
(2025) 01 CESTAT CK 1556

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50009 of 2019

**M/s. Jainco Enterprises Private Limited @APPELLANT @Hash
Commissioner of CGST, Customs and Central Excise, Jodhpur - I
@RESPONDENT**

Date of Decision : 09-01-2025

Acts Referred:

Finance Act, 1994 — Section 65(105), 65(105)(zzzza), 73(1), 78
Central Excise Act, 1944 — Section 11A, 11A(1), 11AC

Citation : (2025) 01 CESTAT CK 1556

Hon'ble Judges : Dr. Rachna Gupta, Member (J); Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Yash Daddha, S.K. Meena

Final Decision : Allowed

Judgement

Dr. Rachna Gupta, J

1. M/s Jainco Enterprises, the appellant is having service tax registration for providing Commercial or Industrial Construction Service, Works Contract Service and Construction of Residential Complex Service. During the course of audit of records of the appellant by the officers of Central Excise Commissionerate, Jaipur, it was observed that the appellant has provided Works Contract Service to M/s Kota Thermal Power Station, Kota (KTPS). Whereas, on perusal of the contract and scope of the work department observed that the appellant has been awarded work order for civil work for pollution control includes GWR with pump house for dust suppression in CHP area, RCC & PCC Flooring, Sire & garden work, car parking and cycle stand, construction of operation & maintenance store, RR stone masonry work, hand railing, drain and misc civil work as required at site of M/s KTPS, Kota.

1.1 Further the appellant has submitted VAT returns which shows that the assessee has also paid VAT/sales tax on the above said work. The essential condition of work contract that transfer of property in goods must be involved in

the execution of such contract is leviable to tax as sale of goods. This condition is being fulfilled here as such the service provided by the assessee was 'Work Contract Service' and classified under erstwhile Section 65(105)(zzzza) of the Finance Act, 1994 and not the "Commercial Construction Service".

1.2 It was observed that the gross value receipt of Work Contract Service during 2010-11 and 2011-12 by the appellant is Rs. 40.81 lakhs and Rs. 96.29 lakhs respectively on which service tax on these amounts was not deposited by the appellant. However, on being pointed out the appellant deposited the service tax amounting to Rs.4,36,950/- along with the interest of an amount of Rs.1,86,868/- vide challan dated 28.02.2014. The said payment was alleged to be a short payment on further calculating the service tax liability of the appellant for the said period department has observed that despite the aforesaid payment the appellant has still short paid the amount of Rs. 9,75,185. The said amount of service tax along with interest with the proposal of imposition of penalty on the appellant was proposed vide show cause notice no. 275/2015 dated 29.1.2016.

2. We have heard Shri Yash Daddha, learned Chartered Accountant for the appellant and Shri S.K. Meena, learned Authorized Representative for the department.

3. Learned Chartered Accountant for the appellant submitted that the impugned order is passed at the second round of litigation. That the first appellate authority in its order, upheld the classification of service as 'Works Contract Service' but allowed the benefit of threshold exemption along with composition scheme to the appellant and remanded the matter back for re-quantification of tax and penalty after following the principles of natural justice. That in the remand proceedings, the demand of tax of Rs. 127, 905/- has been confirmed treating the service as works contract service along with interest thereon and applicable penalty. Ld. Counsel submitted that the said demand is barred by limitation. That the appellant did not have any mala-fide intention and there is nothing on record which proves that appellant had suppressed anything from the revenue. The transaction were duly recorded in the statutory records. The tax was paid immediately as pointed out by the audit. Thus extended period in given case should not be applicable. That further, in the remand proceedings also, no penalty was levied by the revenue as tax along with interest was paid (as per own ascertainment) before issuance of the SCN. Learned Chartered Accountant has relied upon the following decisions: -

i. Jaiprakash Industries Ltd. v. Commissioner of Central Excise, Chandigarh [2002 (146) E.L.T. 481 (S.C.) = 2002 taxmann.com 171 (S.C.)]

ii. Commissioner of Central Excise, Vapi v. Kotety Gum Industries [2016 (335) E.L.T 581 (S.C.)]

iii. Continental Foundation Joint Venture v. Commissioner of Central Excise, Chandigarh [2007 (216) E.L.T. 177 (S.C.) = 2007 taxmann.com 532 (SC)]

With these submissions the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

4. Learned Departmental Representative has acknowledged that the appellant has rendered services to M/s. KTPS by indivisible work contract. Also the appellant has paid VAT/sales tax on the said work order. Accordingly, the nature of contract is the composite works contract for which legislation has made specific entry under Section 65(105)(zzzza) of the Finance Act, 1994 w.e.f. from 01.06.2007. Hence, the activity of appellant is rightly classified as Works Contract Service.

4.1 Learned Departmental Representative while submitting on the issue of invocation of extended period of limitation as the sole ground raised by the appellant has at the outset reiterated the findings in the impugned order. In Para 18.6 thereof, it is submitted since the appellant was working under self assessment system, they were bound to file the correct ST-3 returns. The non-disclosure of their liability in the returns is rightly held to be an act of suppression. Since it resulted into short payment on service tax, there is an intention to evade the payment of tax. Hence, the extended period has rightly been invoked. With these submissions, the order is prayed to be upheld and appeal is prayed to be dismissed.

5. Having heard both the parties and perusing the records, we observe and hold as follows:

5.1 Since there remains no dispute vis-à-vis services being rendered by the appellant to M/s. KTPS, the appellant is no more disputing their liability to pay service tax for rendering Works Contract Services. The department has accepted the appellant to be eligible for the benefits of Works Contract composition scheme and also for cum tax benefit. There remains no dispute vis-à-vis the amount of demand of Rs.1,27,905/- to have been confirmed as short paid service tax against the appellant along with the interest. The only point of contention before us is whether the department has rightly invoked the extended period of limitation while issuing the impugned show cause notice. We observe that the period of dispute is 2010-11 to 2011-12 and the show cause notice is dated 29.01.2016. Hence, the entire period of demand is beyond the normal period of limitation.

5.2 We observe that proviso to Section (1) of Section 11A and 11AC of Central Excise Act which are pari-materia to Section 73(1) and Section 78 of the Finance Act, 1994 use the expressions "by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this act or of the rules made thereunder with intent to evade the payment of duty" as the conditions that would extend the normal period of one year to five years and as would also attract the imposition of penalty. The adjudicating authority below has justified the invocation of extended period holding that there is a suppression of facts on part of the appellant.

5.3 We observe that there is no dispute to the fact that during the period of dispute there was confusion about the nature of the services which involved the transfer of goods also. Despite that the concept of Works Contract Service got coined w.e.f. 01.06.2007 but the confusion remain to exist till the Year 2015 when Hon'ble Supreme Court while deciding the case titled as Commissioner of Central Excise and Customs, Kerala Vs. Larsen and Toubro reported as 2015 (39) STR 913 (SC) has held that in case of composite works contracts the service elements should be bifurcated ascertained and then taxed.

5.4 It is further held that Section 65(105) of the Finance Act, 1994 had levied service tax only on contract's simplicitor and not on composite indivisible work contracts. There was no charging section specifically levying service tax only on Works Contract and measure of tax with service element derive from gross amount charged for Works Contract less value of property in goods transferred in execution of Works Contract. This decision had culled out the prevalent confusion vis-à-vis the services simplicitor and the composite services and the taxability thereof which prevailed during the period from June 2007 till the date of this decision i.e. 23.08.2015. Any short payment of tax during the said period due to the said prevalent confusion cannot be called as an act of suppression. Otherwise also, it was the duty of department to produce the cogent evidence about positive act on part of the appellant which would have resulted into evasion of tax but there is no such evidence. We draw our support for the decision of Collector of Central Excise, Hyderabad Vs. Chemphar Drugs & Liniments, Hyderabad reported as 1989 (40) ELT 276 (SC), wherein it is held that extended period is applicable only when something positive other than mere inaction or failure on the part of the manufacturer is proved. Conscious and deliberate withholding of the information by manufacturer is necessary for invoking the extended period. If the department had full knowledge or the manufacturer had reasonable belief that he is not requested to give a particular information, only normal period of limitation i.e. 1 year is applicable.

5.5 The Hon'ble Supreme Court in the case of in Bharat Hotels Ltd. v. Commissioner of C. Ex. (Adjudication) (2018 (12) G.S.T.L. 368 (Del.)), a Co-ordinate Bench of this Court had referred to the decision in Uniworth Textiles Limited and observed as under:

26. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in Uniworth (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid paying excise duty. The terms "mis-statement" and "suppression of facts" are preceded by the expression "willful". The meaning which has to be ascribed is, deliberate action (or omission) and the presence of

an intention. Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or more failure to pay duty or take out a license without the presence of such intention"

6. Based on the entire above discussion, we hold that the extended period has wrongly been invoked while issuing the impugned show cause notice. The show cause notice is held barred by time. Any confirmation of demand also gets hit by the technicality of limitation. The order confirming the said demand is therefore liable to be set aside irrespective of the discussion therein. Consequent thereto, the appeal is allowed.

[Order pronounced in the open court on 09.01.2025]