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

Service Tax Appeal No. 80 of 2011

(Arising out of Order-in-Original No. 09/Commr/ST/BOL/2011 dated 18.02.2011 passed by Commissioner of Central Excise & Service Tax, Bolpur.)

M/s C. P. Construction Co. (Partnership)
Shyama Building, Bhiringi, G.T.R. Road, Durgapur-713213.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Bolpur.
Sian, Bolpur, Birbhum, West Bengal-731204.

. ..**Respondent(s)**

APPERANCE :
Shri Sumit Ghosh & Mr. Souradeep Majumdar, both Advocate for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77512/2023

DATE OF HEARING : 10.10.2023

DATE OF PRONOUNCEMENT: 21.11.2023

PER K. ANPAZHAKAN :

The Appellant is a Partnership Firm, registered with the Service Tax department under Commercial or Industrial Building and Civil Structures' and 'Maintenance or Repair Services'. The examination of audited financial accounts of the Appellant for the periods 2005-06, 2006-07, 2007-08 and 2008-09, copies of work order for the relevant period, payment receipts and ST-3 returns for the material period, revealed that the Appellant has received certain sum from various clients on which no Service Tax was paid for the respective years. On the basis of the said verification, a demand of Service Tax of Rs.56,46,806/-, including Cess was raised on the Appellant vide Show Cause Notice dated 13.10.2010. The Notice was adjudicated by the Commissioner, Bolpur vide impugned order dated 18.02.2011, wherein he has confirmed the service tax of Rs. 54,97,708/- demanded along with interest and imposed equal amount of tax as penalty under Section 78 of the Finance Act, 1994. The balance demand in the Notice was dropped. Penalties were also imposed under Section 76 and 77((2) of the Finance Act, 1994. Aggrieved against the impugned order, the Appellant filed this appeal.

2. The Appellant stated that in the impugned order the demand of service tax has been confirmed under two categories namely, Erection and Commissioning Service and Supply of Tangible Goods Service. Regarding the demand confirmed under Erection and Commissioning Service, the Appellant stated that though they were registered under 'Commercial or Industrial Construction Service, their activities are more akin to 'Erection and Commissioning Service' which is evident from the work orders produced. However, they contended that the determination of service tax on the gross value without giving the abatement was not correct. They are entitled to 67% abatement on the gross value and liable to pay service tax only on the balance 33% of the gross value vide Notification No. 19/2003-ST dated 21.08.2003 and subsequent Notification No.01/2006-ST dated 01.03.2006, as they have fulfilled all the conditions stipulated therein. In the impugned order, the adjudicating authority has not allowed the abatement on the ground that the Appellant has not produced any evidence to substantiate their claim that the bills raised were inclusive of the value of goods and materials used in providing the service.

3. In support of their contention, the Appellant cited Board Circular No.80/10/2004- and contended that these materials are normally procured from the market and are not covered under the duty paying documents. A general exemption is available to goods sold while providing service (Notification No.12/2003-ST) but the exemption is subject to the condition of availability of documentary proof specially indicating the value of the goods sold. However, in the case of composite contracts, bifurcation of value of goods sold is often difficult. Considering these facts, an abatement of 67% has been provided in the case of composite contracts where the gross amount charged includes the value of material cost. This would, however, be optional subject to

the condition that no credit of input goods, capital goods, input services and no benefit under notification no.12/2003-ST , towards cost of goods are availed. The appellant submits that they are eligible for the abatement as they satisfied all the conditions stipulated in the Notification.

4. Regarding charging of Service Tax under the category of 'Supply of Tangible Goods Service' (on Crane Hiring Charges), the Appellant contended that a perusal of the work orders clearly reveals that the appellant was not in possession and effective control of the entire crane and allied machineries, which were handed over to the transferee and the Appellant had no control over the machineries after handing it over to them. They further asserted that they are registered under the West Bengal Value Added Tax, 2003 under transfer of right to use to be treated as 'deemed sale' and exempted from Service Tax. Section 2(39) of the WBVAT Act deals with "sale" which means any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes-

(a)….

(b)….

(c) any transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration,

(d)….

(e)….

and such transfer, delivery, or supply of any goods shall be deemed to be a sale of those goods by the person or unincorporated association or body of persons making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery, or supply is made, but does not include a mortgage, hypothecation, charge or pledge. The Appellant contended that as the transaction involved was of 'deemed sale', no service tax was payable on the 'Crane Hiring Charges' under the category of 'Supply of Tangible goods service' for the period 2008-09.

5. The Appellant also contested the issue on limitation. They stated that the department itself had doubt about the classification of the service

and demanded service tax under the category of 'Financial Leasing Service' foe the period prior to 16.05.2008. Accordingly, they contended that extended period not invocable in this case.

6. The Ld. A.R. reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal files.

8. We observe that in the impugned order, the demand of service tax has been confirmed under two categories namely, Erection and Commissioning Service and Supply of Tangible Goods Service. Regarding the demand confirmed under Erection and Commissioning Service, the Appellant has not challenged the classification of service. They contended that they are entitled for 67% abatement as provided Notification No. 19/2003-ST dated 21.08.2003 and subsequent Notification No.01/2006-ST dated 01.03.2006. We find that the adjudicating authority has not allowed the abatement only on the ground that the Appellant has not produced any evidence to substantiate their claim that the bills raised were inclusive of the value of goods and materials used in providing the service.

9. We observe that Board has issued Circular being No.80/10/2004-clarifying the issue. In the said Circular it has been clarified that these materials are normally procured from the market and are not covered under the duty paying documents. In the case of composite contracts, bifurcation of value of goods sold is often difficult. Considering these facts, an abatement of 67% has been provided in the case of composite contracts where the gross amount charged includes the value of material cost. The Circular also clarifies that a general exemption is available to goods sold while providing service under Notification No.12/2003-ST, but the exemption is subject to the condition of availability of documentary proof specially indicating the value of the goods sold. From the Circular cited above, we observe that if a service provider wanted to avail abatement of actual material used in providing service as per Notification 12/2003, they have to provide all the bills evidencing the sale of material. However, in a composite contract involving material and service, it is not required to submit the bills evidencing sale of the materials used in providing the service to avail the abatement of 67%. It is enough if the terms of the Contract indicate

that materials also involved in providing the service and the bill raised includes the material cost also. A perusal of the contract indicate that the 'Erection and commissioning Service' rendered by the Appellant include supply of materials also and there was no separate charges raised for the materials used in providing the service. Thus, the we find that the terms of the contract clearly indicate that the 'Erection and commissioning' service rendered by the Appellant in the present case involves supply of materials and the bills raised by the Appellant include the material cost also. In view of the above we hold that the Appellant is eligible for 67% abatement and liable to pay service tax only on 33% of the value of the service. In the impugned order, the adjudicating authority has demanded service tax on the gross value without giving the 67% abatement. Thus, we find that the demand confirmed in the impugned order without giving 67% abatement is not sustainable and hence we set aside the demand pertains to 67% of the value confirmed in the impugned order.

10. Regarding demand of service tax on 'Crane Hiring ' charges under the category of 'Supply of tangible Goods service', we observe that initially the Notice was issued demanding service tax on 'Crane hiring' charges under Financial Leasing service up to 15.05.2008 and under 'Supply of tangible goods' service w.e.f.16.05.2008. The adjudicating authority dropped the demand under 'Financial Leasing service' for the period up to 15.05.2008 on the ground that option to own the cranes at the end of the lease period is an essential ingredient to demand service tax under 'Financial Leasing' which is not available in this case. After examining the work orders for supply of the cranes he concluded that the 'Crane Hire charges' collected by the Appellant is rightly chargeable to service tax under the category of 'supply of tangible goods' service w.e.f.16.05.2008 and confirmed the demand only for the period after 16.05.2008. Aggrieved against the confirmation of demand on 'Crane Hiring' charges' the Appellant contended that the transaction involved is of 'deemed sale' and hence not liable to service tax. The contention of the Appellant is that they have handed over possession and effective control of the cranes to transferee and they have no control over the cranes after handing over the same to the contractor. Thus, it is their

contention that the contract should be construed as 'deemed sale' not liable to service tax.

11. We find that the adjudicating authority has categorically examined the terms and conditions of the contracts for 'Crane Hiring 'and confirmed the demand under 'Supply of tangible Goods service' in the impugned order. From the contracts, we find that

(i) The rates are quoted on per month basis.

(ii) The Appellant retained the right to discontinue the service at any point of time.

(iii) The authorized Representative of the appellant was at the site to supervise the operation of the crane

(iv) The contract is applicable only for a specific period mentioned in the contract.

(v) One crane operator and two rigging helpers were sent along with the crane

12. The terms and conditions mentioned above clearly indicate that the Appellant has not transferred possession and effective control of the cranes to the transferee. They have only transferred the 'right to use' the cranes to the transferee. As per Section 65(105)(zzzzj), service provided in relation to machinery and equipments for use, without transferring the right of possession and effective control of the machinery is liable to service tax under the category of 'Supply of Tangible Goods service' w.e.f.16.05.2008. As per the terms and conditions of the contract discussed above, we observe that the service of 'Crane hiring' rendered by the Appellant falls within the ambit of 'Supply of tangible Goods service' as defined under Section 65(105)(zzzzj) of the Finance Act, 1994. Accordingly, we hold that the adjudicating authority has rightly confirmed the demand of service tax on 'Crane hiring Charges' under the category of 'Supply of Tangible Goods service' w.e.f 16.05.2008.

13.Regarding invoking extended period to demand service tax on 'Crane Hiring Charges', we find that the Appellant has disclosed the income under the head 'Crane Hiring charges' in the Balance Sheet. The demand has been raised based on the details available in the Balance Sheet. Further, we find that the department itself was doubtful about the category of service under which it is taxable. We observe that the Notice was issued demanding service tax on 'Crane hiring' charges under Financial Leasing service up to 15.05.2008 and under 'Supply of tangible goods' service w.e.f.16.05.2008. Later on adjudication the demand for the period prior to 16.05.2008 was dropped. When there was confusion about the category under which 'Crane Hiring Charges' collected by the Appellant was chargeable to service tax' the Appellant cannot be faulted for not registering and paying service tax under the category of 'Supply of tangible Goods Service' immediately w.e.f 16.05.2008. We find that the Appellant disclosed the income on 'Crane Hiring' in the Balance Sheet and not suppressed any information. Thus, we hold that extended period is not invocable and the demand is to be restricted to normal period of limitation. Accordingly, we confirm the demand on 'Crane Hiring Charges' for the normal period of limitation under 'Supply of tangible Goods Service' along with interest. Since, suppression of fact with intention to evade payment of tax has not been established, no penalty imposable under section 78 of the finance Act, 1994. As the ingredients for imposing penalty under section 76 does not exists in this case, no penalty imposable under section 76 of the Finance Act, 1994. Since, the Appellant has not taken registration and filed return for the 'Supply of tangible goods service', the penalty imposed under section 77(2) is sustained.

14. In view of the above discussion, we pass the following order:

(i) The Appellant is eligible for abatement on the gross value in respect of the 'Erection and Commissioning' service and the demand confirmed in the impugned order without extending the 67% abatement is set aside.

(ii) The demand of service tax on 'Crane Hiring' Charges is upheld for the normal period of limitation along with interest under 'Supply of tangible Goods service. The demand confirmed on this count for the extended period of limitation is set aside.

(iii) The penalties imposed under Sections 76 and 78 of the Finance Act, 1994 are set aside. The penalty imposed under section 77(2) of the finance Act, 1994 is upheld.

(iv) The appeal filed by the Appellant is disposed on the above terms.

(Pronounced in the open court on……21.11.2023)

Sd/-
(R. Muralidhar)
Member (Judicial)

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

Tushar