IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. ST/88581/2014

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-007-14-15 dt. 2.62014 passed by the Commissioner of Central Excise, Pune-I)

M/s. ST Electricals Pvt. Ltd. : **Appellant**

VS

Commissioner of Central Excise, Pune-I : **Respondent**

Appearance

Shri J. C. Patel, Advocate and
Shri Anupam Dighe, Advocate for Appellant

Shri M.K. Sarangi, Jt. Commr. (A.R) for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of hearing : 06/03/2018
Date of pronouncement : 27/03/2018

ORDER NO. A/85832 / 2018

Per : Ramesh Nair

Brief facts of the case are that the Appellant are engaged in erection of street lights on roads and infrastructure projects like conversion of overhead lines to underground cables, installation transformers and other electrical works which includes erection of feeder pillars, erection of poles, stringing of conductors, earthing and control panels by using their own material. Such works are undertaken by them on Government Tenders and payments are received as per stage of completion of work. The Appellant were of the view that the works undertaken by them of infrastructure projects and road lightning does not invite service tax. They vide letter dt. 15.03.2006 surrendered the service tax registration which they had obtained under the category of 'erection, commissioning and installation service". The Appellant made communication with the department and statement of Shri A.K. Pandey, director was also recorded to the effect that their services fall under the category of 'Works Contract Service' and not liable for service tax. The Appellant were issued show cause notice in March' 2010 alleging that the services rendered by them are taxable under the category of Erection, installation and maintenance services. Demands of service tax for the period 16.06.2005 to 30.11.2209 was raised against the Appellant by invoking extended period under Section 73 (1) of the Finance Act, 1994. It was also proposed to charge interest and impose penalties under section 76, 77 and 78 of the Finance Act, 1994. The charges made in the show cause notice were set aside by the adjudicating authority vide order dt. 25.09.2010. The revenue filed appeal against the said order before the Tribunal who remanded the matter for consideration of all issues by relying upon the Larger Bench judgment in case of BSBK P. Ltd 2010 (18) STR 555 which held that the Works contract can be vivisected. After due process the adjudicating authority vide the impugned orders confirmed part demand of Service Tax against the Appellant. The interest and penalties under section 76,77 and 78 were also confirmed against the Appellant. Hence the present appeal by the Appellant.

2. Shri J. C. Patel ld. Advocate and Shri Anupam Dighe, ld. Advocate appearing for the Appellant submits that the Tribunal's remand order dt. 09.05.2013 was not followed. That the Tribunal has remanded the case by keeping all the issues open which was not complied by the adjudicating authority. He submitted that the Appellant were

undertaking turnkey/composite contracts of various government organizations which included supply of material. The composite contracts cannot be vivisected for charging service tax on some portion of contract as held by the Apex Court in case of Commissioner Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC). That hence the period prior to 01.06.2007 is not liable for service tax. The Appellant did not render the service of "erection, commissioning and installation' on stand alone basis but executed works contract involving transfer of property in goods on which works contract tax was paid. The adjudicating authority erred in proceeding on basis that the Tribunal in its remand order has held that service tax was payable on 'erection, commissioning and installation' and the same is final. The adjudicating authority failed to observe that when the Tribunal has kept all the issues open and when the law stands settled by the Hon'ble Supreme Court's order the demands are liable to be set aside. The SCN was issued demanding service tax under the category of "erection, commissioning and installation services' for the period 16.06.2005 to 30.11.2009 whereas the Commissioner while passing the order confirmed demand for the period upto 01.06.2007 under the category of "erection, commissioning and installation' and from 01.06.2007 under the category of 'Works Contract'. The demand under service tax category not proposed in the show cause notice the same cannot be continued. He relies upon orders in case of Commissioner Vs. Ballarpur Ind. Ltd. 2007 (215) ELT 489, CCE Vs. Gas Authority of India 2008 (232) ELT 7, Commissioner Vs. Reliance Ports and Terminals Ltd. 2016 (334) ELT 360. He further submits that the Commissioner has recomputed the demand separately for the period before 01.06.2007 and after said period and hence travelled beyond the scope of show cause notice. He submits that the electrification works were undertaken 'in respect of roads' which was excluded from the scope of 'Works Contract' and therefore not liable to service tax even after 01.06.2007. He relies upon the orders in case of Jagdish Prasad Agarwal Vs. CCE 2017 (3) GSTL 455 (TRI), Pioneer Fabricators P. Ltd. Vs. CCE 2016 (42) STR 563, P.B. Rathod Vs. CCE 2015 (39) STR 650 and Lakshmi Constructions Vs. CCE 2015 (39) STR 175. He also submits that the demand hit by limitation of time and for the same reason no penalty can be imposed.

3. Shri M.K. Sarangi, ld. Joint Commissioner (AR) supports the impugned order. He submits that the adjudicating authority has rightly bifurcated the contracts into taxable and non taxable services in terms of the direction of the Tribunal in remand orders. He has filed written submission to the effect that in L& T case supra the issue involved was levy of Service Tax before 01.06.2007 and not of after said period. He relied upon the judgment in case of Nagrajuna Construction Ltd. 2012 (28) STR 561 (SC) that the option to pay tax under different category is not permissible and the said judgment was not cited before the Hon'ble Apex Court in L & T case supra. That in case of Royal Electricals Order No. A/90284/17/STB dt. 18.10.2017 the Tribunal rejected the argument of assessee that service of installation of street lights is related to road and hence excluded from the works contract. He also submits that the extended period in invokable as held in case of Board of Cricket Control of India 2015 (37) STR 785 (TRI), Vodafone Essar Digilink Ltd. 2011 (24) STR 562 (tri) which was upheld by Hon'ble High Court of Rajasthan in 2013 (29) STR 229 (RAJ).

4. We have carefully considered the submission made by both the sides. And perused the records. We find that the Tribunal in its earlier order dt. 09.05.2013 had remanded the case keeping all the issues open. The relevant paras of the said order are as under :

> *"6. In this scenario, we are of the considered view that the lower adjudicating authority has not considered all the relevant facts while deciding the issue. Accordingly, we set aside the impugned order and remand the case back to the original adjudicating authority for consideration of all the issues as discussed above and thereafter pass an order afresh after giving reasonable opportunity to the appellant of being heard. All issues are kept open.*
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> *7. Thus the appeal is allowed by way of remand."*

5. We find from the above findings of the Tribunal that the Tribunal had kept all the issues open. In such case it was imperative for the adjudicating authority to decide the issue in the light of relevant judgments given by the Higher Forums. Even though the tribunal has given its view on the controversy in the light of the judgment passed so far but it did not decide the merits of the case. We find that the Appellant had surrendered their registration issued to them under the category of "erection, commissioning and installation services ' on 15.03.2006 on the ground that they are not rendering taxable service. It was after such letter that the revenue started investigation and recorded statements of the directors. We find from the case papers that the Appellant were undertaking composite contract under which they were supplying goods and also rendering services. Clearly in the light of the Hon'ble Supreme Court's order in case of L & T (supra) no service tax could have been demanded from them for the period prior to 01.06.2007. Coming to the question as to whether the services rendered after

01.06.2007 are liable to tax, we note that the Appellant has submitted that as the services were in respect of road to M/s Pimpri – Chinchwad Municipal Corporation and Uttar Pradesh Power Corporation Limited, the same is excluded from 'Works Contract' service. The revenue has cited the order of this Bench in case of Royal Electricals supra wherein the demands were confirmed. We find that the ratio of Royal Electricals are not applicable to the facts of the present case as in said case no evidence were adduced before Tribunal that such Street lights were installed in respect of Road Construction. Further the services involved were of erection, commissioning and installation whereas in the present case the services involved are of Works Contract as held by the adjudication authority. The Appellants are rendering services of Works contract which also included transfer of property and the said services were in respect of Road. Even their clients are deducting the VAT at source on material so supplied/ used which shows that the services involved are of Works contract. In terms of Section 65 (105) (zzzza) of the Finance Act, 1994 the services in respect of roads has been excluded from the said category. The Tribunal in case of Pioneer Fabricators Pvt. Ltd. Vs. Commissioner 2016 (42) STR 563 (TRI) has held that works of fixing of metal barriers on concrete foundation alongside highways essentially in nature of civil work and metal crash not classifiable as equipment under 'erection, commissioning and installation services'. Applying the ratio of said Tribunal order and in view of our findings we are of the view that the services of Works Contract rendered by the Appellant is in respect of Roads and thus not chargeable to service tax for the period after 01.06.2007.

6. Further we find that the show cause notice has been issued to the Appellant towards demand under the category of ‘erection, commissioning and installation services’ whereas the demands for the period after 01.06.2007 has been confirmed under the category of ‘Works Contract Service’. We find that when no demand was made from the Appellant under the category of ‘Works Contract’ in show cause notice, the adjudicating authority also could not have confirmed demand under said category. The adjudication order has thus travelled beyond the scope of show cause notice and therefore the demand is not sustainable which was raised in the show cause notice under the category of “erection, commissioning and installation services’. Our views are based upon the judgments in case of Commissioner Vs. Ballarpur Industries 2007 (215) ELT 489, CCE Vs. GAIL 2008 (232) ELT 7, Commissioner Vs. Reliance Ports and Terminals Ltd. 2016 (334) ELT 630.

7. We also find that the Appellant in the year 2006 itself had surrendered the registration certificate on 15.03.2006 on the ground that their services do not fall under the category of “erection, commissioning and installation services ’. The department thus was in knowledge of the fact that the Appellant is not paying service tax on its activities. Further we find that there is no evidence of any suppression or malafide intention on part of Appellant towards non payment of service tax. They even submitted the required documents to department in their communication dt. 23/09/2008 and 22/10/2008. The show cause notice was issued after 28 months of issuance of summon and 48 months of surrender of registration. In case of Continental Foundation

Jt. Venture Vs. Commissioner 2007 (216) ELT 177 (SC) the Hon'ble Court held as under :

10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

11. Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly *qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful.*

From the above judgment of the Hon'ble Apex Court it is clear that in absence of any intention to evade payment of duty, it cannot be said that a person has any malafide intention. The facts of present appeal show that the non payment of service tax was informed by the Appellant and was in knowledge of the revenue. In such case there is no suppression on part of Appellant and consequent the demand of service tax for longer period is hit by limitation of time also.

8. In view of our above findings we set aside the impugned order to the extent it upheld demands and imposition of penalties against the Appellant. The appeal is allowed on merit as well as on limitation.

(Pronounced in court on 27/03/2018)

(C.J.Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.