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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 71298 of 2013

AND

Service Tax Appeal No. 71318 of 2013

(Arising out of Order-in-Appeal No. 65-66/ST/B-I/2013 dated 23.07.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. Usha Projects (India) Private Limited **: Appellant**
Usha House, House No. 1,
Surya Vihar, P.O. KIIT Campus,
Bhubaneswar – 751 024 (Odisha)

VERSUS

Commissioner, Central Excise, Customs and Service Tax **: Respondent**
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar,
Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

None for the Appellant

Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NOs. 75550-75551 / 2024

DATE OF HEARING / DECISION: 13.03.2024

Order : [Per Shri Ashok Jindal]

The appellant is in appeal against the impugned order demanding differential Service Tax.

2. The facts of the case are that the appellant was engaged in providing 'works contract service' during the period from October 2008 to September 2009. The appellant exercised its option to pay Service Tax under Rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 vide

its letter dated 12th January, 2008, according to which it would discharge its Service Tax liability by paying an amount equivalent to 2% of the gross amount charged for works contract instead of the rate prescribed under Section 66 of the Finance Act, 1994. The rate of Service Tax under the said scheme was revised from 2% to 4% with effect from 01.03.2008 vide Notification No. 07/2008-S.T. dated 01.03.2008.

3. On the basis of scrutiny of the S.T.-3 returns filed by the appellant for the period from October 2008 to September 2009, it was revealed that the appellant had assessed their Service Tax liability at the rate of 2% of the cost value as against 4% in view of the revised rate of duty vide Notification No. 07/2008-S.T. dated 01.03.2008.

4. Accordingly, two Show Cause Notices were issued to the appellant proposing to demand differential Service Tax from the appellant. The matter was adjudicated and the differential demand of Service Tax came to be confirmed along with interest; penalties were also imposed, under Section 76 of the Finance Act, 1994. On challenging the said order before the Ld. Commissioner (Appeals), the adjudication orders were confirmed. Against the said order, the appellant is before us.

5. None appeared on behalf of the appellant. The record has been perused by us and we find that the appeals can be taken up for disposal.

5.1 We find that the appellant were paying Service Tax in terms of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and also intimated to the Department regarding their option for payment of Service Tax in advance. As per

Rule 3(3) of Notification No. 32/2007-S.T. dated 22nd May, 2007, if the assessee opts to pay Service Tax under the Composition Scheme i.e., at the rate of 2% during the period of the said works contract, then the appellant has to pay Service Tax at the rate of 2% and for that, the option shall remain effective till the completion of the said works contract and shall not be withdrawn until the completion of the said works contract. Therefore, it is the contention of the appellant that the option availed by the appellant cannot be withdrawn during the pendency of the works contract and thus, the impugned demands are not sustainable.

6. On the other hand, the Revenue is of the view that as per Notification No. 07/2008-S.T. dated 01.03.2008, the rate of tax has been increased under the Composition Scheme and therefore, the appellant is liable to pay Service Tax at the rate of 4%.

7. Heard the Ld. Authorized Representative for the Revenue and perused the record.

8. We find that the appellant has opted in advance for payment of Service Tax under Rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and as per the said Rules, if an assessee opts to pay Service Tax under the Composition Scheme, then the assessee has to intimate the Department in advance for opting the same and the said option cannot be withdrawn before completion of the said works contract. The same position also applies to the Revenue. During the impugned period, unless and until the works contract is completed, the rate of tax cannot be changed, as held by the Hon'ble High Court of Calcutta in the case of *M/s. Larsen & Toubro Ltd. v. Assistant*

Commissioner of Service Tax [2017 (7) G.S.T.L. 41 (Cal.)] wherein the Hon'ble High Court observed as under: -

> *"14. This Court, therefore, does not find any lack of competence to vary and/or amend the rate of tax by the competent authority but such rate would be applicable prospectively and shall not affect the pending works contract. The question is still begging an answer when the petitioner exercised an option under the said scheme as both the petitioner and the respondent are at variance on the date of exercise of such option. Sub-rule (3) of Rule 3 of the composite scheme clearly provides that the option should be exercised in respect of works contract prior to the payment of the service tax in respect of the said works contract and such option shall remain applicable for the entire works contract and shall not be permitted to be withdrawn until the completion thereof. It is, therefore, explicit that there is no prescribed mode for exercising such option. Rule 6 of the Service Tax Rules provides that the service tax shall be paid on or before 6th of every month following the month the payments are received for such taxable service. Rule 7 thereof postulates that the return shall be filed on half yearly basis on or before 25th day of the month following the particular area.*
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> *15. In the present case, the service tax was paid at the rate of 2% and was duly received by the department prior to 1-3-2008. The expression 'opts to pay service tax under these rules' cannot be construed and mean the filing of the return and the payment would sufficiently constitute the exercise of option under composite scheme. Apart from relying upon Rules 6 and 7 of the Service Tax Rules there is no iota of piece of paper produced before this Court that an option was exercised prior to 26-3-2008 by payment of the service tax under composite scheme. The authorities have proceeded that since the option was exercised for the first time on 26-3-2008 the petitioner cannot claim that he would still be liable to pay the tax at the rate of 2% under the said composite scheme and not at the rate of 4% subsequently changed on and from 1st March, 2008. If the rate which was applicable as on the date of exercising an option such rate would continue for the entire period of the works contract. This Court finds substance in the submission of the petitioner that the change in a rate of tax subsequent to exercising an option under the said composite scheme cannot operate retrospectively as the rule of the game cannot be changed once it is played."*

8.1 As the issue has been settled by the Hon'ble Calcutta High Court by holding that unless and until the work order is complete, the rate of Service Tax cannot be changed, we therefore hold that the appellant has correctly opted to pay Service Tax at the rate of 2% during the impugned period.

9. Accordingly, we do not find any merit in the impugned orders passed by the authorities below and hence, the same is set aside.

10. In the result, the appeals are allowed with consequential relief, if any.

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

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sdd