(2023) 10 CESTAT CK 0017

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40046 Of 2014

M/s. D.R. Constructions — APPELLANT

Vs

Commissioner Of Central Excise And Service Tax — RESPONDENT

Date of Decision : 13-10-2023

Acts Referred:

Service Tax (Determination Of Value) Rules, 2006 — Rule 2A
Finance Act, 1994 — Section 65(105)(zzzh), 73(1)

Citation : (2023) 10 CESTAT CK 0017

Hon'ble Judges : P. Dinesha, Member (J);Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : S. Durairaj, M. Ambe

Final Decision : Allowed

Judgement

P. Dinesha, Member (J)

1. The present appeal is filed against the impugned Order-in-Original No. 09/2013-ST (Commissioner) dated 07.10.2013 passed by the Commissioner of Customs, Central Excise and Service Tax, Salem and the period involved is from 01.02.2007 to 31.01.2012.

2.1 A perusal of the impugned order reveals that the appellant had entered into a building-material contract with the promoters. The Commissioner also records that the appellant was to provide all materials like jelly, metal, river sand, cement, etc., including the entire labour for construction, for which an amount of Rs.900/- per square foot was fixed as the primary agreement was for the construction of residential complex. The appellant had undertaken the construction work as a sub-contractor and it is also recorded that the principal contractor had discharged the applicable Service Tax on the entire project.

2.2 At paragraph 08.05, the Commissioner observes that the classification of the taxable service was the construction of residential complex having more than 12 residential units and the appellant having undertaken the construction of the residential complex, is the service provider.

2.3 The original authority further records that the contention of payment of Service Tax by the principal contractor on behalf of the appellant defies logic and is not sustainable in law since the liability was on the service provider i.e., the appellant only.

2.4 He also refers to Notification No. 01/2006-S.T. dated 01.03.2006 to hold that the Service Tax was rightly demanded from the appellant.

3. Hence, the demand came to be confirmed as per the impugned Order-in-Original dated 07.10.2013.

4. It is against this demand and the Order-in-Original that the present appeal has been filed before this forum by the appellant.

5.1 Shri S. Durairaj, Ld. Advocate appearing for the appellant, would contend at the outset that the appellant is a proprietorship concern, the demand in the present appeal relates to the alleged construction of residential complex on behalf of M/s. Southern Properties and Promoters, Coimbatore, which is a partnership concern wherein, even the appellant is one of the partners. Further, the period involved is from February 2007 to November 2011 and the demand has been raised even denying the abatement under Notification No. 01/2006 (supra) on the ground the value of materials supplied free of cost i.e., water and electricity, has not been added to the taxable value. Hence, he would contend that the partnership firm having discharged the Service Tax liability, there is no question of payment of the same service tax once again by the appellant; the appellant being a partner of the partnership firm, has rendered essentially the service to itself which is not a taxable event.

5.2 Without prejudice to the above, he would also argue that the service rendered was indivisible works contract service, which has also been admitted in the impugned order and hence the demand up to 31.05.2007 is liable to be set aside, as per the decision of Hon'ble Apex Court in the case of Commissioner of Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)], which has been followed by various CESTAT Benches. He also relied on the decision of the Hon'ble Apex Court in the case of M/s. Total Environment Building Systems Pvt. Ltd. v. Deputy Commissioner of Commercial Taxes & ors. [2022 (63) G.S.T.L. 257 (S.C.)].

5.3 He would further contend that up to 30.06.2010, there can be no liability since the Explanation which expanded the scope of Section 65(105)(zzzh) came to be inserted with effect from 01.07.2010 to include the services of builder/ promoter to the buyers.

5.4 He would also contend that the classification proposed and demanded is under construction of residential complex service even though the authority below considers the fact of provision of indivisible works contract service involving sale of materials as well as service of construction activity and hence, even for the later / remaining period, the Service Tax demand under construction of residential complex service requires to be deleted.

5.5 It is his further case that even the denial of abatement under the Notification (supra) is also not as per law and the same is contrary to the decision of the Hon'ble Apex Court in the case of Commissioner of Service Tax v. M/s. Bhayana Builders (P) Ltd. [2018 (10) G.S.T.L 118 (S.C.)] and hence, Service Tax could not be demanded on the value of materials, since value could only be determined either by giving an abatement as per the above Notification or as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006; in any case, there was no scope for the Revenue to invoke the larger period of limitation since all the details were available in the statutory records of the appellant and it is an undisputed fact that the partnership concern had discharged the Service Tax liability, the Revenue having accepted the Service Tax payment made by the partnership concern, can never allege suppression in the hands of the partner of the partnership firm, which in fact not only defies the logic but also contrary to law.

6. Per contra, Shri M. Ambe, Ld. Deputy Commissioner, relied on the findings in the impugned order.

7. We have heard the rival contentions and we have gone through the documents placed on record, and the only issue that arises for our consideration is: whether the demand, as confirmed in the impugned order under construction of residential complex service for the period from 01.02.2007 to 31.01.2012, is sustainable?

8. The Show Cause Notice came to be issued on 17.04.2012 for the above period proposing, inter alia, demand of Service Tax by invoking the extended period of limitation within the meaning of proviso to Section 73(1) of the Finance Act, 1994, as could be seen from paragraph 12(i) and (ii) of the Show Cause Notice. In the impugned order, the Commissioner has justified the invoking of the extended period of limitation.

9.1 Facts, as we observe from the impugned order, are that the appellant had undoubtedly carried out construction activity, by virtue of indivisible works contract involving supply of goods and construction activity. Hence, the Revenue has proceeded on a wrong premise to confirm the impugned demand.

9.2 Moreover, it is also clear, by virtue of there being no rebuttal by the Revenue, that the main contractor namely, M/s. Southern Properties and Promoters, had remitted Service Tax on the project, for which the appellant was only a sub-contractor. No doubt, the sub-contractor cannot claim immunity from Service Tax just because the liability was on the main contractor, but once we agree that what was involved was indivisible works contract which was not at all amenable to Service Tax in the hands of a builder, at least up to the date of insertion of Explanation i.e., 1.07.2010, there cannot be any liability in the hands of the appellant up to 01.07.2010 under construction of complex service.

10.1 For the subsequent period, however, even though the work was carried out by virtue of indivisible works contract, the authority below has chosen to confirm the demand only under construction of residential complex service, which is not in accordance with law since, apparently, the tax is demanded under a wrong classification which is not permissible in view of the decision of the Hon'ble Apex Court in the case of M/s. Larsen & Toubro Ltd. (supra).

10.2 Moreover, the Show Cause Notice having been issued in 2012, the demand, if at all, could only be for the normal period, provided the same is raised under the proper classification, but however, the same not being the case here, there is no question of sustaining any part of the demand.

11. In view of our above discussions, the demand in the impugned order cannot sustain, for which reason the same is set aside.

12. The appeal is allowed with consequential benefits, if any, as per law.

