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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.75142 of 2015

(Arising out of Order-in-Appeal No.737-738/Pat/S.Tax/Appeal/2014dated 20.06.2014 passed by Commissione(Appeals) Customs, Central Excise, Service Tax, Patna)

M/s. Chinki Construction Pvt.Ltd.,

Shyam Savitri Enclave(Shyam Utsav Hall), Veer Kunwar Singh Path,
Rajeev Nagar, Patna

...Appellant

VERSUS

Commr. of Central Excise & Service Tax, Patna

.....Respondent

(2ND Floor, Central Revenue Building, Birchand Path, Patna-800 001.)

APPEARANCE

Shri K.K.Panday, Advocate for the Appellant (s)
Shri D.Sue, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R.MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO:75336/2025

DATE OF HEARING : 10.01.2025
DATE OF DECISION : 10.01.2025

Per : RAJEEV TANDON :

1. The appellant M/s Chinki Construction Private Limited, is aggrieved vide Order-in-Appeal No.737-738/Pat/S.Tax/Appeal-14 dated 28.06.2014 and has therefore filed the impugned appeal. The Commissioner(A) in his order, upheld the order of the lower authority and classified the service rendered by the appellant to their clients as commercial and industrial services allowing an abatement of 67% on the cumulative amount for the period 2009- 2010, 2010-2011 in terms of notification no.1/2006/ST dated 01.03.2006, resulting in confirmation of demand of Service Tax amounting to Rs.10,84,005/- along with interest and penalty as affixed.

2. During the course of scrutiny of records of Power Grid Corporation of India Limited, Patna, it was noticed that the appellant had provided taxable services falling under the category of construction of residential complex services [as defined under section 65(105)(zzzh)] read with section 65(30a), construction service(commercial or industrial) [as defined under section 65(105)(zzzq)] read with section(25b) and site formation service [as defined 65(105)(zzza)] read with section 65(97a) of the Finance Act, 1994, as the appellant entered into a contract for completion of work of "construction of boundary wall, security room, main gate at 132/133 KV sub-station at Naugachhia, Raxaul, Runnisaiadpur & GOH associated with Bihar Sub-Transmission System(Phase-2), Part-2" & "Construction of Residential quarters at GOH & Runnisaiadpur". As per Letter of Award (LAO) indicating details of payment made by Power Grid Corporation of India Limited, Patna to the appellant, the department inferred that the services rendered by the appellant, fall under the categories aforesaid and the appellant was liable to pay Service Tax thereon for the period 2009-2010, 2010-2011 collectively amounting to Rs.32,84,864/- on the taxable amount of Rs.3,18,91,876/- received by the appellants. A Show Cause Notice issued to the appellant, which inter alia also mentioned that the appellant willfully suppressed the material facts from the department with the sole intention of evading payment of Service Tax. Thus, the appellant M/s Chinki Construction Private Limited, were charged for contravention of the provisions of Sections 66, 67, 68, 69 & 70 of the Act read with Rules 4, 5, 6 & 7 of the Service Tax Rules, 1994 as the appellant was charged for suppression of the material information and even did not obtain any Service Tax registration nor filed any ST-3 returns.

3. The Ld. Advocate asserts that they were mainly the subcontractors of M/s Bihar State Electricity Board (BSEB) and had entered into contract with Power Grid Corporation Limited, Patna, for completion of certain works for M/s BSEB for the project of Govt. of India and Govt. of Bihar under the Rashtriya Vikas Yojona. He,

therefore submits that as a subcontractor they were not liable to pay Service Tax as the main contractor had paid the Service Tax wherever applicable on completion of such works. He further, emphasizes that they had never undertaken any work falling within the ambit of a taxable service under the category of residential complex service, construction service (commercial and industrial) or the site formation service.

4. The Show Cause Notice invokes the provisions of Rule 4(5)(a) of the Cenvat Credit Rules, 2004 and that of Notification No.214/86-CE dated 25.3.1986. In terms of the provisions of Rule 4(5)(a) ibid a manufacturer can send inputs or capital goods as such or after being partially processed to a job worker for further processing, testing, repairs, reconditioning or for the manufacture of intermediate products, necessary for the manufacture of the final products or for any other purpose and it is established from the records and challans and other documents produced by the manufacturer availing cenvat credit, that the goods were received back in the factory within 180 days of sending such materials to the job worker.

5. The Ld.Advocate further submits that in terms of Notification No.1/2006-ST dated 01.03.2006 as amended in any case, an abatement of 67% from the gross amount charged by the service provider for rendering of taxable service under the category (commercial and industrial service) was admissible to them, which was not considered by the authorities below.

6. It is observed that the lower authority however did not accept the appellant's plea and held that as a sub-contractor they were liable to pay service tax, subject to availability of the credit to the main contractor and accordingly confirmed a service tax demand of Rs.10,84,005 along with interest besides imposing penalties under sections 76, 77 & 78 of the Finance Act on the appellants. In appellate proceedings the Commissioner (Appeals) while dismissing the appellant's appeal accepted the department's appeal proposing to levy

penalty @ Rs.200/- per day for delay in Service Tax Registration, besides imposing a late fee of Rs.20,000/- per return. It is seen that the Ld. Commissioner had not accepted the appellant's plea and held that the service rendered by the appellant were taxable irrespective of whatever category it would fall under.

7. It is noted that in respect of Construction Services the Board's Circular No.80/10/2004 dated 17.09.2004 in Para-13.2 clearly mentions that government buildings or civil constructions as are used for residential, office purposes or for providing civic amenities etc. would not be taxable unless such constructions were for commercial purposes like renting of shops and the like.

8. The appellant has pleaded and demonstrated from records that the civil structures of boundary wall or the gate of the power station were got constructed by BSEB for providing civil amenities concerning power supply for its people. It cannot thus be construed as for a commercial act and hence services rendered for provision of such infrastructure or the residential quarters for use by its staff cannot be deemed to be rendering service for commercial or industrial use.

9. The appellant further points out that being a sub-contractor of M/s Power Grid Corporation Ltd., they were also exempted from payment of service tax because:

(i) The services provided by the appellant are also a works contract service and related to construction of government infra structure which is evident from the deduction of WCT (Works Contract Tax) from their payments made by the Power Grid Corporation.

(ii) The construction is owned by the Bihar State Electricity Board and PGCIL is only a technical advisor to the BSEB and the same is a non-commercial organization concerned with providing electric power and its supply to the citizens. The appellant emphasizes that as per sl.no.38 of the Concurrent List, this is a sovereign function of the state.

(iii) In terms of clarificatory circular No.147/16/2011-S.T dated 21.10.2011 the service of construction of infrastructure related to power supply to the state is similar to the construction of infrastructure of roads, airports, railways, bridges, dams etc. The word "etc" appended in the said circular incorporates similar construction works whereby civil amenities for the citizens are provided by the State. Towards their premise they also pointed out that works contract service related to construction of canal was subsequently exempted vide Notification 41/2009-S.T dated 23.10.2009, to subserve this very objective.

10. The learned advocate also drew our attention to the order of the adjudicating authority stating that each building comprised of less than twelve dwelling units meant to serve as residence for the staff of BSEB, and hence the appellant would in any case not be liable to tax.

11. We note that in all there are five "Letter of Agreements" against which the appellant had discharged the various services as a sub-contractor. The nature of scope of work thereto is detailed as under:

LOA NO	Nature of Work
1.I/F-347/LOA-77 dated 18.09.2009	Construction of **Boundary wall, Security Room and Main gate** for 132/33 KV GOH Sub-Station associated with Bihar Sub-Transmission System Phase-2, Part-2.
2.I/F-366/LOA-93 dated 01.12.2009	**Construction of Boundary wall and Main gate** for 132/33 KV Sub-Station at Dalsingh Sarai associated with Bihar Sub-Transmission System Phase-2, Part-2(PKG-G).
3.I/F-382/LOA-104 dated 22.04.2010	**Construction of Quarters and associated** services for 132/33 KV Runnisaidpur Sub-Station associated with Bihar Sub-Transmission System Phase-2, Part-2.
4.I/F-391/LOA-108 dated 28.06.2010	**Construction of Boundary wall, Security Room** and Main gate for 132/33 KV Runnisaidpur Sub-Station associated with Bihar Sub-Transmission System Phase-2, Part-2.
5.I/F-311/LOA-75 dated 20.07.2009	**Construction of Boundary wall, Security Room** and Main gate for 132/33 KV Sub-Station at Naugachhiya and Raxaul associated with Bihar Sub-Transmission System Phase-2, Part-1.

It is evident from the above table that the scope of work in as many as 4 of the LOA's relate to construction of the infrastructure for the power station while one relates to provisioning of the residences for the employees of BSEB. None of these can certainly be said to be concerned with construction, falling within the ambit of any commercial activity. BSEB being a 100% subsidiary of the Government of Bihar, falls well within the scope of a government body and hence would lie within the ambit of clarification issued vide the said circular 80/10/2004-ST dated 17.09.2004, to suggest and indicate it as of non-commercial in nature and thereby not leviable to tax.

12. Further, vide its circular no.147/16/2001 dated 21.10.2011, issued by the CBEC in the context of commercial construction/infrastructure development projects of roads, airports, dams, tunnels etc., regarding levy of Service Tax on various service providers engaged/associated with such construction work, it is clarified that the service provided by the sub-contractor to the main contractor under works contract service would be eligible to avail the exemption as available to the main contractor providing Works Contract Service, in relation to the said projects. Relevant extract thereof is reproduced hereunder:

> *2. The matter has been examined. Vide the circular referred above, it was clarified that when the service provider is providing WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc. and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service, then while exemption is available to the main contractor[as per Section 65(zzzza) of the Finance Act], as regards the services provided by its subcontractors, the same are distinctly classifiable under the respective sub-clauses of section*

65(105) of the Finance Act, as per their description and that their taxability shall be decided accordingly. It is thus apparent that just because the main contractor is providing the WCS service in respect of projects involving constructions of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as WCS. Rather, the classification would have to be independently done as per the rules and the taxability would get decided accordingly.

3. However, it is also apparent that in case the services provided by the sub-contractors to the main contractor are independently classifiable under WCS, then they too get the benefit of exemption so long as they are in relation to the infrastructure projects mentioned above. Thus, it may happen that the main infrastructure projects of execution of works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams, is sub-divided into several sub-projects and each such sub-project is assigned by the main contractor to the various sub-contractors. In such cases, if the sub-contractors are providing works contract service to the main contractor for completion of the main contract, then service tax is obviously not leviable on the works contract service provided by such sub-contractor.

13. It is not disputed that the services so rendered was to BSEB though the order was placed on the appellant by Power Grid Corporation India Limited, Patna, and the payment for the service rendered by the appellant was tendered by PGCIL only. Thus, for all practical practices, PGCIL indeed is the service provider and the appellant acts as a contractor for BSEB who placed order on the appellant (through the aegis of PGCIL), for the work undertaken by them in the latter’s capacity as a sub-contractor.

+

14. The appellant has also pointed out that the department has failed to classify the service precisely, before raising the demand. We note from records and the work orders that the appellant have executed the contract for the work executed with M/s PGCIL as a composite contract which includes arrangement of supply of materials etc. required for the work. The Work Contract Tax is also deducted from the payments received by the appellant from M/s PGCIL. Whereas no Work Contract Tax is to be deducted from payment received by the appellant from M/s PGCIL for the categories of services falling under construction services or commercial or industrial construction services, construction of residential complexes and site formation services, if any, performed by the appellant.

15. We note that the Revenue has made the allegations, merely by combining different services, viz., construction services (commercial or industrial) as defined under Section 65(25b), construction of residential complex service as defined under section 65(105)(zzzh) read with 65(30a) and site formation services as defined u/s 65(105)(zzza) read with Sec.65(97a) of the Finance Act, 1994, without recording transaction made in each taxable services and without calculating value, tax on individual categories of services separately in distinguishable manner of applicability of classification as mandated in law before 30.06.2012, i.e., before introduction of 'Negative List'. It appears that the revenue has simply overlooked the various legal provisions, relatable to execution of a works contract and clarifications as issued by way of circulars referred in earlier paras, have resorted to this sort of an exercise, merely for the sake of issuing the demand note. Therefore, the impugned order is no more than being based on mere surmise and conjecture.

16. Furthermore, as there is no service tax paid to the appellants neither have they collected the same from PGCIL, rather what was deducted from their bills by PGCIL was Works Contract Tax(WCT) @ 4%, it can safely be concluded that Service Tax component was never a part of the payment received/collected by the appellant from PGCIL. This indeed is so, as in the first place there was no liability to pay Service Tax on part of the appellant. The appellant obtained Service Tax Registration No.AADCC0435DSD001, for providing taxable service falling under the category of 'construction service'(commercial and industrial) defined under Sec.65(25b) of the Finance Act, 1994. Sec.65(25b) of the Act ibid outlines the scope of 'commercial or industrial construction services'. They have also classified the services provided under the category of 'construction of residential complex' services as covered by Sec.65(30a) and site levelling and slope protection works undertaken by the appellant falling under the category of 'site formation and clearance, excavation and earth moving and demolition service' covered under Sec.65(105)(zzza) of the said Act. It cannot be disputed that the service discharged is actually covered by construction of complex service (Sec.65(30a) ibid, as to:

"Construction of complex" means-

(a) Construction of new residential complex or a part thereof; or

(b) Completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tilling, wall covering and wall preparing, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) Repair, alteration, renovation or restoration of, or similar services in relation to residential complex.

Furthermore, residential units of less than twelve dwellings are indeed not liable to tax. The appellant submitted that each block had less than 12 units in each of the premises of sub-station which are located differently and at different places namely at Runnisaiadpur, Raxaul, Goh, & Naugagachia. Further, staff quarters constructed for BSEB, are for the personal use of its employees. Thus, no service tax is payable by the appellant in respect of such residential complex constructed at each of the sub-stations located at different places. The residential complex constructed by the appellant were for residence of staff of the Bihar State Electricity Board and to stay there till they were posted at the said place. These are temporary accommodation for the personnel of Bihar State Electricity Board and as the residential complex did not contain over twelve units at one place, and meant for use of the personnel of Bihar State Electricity Board, a Government Undertaking, no service tax is payable for construction of the said residential complexes located at different premises. It may not be out of place to point out that even builders / developers were also not required to pay Service Tax on the construction of flats and sale thereof to their customers till July, 2010.

17. The jobs undertaken by the appellant, were in connection with or in the category of or a part of the work undertaken by them in construction of the residential complex. It cannot be considered as a job separately for site levelling and slope protection work. The construction of the boundary wall, security room and levelling of the premises is part and parcel of the work, construction of residential complex at the sub-stations of Bihar Electricity Board.

18. Moreover, in a series of judicial pronouncements, the leviability to tax on a sub-contractor, has since been emphatically concluded. In this regard we would reflect on the following cases:

(i) **Synergy Audio Visual Workshop Pvt.Ltd.** v. **Commissioner, Service Tax, Bangalore**- [2008(10)STR 578T]

(ii) **Evergreen Suppliers** v. **Commissioner, Central Excise, Mangalore**- [2008(9) STR 467T], wherein it has been categorically held that the sub-contractors were not required to pay Service Tax.

19. For reasons aforesaid and the elaborate discussions in preceding paras we find no merit in the order appealed, being not in accordance with law, we set aside the impugned order and allow the appeal filed by the appellant with consequential relief, if any, as per the law.

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

Sd/
(R.MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

SB