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

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.75519 of 2014

(Arising out of Order-in-Appeal No.03/SH/CE(A)/GHY/14 dated 03.01.2014 passed by Commissioner (Appeals), Customs & Central Excise, Guwahati.)

M/s. ABCI Infrastructure Limited
(Club Road, Silchar-788801.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Shillong

.....Respondent

(M.G. Road, Shillong-793001.)

APPEARANCE

Shri Rajeev Agarwal, Advocate & Shri Amit Jain, C.A. for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

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

FINAL ORDER NO. 76720/2023

DATE OF HEARING : 14 September 2023
DATE OF DECISION : 14 September 2023

Per : ASHOK JINDAL :

The appellant is a private limited company and entered into the execution of works namely works contract, maintenance & repair, supply of tangible goods and as a service recipient under the taxable service 'transportation of goods by road'.

2. The facts of the case are that the proceedings were initiated against the appellant for non-payment of service tax under the

category of commercial and industrial construction services, works contract etc.. On being pointed out, the appellant deposited applicable service tax along with interest on 07-09/01/2010. Thereafter show cause notice was issued to the appellant on 09.08.2010 to propose demand of service tax for their activities and the show cause notice was adjudicated, demand of service tax was confirmed. Against the said orders, the appellant is before us.

3. The appellant is not contesting the services against confirmation of duty against them under the category of works contract, maintenance and repair, supply of tangible goods etc.. With regard to the demand of service tax on services provided to Bharat Heavy Electricals Limited (BHEL) for construction of Thermal Power Plant, the appellant submitted that the said services merit classification under Works Contract Services and not under Commercial Industrial Construction Services. It is his submission that the said service had qualified as works contract service as they were providing that service along with material, therefore, merit classification as works contract service, not 'commercial or industrial construction service'. It is further submitted that demand has been quantified by extending the benefit of abatement of 67% which is available where the contract also involves supply of goods. To support his case he relied on the decision of National Building Construction Corporation Ltd. v. CCE, Shillong [2022 (66) GSTL 476 (Tri.-Kol.)]. Therefore, he submits that the demand confirmed under the category of commercial or industrial construction service has to be set aside. He fairly conceded that the appellant has short paid an amount of Rs.12,525/- under the works contract service due to some calculation error and the appellant is ready to pay the same along with interest.

4. He also submitted that in the facts and circumstances of the case as they have paid service tax on pointing out by the department and thereafter show cause notice has been issued by invoking extended period of limitation, in that circumstances, penalty be waived by giving benefit of section 80 of the Finance Act, 1994.

5. Heard the parties.

6. Considering the fact that demand confirmed against the appellant under the category of works contract service, maintenance & repair service, supply of tangible goods, goods transport agency etc. are not contested, therefore, the same are confirmed and the same has been paid by the appellant except a demand of Rs.12,525/-, which is payable by the appellant along with interest.

7. The appellant is contesting only a demand of Rs.30,11,274/- confirmed under the category of commercial and industrial construction service.

8. We find that the appellant is providing the said service along with material, in that circumstances, the appropriate classification of the activity undertaken by the appellant is 'works contract service', as held by the Hon'ble Apex Court in the case of CCE & C, Kerala v. Larsen & Toubro Ltd. [2015 (39) STR 913 (SC)], 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.

....

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."*

9. Therefore, we hold that the appellant is not liable to pay service tax under commercial or industrial construction service. Therefore, demand of service tax of Rs.30,11,274/- is set aside.

10. We further take note of the fact by giving benefit of section 80 of the Finance Act, 1994, we refrain from imposing penalty on the appellant.

11. Accordingly, penalty on the appellant is not imposable as they have paid the entire amount of service tax along with interest before issuance of show cause notice.

12. In view of the above, we pass the following order:-

(a) The demand confirmed by the respondent under the category of works contract service, maintenance & repair, supply of tangible goods, goods transport agency service are confirmed along with interest and the same has been paid by the appellant except the amount of Rs.12,525/-, which is payable by the appellant along with interest and no penalty is imposable on the appellant. The appellant shall pay the amount of Rs.12,525/- along with interest within 30(thirty) days of the receipt of this order.

In these terms, the appeal is allowed with consequential relief, if any.

(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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