(2024) 03 CESTAT CK 0032

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 52092 Of 2018

M/s. India Commercial Services — APPELLANT

Vs

Commissioner Of Central Excise, Service Tax And CGST — RESPONDENT

Date of Decision : 20-03-2024

Acts Referred:

Finance Act, 1994 — Section 65(39a), 65(105)(zzzza), 65(105)(zzd), 73(1), 73(2), 75, 77, 78

Citation : (2024) 03 CESTAT CK 0032

Hon'ble Judges : Binu Tamta, Member (J)

Bench : Single Bench

Advocate : B.L. Sharma, Vishwa Jeet Saharan

Final Decision : Allowed

Judgement

Binu Tamta, Member (J)

1. The appellant has No.49(RK)ST/JPR/2018-2019 demand towards service tax in challenged the Order-in-Appeal dated 25.05.2018 confirming the terms of the show cause notice.

2. The appellant is providing taxable service viz. ?Erection, Commissioning and Installation Services? and ?Works Contract Service? defined under Section 65(39a) and 65(105)(zzzza) of the Finance Act, 1994 (the Act) and made taxable under Section 65(105) (zzd) and 65(105)(zzzza) of the Act. During the course of audit of the records, it was noticed that the appellant had opted to pay service tax @4.12% on the services of ?Erection, Commissioning and Installation? rendered to Jaipur Vidyut Vitaran Nigam Limited, Jaipur (JVVNL) opting for composition scheme under ?Works Contract Service?. It was further observed that the cost of materials was not taken into account for payment of the service tax, which is primary condition of works contract. Show cause notice dated 3.6.2013 was issued to the appellant as they had deposited service tax @4.12% of the taxable value instead of 10.30% of the taxable value, which resulted in

short payment of service tax of Rs.33,77,286/- for the period October, 2009 to January, 2010. The Adjudicating Authority vide order-in-original dated 10.06.2015 confirmed the demand along with interest under Section 73(2)/75 of the Act and imposed penalty under Section 77 and 78 of the Act. The Adjudicating Authority also ordered for appropriation of the service tax of Rs.4,50,968/- and interest of Rs.97,127/- in the Government Account. On challenge in appeal, the Commissioner (Appeals) by the impugned order confirmed the demand. Hence, the present appeal before this Tribunal has been filed.

3. Having heard both the sides and perused the records.

4. The submission of the learned counsel for the appellant is that prior to the visit of the Audit team in the month of Feb./March, 2011, one Audit team had earlier visited their premises in the month of Feb./March, 2010, whereby IAR No.07/2010 dated 20.04.2010 for short payment of service tax was worked out for the period from April, 2006 to December, 2009. He also submitted that though the period of audit was from April, 2006 to September, 2009 but they extended the period of demand upto December, 2009. The submission of the learned Counsel is that the period of October to December, 2009 (subject matter in issue) was already considered by the earlier Audit team in IAR No.07/2010 and the value for the period October to December, 2009 was Rs.4,96,10,218/-, out of the total value of demand i.e. Rs.5,46,48,640/- and for the remaining value of Rs.50,38,422/- pertaining to the month of Jan. 2010, the appellant had voluntarily paid vide challan dated 30.01.2012.

5. I am not convinced with the contention of the learned counsel for the appellant and the same needs to be rejected. In view of the reasoning noted by the Adjudicating Authority that there is a standard practice that the Departmental Audit is conducted for a specified period, which has been clearly mentioned in IAR as April, 2006 to September, 2009 in Col.-9 in Part-I and the appellant has not shown anything that the period specified was extended by the proper officer, there is no merit in the submission of the learned Counsel that IAR No.07/2010 dated 20.04.2010 covered the period from October ? December, 2009.

6. Further, I find from the order of the Adjudicating Authority that the appellant though had the opportunity to substantiate their claim and present documentary evidence in their support, however, they have only presented IAR No.07/2010, which is based on the documents produced by the appellant but the short payment of service tax was calculated only for the period under audit, i.e. April, 2006 to September, 2009 as per serial no.9 of IAR No.07/2010.

7. On the issue of classification of services as to whether they are classifiable under ?Works Contract Service? and liable to make payment of service tax @4.12%, the Adjudicating Authority has noted that the assessee did not produce the bills/invoices required at the time of audit, for verification of the facts that

the VAT/Sales Tax has been charged and they failed to produce any evidence to the effect that the cost of materials used/consumed in providing of services was included in the gross amount of taxable service shown as Rs.5,46,48,640/-. Para 4.3.4 from the order of the Adjudicating Authority is reproduced below:-

?4.3.4 The fact of the case indicate that the assessee did not produce the bills/ invoices required at the time of audit for verification of the facts that VAT/Sales Tax has been charged and they also failed to produce any evidence to the effect that the cost of material used/consumed in providing of service was included in the gross amount of taxable service shown as Rs.5,46,48,640/-. Even after issuance of the audit para and before being show caused, the jurisdictional Superintendent, Service Tax Range-I, Jaipur repeatedly asked them to produce requisite information/documents vide his letters dated 18.05.2011, 13.06.2011, 25.04.2022, 27.04.2012 and 08.01.2013. Rather than supplying documents/ evidences to prove that they have fulfilled the conditions for availing composition scheme under the Works Contract Services, they kept on putting up some argument or the other. Therefore, it is a clear case where the assessee have failed to produce the documents required to verify that the sale tax/VAT had been paid on the goods/material involved in execution of the work contract of JVVNL and the value of such goods/materials had been included in the gross amount shown against ?Works Contract Service?. No such proof documentary or otherwise was produced along with their written reply and also at the time of personal hearing on 12.12.2014. Accordingly, I find that the composition scheme is not available to the assessee and service provided do not fall under the category of Works Contract attracting service tax @4.12% but classifiable under ? Erection, Commissioning and Installation Services? attracting service tax @ 10.30% as alleged in the impugned notice.?

8. In absence of any documents placed by the appellant, both the Adjudicating Authority and the Appellate Authority have not found favour with the appellant and hence, confirmed the demand. I feel that it is in the interest of justice that the appellant may be granted an opportunity to place on record the requisite documents, as mentioned above before the Adjudicating Authority as the stand taken by the appellant is that the bills of VAT/Sales Tax on materials used in the ? Works Contract Service? have already been provided by the appellant to the Superintendent, Service Tax.

9. Learned Counsel for the appellant has taken an alternate averment that the demand is time barred. His submission is that the non-inclusion of the value of the material used in the ?Works Contract Service? was noticed by the earlier Audit team of Service Tax, who had issued IAR No.07/2010 dated 20.04.2010 and, therefore, the action for raising the demand for service tax for the subsequent period i.e. October, 2009 to Jan. 2010 should have been taken within the normal period of 18 months, as per Section 73(1) of the Act. Whereas the show cause notice dated 03.06.2013 has been issued after 3 years on the basis of subsequent Audit Report No.1192/2010 dated 03.05.2011. From the records

of the case, I find that the ST-3 Returns were filed by the appellant on 24.04.2010 for the period October, 2009 to March, 2010 and the Audit Report No.1192/2010 was dispatched to them on 3.5.2011. Subsequently, the jurisdictional Range Officer sent letters dated 18.05.2011, 13.06.2011, 25.04.2012, 27.04.2012 and 08.01.2013 calling upon them to submit information and documents etc. However, the appellant, after two years of filing the periodical ST-3 Returns submitted that the value of the taxable services in the said returns has been wrongly given. The submission of the appellant was found to be non-corroborative without any documentary evidence and was found to be of no merit. On this aspect also, the learned Counsel for the appellant was required to substantiate his case with the supporting documents, which he failed to do so.

10. The reliance placed by the appellant on the earlier Audit has been found to be distinguishable by the Adjudicating Authority as according to it, the preceding Audit team must have prepared the audit on the basis of the information presented by the assessee themselves. All these facts and submissions can be made by the appellant before the Adjudicating Authority once again along with the necessary and corroborative documents in that regard.

11. It would be just and fair that the matter is remanded before the Adjudicating Authority, granting liberty to the appellant as well as to the Department to place on record the documents and the Adjudicating Authority may consider the same on merits.

12. The appeal, is allowed by way of remand.

