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

Service Tax Appeal No. 117 of 2012

(Arising out of the Order-in-Original No. 20/ST/Ayukt/2011 dated 21.12.2011 passed by Commissioner of Central Excise & Service Tax, Patna.)

M/s Housing and urban Development Corporation Ltd.,
2nd Floor, Block-B/2, Mauryalok Complex Dak Bunglow Road, Patna-800001.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Patna,
C. R. Building, 2nd Floor, Birchand Patel Path, Patna-800001.

...**Respondent(s)**

APPERANCE :
Shri Sushil Kumar 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. 75455 / 2024

DATE OF HEARING : 06.03.2024
DATE OF DECISION : 06.03.2024

PER K. ANPAZHAKAN :

The present appeal has been filed against the impugned Order-in-Original No. 20/ST/Ayukt/2011 dated 21.12.2011 passed by Commissioner of Central Excise & Service Tax, Patna, wherein the Ld. Commissioner has confirmed the demand of Service Tax Rs. 90,63,761/- along with interest and imposed equal amount of tax as penalty. He also denied CENVAT Credit Rs.4,92,438/- along with interest and imposed equal amount of credit denied as penalty. Aggrieved against the confirmation of these demands, the appellant has filed this appeal.

2. The facts of the case are that the Appellant was appointed as an Executing Agency by Bihar Urban Development Agency vide MOU dated 08.01.2008, whereby they were required to execute the work of construction of Residential Complexes in the state of Bihar. For this purpose, they have received 8.5% of the project cost as consultancy agency fees and paid service tax under the category of 'Consulting Engineer Service'. However, the Department was of the view that the Appellant was liable to pay Service Tax on the full amount received by them from the Government of Bihar for executing the JNNURM (Jawaharlal Nehru National Urban Renewal Mission) Project under the category of 'Construction of Complex service' as defined under Section 65(105)(zzzh) of the Finance Act, 1994.

2.1. The Appellant availed and utilized CENVAT Credit of Rs. 4,92,438/- on Architectural Consultancy services received by them from the Architect Consultancy Firm M/s. Enarch Consultant Pvt. Ltd during the months October 2008, January 2009 and March 2009. The Department proposed to deny the credit of service tax on 'architectural Service' availed by the Appellant on the ground that the same is not covered within the definition of 'input service' in terms of Rule 2 of CENVAT Credit Rules, 2004.

2.2. Accordingly, a Show Cause Notice dated 08.10.2010 was issued to the Appellant collectively demanding service tax of Rs.1,92,19,262/- along with interest and penalty on the above issues.

3. The Notice was adjudicated by the Ld. Commissioner vide the impugned order dated 21.12.2011, confirming the demand of service tax of Rs.90,63,761/- along with interest. CENVAT Credit amounting to Rs.4,92,438/- was also ordered to be recovered. Penalties have been imposed under Sections 76,77 and 78 of the Finance Act, 1994 and under Rule 15 of the CENVAT Credit Rules, 2004.

4. The Appellant submits that they have not rendered the service of 'Construction of complex service'. The amount received by them towards construction of residential complexes have been disbursed to the contractors, who actually carried out the construction work. As an Execution Agency, they were eligible only for 8.5% of the cost by way of consultation charges. Accordingly, they submitted that they were not liable to pay service tax under 'Construction of Complex service' on the total amount of Rs. 7.04 crores received for the entire work. As they have already paid service tax on 8.5% of the project cost received under 'Consulting Engineer Service', they prayed for setting aside the demand confirmed in the impugned order on this count.

4.1. The Appellant has availed and utilized CENVAT Credit of Rs. 4,92,438/- on Architecture Consultancy services received by them. The Appellant submits that Architecture service received is an input service for the Consultant Engineer service rendered by them. Accordingly, they are eligible for the credit availed by them on the 'Architecture Service' as 'input service'.

5. The Ld. Authorized Representative appearing on behalf of the respondent reiterated the findings in the impugned order and contended that the Appellant has received the entire consideration for the construction service. Accordingly, he argued that they are liable to pay service tax on the full value received by them. He also contended that the Architecture Service received by the Appellant was meant for 'Construction Service' as such it is not an input service for 'Consulting Engineer service. Accordingly, he contended that the credit has been rightly denied in the impugned order.

6. Heard both sides and perused the appeal documents.

7. We observe that the demand of Rs.90,63,761/- has two parts. Rs.87,01,440/- has been demanded on an amount of Rs.7.04 crores received by the appellant as advance from the Bihar State Government in the month of April 2008 and the balance amount of Rs.3,62,321/- has been demanded on the differential value of taxable service of Rs.29,31,401/- during the period from 2005-06 to 2008-09.

7.1. We observe that the appellant has paid Service Tax on the advance of Rs.7.04 crores received from the Bihar State Government under the category of 'Consulting Engineer Service'. Thus, it is observed that the appellant has received 8.5% of the project cost as consultancy agency fees and paid service tax under the category of 'Consulting Engineer Service'. However, the Department was of the view that the Appellant was liable to pay Service Tax on the full amount received by them, under the category of 'Construction of Complex service' as defined under Section 65(105)(zzzh) of the Finance Act, 1994.

7.2. We have perused the MOU dated 08.01.2008 signed by the Appellant with Bihar State Urban Development Agency and the role of the Appellant as 'Executing agency' in the MOU. The scope of works assigned to the Appellant under the MOU are furnished below:

(i) Pre-construction stage - Preparing Detailed Project Report (DPR) highlighting various aspects of construction
(ii) Construction Phase - Prepare and issue Tender documents in accordance with DPR. Examine and evaluate the bids and conclude contract for execution of works. The Execution Agency shall get the works executed from the start of construction up to commissioning and handing over the project duly completed. The Executing Agency will provide expertise and experience in projects, to execute the entire work as per drawings and specifications.
(iii) Post-Construction Phase - Executing Agency shall ensure that the deployed contractor shall rectify all defects within the liability period.

7.3 From the above Terms of the MOU, we observe that the Executing Agency has not been assigned the work of actual construction, which has been done by the contractors. The role of the Appellant as an Executing Agency is to ensure that the works are executed as per drawings and specifications. They have to provide their expertise and experience for smooth completion of the projects. Accordingly, we hold that the Appellant has not rendered 'Construction of Complex Service'. The service rendered by the Appellant is rightly classifiable as 'Consulting Engineer Service' and the Appellant has rightly paid service tax on the 8.5% agency fees received, under this category. Accordingly, we hold that the demand of service tax along with interest and penalty confirmed in the impugned order under the category of 'Construction of Complex service' is not sustainable and hence we set aside the same.

7.4 We observe that the impugned order has confirmed the Service Tax of Rs.3,63,321/- on the differential value of Rs.29,31,401/- during the period 2005-06 to 2008-09. In the impugned order, the adjudicating authority has given a finding to work out this amount of Service Tax which is reproduced below:-

> *"14. In the SCN it is also alleged that during the period from 2005-06 to 2008-09 they suppressed the service value of Rs. 2,87,12,269/- resulting into short payment of service tax of Rs. 35,45,725/-. The noticee in their defence submitted that during the period covered under the instant SCN, they received service value of Rs. 6,59,59,001/- and they have shown Rs. 6,61,36,486/- in their ST-3 returns. Accordingly there is no suppression of taxable value on that count. On examination of relevant documents such as ledger and ST-3 returns, it has been found that the noticee has shown the value of taxable service of Rs. 7,80,079/-, Rs.44,99,460/-, Rs. 60,24,635/- and Rs. 5,48,32,312/- during the period 2005-06,2006-07,2007-08 and 2008-09 respectively in their ST-3 returns. Whereas as per Show Cause Notice they received Rs. 9,24,100/-, Rs. 43,11,815/-, Rs.3,45,92,883/- and Rs. 2,92,39,089/- during the year 2005-06, 2006-07, 2007-08 & 2008-09 respectively. Thus, during the period covered under the instant SCN they received Rs,6,90,67,887/- as per Show Cause Notice but they paid service tax on the service value of Rs.6,61,36,486/- and by this way they have not paid service tax on the value of service of*

Rs.29,31,401/- But in the Show Cause Notice the differential taxable value has been calculated as Rs. 2,87,12,269/- as against Rs. 29,31,401/- for the above mentioned four years. On examination of the calculation table given in the Show Cause Notice the reason is found in the table itself in as much as the differential value has been worked out during 2005-06 and 2007-08 on the basis of suppressed value of service declared in the ST-3 returns during these years in comparison to their actual service value received by them. But the excess declaration of value of service in their ST-3 returns during 2006-07 and 2008-09 in comparison to their actual receipts of taxable service value during these years has not been considered in the taxable value while calculating the total differential value and short payment of service tax thereon. Thus the method adopted for calculation of differential value in the service tax is not correct and fair and the actual differential value during these years is Rs. 29,31,401/- only which has not been disputed by the noticee in their defence reply or otherwise. Accordingly service tax of Rs. 3,62,321/- on the differential value of taxable service of Rs.29,31,401/- during the period from 2005-06 to 2008-09, along with interest is recoverable from the noticee under Section 73 and 75 of the Act."

7.5. We observe that this calculation has been done unilaterally by the adjudicating authority without giving an opportunity to the appellant to explain the actual difference. Accordingly, we find that it is required to remand it back to the adjudicating authority to arrive at the differential value after giving an opportunity to the appellant to explain the difference. Hence, the matter is remanded back to the adjudicating authority only for the limited purpose of arriving at the differential value of taxable service of Rs.29,31,401/- worked out by the Department as above.

8. Regarding denial CENVAT Credit of Rs. 4,92,438/- availed and utilized by the Appellant on Architectural Consultancy services, we observe that the Appellant availed CENVAT Credit of the architecture service received from the Architect Consultancy Firm M/s. Enarch Consultant Pvt. Ltd during the months October 2008, January 2009 and March 2009. We observe this is an essential input service required for rendering of the 'Consulting Engineer service rendered by the Appellant. As per the MOU signed on 18.01.2008, it is the responsibility of the Appellant to

ensure that the works are executed as per drawings and specifications. The Appellant cannot fulfill this responsibility without the input service of architecture received from the Architects. Thus, we observe that there is no merit in the findings in the impugned order that 'architectural Service' is not covered within the definition of 'input service'. Accordingly, we hold that the 'Architecture ' service received by the Appellant is an 'input service' in terms of Rule 2 of CENVAT Credit Rules,2004 and the Appellant has rightly availed and utilized the credit on such input service. Hence, we hold that the denial of CENVAT Credit availed and utilized by the Appellant on 'Architecture service' is not sustainable. Accordingly, we set aside the impugned order demanding reversal of this credit along with interest and penalty.

9. In view of the above discussions, the impugned order is modified as given below: -

(1) The demand of Service Tax of Rs.87,01,440/- is set aside as the appellant has already paid Service Tax on 8.5% of the consulting fees received by them under the category of 'Consulting Engineer Service'.

(2) In respect of the demand of Service Tax of Rs.3,62,321/-, the issue is remanded back to the adjudicating authority to ascertain the correctness of the differential value of taxable service of Rs.29,31,401/- for the period from 2005-06 to 2008-09.

(3) The CENVAT Credit availed by the appellant of Rs.4,92,438/- is allowed.

10. The appeal is partly allowed and partly remanded, as indicated above.

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

Sd/-	Sd/-
(K. ANPAZHAKAN)	**(ASHOK JINDAL)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Tushar Kr. / Sdd