
(2014) 11 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Stay Application No. 60961 Of 2013, Service Tax Appeal No. 60105 Of 2013

M/s Ahluwalia Contracts (India) Ltd.

APPELLANT

Vs

CST, New Delhi

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Service Tax Rules, 2004 — Rule 6(3A)(a), 6(4)(B)(iii)

Finance Act, 1994 — Section 65, 68, 73

Service Tax (Determination of Value) Rules, 2006 — Rule 2A, 4B, 6(3)(A)

Service Tax Rules, 1994 — Rule 6(1), 6(2)

Citation : (2014) 11 CESTAT CK 0004

Hon'ble Judges : G. Raghuram, J; R. K. Singh, Technical Member

Bench : Division Bench

Advocate : S.K. Sarwal, Suchitra Sharma, Amresh Jain

Final Decision : Allowed

Judgement

1. The appellants have filed the stay application along with appeal against Order-in-Original No.16/ST/COMMR/DM/RTK/2013-14 dated 31.5.2013 in

terms of which service tax demand of Rs.30,59,07,287/- for the period April, 2010 to March, 2011 was confirmed along with interest, Cenvat credit

amounting to Rs.49,25,935/- was disallowed and ordered to be recovered and the suo moto adjustment of service tax amounting to Rs.2,60,910/- was

also disallowed. Penalties under Sections 76 and 77 were also imposed.

2. The appellants had been providing â??Commercial or Industrial Construction Serviceâ? (CICS) and â??Construction of Complex Serviceâ? (CCS)

and availed of the benefit of Notification No.1/2006-ST claiming abatement of 67% and while availing of the Composition Scheme to pay service tax

under Works Contract Service they had utilised Cenvat credit on inputs and input

services. Further they also did not pay service tax on the construction services i.e., CICS and CCS rendered to DDA, BSNL and NDMC, Reliance, Dr. B.L Kapur Memorial Hospital project and Jassaram Hospital project on the ground that these were not commercial or industrial constructions and the construction of flats for DDA being for DDA's use were not liable to service tax under construction of complex service. The service tax (except the one related to DDA) was also not paid on the Karnataka Project and NSG Hqrs. Delhi on the ground that they were government/non-commercial project. The adjudicating authority disallowed the benefit of Notification No. 15/2004-ST, /18/2005-ST/ 1/2006-ST on the ground that the value of the free supplies had not been included in the value for the purpose of claiming the abatement. The composition scheme benefit was disallowed on the ground that they had started taking the benefit of composition scheme in respect of projects which were on-going before 01.06.2007 and also because they had taken/utilised Cenvat credit on inputs and input services. As regards the construction service rendered to BSNL, NDMC, Reliance and Dr. B.L. Kapur Memorial Hospital, the adjudicating authority held that the buildings qualified to be commercial or industrial construction. As regards construction of residential buildings for DDA, as they were not meant for self use (i.e. for use of DDA or its employees) the service tax was leviable, held the adjudicating authority. The adjudicating authority also noted that the appellants had availed of the Cenvat credit amounting to Rs.49,25,935/- on inputs, input services and credit received from input service distributor and found that the party has wrongly availed and utilised this inadmissible Cenvat credit towards discharging their service tax liability under Works Contract Service... and so disallowed the said Cenvat credit. An amount of Rs.2,60,910/- which was suo moto adjusted by the appellants has been held to have been so done in violation of Rule 6(3A)(a) and 6(4)(B)(iii) of the Service Tax Rules, 2004 and so the said adjustment has also been disallowed by the adjudicating authority.

3. The appellants have contended that the denial of 67% abatement under Notifications No. 1/2006-ST on the ground that the value of free supplies had not been included is untenable in the light of the judgement of the Larger Bench in the case of Bhayana Builders (P) Ltd. Vs. CST, Delhi [2013 (32) STR 49(Tri. - LB)]. As regards the Cenvat credit of Rs.49,25,935/- it has

been disallowed in a rather summary manner and that they have not taken any credit on inputs. As regards the buildings constructed for DDA, NDMC, Reliance, Dr. B.L. Kapur Memorial Hospital project and Jassaram Hospital project, the appellants stated that these being non-commercial constructions or constructions for charitable organisations or for DDA's residential purposes were not liable to service tax.

4. We have considered the submissions of both the sides. As regards disallowance of abatement of 67% under Notification Nos.15/2004-ST, 18/2005-ST and 1/2006-ST on the ground that the value of free supplies was not included in the gross amount charged, the Larger Bench of the Tribunal in the case of Bhayana Builders, supra has held that the value of free supplies by the service recipient to service provider is not required to be included in the gross amount charged for the purpose of availing the benefit of the aforesaid Notifications.

5. Coming to the contentions of the appellants that from 01.06.2007, they only took credit of input services and paid service tax under composition

scheme, which has been denied on the ground that they started availing of the compositional scheme for on-going contracts, we find that in the Show

Cause Notice it is mentioned that they started availing of the input service credit with effect from 01.06.2007 (para 16 of the Show Cause Notice)

while in the adjudication order it is stated that they took CENVAT credit of input and input services. In this regard, we find that for 67% abatement

under the aforesaid Notifications (except Notification No.1/2006-ST) only credit of input and capital goods is not permissible. Thus there is variance

between the Show Cause Notice and the adjudication order with regard to whether the appellants took CENVAT credit of only input services or both

inputs and input services (and also capital goods) which needs to be reconciled. The adjudicating authority has stated that for the on-going projects, the

classification could not be changed to Works Contract service with effect from 01.06.2007. In this regard, it is to state that the classification of a

service depends upon its nature vis-a-vis the definitions of various services contained in Section 65 of the Finance Act, 1994. Thus, there is absolutely

no legal bar, indeed it is legally required, to re-classify the service if it gets more specifically cover under the new or newly carved out service. Thus, if

the service rendered by the appellants more specifically gets cover under the

definition of "Works Contract" service w.e.f. 01.06.2007 then it will have to be classified thereunder. But even with the classification of the impugned service under works contract service w.e.f. 01.06.2007, the appellants will not be eligible for the compositional scheme to pay service tax under works contract service in respect of on-going projects for which service tax had been paid during the period prior to 01.06.2007. It has been so held upto the level of the Supreme Court in the case of Nagarjuna Construction Co. Ltd. Vs. GoI [2012 (028) STR 0561 SC]. However, that would not disqualify the appellants from claiming the benefit under Rule 2A of Service Tax (Determination of Value) Rules, 2006 or any other exemption Notification provided they satisfy the conditions and establish their eligibility.

6. As regards the contentions of the appellants that the flats made for Delhi Development Authority (DDA) were to be treated as meant for

DDA's personal use, this contention is totally untenable because these flats were allotted to individuals and not meant for DDA or for its

employees. Therefore, the service rendered with regard to construction of flats for DDA is taxable under CCS. The buildings constructed for BSNL,

Reliance or Municipal Corporation clearly satisfy the definition of "Commercial or Industrial Construction Service" (CICS). BSNL is a

commercial organisation as is Reliance. Even the Municipal Corporation buildings are not outside the purview of commercial or industrial construction;

indeed, many of its buildings are rented to various organisations. A claim has been made that the buildings made for the said hospitals is outside the

purview of CICS on the ground that they were made for the charitable organisations. In this regard, there is no ambiguity that charitable organisation

is not prevented from carrying out commercial activity; the only condition is that the profit so generated has to flow back into the organisation towards

fulfilment of its charitable purposes. Thus, merely because the hospitals were constructed for the charitable organisations do not make the hospitals

per se non-commercial. Indeed these hospitals are not non-commercial and charge the patients for the medical services.

7. It is seen that while disallowing the credit of Rs.49,25,935/-, the adjudicating authority has merely stated in para 91 of the adjudication order as

under:-

It is observed that the party has availed Cenvat Credit of inputs, Input Service and credit received from Input Service Distributor amounting to

Rs.49,25,935/- (Rupees Forty Nine Lakhs Twenty Five Thousand Nine Hundred Thirty Five only). I find that the party has wrongly availed and

utilised this inadmissible Cenvat Credit towards discharging their Service Tax liability under Works Contract Service. The plea that they had a

bonafide belief is misplaced. Hence, it is concluded that the Noticee had contravened the said provisions with the intention not to pay Service Tax at

the appropriate time. Thus, the Show Cause Notice in the instance case, is correctly issued for demand and recovery of the said Cenvat Credit by

invoking the provisions of Section 68 & 73 of the said Act read with Rule 6(1) & (2) of Service Tax Rules, 1994 *ibid* for contravention of the said

provisions of the said Act and the Rules *ibid* with intent to evade payment of the said Service Tax.

It is evident from the above para that adjudicating authority has simply declared the impugned credit to be inadmissible without analysing as to how

that is so.

8. While disallowing suo moto adjustment of Rs.2,60,910/-, the adjudicating authority has observed as under:-

The party has made a suo moto adjustments of Rs.2,60,910/- (Rupees Two Lakhs Sixty Thousand Nine Hundred Ten only) during the months of

April 2010 to Sept-2010 and Oct 2010 to March-2011 in violation of Rule 6(3A) (a) & 6(4)(B)(iii) of the Service Tax Rules, 2004. Thus, the Show

Cause Notice in the instant case, is correctly issued for demand and recovery of said adjustment of Service Tax by invoking the provisions of Section

68 & 73 of the said Act read with Rule 6(1) & (2) of Service Tax Rules, 1994 *ibid* for contravention of the said provisions of the said Act and the

Rules *ibid* with intent to evade payment of the said Service Tax.

We notice that there is no elucidation as to how the said suo moto adjustment is in violation of the said Service Tax Rules.

9. In the light of the foregoing, we set aside the impugned order and remit the matter (waiving the requirement of pre-deposit) to the adjudicating

authority for de novo adjudication *inter alia* on the following terms:-

i. Applicability of 67% abatement under Notification Nos.15/2004-ST, 18/2005-ST and 1/2006-ST should be reconsidered in the light of the decision of

the Tribunal in the case of Bhayana Builders, supra.

ii. While the composition scheme notified under Notification No.32/2007 is not available to the appellants in respect of on-going projects which

commenced prior to 01.06.2007 and on which service tax was paid prior to that date in the wake of the decision in the case of Nagarjuna

Constructions Co. Ltd., supra, the appellants should be allowed to make a claim for the benefit of Rule 2A of the Service Tax (Determination of

Value) Rules, 2006 or any other exemption Notification and if such a claim is made, the benefit claimed should be extended if the appellants are found

to be eligible therefor.

iii. As regards impugned credit of Rs.49,25,935/-, the issue should be reconsidered and clear reasons for its inadmissibility (or otherwise) should be recorded.

iv. As regards disallowing of suo moto adjustment of Rs.2,60,910/- a clear finding is to be recorded as to how such adjustment is in violation of Rules

6(3)(A) and 4B of the Service Tax (Determination of Value) Rules, 2006, if it is so found.

11. Needless to say that before de novo adjudication, the appellant is to be given an opportunity of being heard.