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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75528 of 2016

(Arising out of Order-in-Appeal No. 01/ST/B-I/2016 dated 22.01.2016 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

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

VERSUS

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

APPEARANCE:

Shri Sheshadebu Das and Shri Anand Das, both Advocates,
For the Appellant

Shri S.K. Singh, Authorized Representative,
For the Respondent

CORAM:

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

FINAL ORDER NO. 76145 / 2025

DATE OF HEARING / DECISION: 25.04.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Usha Projects (India) Private Limited, USHA House, No. 1, Surya Vihar, P.O. KIIT Campus, Bhubaneswar – 751 024, Odisha(hereinafter referred to as the "appellant") are engaged in providing works contract services and filing periodical Returns in Form S.T.-3. The appellant was awarded a contract by M/s. Brahmani River Pellets Ltd. bearing No. BRPL/CON/Pipe Line/330 dated 28.09.2007 for execution of 300 dia slurry pipe line products in the Districts of Jajpur and Keonjhar in the State of Odisha and for laying and installation of 13.25 outer dia carbon steel pipe from Harichandanpur (160/0km) in the District of Keonjhar to BRPL Plant (230/0km) in the District of Jajpur, in the State of Odisha. As the appellant used materials for rendering these services, the said services were classifiable under the category of "works contract service".

2. As per Rule 3 of the Works Contract Service (Composition Scheme for Payment of Service Tax) Rules, 2007, the appellant had exercised the option to pay Service Tax on the works contract services rendered by them by paying an amount equal to 2% of the gross amount charged for the entire contract instead of paying Service Tax at the rate specified in Section 66 of the Finance Act, 1994. Accordingly, Service Tax liability was discharged by the appellant by paying an amount equal to 2% of the gross amount charged for the entire contract in terms of sub-Rule (3) of the said Rules.

2.1. The rate of Service Tax under the above referred composition scheme was increased from 2% to 4% vide Notification No. 07/2008-S.T. dated 01.03.2008. However, the appellant continued to pay Service Tax by paying an amount equal to 2% of the gross amount charged on the ground that they had already exercised the option to pay Service Tax by discharging an amount equal to 2% of the gross amount charged, for the entire contract.

3. On scrutiny of the Returns filed by the appellant, it was noticed by the Departmental officers that appellant had not paid appropriate Service Tax at the rate of 4% of the taxable value effective from 01.03.2008. In view of this, a Show Cause Notice dated 06.07.2011 was issued to the appellant seeking to demand Service Tax of Rs.5,18,820/- (inclusive of cesses), along with interest and penalty.

4. On adjudication, the ld. adjudicating authority passed the Order-in-Original No. ADC/B-I/ST-63/2012 dated 21.12.2012 confirming the demand of Rs.5,18,820, along with interest and imposed equal amount of tax as penalty.

5. The appellant challenged the said order before the Ld. Commissioner (Appeals), who upheld the demand, along with interest, and penalty as confirmed in the Order-in-Original dated 21.12.2012.

6. Aggrieved by the confirmation of the demands against them, the appellant has filed this appeal.

7. The Ld. Counsel appearing on behalf of the appellant submits that as per Rule 3 of the Works Contract Service (Composition Scheme for Payment of Service Tax) Rules, 2007, the appellant had duly exercised the option to discharge Service by payment of an amount equal to 2% of the gross amount charged, which had been intimated to the Department on 12.01.2008 vide their Letter No. UPIPL/8-9/01; the appellant have been discharging Service Tax accordingly in respect of the said contract entered into by them with M/s. Brahmani River Pellet Ltd. It is stated that the rate of 2% was increased to 4%, vide Notification No. 07/2008-S.T. dated 01.03.2008. It is his contention in this regard that since the appellant had already exercised the option to pay Service Tax at the rate of 2% and thus a subsequent increase in the rate will not be applicable to the contract, since an option had already been exercised for the entire contract in terms of sub-Rule (3) of the said Rules.

7.1. It is pointed out by the Ld. Counsel for the appellant that the ld. adjudicating authority as well as the ld. lower appellate authority have observed that the rate prevalent at the time of payment of tax is relevant for discharge of Service Tax liability in respect of the Composition Scheme. In this regard, he submits that it has already been clarified that once an option has been exercised, to discharge Service Tax by paying an amount equal to 2% of the gross amount charged in terms of Rule 3 of the said Rules, and the same is accepted by the Department, then the said option will be applicable for the entire contract in terms of sub-Rule (3) thereto and any subsequent revision / amendment will not affect the liability to pay Service Tax at the rate of 2% of the gross amount charged already opted by the appellant. In support of this view, the appellant cited the decision of the Hon'ble High Court at Calcutta in the case of *M/s. Larsen & Toubro Ltd. v. Asst. Commissioner, Service Tax Commissionerate, Division-III, Kolkata vide Judgement dated 06.12.2022 in MAT 1668 of 2016 with IA No. CAN 1 of 2016.*

7.2. In view of these submissions, the Ld. Counsel for the appellant contends that the demands confirmed in the impugned order are not sustainable.

8. On the other hand, the Ld. Authorized Representative of the Revenue submits that as per the Point of Taxation Rules, 2011, tax is payable at the rate prevalent on the date of rendering the service. He submits that since the rate was increased to 4%, by way of Notification No. 07/2008-S.T. dated 01.03.2008, the rate prevalent at the time of payment of tax shall be applicable for the purpose of payment of Service Tax, which is 4% of the gross amount charged after 01.03.2008.

8.1. Accordingly, the Ld. Authorized Representative of the Revenue supported the impugned order.

9. Heard both sides and perused the appeal records.

10. We observe that in this case, the appellant had exercised an option for payment of Service Tax by paying an amount equal to 2% of the gross amount charged in terms of Rule 3 of the Works Contract Service (Composition Scheme for Payment of Service Tax) Rules, 2007. Under these circumstances, once an option is exercised and the same is accepted by the Department, the said option becomes applicable for the entirety of the contract. Any subsequent change in rate would only be applicable to prospective contracts and shall not be applicable retrospectively for the contracts for which the appellant had already exercised their option and started paying Service Tax i.e., at the rate of 2%, therefore, this would be applicable for the entire tenure of the said contract and any subsequent revised rate, such as at the rate of 4%, would not be applicable for the said contract for which the appellant had already started paying Service Tax as per the option exercised earlier.

10.1. We observe that this view has been held by the Hon'ble High Court at Calcutta in the case of *M/s. Larsen & Toubro Ltd. v. Asst. Commissioner, Service Tax Commissionerate, Division-III, Kolkata vide Judgement dated 06.12.2022 in MAT 1668 of 2016 with IA No. CAN 1 of 2016* wherein the Hon'ble High Court has made the following observations: -

> *"9. By notification No. 07 of 2008, dated 01.03.2008, the rate of service was substituted as 4% instead of 2% and this notification came into effect on 01.03.2008. Subsequently, by notification No. 10 of 2012, dated 17.03.2012 the rate of tax was substituted at 4.8% with effect from 01.04.2012. From the above notification more particularly, Rule 3(1), it is seen that it commences*

with non-obstante clause taken and states that notwithstanding anything contained in Section 67 of the Finance Act, 1994 and Rule 2A of the Service Tax (determination of value) Rules 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his services tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to 2% of the gross amount charged for the works contract.

10. Thus, Rule 3(1) of the scheme gives an option to the person liable to pay service tax to discharge his service tax liability in terms of the scheme by paying an amount equivalent to 2% of the gross amount charged for the works contract. Sub rule (3) of Rule 3 states that a person who opts to pay service tax under the composition scheme shall exercise such option prior to payment of service tax 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. The argument of the department is that the option to pay service tax under the composition scheme shall be exercised prior to the payment of service tax and the appellant having not exercised the option prior to 26.03.2008 is required to pay service tax at the rate of 4% and not 2%. The department further proceeds to state that this short payment is intentional to evade payment of duty and therefore extended period of limitation can be invoked. The cardinal principle of interpretation has taught us to read the rule in its entirety to ascertain the true meaning and intention of the legislation. If that be so sub rule (3) of Rule 3 of the scheme cannot be read in isolation. It is required to be read in conjunction with sub rule (1) of Rule 3.

11. Sub rule (1) of Rule 3 is substantive portion of the rule which provides for an option to be exercised by the person liable to pay service tax. By virtue of the said rule, the person liable to pay service tax has an option to discharge the liability by paying the amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66 of the Act. On a reading of sub rule (1) of Rule 3 shows that the option exercisable by this person liable to pay service tax is exercised by paying service tax at the 2% instead of rates specified in Section 66. Sub

> *rule (3) of Rule 3 states that the provider of the taxable service who opts to pay service tax under the composition scheme shall exercise such option prior to the payment of service tax. If rule 3(1) and (3) and read in conjunction and harmoniously, the intention of the scheme is to give an option to the provider of taxable service to discharge his service tax liability by paying an amount equivalent to 2%. This being the substantive part of the scheme, sub rule (3) which is a machinery provision has to give life to the substantive part of the rule namely Rule 3(1) and that would mean that the option shall be exercised by paying the amount equivalent to 2% of the gross amount charged for the works contract. It is the submission of the learned senior standing counsel that the crucial words in sub rule (3) of Rule 3 is "opts" and "prior to payment of service tax". Thus, the department would contend that the option has to be exercised by the provider of taxable service prior to the payment of service tax. If that be so the rule should provide in what manner the provider of taxable service has to exercise such option. Admittedly no procedure has been laid down under the rule and there is no statutory form for exercise of such option. This has been held so by learned Single Bench, against which the revenue are not on appeal. In the absence of statutory format can the department be heard to say that the option should be exercised in a particular fashion and cannot be by conduct, that is by paying the service tax equivalent to 2% of the gross amount charged for the works contract."*

11. In view of the above discussion and by relying on the decision cited supra, we hold that the appellant has rightly paid Service Tax by paying an amount equal to 2% of the gross amount charged in terms of Rule 3 of the said Rules, for the contract executed by the appellant. Hence, the demand of Service Tax confirmed against them at the rate of 4% as per the subsequent Notification No. 07/2008-S.T. dated 01.03.2008 is not sustainable and accordingly, we set aside the same.

11.1. Since the demand of Service Tax is not sustainable, the question of demanding interest or imposing penalties does not arise.

12. In the result, we set aside the impugned order and allow the appeal filed by the appellant, with consequential relief, if any, as per law.

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

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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

Sdd