IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

<u>Service Tax Appeal No.75498 of 2015</u>
(On behalf of Appellant)

(Arising out of Order-in-Original No.09/ST/ADJ/Commr./DIB/14-15 dated 27.03.2015 passed by Commissioner of Central Excise & Service Tax, Dibrugarh)

M/s Buildrite Constructions
A.T.Road, Jorhat, P.O. & Dist.-Jorhat-785001, Assam

Appellant

VERSUS

Commissioner of CGST & Excise, Dibrugarh
Milan Nagar Lane "F", P.O.- C.R.Building, Dibrugarh-786003

Respondent

<u>APPERANCE :</u>

Shri Anurag Base, Chartered Accountant for the Appellant
Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76336/2023

<u>DATE OF HEARING : 01 .08.2023</u>
<u>DATE OF DECISION : 01 .08.2023</u>

<u>Per Ashok Jindal :</u>

The appellant is in appeal against the impugned order confirming demand of service tax of Rs.99,03,217/- for the period 2009-10 and 2012 -13 by issuance of show-cause notice dated 21.07.2014.

2. The facts of the case are that the appellant is engaged in providing works contract service in the nature of civil construction to different Government Organisation/PSU and was registered under the Service Tax Department and filed ST-3 Returns.

2.1 An audit was conducted on the premises of the appellant on 11.04.2012 and detected certain discrepancies in services provided to

NEDFI (North Eastern Development Finance Corporation Limited) and voluntarily paid the service tax along with interest.

2.2 After audit, it was found that the appellant had provided services towards Tezpur University, House Fed, IIT, PWD (NH), Airport Authority, Assam Tourism Development Corporation and NEDFI under the category of "Commercial or Industrial Construction Service". During the period 2007-08 to 2011-12, it was objected that the services provided by the appellant to NEDFI was taxable and against that, he payment was made by the appellant voluntarily. No further objection in respect of other service receivers was raised by that Audit Team.

2.3 Thereafter, on 27.09.2013 & 27.12.2013, a letter was issued to the appellant to furnish details of annual balance sheets, work orders, agreement copies, payment particulars etc.. The same were supplied by the appellant.

2.4 Thereafter, a show-cause notice was issued to the appellant to demand service tax by invoking extended period of limitation for the services rendered by during the period from 2007-08 to 2012-13 alleging in respect of the work undertaken for CIDCO Ltd. and BSNL.

2.5 Thereafter, the matter was adjudicated. A part of demand was dropped, but the demand of Rs.99,03,217/- for the period from 2007-08 to 2012-13 was confirmed along with interest and equivalent amount of penalty was also imposed under Section 78 of the Finance Act, 1994.

2.6 Against the said order, the appellant is before us.

3. The ld.Consultant for the appellant, submits that the show-cause notice is a vague and void abinitio. It is his submission that the demand has been confirmed under "Commercial or Industrial

Construction Services" and is beyond the show cause notice. He further submits that the allegations have been leveled in respect of work undertaken for CIDCO Ltd. and BSNL, but while calculating the proposed demand, the show-cause notice has calculated the amount received towards services provided to Assam State Co-operative Housing Federation Limited, NEDFI, BSNL, Airport Authority,CIDCO, ATDC and Rites. It is his submission that the services provided by the appellant have merits classification under "works contract service" w.e.f. 01.06.2007. As no demand has been raised against the appellant under "Works Contract Service", they are not liable to pay service tax.

3.1 To support his contention, he relies on the judgement of the Hon'ble Apex Court in the case of Larsen and Toubro Limited reported in 2015 (39) STR 913 (SC). He also relies on the decision of this Tribunal in the case of KMV Projects Limited Vs. Commissioner of Central Excise & Service Tax, Hyderabad reported in 2019 (27) GSTL 388 (Tri.-Hyd.) to say that there is no allegation in the show-cause notice that these units are profit making units and all the units of Government or Local Authority cannot be considered as primarily engaged for the purpose of commerce and buildings constructed for non-commercial use is not for taxable under "Works Contract Service".

3.2 He also submits that for the period from 01.07.2012 to 31.12.2013, under the negative list, the "Works Contract Service" was liable to tax under reverse charge mechanism. In this regard, it is his submission that if it is held that the service tax is payable by the appellant, the same is restricted upto 50% of the total liability as per Notification No.30/2012-ST dated 28.06.2012.

3.3 He further submitted that the construction undertaken by the appellant is not liable to pay service tax under the category of "Commercial and Industrial Construction Service" as buildings being Government Buildings not used primarily for commerce and industry.

3.4 In respect of the services provided to Assam State Co-operative Housing Federation Limited, it is his submission that the appellant has undertaken construction of International Centre for Trade and Commerce and construction of office building at Guwahati. These buildings are meant for official use by the Government for civic amenities. Therefore, in such services, no service tax is payable by the appellant.

3.5 He further submitted that in the impugned order, the adjudicating authority has neither considered the nature of the building being a Government building is not for the purposes of profit or loss nor used for Government officers and public amenities. The said observation of the adjudicating authority is baseless.

3.6 With reference to the services provided by BSNL, it is his submission that it is a 100% Government owned Public Sector Undertaking. The Building house is an institution for imparting training and is not meant for any commercial or industrial use.

3.7 Further, in respect of services provided to RITES Limited, he submitted that the appellant has undertaken the services of construction of Radar-Cum-Antenna building at Indian Airport Station. Since such work is in respect of Airport, the same is specifically excluded from leviability of Service Tax under Section 65(105)(zzzza) of the Finance Act, 2004 and the definition of "Commercial or Industrial

Construction" is specifically excluded the services provided in respect of "Airports" , but the Adjudicating Authority did not consider the same.

3.8 In regard to services provided to Nagaland through CIDCO, the appellant undertook for construction of work of Nagaland State Guest House cum Emporium. The said building was constructed for the benefit of public of Nagaland, who visit Mumbai for medical and educational purpose also social and cultural activities. The said building is not constructed for any commercial or industrial use and not meant for profit earning. In this regard, a Certificate issued by the Executive Engineer, Nagaland Public Works Department, was discarded by the Adjudicating Authority without assigning any reasons.

3.9 With reference to the services provided to Assam Tourism Development Corporation Limited, it is his submission that the said services relates to construction of work of Tourist Cum Reception Centre, where Assam Tourism Development Corporation Limited provides amenities to the tourists, who visit Assam and is a Government building used primarily to provide support to tourists without profit motive.

3.10. Further, he submitted that the extended period of limitation is not invokable in the present facts and circumstances of the case as they took registration with the Department on 15.03.2007 and filed Service Tax Return regularly. In 2012, they have paid service tax on work done for NEDFI on 05.04.2012 and the Audit took place on 11/12.04.2012. Therefore, the show-cause notice issued on 21st July, 2014, is highly barred by limitation.

3.11 He therefore, prayed that the impugned order is to be set aside.

4. On the other hand, the ld.A.R. for the Revenue, submits that the appellant was registered with the Service Tax Department under the category of "Commercial and Industrial Construction Services" and they have admitted that the activity merits classification under "Works Contract Service". Therefore, they are liable to pay service tax under "Works Contract Service". Moreover, in the part of the period, they themselves paid the service tax and they admitted their service tax liability and post 30.06.2012, the appellant was liable to service tax in the regime of negative list. Therefore, the demand of service tax has rightly confirmed against the appellant.

5. Heard the parties and considered the submissions made from both the sides.

6. In this case, it is not in dispute that the appellant is providing the services along with materials. Therefore, the merits classification of the above services under "Works Contract Service" and no demand is raised against the appellant under "Works Contract Service". Therefore, following the decision of the Hon'ble Apex Court in the case of Larsen & Tourbro Limited reported in 2015 (39) STR 913 (S.C.), wherein the Hon'ble Apex Court has observed as under :

> "***24.*** *A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation*

contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

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41. *We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts."*

7. We hold that the merits classification of the impugned service is under "Works Contract Service" and no demand has been made under "Works Contract Service" as per the show-cause notice. Therefore, till

30.06.2012, we hold that the appellant is not liable to pay any service tax.

8. For the post 30.06.2012, the appellant has paid the service tax in respect of service to BSNL not contesting the same.

9. Further, we find that the issue before us has not been considered by the adjudicating authority in respect of construction of Guest House in the State of Nagaland Government, wherein the adjudicating authority has observed as under :

> *"4.28 I have perused the Certificate dated 28.02.2012 issued by the Executive Engineer, NPWD (Nagaland Public Works Department), Kohima and in this regard, I find that the construction in question carried out by the said notice was to the Nagaland Government through M/s CIDCO Limited. A certificate was issued by the Executive Engineer, NPWD (Nagaland Public Works Department), Kohima, wherein he mentioned that no commercial or industrial use of this building is involved that it is not for making any profit-earning. I have perused the certificate issued by Executive Engineer, NPWD (Nagaland Public Works Department), Kohima and find that mere submitting a Certificate from a Departmental Officer cannot be accepted as the proof that the said building is not for use for any commercial consideration."*

10. The adjudicating authority in the impugned order has observed that the certificate issued by Executive Engineer, NPWD (Nagaland Public Works Department), Kohima cannot be accepted as the proof that the said building is not for use for any commercial consideration.

11. It is very strange that the adjudicating authority has not accepted the said Certificate by only saying that the said Certificate cannot be accepted, but did not explain what other documents are required for consideration to find out the activity of construction, the said Guest

House is taxable or not ? Whereas the appellant has explained that the said Guest House is constructed for welfare activity of the Nagaland people who visit Mumbai for medical and educational purposes. The appellant has also explained the nature of the activity that the said Guest House is not for commercial and industrial use.

12. In that circumstances, we hold that the said Guest House constructed by the appellant for CIDCO, is not liable for service tax as the same is not used for commercial and industrial use. Therefore, the demand with reference to the said Guest House is also set aside.

13. In view of the above, we hold that as the appellant has admitted the service tax liability with reference to construction services provided to BSNL/Port w.e.f.30.06.2012 and paid the service tax thereon, the same demand is confirmed and rest of the demand confirmed under the impugned order, is set aside.

14. In that circumstances, no penalty is imposable on the appellant. Therefore, the penalty imposed on the appellant is set aside.

15. In view of the above, the appeal is allowed by modifying the impugned order.

(Operative part of the order was pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K.Anpazhakan)
Member (Technical)

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