
(2024) 04 CESTAT CK 0014

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 1785 Of 2012

M/s Competent Engineers

APPELLANT

Vs

Commissioner Of Excise, Ludhiana

RESPONDENT

Date of Decision : 05-04-2024

Acts Referred:

Finance Act, 1994 — Section 65(105) (zzzza), 75, 76, 77, 78, 80
Central Excise Act, 1944 — Section 11A, 11A(1), 11A(4)

Citation : (2024) 04 CESTAT CK 0014

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Nikhil Goyal, Ashok Goyal, Sahil Garg, Shivani

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 14.03.2012 whereby the Ld. Commissioner has confirmed the demand of Rs. 58,58,591/- along with interest under section 75, and also imposed fine of Rs. 200/- @ per day of delay from 13.04.2006 to 10.05.2008 and also a penalty of Rs. 5000/- under Section 77 and also imposed equal penalty under Section 78 of the Finance Act, 1994.

2. Briefly the facts of the present case are that the appellant is a "proprietary concern duly registered with Central Excise Division Amritsar" and is holding service tax registration and has been regularly filing ST-3 returns. The appellant is engaged in executing turnkey projects for construction designing, supplying, erecting, installing commission of Electrical equipment's for lumpsum price to Airport Authorities, C.P.W.D., Defence and paramilitary organizations such as BSF, CRPF, ITF etc., in term of agreement so entered into with its customers and the appellants were responsible to hand over the functional systems to its customers.

3. It has been further alleged that the appellant used to quote the price in form

of consolidate consideration for the entire contract/work without bifurcating into two parts namely; supply of goods and for services rendered. The works contract so executed was indivisible and could not be vivisected into sale of goods and rendering of services for levy of service tax. The appellant was also registered with the Sales Tax Department and was filing Sales Tax returns regularly. On 26.06.2008, an audit team visited the appellant's premises to conduct audit its account and after conducting the audit for two days the audit team prepared the Audit Objection Memo and presented the same before the Assistant Commissioner Audit, who appended his dated signature on 23.08.2008 as token of its acceptance.

4. Thereafter, a show cause notice dated 24.10.2010 was issued by the Ld. Commissioner on the basis of audit objections of which the appellant filed reply. After following the due process, the Ld. Commissioner vide order dated 14.03.2012 confirmed the demand along with interest and penalties. Hence, the present appeal.

5. Heard both the parties and perused the record.

6. Ld. Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedents. He further submits that the entire demand and penalties imposed are based only on the audit objections which is contrary to the statutory provisions as mandated in Section 11A(1) of the Central Excise Act, 1944. He further submits that the show cause notice issued on the basis of audit objections without the necessary investigation is bad in law. In support of his submissions, he relied upon the following decisions :

- Delta Power Solutions India (P.) Ltd. Vs. Commissioner, Customs, Central Excise & Service Tax, Hapur [2022] 137 taxman.com 367 (New Delhi-CESTAT).
- Kirloskar Pneumatic Co. Ltd. Vs. Commissioner of C.Ex. Pune-III, [2010] 2 taxman.com782 (Mumbai-CESTAT).
- Hercules Hoists Ltd. Vs. Collector of Central Excise, Bombay [1997] 1997 taxman.com 881 (CEGAT-New Delhi).
- Swastik Tin Works V. Collector of Central Excise, [1986] 1986 taxmann.com 117 (CEGAT-New Delhi)(SB).

7. He further submits that in the present case, the demand of service tax has been confirmed in respect of service rendered to airport which otherwise are exempted from the levy of service tax by virtue of definition of works contract under Section 65(105) (zzzza) of Chapter V of Finance Act, 1994. He also referred to the Board's Circular No. 116/10/2009-S.T. Dated 15.09.2009, which exempts Service Tax in respect of service rendered to Airports, Railways etc.

8. He further submits that the department's contention that the services of the appellant is falling under the category of "Erection, Commissioning or

Installation? is incorrect. In view of the decision in the case of Goa Friends Engineering & Electricals (P.) Ltd. Vs. Commissioner of Customs & Central Excise [2021] 131 taxman.com 238 (Mumbai-CESTAT) wherein it has been held that the Erection, Installation, Testing and Commissioning of electrical works cannot exist independent of civil structure just as tax liability arises on ancillary activities of civil construction so would exemption that pertains to civil construction, retrospective effect of exemption is applicable to electrical works executed and maintenance undertaken by the appellant. He also referred to the decision of the Supreme Court in the case of Commissioner of Customs and Central Excise, Vadodara- I v. Jyoti Ltd. [2022] 141 taxman.com 437 (SC).

9. Ld. Counsel further submits that the service tax prior to 01.06.2007 are exempted in view of the decision of the Supreme Court in the case of Commissioner, Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd. (2015) (SC), wherein, it was held that a works contract is a separate species of contract distinct from contracts from services simplicitor recognized by the world of Commerce and law as such and has to be taxed separately as such. It was further observed by the Hon^{ble} Apex Court that the Assessee's argument that there is no charge of tax of works contracts in the Finance Act, 1994 is correct. Therefore, while introducing the concept of service tax on indivisible works contracts in 2007 various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnel and dams. These infrastructure projects have been excluded and continue to be excluded presumable because they are conceived in the national interest. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it.

10. Ld. Counsel also cited the decision of Shree Mohangarh Construction Co. Vs. Commissioner of Central Excise & Service Tax, Rajasthan [2021] 129 taxman.com 225 (New Delhi-CESTAT), wherein, it has been held that works contract service could not be equated either with a contract for sale of goods or a contract for supply of services simplicitor and service tax can only be demanded on works contract services after introduction of a charge on works contract service and not under any other head either before introduction of service or thereafter. Ld. Counsel further submits that as regards the contract executed for C.P.W.D., the Ld. Counsel relied upon the decision of Khurana Engineering Ltd. Vs. Commerce of Central Excise, Ahmedabad [2011] 21 STR 115 (Ahd.-CESTAT), wherein, tenders were invited by the CPWD on behalf of the President of India. It was held in the above cited case that various departments of Government of India act on behalf of the President of India and therefore it cannot be said that CPWD can be equated with NBCC which is a public sector undertaking. Further, since on behalf of the President of India contracts are entered into, agreements are entered into bonds are accepted government of India is treated as "Person". In fact, CPWD, in this case was engaged for construction of residential complex

for giving it on rent to the employees of income tax department and therefore, this service cannot be included in the definition of residential complex service. It is basically the case of one department taking the help of another department to get the work done basically because of specialization of that department in preparing documents and get the work executed.

11. As regards the imposition of penalty under Section 76 and 78 of the Finance Act, the Ld. Counsel relied upon the decision of Commissioner of C.Ex. Ludhiana Vs. Pannu Property Dealers reported in 2011 (24) STR 173 (P& H). Ld. Counsel further submits that it is a fit case for invocation of Section 80 of the Finance Act for dropping the penalties as the appellant had bona fide belief that they have provided the services to the government of India through CPWD and airport and it is not liable to service tax.

12. On the other hand, Ld. AR reiterated the findings of the impugned order and submitted that the appellant did not disclose all the facts to the department which was detected during the course of audit and therefore, the appellant has suppressed the facts with intend to evade the service tax and therefore the department has rightly invoked the extended period of limitation.

13. We have considered the submissions of both the parties and perused the material on record as well as the decisions relied upon by both the sides.

14. First of all, we will deal with the invocation of extended period of limitation because as per the Ld. Counsel for the appellant entire demand is barred by limitation as the demand has been raised only on the basis of audit objections without any further investigation by the department and without satisfying the requirement for invoking the extended period of limitation under Sub-section 4 of Section 11A of the Central Excise Act, 1944.

15. To appreciate the submissions of the Ld. Counsel, it would be appropriate to reproduce the relevant provision of sub-Section (1) and sub-Section (4) of Section 11A of the Central Excise Act, which are reproduced here in below :

- A perusal of section 11A (1) of the Excise Act shows that where any duty of excise has not been paid for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Excise Act with intent to evade payment of duty, the Central Excise Officer shall, within one year from the relevant date, serve notice on the person requiring him to show cause why he should not pay the amount specified in the notice. However, sub-section (4) of section 11A of the Excise Act provides that where any duty of excise has not been levied or short paid by reason of fraud or collusion or any wilful misstatement, the notice can be issued by the Central Excise Officer within five years from the relevant date.
- The provisions of section 11A of the Central Excise Act came up for interpretation before the Supreme Court in Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay⁶ . The Supreme Court observed that

section 11A empowers the Department to reopen the proceedings if levy has been short levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the Supreme Court observed-

"2. ***** The Department invoked extended period of limitation of five years as according to it the duty was shortlevied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs. *****"

4. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

- It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.
- This decision of the Supreme Court in Pushpam Pharmaceuticals was followed by the Supreme Court in Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut⁷ and the relevant paragraph is as follows:-

"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts." (emphasis supplied)

- In Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore⁸, the Supreme Court observed that for invoking the extended period of limitation,

duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

- The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in *Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur*⁹ and the relevant portion of the judgment is reproduced below:

"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of nonpayment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso." (emphasis supplied)

- The Supreme Court in *Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh*¹⁰ also observed in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:-

"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 wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct." (emphasis supplied)."

16. We also find that identical issue of invoking the extended period of limitation based on audit objections was considered by the co-ordinate Bench in the case of *Delta Power Solutions India (P.) Ltd.* cited (Supra) and the Division Bench of the Tribunal after considering the various decisions of the Hon'ble Apex Court cited

(Supra) has held in para 25 and 26 as follows:

"25. In the present case, what is seen is that the audit was conducted between June 17, 2011 to June 22, 2011 and the show cause notice refers to this audit only. The notice, therefore, should have been issued within one year from the relevant date and there is no good reason as to why the Central Excise Officer should have waited till March 19, 2015 to issue the show cause notice. The extended period of limitation, for this reason alone, could not have been invoked. Even in a case of self-assessment, the Department can always call upon an assessee and seek information and in this case an audit objection was raised, to which a reply was submitted. The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment. This apart, an assessee is called upon to provide only that information that is required to be furnished in the self-assessment form. There is no averment in the show cause notice, nor there is any finding in the order passed by the Commissioner (Appeals) that the appellant had provided incorrect information to any matter required to be stated in the self-assessment form with intent to evade payment of service tax. All that has been stated is that the transaction details were not supplied to the Department and merely because of this, it has been assumed that the appellant suppressed facts with intent to evade payment of service tax. Suppression in selfassessment matters can arise only when information sought in the prescribed form is not supplied or incorrect information is supplied. 26. Thus, in view of the aforesaid discussions, it cannot be said that the appellant had suppressed any information with intent to evade payment of tax."

17. In view of the decisions cited (Supra), we hold that the entire demand in the present case is barred by limitation.

18. The second issue involved in the present case is whether the appellant is liable to pay service tax under the category of Erection, Commissioning or Installation service with effect 16.05.2005 as alleged by the department, whereas, the claim of the appellant is that the services provided by them to CPWD and Airport authority are in the nature of works contract as per their agreement and are exempted from payment of service tax. Besides this, the appellant's stand is also that prior to 01.06.2007, service tax on works contract was not leviable to service tax as per the decision of the Hon'ble Apex Court in the case of Commissioner, Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd. cited (Supra), in this regard we find that the demand of service tax in respect of service rendered to airport is exempted from levy of service tax by virtue of definition of works contract under Section 65 (105) (zzzza) of chapter V of Finance Act, 1994 which is reproduced here in below:

"Taxable Service" means any service provided or to be 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. For the purposes of this sub-clause, "works contract" means a contract wherein, (1) 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,

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated 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, fireproofing 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

(f) commissioning (EPC) projects;"

19. Moreover, the Board's Circular No. 116/10/2009-ST dated 15.09.2009 exempts service tax in respect of service rendered to Airport, Railways etc. We also find that the stand of the department that appellant is liable to pay service tax under the category of Erection, Commissioning or installation service is also not tenable in view of the decisions of the Tribunal in the case of Goa Friends Engineering & Electricals (P.) cited Supra wherein the Tribunal has held as under:

"9. The appellant was engaged in 'erection, installation, testing and commissioning of electrical works and it belies logic to expect electrical works to generally exist independent of civil structure as well as in disregarding the critical indispensability of electrical installation in civil structures. To segregate one component out of the entirety of civil structure does not appear to be the intent of law. It would also appear from a perusal of the notification that the exemption is accorded to activities in connection with 'civil structure' or 'original structure and not restricted to erection of the structure which appears to be the construction placed upon the expression by the lower authorities.

10. In the facts and circumstances narrated supra, the retrospective effect of the exemption is applicable to the electrical works executed, and the maintenance undertaken, by the appellant for Goa State Industrial Development Corporation (GSIDC) and Goa Medical College (GMC) Accordingly, we set aside the impugned order and allow the appeal with consequential relief."

20. Further, we also find that the services rendered by the appellant to CPWD, Airport falling under the category of works contract as per their agreement and it cannot be taxed in any other category as held by the Tribunal in the case of Shree Mohangarh Construction Co. Vs. Commissioner of Central Excise & ST,

Rajasthan cited (Supra) wherein, it has been held that works contract service could not be equated either with a contract for sale of goods or a contract for supply of services simplicitor and service tax can only be demanded works contract service after introduction of a charge on works contract service and not under any other head either before introduction of service or thereafter. Thus, in the instant case even if assessee had not fulfilled conditions required under Works Contract Composition Scheme, there was no case for department to charge service tax on service provided by assessee under any other head.

21. In view of the discussion above, we are of the considered view that the impugned order is not sustainable on merit as well as limitation. Hence, we set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.