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(2021) 02 CESTAT CK 0010

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 51352 Of 2018

India Guniting Corporation @Hash Commissioner of Central Tax

Date of Decision : 10-02-2021

Acts Referred:
Finance Act, 1994 — Section 65(25b), 65(105)(zzq), 65(105)(zzzh), 65(105)(zzg), 65(105)(zzzza), 98

Citation : (2021) 02 CESTAT CK 0010

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Advocate : V.P. Batra, A.Thaplial

Final Decision : Allowed

Judgement

S. No.,Description of Work Done,"Category of

Service","Taxability status as mentioned in

Show Cause Notice

1.,Work related to Airports,"Commercial

Construction

Service","The work related to airports are

exempt under work contract/

commercial construction service

2.,"Work related to Autonomous

bodies like, CSIR, National

Cooperative Development

Corporation, Delhi Jal Board","Commercial

Construction

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Service","These organizations are autonomous
bodies and also engaged in
commercially exploiting their
products/ research.
3.,"Work related to Govt.
Buildings Police Headquarters,
Moulana Azad Medical
College","Commercial
Construction
Service","Construction for non commercial
purposes including Police building,
college Hostel are not taxable
4.,"Work related to PSUs like
HAL","Commercial
Construction
Service","PSU are engaged in commercial
venture, hence are taxable
5.,"Work related to Govt.,
Buildings given on rent like
Delhi High Court Advocates
Chambers, Community Centre
Golf Link, Mohan Singh Place,
Chanakya Bhawan, Mayur
Bhawan, Bharat Gas","Commercial
Construction
Service","Buildings built by government
authority but leased out on
commercial terms like Barat Ghar
used as Mandap on which NDMC
was charging service tax.

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6.,"Road maintenance at Aurbindo

Marg","Maintenance &

Repair","Street scraping & footpath

maintenance is part of road

maintenance therefore taxable

7.,"Work related to Government

aided school like NP Boys Sr.

Sec. School","Commercial

Construction

Service","The school is run by a private body

with assistance from Govt. but being

private institution added by

government is taxable.

8.,"Lal Bahadur Sadan (NDMC

staff quarters)","Construction of

residential complex","The construction may be for NDMC

but there is no specific exemption in

such cases and contractor is liable to

tax.

any illegality so as to call for any interference in this appeal. Learned Authorised Representative also submitted that the demand made under a,,,

particular category of service can always be confirmed under a different category, if it is found as a fact that the nature of service provided actually",,,

fall in that category of service.,,,

14. The submissions advanced by the learned Consultant for the appellant and the learned Authorised Representative of the Department have been,,,

considered.,,,

15. It is w.e.f. 1 June, 2007 that clause (zzzza) was inserted in section 65(105) of the Finance Act in relation to execution of â??works contractâ?.",,,

Taxable Service under Section 65(105)(zzzza) is defined as :,,,

â??65(105)(zzzza) â??taxable serviceâ?? means any service provided or to be

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provided to any person, by any other person in relation to",,,

the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels",,,

and dams.,,,

Explanation â?" For the purposes of this sub-clause, â??works contractâ?? means a contract wherein,â?"",,,

Â (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and",,,

(ii) such contract is for the purposes of carrying out,â?"",,,

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of",,,

electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-",,,

conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water",,,

proofing, lift and escalator, fire escape staircases or elevators; or",,,

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce",,,

or industry; or,,,

(c) construction of a new residential complex or a part thereof; or,,,

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or",,,

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;â??",,,

16. The Supreme Court in Commissioner of Central Excise and Customs, Kerala vs. Larsen and Toubro Ltd., 2015 (39) STR 913 (SC) noted that a",,,

â??works contractâ? is different from a contract for service simpliciter and could be subjected to service tax only with effect from June 1, 2007. The",,,

observations are as follows:-,,,

â??This group of appeals is by both assessees and the revenue and concerns itself with whether service tax can be levied on indivisible,,,

works contracts prior to the introduction, on 1st June, 2007, of the Finance Act, 2007 which expressly makes such works contracts liable to",,,

service tax.,,,

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xxxxxxxxxxxxxxxxxxxxxxxxxxx,,,

â?¦â?¦â?¦â?¦ This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax",,,

charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can",,,

only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the,,,

works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the,,,

Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service",,,

contracts simpliciter and not composite indivisible works contracts.,,,

xxxxxxxxxxxxxxxxxxxxxxxxxxxx,,,

17.We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts,,,

for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such.â??",,,

17. The Commissioner has recorded a categorical find that each of the â??works contractâ? undertaken by the appellant are not covered under the,,,

three services namely (i) commercial or industrial construction, (ii) construction of complex and (iii) management, maintenance or repair mentioned in",,,

the first show cause notice. The Commissioner further recorded a categorical finding that the activities undertaken by the appellant would be,,,

classifiable as â??works contractâ?? as they involved goods as well as labour services.,,,

18. The Commissioner therefore, dropped the demand for the period prior June 1, 2007. But for the demands for the period w.e.f. June 1, 2007 the",,,

Commissioner proceeded to examine whether the particular work performed under â??works contractâ? is exempted from levy of service tax under,,,

Notifications issued from time to time.,,,

19. Learned Counsel for the appellant has submitted that there was no necessity for the Commissioner to examine whether service tax is exempted,,,

under the Notifications because a demand made under a particular category of service cannot be confirmed under a different category of service.,,,

20. That submission advanced by the learned Counsel for the appellant has force

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and it is not possible to accept the contention of the learned,,,

Authorized Representative of the Department that a demand made under a particular category can be confirmed under a different category.,,,

19. In this connection it would be pertinent to refer to the decision of the Mumbai Tribunal in Ashish Ramesh Dasarwar vs Commissioner of Central,,,

Excise & Service Tax, Nagpur, 2017-TIOL-3230-CESTATMUM. The Division Bench of the Tribunal held as follows :",,,

â??6. As regards the period after 1.6.2007, since the demand was raised under â??commercial or industrial construction service, whereas",,,

admittedly the service is correctly classifiable under works contract service, the demand raised under wrong head of service cannot sustain.",,,

7. As per above discussion, the demand raised under â??commercial or industrial construction service? shall not sustain. Hence, the same is",,,

set aside.â??,,,

20. In M/s. Choudhary Stone Crushing Company versus Commissioner of Central Excise and Service Tax â?" Jaipur-II, 2019 (3) TMI 38 â?"",,,

CESTAT, New Delhi, the Tribunal observed as under:-",,,

â??8. For period commencing on 1/06/2007, the composite services would be liable for classification under Works Contract Service only.",,,

But we note that Show Cause Notice has proposed the demand for service tax under the category of Commercial and Industrial,,,

Construction Service as well as Repair and Maintenance Service. Hence we are of the view that the confirmation of demand under the,,,

category of WCS will not be proper particularly in view of the decision of the Tribunal in case of Ashish Ramesh Dasarwar (supra) wherein,,,

Tribunal has taken the view that demand for Service Tax is to be set aside if the Show Cause Notice proposed a classification different from,,,

WCS for construction activity.â??,,,

21. A Division Bench of the Tribunal in M/s Gurjar Construction as Commissioner of Central Excise, Jaipur II, 2019 (5) TMI 717 â?" CESTAT, New",,,

Delhi also examined such a position and observed that a demand made under a particular category cannot be sustained under a different category.,,,

22. In view of the aforesaid decisions of the Tribunal, it has to be held that the Commissioner was not justified in confirming the demand of service tax",,,

under the category of â??works contractâ? for the period post June 1, 2007 even

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if the levy of service tax was not exempted under Notifications,",,,

since, the show cause notice that demand it service tax under the three categories namely (i) commercial or industrial construction, (ii) construction of",,,

complex and (iii) management, maintenance or repair.",,,

23. The order dated January 31, 2018 passed by the Commissioner that has confirmed the demand of service tax, therefore, deserves to be set aside",,,

and is set aside. The appeal is, accordingly, allowed.",,,

(Dictated and pronounced in the open Court),,,

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