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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.16 of 2012

(Arising out of Order-in-Original No.33/COMMR/ST/KOL-2011-12 dated 27.09.2011 passed by Commissioner, Service Tax, Kolkata.)

M/s. Gannon Dunkerley & Company Limited
(23A, Netaji Subhas Road, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri Sudip Bhagat, C.A. for the Appellant (s)
Shri J.Chattopadhyay, Authorized Representative for the Revenue

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

FINAL ORDER NO 77557/2023

DATE OF HEARING : 21 November 2023
DATE OF DECISION : .

Per : K. ANPAZHAKAN :

The present appeal has been file by the Appellant M/s Gannon Dunkerley & Company Ltd. against the impugned Order-in-Original dated 27.09.2011, wherein the Ld. Commissioner has confirmed Rs.1,29,17,221/- along with interest and penalty.

2. In the impugned order the demands have been confirmed under various heads. The Appellant has summarized the demands confirmed and the points for consideration by this Tribunal as below:

Particulars	Amount (in Rs.)	Remarks	Point of Consideration before Hon'ble CESTAT
a. Failure to Pay Service Tax on receipt of Advance during the FY 2008-09 .	6,09,944.00	Paid vide GAR 7 challan No - 50013 dated 24.12.2019	Amount paid alongwith Interest amounting to Rs. 116658/- prior to issusance of SCN dated 19.04.2011, also considered in SCN.
b. Failure to on receipt of Advance on 15.11.2008 and on 15.03.2009	5,53,663.00	Adjusted thorugh CENVAT Credit	Amount paid alongwith Interest amounting to Rs. 65325/(Rs. 41303 + Rs. 24022)- prior to issusance of SCN dated 19.04.2011, also considered in SCN.
c. Short payment of service tax in terms of Rule 6 of the Service Tax Rules, 1994	56,58,835.00	Amount paid thorugh various GAR 7 Challan	Amount paid beofre issuance of SCN and the same has been considered in SCN
d. Short payment of Service tax during the period of FY 2006-07 and 2007-08	28,99,880.00	Not Paid	Service Provided prior to change in Rate of Duty and Invoices Raised prior to change in Rate of Duty. Hence there should be no Demand of Tax.
e. Short payment of service tax during the period from 23.08.2006 to 27.03.2008	2,67,141.00	Paid amount Rs. 277621/- and Interest amounting to Rs. 69227 on 04.02.2010	Amount paid before issuance of SCN but the same has not been considered in SCN. There should be no invocation of Extended Period.
f. Non-payment of service tax during the period of FY 2007-08 for providing service as Sub-contractor.	23,08,763.00	Not Paid	Non payment of Tax due to Sub-contracting. Principal contractor paid due taxes.
g. Short payment of service tax during the period of FY 2007-08 .	6,18,985.00	Not Paid	Non payment of Tax due to Availing Composition Scheme. In SCN, benefit of Composition Scheme has been denied due to Non intimating Department
Total	1,29,17,221.		

3. The Appellant submits that in respect of the demands confirmed at (a),(b),(c) and (e) above, the entire service tax along with interest has

been paid before issue of the Show cause Notice. Hence, as per Section 73(3) of the Finance Act, 1994, show cause notice should not have been issued for this demand. The demands should not have been confirmed by invoking extended period and no penalty imposable on this demand.

4. The demand mentioned at (d) above has occurred due to change in rate of duty. The Appellant submits that the service was provided prior to change in rate of duty and Invoices have also been raised prior to change in rate of duty. Hence there should be no demand of tax.

5. Regarding the demand of Rs.23,08,763/- confirmed at (f) mentioned above, the Appellant submits that during the period 2007-08 they have received a sum of Rs. 1,86,79,310/- from Simplex Project Limited and Tata Projects Limited, for providing service as a sub-contractor and in both the cases, work orders executed specifically provides that they don't have to pay service tax as the same has been paid by the principal contractor namely Simplex Project Limited and Tata Projects Limited. Accordingly, the Appellant submits that when the main contractor has discharged service tax liability, then no demand can be imposed on the sub-contractor. In support of this contention, they cited the following decisions:

1. Power Mech Projects Ltd Vs. Commissioner of Customs, Guntur **[2017(48) STR 165 (Tri – Hyd)]**
2. Visesh Engineering Co Vs. Commissioner of Customs, Ex & ST, Guntur **[2016(43) STR 232 (Tri – Hyd)]**

6. Regarding the demand of Rs.6,18,915/- confirmed at (g) mentioned above, the Appellant submits that the demand arises due to payment of service tax under composition scheme for the period of July 2007 to March 2008 and non-complying the Notification No 32/2007 dated 22.05.2007. They have intimated the department regarding payment of Service tax under composition scheme vide letters dated 08.10.2007 and 02.07.2008. But in the impugned SCN, it has been alleged that they have paid service tax under the composition scheme

without exercising the option, which is factually not correct. The Appellant submits that the Ld. Commissioner while passing the OIO has rejected their intimation letter by stating that they failed to establish conclusively that options were exercised in terms of Rule (3) of the Works Contract (Composite Scheme for payment of Service Tax) Rule 2007 before payment of service tax on the bill values. In respect of the same, the Appellant submits that they have intimated the department regarding payment of service tax prior to the payment of service tax except in one case. In that case also they have intimated the same upon payment. **Rule 3(1)** of the scheme gives an option to the person liable to pay service tax to discharge their service tax liability in terms of the scheme by paying an amount equivalent to 2% of the gross amount charged for the works contract. The intention of the scheme is to give an option to the provider of taxable service to discharge their service tax liability by paying an amount equivalent to 2%. No procedure has been laid down under the Rule and there is no statutory form for exercise of such option. In the absence of statutory format, the option can be exercised by paying the service tax equivalent to 2% of the gross amount charged for the works contract. The payment of an amount equivalent to 2% of the gross amount charged for the works contract implies that they have opted for the composition scheme. The Appellant further submits that they have given the service tax rate wise breakup details in the ST-3 returns filed by them and indicated that service tax has been paid at the rate of 2% under composition scheme. The assessing officer has accepted the return submitted by them and not raised any objection of any short payment of service tax in respect of such contracts. This indicates that the department has accepted that the Appellant has availed the option under composition scheme to discharge the service tax liability. In this regard, the Appellant cited the decision in the case of ***ABL Infrastructure Private Limited*** **v.** ***Commissioner of Central Excise, Nashik*** **2015 (2) TMI 801 CESTAT Mumbai/*2015 (38) S.T.R. 1185 (*Tri - Mum.)**. Thus, filing the return and paying tax at the compounded rate of 2% is sufficient compliance of exercise of option under the scheme and therefore the subject contracts for which tax had been remitted by the Appellant at the rate of 2% is permissible and acceptable under law. Accordingly, they contended that the demand confirmed in the impugned order on this count is not sustainable.

7. The Ld. D.R. reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal documents.

9. We observe that that in respect of the demands confirmed at (a),(b),(c) and (e) mentioned in Para 2 supra, the entire service tax along with interest has been paid before issue of the Show cause Notice. Thus, as per Section 73(3) of the Finance Act, 1994, no need to issue show cause notice for this demand. Also, the department has not brought in any evidence on record to substantiate the allegation of fraud, collusion, suppression or misrepresentation of fact. Thus, we hold that extended period cannot be invoked in respect of these demands and hence no penalty imposable on this demand. Accordingly, we set aside the penalty imposed on these demands.

10. We observe that the demand mentioned at (d) in Para 2 supra has occurred due to change in rate of duty. We observe that the service was provided by the Appellant prior to change in rate of duty and Invoices have also been raised prior to change in rate of duty. The recovery of the amount after the change in the rate of duty does not mean that the revised rate would be applicable for the services rendered prior to the rate change. This view has been held in the case of Commissioner of Service Tax Vs. Consulting Engineering Services (I) Pvt. Ltd [2013 (30) STR 586 (Del), the relevant portion of the decision is reproduced below:

> *7. In the absence of any Rules, we will have to examine as to what is the taxable event. The taxable event as per the Finance Act, 1994 is the providing of the taxable service. In the present case, we find that not only were the services admittedly provided prior of 14-5-2003 but also the bills have been raised prior to 14-5-2003. The only thing that happened after 14-5-2003 was that the payments were received after*

> *that date. That, in our view would not change the date on which the taxable event had taken place. Since the taxable event in the present case took place prior to 14-5-2003, the rate of tax applicable prior to that date would be the one that would apply. In the present case, the rate of 5% would be applicable and not the rate of 8%. Consequently, we answer the question in favour of the respondent and against the appellant.*

11. By following the decision cited above we hold that the demand confirmed by adopting the revised rate of duty is not sustainable. Accordingly, we set aside the demand confirmed on this count along with interest and penalty.

12. Regarding the demand of Rs.23,08,763/- confirmed at (f) mentioned at Para 2 supra, we observe that the Appellant has provided service as a sub-contractor. The work orders executed specifically provides that they don't have to pay service tax as the same has been paid by the principal contractor namely Simplex Project Limited and Tata Projects Limited. The submission of the Appellant is that when the main contractor has discharged service tax liability, then no demand can be imposed on the sub-contractor. They referred Notification 1/2006-ST which provides abatement in respect of construction service, provided no Cenvat credit is taken. The submission of the Appellant is that payment of service tax by both sub-contractor and main contractor would lead to double taxation. The Appellant cited the following decisions in support of their argument that sub contractor is not liable to pay service tax when the main contractor pays service tax on the full value.

1. Power Mech Projects Ltd Vs. Commissioner of Customs, Guntur **[2017(48) STR 165 (Tri – Hyd)]**
2. Visesh Engineering Co Vs. Commissioner of Customs, Ex & ST, Guntur **[2016(43) STR 232 (Tri – Hyd)]**

13. We observe that the adjudicating authority has relied on the Board circular 96/7/2007-ST dated 23.08.2007 wherein it has been clarified that sub-contractor is also liable to pay service tax even if the main contractor pays service tax. We observe that this clarification was

issued on 23.08.2007. Thus, on merit we do not agree with the submission of the Appellant. However, we observe that prior to this clarification, there were confusion about the liability of sub-contractor to pay service tax when the main contractor pays service tax on the full value. Also, the service tax paid by the sub contractor would be available as credit to the main contractor. In this case we find that the main contractors Simplex Project Limited and Tata Projects Limited have paid service tax on the full value. Further, we find that the demand is hit by limitation. The demand in this case pertains to the period 2007-08 and the show cause notice was issued on 19.04.2011, beyond the normal period of limitation. The department has not brought in any evidence to substantiate the allegation of suppression. Thus, we observe that the demand is hit by limitation. Accordingly, we hold that the demand confirmed in the impugned order by invoking extended period is not sustainable. In view of the above discussion, we set aside the demand confirmed in the impugned order on this count along with interest and penalty.

14. Regarding the demand of Rs.6,18,915/- confirmed at (g) mentioned in Para 2 supra, we observe that the demand has arisen due to payment of service tax by the Appellant under composition scheme for the period of July 2007 to March 2008 and non-complying the Notification No. 32/2007 dated 22.05.2007. We observe that the Appellant has intimated the department regarding payment of Service tax under composition scheme vide letters dated 08.10.2007 and 02.07.2008. The Ld. Commissioner while passing the OIO rejected their intimation letters on the ground that they have failed to exercise the option before payment of service tax. The Appellant submits that they have intimated the department regarding payment of service tax prior to the payment of service tax except in one case. In that case also they have intimated the same upon payment. We observe that no procedure has been laid down under the Rule and there is no statutory form for exercising the option for availing the composition scheme. In the absence of statutory format, the option can be exercised by paying

the service tax equivalent to 2% of the gross amount charged for the works contract. Accordingly, we hold that the payment of an amount equivalent to 2% of the gross amount charged for the works contract implies that they have opted for the composition scheme. This view has been held by the Tribunal Mumbai in the case of *ABL Infrastructure Private Limited* v. *Commissioner of Central Excise, Nashik* 2015 (2) TMI 801 CESTAT Mumbai *2015(38)S.T.R.1185(*Tri-Mum.). The relevant portion of the decision is reproduced below:

> 6.3 Having viewed that the appellant have executed the new contract w.e.f. 5-6-2007 and the activity is eligible to be classified as a Works Contract Service, we may now examine whether they are eligible for paying duty at the lower rate under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The objection of Revenue is that the appellant has not fulfilled the condition of Rules. For convenience, Rule 3 is extracted below: -
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> > "The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."
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> The above Rule requires that the provider who opts to pay tax under the Rule shall exercise such option prior to payment of Service Tax. We find force in the appellant's contention that the fact that they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-9-2007, the substantial benefit cannot be denied for procedural

deficiency of delay in opting for Works Contract Service by a specific declaration under Rule 3. More so, when no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme. Reliance is placed on the case of *Bridge and Roof Company* (supra), wherein it was held as under: -

> "After hearing both sides, duly represented by Shri Bipin Garg, learned Advocate appearing for the appellant and Shri K.K. Jaiswal, learned AR appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract. However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."

We have also seen Board's Circular and the judgment of *Nagarjuna Construction* (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 1-62007 and after 1-6-2007. In the present case, we have held above that the appellant was executing work in a new contract from 5-6-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax.

15. By relying on the decision cited above, we hold that the Appellant has exercised the option to avail the Composition Scheme for the period 2007-08. Accordingly, we hold that the demand confirmed in the impugned order along with interest and penalty is not sustainable, Accordingly, we set aside the same.

16. In view of the above we pass the following order:

(i) In respect of the demands confirmed at (a),(b),(c) and (e) mentioned in Para 2 supra, we set aside the penalties imposed under Section 78 of the Finance Act, 1994.

(ii) The demands confirmed in (d), (f) and (g) in Para 2 supra is set aside along with interest and penalty.

(iii) The impugned order is modified on the above lines.

(Order pronounced in the open court on 30.11.2023.)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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