renovation of hospital under the category of Commercial or Industrial activity merely on the basis of ownership of property by holding that SAIL is a commercial organisation.

In the case of CST vs. N S Associates Pvt Ltd 2018 (11) GSTL 332 Tri), it has been held that ownership status of the owner of the hospital is not relevant consideration for classifying the service under the head Commercial or Industrial Construction service.

(v) In any case, since service is classifiable under Works Contract Service w.e.f. 01.06.2007, which taxing entry has not been invoked, the entire demand is liable to be set aside on this ground alone. He relied on the decision in the case of CCE vs. Larsen & Tourbo 2015 (39) STR 913 (SC) as also followed by the Tribunal is various cases.

(vi) There is no case of fraud or suppression and hence, the larger period of limitation is not available. Since the dispute in the instant case relate to proper classification of service and interpretation of statutes, the extended period of limitation is not available as has been held in the case of Calcutta Industrial Supply Corporation vs. CST 2019 (31) GSTL 487 (Tri-Kol.) and in the case of Continental Foundation Jt Venture vs. CCE 2007 (216) ELT 177 (SC).

5. The Ld. Departmental Representative submitted that the Ld. Commissioner erred in dropping the demand in respect of activities undertaken for construction of road. The said activities were for 'black topping of road' which were not construction activities but maintenance or repair service and hence, liable to tax. He also reiterated the observations made by the Ld. Commissioner in respect of portion of activities where the demand has been confirmed and submitted that the appeal filed by the assessee be rejected.

6. We have carefully gone through the appeal records and submissions made by both sides. We find that nowhere in the entire Show Cause Notice (SCN), the demand of service was proposed in the category of Cleaning Services and Erection, Commissioning and Installation services. However, the demand has been confirmed under the category of Cleaning services as is evident from para 4.56 of the impugned order. Further the demand has also been raised in the category of Erection, Commissioning and Installation services as seen

from para 4.46. The Hon'ble Supreme Court in the case of **CCE vs. Shital International (2011) 1 SCC 109** has held that the Revenue cannot be permitted to build up a new case which was not taken in the Show Cause Notice which is the foundation of the proceedings against the assessee. Therefore, the demand in the aforesaid categories cannot be sustained and thus, set aside.

7. We further find that vide specific exemption notification being Notification No.24/2009 dated 27.07.2009, introduced to exempt the activity of maintenance or repair of road retrospectively for the period from 16.06.2005 onwards, a fact that the Ld. Commissioner has completely ignored and therefore, the demand is liable to be set aside. We also agree with the submissions made by the assessee that the activity of improvement of infrastructure efficiency at Level Crossing for railways cannot be classified under the maintenance or repair service and that the same would be considered as construction services pertaining to railways which were kept outside the purview of service tax under the definition of Commercial or Industrial Construction service during the period in dispute.

8. With regard to the submissions made by the Ld. Advocate that the construction activities undertaken by the assessee could only be taxed under the category of Works Contract Service w.e.f. 01.06.2007 which plea was taken by the assessee in the course of adjudication. We find that the Ld. Commissioner has observed in para 4.9 of the OIO that since the assessee has not chosen to seek registration under the said category of works contract service, the services would be classifiable under other categories as per SCN even though the same is classifiable under Works Contract Service. The said finding cannot be sustained inasmuch as the Hon'ble Supreme Court in the case of Larsen & Tourbo (Supra) has held that works contract cannot be taxed under the category of Commercial Construction Service or Erection commissioning Installation Service or Maintenance or repair service.

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In the case of **PES Engineers Pvt Ltd vs. CCE & ST, Hyderabad – II [2017 (7) GSTL 57 (Tri- Hyd.)]** the issue involved for demand pertaining to the period January 2005 to March 2012 under Erection Commissioning and Installation Service. The Tribunal has held that the services were classifiable under "Works Contract Service" and not "Erection Commissioning and Installation Service", demand could not be sustained. The relevant paras of the Tribunal order is as under :

> "..*5.8 Viewed in this light and also taking note of the fact that the work has been performed by the assessee on specific sub-contract agreements for specific works detailed therein, the nature of work cannot, but, be otherwise than "Works Contract" and definitely not under "ECIS" as perceived by the department for the period upto March, 2010. The nature and scope of the activity performed by the assessee also answers to the scope of works contract defined in Section 65(zzzza) of Finance Act, 1994 for fabrication and installation work in respect of tunnel for transport of water from the Dam projects.*
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> *5.9* ***Once it is clear that the impugned activity comes within the ambit of "works contract", the same would also be taxable only w.e.f. 1-6-2007, when the said service was brought into the fold of service tax. The attempt by the department to categorise the very same activity for an earlier period under ECIS cannot then sustain. This aspect has been finally settled by Hon'ble Apex Court in the case of Commissioner of Central Excise & Customs, Kerala v. L&T [2015 (39) S.T.R. (913)] to the effect that composite contracts involving services and goods covered under four categories i.e. "Erection, Commissioning and Installation", "Construction of building for Commerce or Industry", "Construction of Residential Complexes" and "Turnkey Projects" under Section 65(105)(zzzza) are liable to tax only from 1-6-2007. The Hon'ble Apex Court in their said judgment also held that the taxability would only be for service contracts simplicitator and not to composite works contracts and that all the services referred to in the sub clauses of Section 65(105)(zzzza) are any other element in them……***...
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> *5.12 It is not even the case of the department that the impugned activity is not "works contract" and will fall only under ECIS. Although in the proceedings for the periods upto March, 2010 which have culminated in these appeals, the department sought to bring the impugned activity of the assessee under ECIS. However, from April, 2010, for no cogent reason or ground, the very same activity is now sought to be taxed as "Works Contract Service".*

5.13 It is intriguing to note that for very same continued activity performed by the assessee for the periods January, 2005 to March, 2008, April, 2008 to March, 2009 and April, 2009 to March, 2010, the department has sought to bring it within the fold of Erection, Commissioning or Installation service. However, for the subsequent periods April, 2010 to March, 2011 and April, 2011 to March, 2012, the very same activity has been alleged by the department to be "Works Contract Service". The reasoning given for such peremptory change is unconvincing, to say the least.

5.14 Interestingly, in the show cause notice dated 19-9-2011, for the period April, 2010 to March, 2011, the same activity which was proposed in the show cause notices issued earlier as ECIS, is suddenly proposed to be covered under the category of "Works Contract Service".

5.15 From these discussions, we find that the impugned activity of the assessee was nothing but "works contract service" in respect of tunnels/dams. We further find that since the works contract was in respect of tunnels for dams/power projects, the same would then be excluded from taxability thereunder in view of the exclusion in Section 65(105)(zzzza) of Finance Act, 1994.

5.16 In the event, all the demands of differential service tax liability confirmed in the proceedings related to the appeals ST/981/2009, ST/1248/2010 and ST/26552/2013 cannot, therefore, sustain and will have to be set aside, which we hereby do. For these very same reasons, the appeals ST/981/2009; ST/1248/2010 and ST/26552/2013 filed by assessee will succeed and they are therefore allowed with consequential benefits if any.

5.17 When there cannot be any taxability on the impugned activity, the appeal No. ST/962/2009 filed by Revenue against reduction of tax liability by the adjudicating Commissioner will also fail and hence the same is dismissed.

5.18 ***Coming to the Appeal No. ST/412/2007 filed by the assessee, the same relates to claim of refund of an amount of Rs. 28,06,915/- filed by the assessee on their contention that the activity does not amount to providing of taxable service as ECIS. The claim was rejected by original authority on the grounds that service tax has been correctly discharged on taxable service, which order was upheld by lower appellate authority. In view of the discussions hereinabove, as there can be no taxability on the impugned activity during the period of dispute, the said amount would be refundable ...."***

Further, in the case of **URC Construction (P) Ltd vs. CCE, Salem 2017 (50) STR 147 (Tri- Chennai)** wherein there was an identical issue, amongst others, whether demand could be upheld for the period June 2007 to September 2008 under CICS, in case where the construction service rendered by the assessee also involved supply of materials and the classification of Works Contract Services was not proposed in the SCN for raising demand. Taking note of the precedence set by the Hon'ble Supreme Court in Larsen & Tourbo's case (Supra), the Tribunal set aside the entire demand under the category of CICS and observed as follows:

> *"11. Insofar as demand for subsequent period till 30th September, 2008 is concerned, it is seen* ***that neither of the two show cause notices adduce to leviability of tax for rendering 'works contract service'.*** *On the contrary, the submission of the appellant that they had been providing 'works contract service' had been rejected by the adjudicating authority****. Therefore, even as the services rendered by them are taxable for the period from 1st June, 2007 to 30th September, 2008 the narrow confines of the show cause notices do not permit confirmation of demand of tax on any service other than 'commercial or industrial construction service'. It is already established in the aforesaid judgment of the Hon'ble Supreme Court that the entry under Section 65(105)(zzd) is liable to be invoked only for construction simpliciter.*** *Therefore, there is no scope for vivisection to isolate the service component of the contract.*

9. In view of the above legal position, the demand raised in the impugned order cannot be sustained and hence, set aside. In so far as the Revenue's appeal is concerned, even if the contention that the services for road were classifiable under Repair or Maintenance service, in that case also the same were wholly exempted vide Notification No.24/2009 dated 27.07.2009 retrospectively for the period from 16.06.2005 onwards. Hence, no demand can be sustained. Since we have decided the appeal on merits, we refrain from making any observation on the aspect of limitation.

10. Hence, the appeal filed by the assessee is allowed with consequential relief as per law. Further, we find that the Department has filed an application for withdrawal of their appeal under the litigation

policy. Accordingly, the appeal filed by the Department is dismissed as withdrawn.

11. Both the appeals stand disposed of in the above terms.

(Pronounced in the open Court on **18.04.2022**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(P. Anjani Kumar)
Member (Technical)

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