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

Service Tax Appeal No. 417 of 2012

(Arising out of the Order-in-Original No. 04/ST/ADJ/COMMR/DIB/12 dated 31.05.2012 passed by Commissioner of Central Excise & Service Tax, Dibrugarh.)

M/s Associated Works,
B.V.F.C. Ltd., Factory, Namrup, P.O.- Parbatpur, Dist.- Dibrugarh, Assam-786623.

...Appellant (s)

VERSUS

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

. ...**Respondent(s)**

APPERANCE :
Shri S. K. Goyal, Chartered Accountant for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER No……76501/2023

DATE OF HEARING: 25.08.2023
DATE OF DECISION : 25.08.2023

PER K. ANPAZHAKAN :

M/s Associated Works (The Appellant), is a Partnership firm, providing taxable services under the categories of a) Work Contract Service, b) maintenance or Repair Service, c) Construction Services in respect of Commercial & Industrial Buildings and Civil Structures, d) business Support Services, e) Cab Operators and f) Erection Commissioning and Installation Services. Audit of the accounts of the Appellant was conducted for the period July 2007 to September 2010 and Audit Report dated 22.02.2011 was issued. As per the Audit Report, the Appellant has to pay an amount of Rs.50,37,496/- as Service Tax along with interest, for non-payment of Service Tax payable on contract receipts, under the categories of Erection, Commissioning and Installation Services, on the taxable amount of Rs.4,65,11,026/-received by them during the relevant period. The relevant extract (in tabular format) of the Audit Report is as follows:

Year	Taxable Amount	ST	Ed. Cess	S. & H.E. Cess	Total
2008-09	1,19,83,731	14,38,047	28,760	14,380	14,81,187
2009-10	3,00,44,540	30,04,454	60,089	30,044	30,94,587
2010-11 (upto Sep, 2010)	44,82,755	4,48,275	8,965	4,482	4,61,722
Total	4,65,11,026				50,37,496

3. The Ld. Commissioner, Dibrugarh issued a Show Cause Notice dated 14.12.2011, demanding service tax of Rs.50,37,496/- along with interest and penalty. The said Notice was adjudicated vide Order-in-Original dated 31.05.2012, confirming the demand of service tax along with interest and equal amount of tax as penalty under Section 78 of the Finance Act, 1994. Aggrieved against the impugned order, the Appellant filed the present appeal.

4. In their submissions, the Appellant denied to have provided any taxable service to M/s Rajsekhar Construction Pvt. Ltd. They stated that they were Consortium partners with M/s Rajshekhar Construction Pvt. Ltd., for execution of Work Order Doc No. PSER: SCT: -013:09(Rev 00), Ref. No. PSER: SCT: LKW-C937:09:WO:1638, issued by BHEL. M/s Rajsekhar Construction Pvt. Ltd., was the Lead consortium Partner and they had provided taxable services as Consortium Partners to BHEL along with M/s Rajsekhar Constructions Pvt. Ltd. As per the agreement, the Lead Consortium Partner, M/s Rajseskhar Constructions Pvt. Ltd., have fully discharged the Service Tax payable for the services rendered to BHEL, as per the above work order.

5. Regarding service rendered as a sub-contractor to other main contractors namely, M/s.L&T, M/s Stewards & Lloyds Ltd., & M/s Tata Projects, they stated that they have not realized any service tax from the main contractors. As the main contractors have paid service tax on the fill value of services realized by them, the sub-contractors are not liable to pay service tax again.

6. The Appellant further stated that the entire issue was raised by the department based on the Audit Report dated 22.02.2011. They have not suppressed any information from the department and hence the demand is not sustainable on the ground of limitation also. Accordingly, they prayed for setting aside the impugned order.

7. The Ld. A.R cited CBEC Circular No. 96/7/2007 ST dated: 23.08.2007 and contended that as per the Circular, service rendered by a sub-contractor is liable to service tax, even if the main contractor pays service tax on the full value. Accordingly, he contended that the Appellant rendered taxable service to their Principal Contractor namely M/s L&T, Rajshekhar Construction, S&L Kolkata, TATA Project West Bengal, and hence they were liable to pay service tax as a sub-contractor, as per the Master Circular cited above.

8. Heard both sides and perused the appeal records.

9. From the facts on record, we observe that the appellant has rendered two types of services. In the first category, they have rendered services as a consortium partner, along with the Lead Partner, M/s Rajshekhar Constructions, to BHEL. In the second category, they rendered services as a sub-contractor to the main contractors namely M/s L&T, S&L Kolkata, TATA Project West Bengal. We observe that the impugned order considered the Appellant as sub-contractor on both these categories and confirmed service tax by citing the Master Circular No. 96/7/2007 ST dated: 23.08.2007, issued by Board. we observe that there is a distinction in both the above categories, which has not been considered in the impugned order.

9. In case of services rendered to BHEL, the Appellant was a consortium partner. In this case, the Appellant and the Lead Consortium Partner M/s Rajshekhar Constructions Pvt. Ltd. together were the service providers and BHEL was the service receiver. Establishment of a Consortium Agreement was necessitated because the Lead Consortium Partner was qualifying all criteria for allotment of the work by BHEL, except the criteria of Fabrication and Erection of structural works. Accordingly, BHEL allowed the First Bidder M/s Rajshekhar Constructions Pvt. Ltd. to form a Consortium and to meet the qualifying criteria. Accordingly, a 'Consortium' was formed with M/s Rajshekhar Constructions Pvt. Ltd as the Lead Partner and the Appellant as an individual partner. Both the Consortium partners are jointly and severally liable for execution of the work order. As per the consortium agreement, no bill will be paid to individual consortium partners. The Lead Partner M/s Rajshkhar Constructions Pvt. Lts raised all the bills to BHEL along with service tax and deposited the service tax collected by them in the Government account. After depositing service tax, they retained their share of the revenue for the works rendered by them and paid the balance to the Appellant for their share of services. From this arrangement, it is evident that the Lead Partner has collected and paid service tax on the full value received for the services rendered to BHEL. The Appellant has rendered their respective share of the work order to BHEL, but service tax pertains to that portion of service was also paid by the Lead Partner, as they have raised the bills on the total value with BHEL. In view of the above, we hold that the Appellant were not sub-contractors in this case and hence the clarification issued by the Board Vide Master Circular No. 96/7/2007 ST dated: 23.08.2007 is not applicable in this case. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable.

10. The next category of demand in the impugned order is the liability of service tax on the Appellant for the services rendered to main contractors namely M/s L&T, S&L Kolkata, TATA Project West Bengal. In these cases, the Appellant has also not denied the fact that they have rendered services to the main contractors namely, M/s L&T, S&L Kolkata, TATA Project West Bengal. Their contention is that since the main contractors have paid service tax on the full value, they were not liable to service tax. Their main defense is that they have not collected service tax from the main contractors and hence the demand of service tax on them is not sustainable.

11. We observe that Board has issued Circular No. 96/7/2007 ST dated: 23.08.2007, wherein the liability service tax by the sub-contractor on the services rendered to the main contractor has been clarified. The relevant part of the Circular clarifying the said issue is reproduced below:

999.03 / 23.08.07	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

12. From the above, clarification issued by Board, we observe that a sub-contractor is liable to pay service tax, even if the main contractor pays service tax on the full value, as the service tax paid by the sub-contractor will be

available as input service to the main contractor. Relying on the above Circular issued by the Board, we hold that the Appellant, as sub-contractor is liable to pay service tax on the services rendered by them to the main contractor. Accordingly, we uphold the demand confirmed in the impugned order on this count.

13. Regarding penalty imposed on them, the Appellant stated that the entire issue was raised by the department based on the Audit Report dated 22.02.2011. They have not suppressed any information from the department and hence extended period not invocable in this case. Accordingly, they contended that the penalty imposed in the impugned order under Section 78 of the Finance Act, 1994 is not sustainable.

14. We observe that there were contradicting decisions of Tribunal, before issue of the Circular No. 96/7/2007 ST dated: 23.08.2007 clarifying the issue. The clarification issued also clearly states that the service tax paid by the Appellant would be available as credit to the main contractor. Thus, the entire issue is revenue neutral. We observe that the Appellant has not collected the service tax from the main contractors. Hence, we observe that there was no mensrea established on the part of the Appellant to evade payment of service tax. Section 80 of the Finance Act, 1994, states that penalties can be waived off if the assessee in question can furnish reasonable evidence or proof that can provide justification of failure to make payment of service tax. We observe that the Appellant has clearly justified their reasons for non-payment of service tax. Accordingly, we hold that this is a fit case for waiver of penalty under section 80 of the Finance Act, 1994, which existed during the relevant period under dispute. Accordingly, we waive the penalty imposed in the impugned order.

15. In view of the above discussion, we set aside the demand of service tax in the impugned order, on the services rendered by the Appellant as a

consortium partner to BHEL. The demand of service tax, along with interest, as a sub-contractor to other main contractors (Other than services rendered to BHEL) in the impugned order is upheld. All the penalties imposed on the Appellant are waived as per Section 80 of the Finance Act, 1994, which existed during the relevant period under dispute. The appeal is disposed of on the above terms.

(Dictated and pronounced in the open Court)

Sd/-

(Ashok Jindal)
Member (Judicial)

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

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