(2020) 10 CESTAT CK 0007

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 50940 Of 2015

M/s. BSBK Pvt. Ltd. @Hash Commissioner, Customs, Central Excise and Service Tax, Commissionerate, Raipur

Date of Decision : 08-10-2020

Acts Referred:
Finance Act, 1994 — Section 73, 75, 76, 77, 78

Citation : (2020) 10 CESTAT CK 0007

Hon'ble Judges : Delip Gupta, J;C. L. Mahar, Technical Member

Bench : Division Bench

Advocate : B.L. Narasimhan, Poorvi Asati, K. Poddar

Final Decision : Allowed

Judgement

1. The order dated December 23, 2014 passed by the Commissioner, Central Excise, Customs & Service Tax, Raipur, the Commissioner, by which

the two show cause notices dated November 21, 2008 and October 13, 2009 have been adjudicated upon has been assailed in this Appeal. The order

confirms demand of service tax with interest under section 75 of the Finance Act 1994, the Finance Act and penalties under section 76, 77 and 78 of

the Finance Act.

2. The issue involved in this appeal relates to admissibility of abatement under Notification No. 01/2006-ST dated March 1, 2006, the Notification

dated March 1, 2006 in respect of â??commercial or industrial construction serviceâ?? CIC and â??erection, commissioning or installation

serviceâ?? ECI . The period of dispute is from March 1, 2006 to March 31, 2009.

3. The Appellant is a private limited company. It was registered with the Service Tax Department under the category of â??CICâ??, â??ECIâ??,

â??consulting engineerâ??, â??works contractâ??, â??technical testing and analysis serviceâ?? and â??goods transport agency serviceâ??. The

Appellant executes large size Civil Engineering Projects and Turnkey Civil Construction Contracts mainly for Steel, Power and Infrastructure Sectors.

4. The Appellant along with M/s. Danieli & C Officine Meccaniche SPA, Italy, M/s. Siemens Ltd., Mumbai and M/s. Beekay Engineering

Corporation entered into a consortium for execution of various works. The consortium members entered into agreements with the principals, namely

M/s. Bhilai Steel Plant. and M/s. Durgapur Steel Plant to execute the entire turnkey project. Each of these contracts involved the following services:

(a) Design and Engineering;

(b) Civil Engineering Work,

(c) Supply of fabricated Steel Structures;

(d) Erection of Steel Structures at site, including sheeting, glazing and shop painting.

5. The Appellant provided the said services under various categories of CIC, ECI & â??Consulting Engineer serviceâ?? CE and claims to have been

paying service tax under respective categories of services.

6. Till February 28, 2006, the Appellant availed abatement in respect of CIC under Notification dated September 10, 2004 and on ECI under

Notification dated August 21, 2003. The Appellant also availed CENVAT credit in respect of the input service used for providing CIC and ECI, as

there was no restriction in the said Notifications for availing such credit benefit.

7. However, with the supersession of previous Notifications by Notification dated March 1, 2006, the abatement on CIC and ECI continued, but with a

condition that CESVAT credit on inputs, input services and capital goods used for provision of those output services shall not be availed. The

Appellant claims that, it stopped availing CENVAT credit on CIC and ECI with effect from March 01, 2006.

8. The Appellant was also receiving input services of CE, for which purpose, the Appellant had sub-contracted design and engineering work to

independent sub-contractors, who were also discharging their service tax liability on the input services under CE. The Appellant availed the credit of

the same and utilized it for providing output service of CE only.

9. Since, there was no change in respect to CE with effect from March 1, 2006, the Appellant continued to pay service tax at the full rate after

availing the credit of input services of CE used for providing the output service.

10. However, a show cause notice dated November 21, 2008 was issued for the period June 1, 2006 to March 31, 2008, wherein a service tax demand

of Rs. 5,69,45,194/- was raised on following grounds-

(a) The Appellant had wrongly availed the credit of various input services of Construction service, Telephone service, Consulting Engineering service,

Internal Auditing, Computer Upgrading, Security used for providing the output services of CICS and ECI service.

(b) The Appellant was not entitled to abatement in terms of Notification dated March 1, 2006 availed by it in respect to CIC and ECI provided by it.

11. The said show cause notice dated November 21, 2008 was adjudicated upon by an order dated March 31, 2009, wherein the entire demand was

confirmed with interest and penalties. Aggrieved by this order, the Appellant filed an appeal before this Tribunal and by decision dated October 30,

2009, the matter was remanded to the adjudicating authority. Aggrieved by the said order of the Tribunal, the Appellant filed an appeal before the

Supreme Court, which was admitted on July 8, 2010 but was dismissed as withdrawn on August 6, 2015. In the meantime, the show cause notice

dated November 21, 2008 was again adjudicated and an order was passed on February 29, 2012.

12. Another show cause notice dated October 13, 2009 was issued to the Appellant for the subsequent period 2008-09 on the same grounds as the

first show cause notice. Service tax demand of Rs.1,61,82,519/- was proposed with recovery of interest and imposition of penalties. This show cause

notice was also adjudicated by the order dated February 29, 2012.

13. The Appellant filed two separate appeals against these orders dated February 29, 2012 before the Tribunal. Both the appeals were decided by a

common order dated April 12, 2013. The Tribunal, again remanded the matter for fresh adjudication. The two show cause notices were thereafter

adjudicated by an order dated December 23, 2014. The entire demand was confirmed with interest and penalties. It is this order that has been assailed

in this appeal.

14. The relevant portion of the impugned order dated December 23, 2014 is reproduced below.

â??10.9- Factually Annexure-J to the Show Cause Notice dated 21-11- 2008 is in two parts which contains the list of the documents issued

by various service providers on the strength of which the Ncticee had taken the credit.

First part of the said Annexure-J contains the list of total documents which were issued prior to 01.01.2006 (except the invoices mentioned

at S. Nos. 6, 7 and 9 dated 07.07.2008, 07.07.2008 and 08.04.2008 issued by M/s. N.S. Consultants). Going through the copies of the said

invoices submitted by the Noticee the dates mentioned against the Invoices in Annexure-J to the Show Cause Notice dated 21-11-2008 have

been inadvertently indicated as 07.07.2008, 07.07.2008 and 08.04.2008 instead of 07.07.2005, 07.07.2005 and 08.04.2005 respectively.

Therefore one thing is evident that all the aforesaid invoices had been issued prior to 01.01.2006.

10.10 As far as the question of the period of taking of the credit is concerned I find that in para 7 of the Show Cause Notice it has been

specifically mentioned that the Noticee vide letter BSBK/NC/2008/1148 dated 11.09.08 informed that they had inadvertently missed to show

the amount of CENVAT Credit availed amounting to Rs.8,31,262/- in the month of December 05 and had added the same in the opening

balance of Jan 06 and also furnished copies of invoices on which they had taken credits. I also find from the ST-3 return for the half-year

ending 31.3.2006 that the closing Balance of the credit for the December 2005 was Rs.37,613)- and the Opening Balance of the credit for

the month of January 06 is Rs. 8,68,875/- which includes the credit of Rs. 8,31 262/-. Thus it is evident that the credit of Service Tax

amounting to Rs. 8,31,262/- had been taken on the various input services viz. Construction Services, Telephone, Consulting Engineering

Service, Internal Auditing, Computer Upgrading, Security etc. prior to 01.03.2006. However I find that during the Month of Â March-2006

the ST-3 return filed by the Noticee reflects payment of Rs 2,14,526/- (Service Tax), Rs 47,162/-(Edu Cess) and ""Rs 4,290/- (S.H.E. Cess)

through Cenvat Credit account in case of CIC (commercial and industrial construction Service). This Cenvat credit pertains to the first part

of the said Annexure-J and contains the list of total documents which were issued prior to 01.01.2006 and is composed of various services as mentioned in pre-para which are in nature undisputed input services (other than Consulting Engineer Services) for Commercial and

Industrial Construction Services provided by the Noticee. The availment of Cenvat credit has not been distinguished by the Noticee in their

reply during the original proceedings, therefore, I find that the duty liabilities for the Month of March 2006 has been made by the Noticee

by payments through Cenvat credit therefore they have infringed the conditions of the ruling Notification No. 1/2006-ST dated 1.3.2006 by

availing and utilizing Cenvat Credit of Service Tex. Therefore, the abatement is not admissible to them during the said month and Service

Tax of Rs. 35,34,746/- (Service Tax), Rs. 72,695/- (Edu Cess) as demanded for the month in the annexure to the Show Cause Notice dated

21-11-2008 is recoverable from them.

10.23 ******

I find that the entire tenor of the agreement and the purchase orders issued by the service recipients, viz., SIL BSP/DSP clearly indicates the

execution of a lump-sum work including a cluster of activities/services.

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12.3 Once it is held that â??consultancy engineering serviceâ?? (CES) is a part of the composite contract and an input service for

â??commercial and industrial constructionâ?? and â??erection and commissioning serviceâ?? the Noticeeâ??s claim for the benefit of

Notification No. 01/2006-ST cannot be accepted. I, therefore, hold that the benefit of Notification No. 01/2006-ST is not available to the

Noticee.â??

ORDER

A) In respect of show cause notice no. V (ST) 15- 341/Commr/Bhi-II/2008/ Adj/7223 dtd 21-11-2008:

i) I confirm the demand of Service Tax amounting to Rs.36,07441/- (Rs. Thirty Six lakhs Seven thousand four hundred and forth one) (Rs.

35,34,746/- (Service Tax), Rs. 72,695/- (Edu Cess) on disallowed abatement for the month March 2006. Further I also confirm demand

Service Tax, on account of disallowed abatement for the period thereafter, amounting to Rs. 5,33,37,753/- (Rs. Five Crores thirty lakhs seven thousand seven hundred and fifty three) (Rs. 5,21,33,893/- + Ed Cess Rs. 10,40,703/- + SHE Rs. 1,63,157/-). I order for recovery of

total service tax amounting to Rs. 5,69,45,194/- (Rs. five Crores sixty nine lakhs forty five thousand one hundred and ninety four only)

under Section 73 along with interest under section 75 of the Finance Act, 1994.

ii) I impose a penalty at the rate of two percent from the due date of payment to the actual date of payment on the amount of Service Tax

evaded subject to the limit of Rs. 5,69,45,194/- under section 76 of the Finance Act 1994.

iii) I impose a penalty of Rs. 1000/- under section 77 of the Finance Act 1994.

iv) I impose a penalty of Rs. 5,69,45,194/- (Rs. five Crores sixty nine lakhs forty five thousand one hundred and ninety four only) under

Section 78 of the Finance Act 1994. If the amount of Service Tax along with the interest together with twenty-five percent of the penalty is

paid within thirty days of the communication of this order, the said penalty will stand reduced to twenty-five percent.

B) In respect of show cause notice no. V(ST)15- 318/Commr/Bhi-II/2009/ Adj/7843 dtd 13-10-2009:

i) I confirm the demand of Service Tax amounting to Rs. 1,57,04,543/-, Education Cess Rs. 3,14,100/- and S.H. Edu Cess Rs. 1,63,875/-,

total Rs. 1,61,82,519/- (Rs. One Crore Sixty One Lakhs Eighty Two Thousand Five Hundred and Nineteen only) on account of service tax

payable on disallowed abatement and order for its recovery under section 73 along with interest under section 75 of the Finance Act, 1994.

ii) I impose a penalty at the rate of two percent from the due date of payment to the actual date of payment on the amount of Service Tax

evaded subject to the limit of amount due upto 10-5-08 under section 76 of the Finance Act, 1994.

iii) I impose a penalty of Rs.1000/- under section 77 of the Finance Act, 1994.

iv) I impose a penalty of Rs. 1,61,82,519/- (Rs. One Crore Sixty One Lakhs Eighty Two Thousand Five Hundred and Nineteen only) under

section 78 of the Finance Act, 1994. If the amount of Service Tax along with the interest together with twenty-five percent of the penalty is

paid within thirty days of the communication of this order, the said penalty will stand reduced to twenty-five percent.

(emphasis supplied)

15. This appeal has been filed against that part of the order of the adjudicating authority that it is prejudicial to the Appellant.

16. Shri B. L. Narasimhan, learned counsel for the Appellant made the following submission:

(i) The agreement entered into between the Principals and the Consortium members is a composite contract having the essential character of a

â??works contractâ??, involving both supply of goods as well as provision of services. The impugned order has also recorded a finding to the effect

that the contract involves provision of services as well as supply of goods. Hence, the services provided by the Appellant under the said agreement

will be more appropriately classifiable under â??works contractâ? services, which became taxable only from June 1, 2007. The demand raised for the

period prior to June 1, 2007 is, therefore, not sustainable. For the demand raised post June 1, 2007, the same is also not sustainable as the demand has

been raised under the category of CIC and ECI and not under â??works contractâ?? services. In this connection reliance has been placed on a

judgment of the Supreme Court in Commissioner vs. M/s. Larsen & Toubro Ltd. and Others, 2015 (8) TMI 749 â?" Supreme Court;

(ii) The Appellant has availed the credit of input services for discharging its services tax liability on output service of CE only. The Appellant, in the

instant case, received designs and drawings from sub-contractors and the service tax has duly been discharged by the sub-contractors under CE.

These services have thereafter been used by the Appellant for provision of its output service of CE and the Appellant has utilized the credit availed for

discharging its service tax liability under the CE. In this regard, reliance has been placed on a Circular dated August 23, 2007, wherein it has been

clarified that when a sub-contractor pays tax on a service, the same shall be an input service on which credit can be availed by the main contractor;

(iii) The impugned order has denied the abatement availed by the Appellant during the month March 2006 on the ground that the Appellant availed and

utilized credit of Rs. 2,18,816/- for providing the output services of CIC for the month of March 2006. However, CENVAT credit entry of Rs.

2,18,816/- in the ST-3 Return for March 2006 for CICS is in respect to input services received prior to March 1, 2006 and the same has been accepted in the impugned order. Further, the said credit has also been utilized for output services provided by the Appellant prior to March 1, 2006.

This is evident from break-up of the amount billed in the month of March 2006 under CIC and details of service tax lability paid thereon, and invoices

raised in the month of March 2006;

(iv) Even otherwise, the credit of Rs. 6,26,509/- along with interest of Rs. 7,28,366/- has been reversed by the Appellant;

(v) The show cause notice and the impugned order have failed to establish suppression/mis-declaration on the part of the Appellant. Therefore, the

extended period of limitation could not have been involved;

(vi) The Appellant is entitled to cum-tax benefit; and

(vii) Interest is not recoverable, and penalties are not imposable.

17. Shri K. Poddar, learned Authorized Representative of the Department has however, supported the impugned order and has submitted that it calls

for no interference in this appeal. The submissions are as follows:

(i) The ST-3 return for the month of March 2006 filed by the Appellant reflects payment of Rs. 2,14,526/- through CENVAT credit account for CIC.

Thus, the duty liabilities for the month of March 2006 have been discharged by the Appellant by payment through CENVAT credit and hence the

condition of Notification dated March 1, 2006 has been infringed. In such circumstances the abatment was not admissible and hence service tax of

Rs. 35,34,746/- is recoverable from the Appellant;

(ii) A person who claims exemption has to establish that he is entitled to that exemption. A provision providing for an exemption has to be construed

strictly and if exemption is available on compliance of certain conditions, such conditions have to be complied with;

(iii) The design and engineering work provided by the Appellant is only incidental to the service provides for CIC and ECI and is not a separate

activity; and

(iv) The additional ground relating to â??works contractâ?? cannot be permitted to be raised at this stage.

18. The submissions advanced by learned Counsel for the appellant and the learned Authorized Representative of the Department have been

considered.

19. The issue that arises for consideration in this appeal is regarding the admissibility of abatement under the Notification dated March 1, 2006 in

regard to CIC and ECI. The impugned order has denied the abatement availed by the appellant during the month of March, 2006 on the ground that

the appellant availed and utilized credit of Rs. 2,18,816/- for providing the output services of CIC for the month of March 2006, which is not permitted

under the Notification dated March 1, 2006.

20. The appellant contends that till February 28, 2006, the appellant was availing abatement in respect of CIC under a Notification dated September

10, 2004 and on ECI under a Notification dated August 21, 2003. The appellant availed CENVAT credit in respect of input services used for providing

CIC and ECI as there was no restriction in the said Notifications for availing the credit benefit. However, the Notification dated March 1, 2006

superseded the previous Notifications and abatement on CIC and ECI continued, subject to a new condition/restriction of non-availment of CENVAT

credit on inputs, input services and capital goods used for provision of those output services. The appellant claims that w.e.f March 1, 2006 it stopped

availing CENVAT credit on CIC and ECI.

21. It is seen that the CENVAT credit entry of Rs. 2,18,816/- in the ST-3 Return for March, 2006 for CIC is in respect of input services received

prior to March 1, 2006 and this fact is also evident from the impugned order. Thus, the said credit has been utilized for output services provided by the

appellant prior to March 1, 2006. The restriction/condition contained in the Notification dated March 1, 2006 would, therefore, not apply.

22. This apart, even if the credit availed prior to March 1, 2006 has been utilized after March 1, 2006, the same cannot be denied as was held by the

Tribunal in M/s Shapoorji Pallonji & Co. Ltd. vs. Commissioner of Central Excise, Pune, 2015 (11) TMI 225-Cestat Mumbai. The relevant portion of

this decision is reproduced below :

â??6.2 Firstly the said Notification 1/2006-ST came into the effect from 01.03.2006. In the case in hand the appellant had taken a plea

before the lower authority that the CENVAT credit availed by them on the service tax paid by various service providers were in respect of

the services rendered before 01.03.2006 and there was no restriction for availing such CENVAT credit and claiming abatement from the total value of the bill. It is also the plea of the appellant before the lower authority that post 01.03.2006 they have not taken CENVAT credit

of the service tax paid by various service providers.

In our considered view the CENVAT credit availed by the appellant of the service tax paid by the service providers for the services rendered

prior to 01.03.2006 cannot be faulted with as availment of CENVAT credit by service recipient is subject to the condition that payment for

such service rendered as the provisions. Undisputedly, in this case the appellant had paid the service providers / settled the service

providers bill subsequently from March 2006 for the service rendered prior to 01.03.2006 and has correctly claimed the legitimate CENVAT

credit available.â??

23. The decision of this Tribunal in M/s. IL & FS Maritime Infrastructure Co. Ltd. Vs. Commissioner of Service Tax, Mumbai-I , 2017 (7) TMI 644-

Cestat Mumbai on a similar issue is also reproduced below:

â??On careful reading of the above condition, we find that the notification shall not apply only in a case where the cenvat credit of service tax was

availed in respect of that input services which was used for providing taxable service on which the abatement was claimed in terms of Notification

No. 1/06-ST. In the present case as per the submission of the Ld. Counsel the cenvat credit was availed in respect of the service tax paid on those

services, which were received and used prior to 1.3.2006 during which the cenvat credit was admissible. We agree with the submission of the Ld.

Counsel that even though the credit was availed on or after 1.3.2006 but it pertains to the period prior to 1.3.2006. The services were used before

1.3.2006 for output service which was provided before 1.3.2006. The benefit of abetment under notification No. 1/2006-ST available on the output

service provided on or after 1.3.2006 cannot be disputed.â??

24. The contention of the learned Authorized Representative of the Department that design and engineering work provided by the appellant is

incidental to CIC and ECI service cannot be accepted. They are separate services.

25. The appellant had also moved an application for addition of a ground in the appeal to the effect that the activities carried out by the appellant are

appropriately covered under the scope of â??works contractâ?? services and thus the demand under a different head is liable to be set aside. This application was allowed by order dated September 9, 2020.

26. The Commissioner has held in the impugned order that the agreement between the Principles and the Consortium Members is a composite

contract for provision of services and supply of goods. According to the appellant, the composite contract has the essential character of a â??works

contractâ?, as it involves both supply of goods as well as provision of services. Hence, the various services provided by the appellant under the

agreement will more appropriately being classified under â??works contractâ?? service which became taxable w.e.f June 1, 2007. The impugned

order also records a finding that the contract involves provision of services as well as supply of goods. Thus, the demand raised for a period prior to

June 1, 2007 is not sustainable. Even for the period post June 1, 2007, the demand cannot be sustained as it has been raised under CIC and ECI and

not under â??works contractâ?? service.

27. The contention of the learned Authorized Representative of the Department is that since the appellant registered itself under the head of CIC or

ECI, it cannot now contend that the services rendered by it would be classified under â??works contractâ?? service.

28. This contention cannot be accepted in view of the decision of the Gujarat High Court in M/s. N J Devani Builders Pvt. Ltd. vs. Union of India.

The High Court observed as follows:

â??5.2. The learned advocate Mr. Bhatt submitted that, the issue before the adjudicating authority was the applicability of the notification

dated 01.03.2006, as the petitioner availed CENVAT credit in March, 2006 from the GTA services. Therefore, according to the adjudicating

authority, the petitioner was not entitled to the benefit of notification dated 01.03.2006 with regard to the abated value on the ground that

the petitioner availed the CENVAT credit. In such circumstances, both the Commissioner (Appeals) as well as the Tribunal were justified in

holding that the petitioner was not liable to the benefit of the notification dated 01.03.2006. It was submitted that, the petitioner could not

have raised a contention of not liable to pay service tax, despite the fact that the petitioner had voluntarily registered under the category of

'commercial / industrial construction services' under the provisions of the Act, from 16.06.2005 and was paying service tax since 2005 under the said head of 'service tax'.

6.1. Having heard the learned advocates appearing for the receptive parties and having gone through the material on record, it emerges on

record that the petitioner no.1 was rendering services classifiable as 'works contract'. This fact has neither been disputed by the

Commissioner nor by the Tribunal. That only because the petitioner no.1 registered itself for the service tax under the head of 'commercial /

industrial construction services', the petitioner cannot be fasten its liability to pay service tax on the services rendered by it as 'work contract'

services.

6.5. Considering the aforesaid amendment in the Finance Act, 1994, the Supreme Court in the case of L & T Ltd. (supra), after considering

the decision of the Supreme Court in the case of Gannon Dunkerley reported in (1993) 1 SCC 364 = 2002-TIOL-103-SCCT-CB held that

the separation of the value of the goods contained in the execution of a works contract will have to be determined by working from the

value of the entire works contract and deducting there from charges towards labour and services. The Apex Court therefore was of the

opinion that the service tax charging Section itself must lay down with specificity that the levy of the service tax can only be on works

contracts, and the measure of tax 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 the property in goods transferred in the execution of the works contract. In

such circumstances, the Apex Court held that when the legislature has introduced the concept of service tax on indivisible works contracts

then such contracts were never intended to the subject matter of the service tax, and therefore, such contracts, not being exempt under the

Finance Act, 1994, cannot be said to fall within its tentacles, as which was never the intention of Parliament. The Apex Court, therefore,

held that the levy of service tax on works contract was non-existent prior to 01.06.2007.

7. We are therefore of the opinion that the impugned order passed by the Tribunal in Service Tax Appeal No. 107 of 2009 is without

jurisdiction and contrary to the law laid down by the Apex Court in the case of L

& T Ltd. (supra). The Tribunal has further erred in

brushing aside the decision of the Coordinate Bench by referring it to be the decision of the Mumbai Tribunal which is contrary to the

record. The Tribunal is bound to follow the decision of the Coordinate Bench, whether it is situated in the same region or any other region

on the similar facts. Thus, the Tribunal has committed a breach of judicial propriety by remanding the matter to the adjudicating authority

to verify the applicability of the notification dated 01.03.2006, though, admittedly the petitioner was not liable to pay the service tax prior to

01.06.2007, as the petitioner was rendering services of 'works contract'.

8. The contention raised on behalf of the respondents that as the petitioner had voluntarily registered under the head of 'commercial

/industrial construction services', the petitioner is liable to pay service tax, is not tenable as the petitioner cannot be held to be liable to pay

service tax prior to 01.06.2007, where, it is not in dispute that the petitioner was rendering 'works contract service'.â??

(emphasis supplied)

29. Thus, the demand raised under CIC and ECI for the period July 1, 2007 and post June 1, 2007 cannot be sustained.

30. In view of the aforesaid discussion, the impugned order cannot be sustained and is set aside. The appeal is, accordingly allowed.

