(2024) 12 CESTAT CK 1228

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

Case No : Service Tax Appeal No. 59894, 60130 of 2013

M/s Kailash Chawla, Delhi @APPELLANT @Hash Commissioner of Central Excise & Customs (Adj.), Rohtak @RESPONDENT

Date of Decision : 11-12-2024

Acts Referred:

Finance Act, 1994 — Section 65(3c), 65(64), 65(105), 65(105)(zzq), 65(105)(zzzza), 66, 67
Airports Authority of India Act, 1994 — Section 2(b)
Aircraft Act, 1934 — Section 2(2)
Central Excise Act, 1944 -

Citation : (2024) 12 CESTAT CK 1228

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

Bench : Division Bench

Advocate : A.K. Batra, Rajeev Kapoor

Final Decision : Allowed

Judgement

Rachna Gupta, J

1. The present order disposes of two appeals, the appellant being same and the order in original being common and issue also being same except for two different periods. The details of both the appeals are:

Appeal No.

Show Cause Notice No.

Order-in-Original No.

Period

ST/59894/2013

370-DivII/2012 dated 30.03.2012

21 TO 22/ST/COMMR/DM/RTK/ 2013-14 dated 18.06.2013

01.04.2006 to 31.03.2011

ST/60130/2013

496/ST/DivII/2012 dated 11.19.2012

21 TO 22/ST/COMMR/DM/RTK/ 2013-14 dated 18.06.2013

01.04.2011 to 31.03.2012

2. The facts relevant for the present adjudication are that the appellant is registered for providing taxable service under the works contract services (hereinafter referred as WCS). During the audit of service tax records of Airport Authority of India (hereinafter referred as AAI), it was observed that the appellant had provided services to AAI more than the threshold limit but the appellant has not paid the service tax on the amount received for providing the said services. Observing this fact several documents were called from the appellant as that of balance sheet, profit and loss account agreements/work orders, income tax returns, TDS, ST-3 returns etc. The documents were provided by appellant vide their letter dated 3.10.2011 with the mention that the appellants have not charged any service tax to AAI. They are rather covered under the general exemption of Notification No. 42/2010 dated 28.6.2010.

3. From the perusal of the work orders, department observed that the appellant had entered into annual rate contract for repair and maintenance of civil work. As such they were providing the maintenance and repair services and not the WCS. No exemption is available for providing maintenance and repair services not even in Notification No. 24/2009 dated 27.7.2009. It is, therefore, alleged that the appellants have provided taxable services not only to AAI but also to Delhi Flying Club Ltd., Punjab National Bank, M/s Vaishnavi Corporate Communications Pvt. Ltd. etc. and have not paid the service tax. Nil ST-3 returns despite declaring that the service provided by the appellant is a work contract service is alleged to be sufficient mis-statement of facts by the appellant. This act has resulted into evasion of amount of service tax. Resultantly while invoking the extended period of limitation, show cause notices as mentioned above been issued for the respective period already mentioned in the above table. The proposals of both the show cause notices have been confirmed vide common order-in-original as mentioned in the above table. Being aggrieved, the appellant is before this Tribunal.

4. We have heard Shri A.K. Batra, learned Chartered Accountant and Shri Rajeev Kapoor, learned Authorized Representative for Revenue.

5. Learned counsel for the appellant has mentioned that the appellant is a contractor providing services in relation to construction, renovation, repair, maintenance, completion and finishing etc. of the buildings or the civil structures. The appellant is the registered contractor of AAI and during most of the period in dispute, the appellant had been executing contracts entered with AAI. The other authority to whom the services have been provided during the impugned period

is Central Public Works Department (CPWD) i.e. a non commercial Government body. The appellant is also registered with the VAT department. Foremost the show cause notice is alleged as vague where the demand has been proposed under WCS and MMR without providing quantum of demand under each category of services. The adjudicating authority have erred in confirming the demand under MMR even for the composite contracts which are otherwise classifiable under WCS. Hence the demand is liable to be set aside on these grounds only. It is submitted that there is no denial to the fact that services of repair and maintenance of building have been rendered involving the transfer of the goods required for the purpose. Thus the contract in question are the composite contracts instead that for services simpliciter. Hence the service is wrongly alleged to be MMR. Demand proposed under MMR is liable set aside on this ground.

5.1 Learned counsel brought to the notice that the definition of works contract services excludes services provided to governmental authorities hence the services provided to CPWD are out of the scope of taxability. The demand has been confirmed including the value of goods involved in rendering the services which amounts to travelling beyond the scope of statutory provision of law. Similarly error has been committed while invoking the extended beyond the period of five years. Since there was no liability of the appellant to pay service tax in light of the Notifications No. 42/2010 dated 28.6.2010 and 54/2009 dated 27.7.2009. Nil returns were rightly filed.

5.2 Learned counsel has relied upon the decision in the case of Shubham Electricals Vs. Commissioner of C. Exc. & ST, Rohtak – 2015 (40) STR 1034 (Tri.-Del.) and The Principal Commissioner, Service Tax, Delhi Vs. Shubham Electricals – 2016 (5) TMI 1055- Delhi High Court to impress upon that the demand cannot be confirmed based on vague show cause notice. Also relied upon in the case of M/s Jyoti Sarup Mittal Vs. Commissioner of Central Tax, GST, Delhi-East – 2024 (1) TMI 334- CESTAT, New Delhi, Agarwal Engineering Works Vs. CC, C. Ex. & ST, Hyderabad-IV – 2019 (24) GSTL 264 (Tri.-Hyd.) and M/s Nitson & Amitsu Pvt. Ltd. Vs. Commissioner of Service Tax, Kolkata-II -2018 (4) TMI 1322-CESTAT Kolkata to impress upon that the services rendered by the appellant are composite works contract services. With these submissions, the appellants have prayed for the order under challenge to be set aside and appeal to be allowed.

6. While rebutting these submissions, learned Authorized Representative has reiterated the findings arrived at by the original adjudicating authority. Emphasis has been laid down the definition of Management, Maintenance and Repair Service as given in Section 65(64) of Finance Act, 1994. It is also impressed upon that the services in the present case are admittedly that of maintenance and repair, the exemption benefit vis-à-vis works contract service has wrongly been availed. Impressing upon no infirmity in the order under challenge appeal is prayed to be dismissed.

7. Having heard both the parties at length perusing the entire record, we observe

and hold as follows:

8. The entire period in dispute is prior negative list era i.e. for the entire period, the classification of service was the relevant criteria. Seen from that observation, the controversy to be adjudicated in the present case is :

(1) Whether the services rendered by the appellant to AAI amounts to rendering Works Contract Services or amounts to 'Management, Maintenance or Repair Service'?

(2) Whether the show cause notice is barred by time?

Issue No. 1

9. To adjudicate the issue foremost we need to look into the definition of both the services. Section 65(105)(zzzza) defines the taxable Work Contract Service (WCS), it says :

"Any services 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, -

(i) 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 pre-fabricated 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, fire proofing 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 commissioning (EPC) projects."

"Management, Maintenance or Repair Services as defined under Section 65(64) of the Finance Act, 1994 reads as under:

With effect from 16.06.2005

“Maintenance or Repair” means any service provided by –

(i) Any person under a contract or an agreement; or

(ii) A manufacturer or any person authorized by him,

In relation to;

(a) Maintenance or repair including reconditioning or restoration or servicing of any goods or equipment, excluding motor vehicle; or

(b) Maintenance or management of immovable property.

With effect from 01.05.2006

“Management, maintenance or Repair” means any service provided by –

(i) Any person under a contract or an agreement; or

(ii) A manufacturer or any person authorized by him, In relation, to -

(a) Management of properties, whether immovable or not;

(b) Maintenance or repair of properties, whether immovable or not; or

(c) Maintenance or repair including reconditioning or restoration of servicing of any goods or equipment, excluding motor vehicle; or

Section 65(105)(zzq) defines the taxable services as follows-

“taxable service” means any service provided or to be provided, to any person, by any person in relation to management, maintenance or repair.”

10. A close look of the above definitions in Section 65(105) of Finance Act, 1994 would show that the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines ‘taxable service’ as ‘any service provided’. All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. The composite contracts involving transfer of property in goods are the works contract where value of goods is not chargeable to service tax. Further, under Section 67 of Finance Act, 1994, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contract, such as are contained on the facts of the present cases.

11. It is also noticed that no attempt to remove the non-service elements from the composite works contract has been made by deducting from the gross value received, the value of property in goods which got transferred in the execution of

a works contract. In fact, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes about such cases, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner. We have also seen that Rule 2(A) of Service Tax Rules, 1994 framed pursuant to this has followed the second Gannon Dunkerley case reported in 1958 (9) STC 353 in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contract how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax."

12. Reverting to the facts of the present case, we observe that there is no denial about the appellant being engaged in carrying out following activities for CPWD and AAI:

(i) Construction;

(ii) Renovations;

(iii) Maintenance and Repairs;

(iv) Civil Works (as detailed in show cause notice also)

The respective contracts involve the sale of goods/material along with the provision of services and a lump sum amount inclusive of material has been charged by the appellant from the service recipients. This particular perusal in light of above discussion makes it clear that the services rendered by the appellants were not services simpliciter of 'Maintenance, Management and Repair' but were the composite services involving service element as well as the element of sale of goods. As already discussed Service Tax can be charged only on the service element. The value of goods if defined clearly has to be deducted from the total value. Since in present case, it is indivisible composite contract, the assessee is entitled to avail benefit of abatement of 67% under the Notification No. 1/2006-ST dated 01.03.2006. We hold that gross amount charged for rendering composite service/WCS has been wrongly taken for calculating service tax liability and that the impugned services are wrongly alleged as that of Maintenance, Management and Repair Service.

13. We observe that the Hon'ble Apex court in the case of Commissioner Vs. Larsen & Toubro - 2015 (39) STR 913 (SC) had held that when the activities undertaken under various contracts involved providing of services along with providing the material for the same, the services are not simpliciter services but are the composite services called as 'Works Contract Service'. The Hon'ble Apex Court had also held that the Works Contract Services got identified in statute with effect from 1.6.2007 hence any contract for rendering the composite services cannot be levied to tax prior to 1.6.2007.

14. The learned Departmental Representative for department also has relied upon the Circular No. 12/2003-ST dated 20.06.2003 which also exempts so much of the value of all taxable services, as is equal to the value of the goods and materials sold by the service provider to the recipient of service from the service tax leviable thereon under Section 66 of the Finance Act. Though as per department this circular is applicable if there is documentary proof specifically indicating the value of said goods or materials. But as already held above that in such case there shall be available the abatement of 67%. In any case the value of goods is not leviable to service tax.

15. The entire above discussion is sufficient for as to hold that the activity of the appellant rendered to AAI should be classified as Works Contract Service with effect from 1.6.2007. For the period i.e. from March 2006 to May 2007, the activity still cannot be called as Maintenance Management or Repair service. Though it could be Commercial or Industrial Construction Service as defined under Section 65(105) (zzq) of Finance Act, 1994, that too was not the service simpliciter, in the present case.

16. For calculating the service tax liability for composite contract services the value of goods involved has to be excluded or an abatement is to be provided vis-à-vis the value of goods. But as apparent, in the present case the entire value of service contract has been taken as the gross value for the purposes of calculation of service tax which involves the value of goods i.e the amount of VAT paid by the appellants has also been added to the gross value of consideration received. The demand confirmed on such part of the amount is definitely liable to be set aside.

17. With respect to the amount received vis-à-vis the element of service, we observe that the definition of Works Contract Service as quoted above reveals that the services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams shall remain out of the scope of levy of service tax. The appellant has provided services to AAI and for the complexes like R.G. Bhawan and Safdarjung Airport etc. To see whether or not these places amount to airport, we look into the definition of 'Airport' as given under Section 65(3c) of Finance Act, 1994 which reads as under:

“(3c) ”airport” has the meaning assigned to it in clause (b) of section 2 of the Airports Authority of India Act, 1994:

Section 2(b) of the Airports Authority of India Act, 1994 defines the term “airport”, as under:

2. In this Act, unless the context otherwise requires,-

(b) “airport” means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of Section 2 of the Aircraft Act, 1934;

Meaning of aerodrome in clause (2) of section 2 of Aircraft Act, 1934:

“aerodrome” means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structure thereon or appertaining thereto;”

18. These definitions makes it clear that any area assessable for landing and taking off area for aircrafts for runways, for maintenance of aircrafts, for facilities of passengers and for aerodrum all are defined as airport. Resultantly R.G. Bhawan as well as Safdarjung is held to be covered under ‘Airport’. The Works Contract Services being provided to airports since are exempted. The demand of service tax on the service element also is held to be wrongly confirmed.

19. Coming to the services provided to CPWD, we observe that CPWD works under Ministry of Urban Development, Government of India for developing civil structure of the country. It is denied to have any commercial purpose by the appellant i.e. CPWD doesn’t work for commerce. The Hon’ble Apex Court in the case of Gannon Dunkerley & Co. Madras Ltd. Vs. State of Madras -1954 (15) STC 216 (Mad.) has observed about trade and commerce in the following words:

"Trade has been explained" to quote the passage where it was considered, "in the Concise Oxford Dictionary" 'as business, especially mechanical or mercantile employment opposed to profession carried on as means of livelihood or profit'. The meaning of 'commerce' as given by the same Dictionary is 'exchange of merchandise, especially on large scale'. In ordinary parlance, trade and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell them for profit, it is an ordinary case of trade. If the transactions are on a large scale it is called commerce. Nobody can define the volume of business, which would convert a trade into commerce. But everybody understands the distinction between the two with sufficient vagueness."

Hence, profit motive can be considered to be an important aspect for determining a transaction as a transaction for commerce or industry. Even under the common parlance the expression “commerce” and “industry” is associated with trade and business, which is generally carried out with the intention of making profits.

20. Circular No. 80/10/2004 dated 17.09.2004 clarifies that the civil structure which are for the use of public at large and are not for the purposes of profit are not taxable being non commercial in nature. Though the said notification later got amended but still the situation remained the same i.e. use of service should be for commerce or industrial in order to be covered under service tax ambit. The civil structures raised and maintained by CPWD since are for the government premises CPWD is held to be a non-commercial organization. Service tax liability for any services to such an organization does not arises. Therefore, demand confirmed is definitely liable to be set aside.

Issue No. 2

21. As apparent from the show cause notice, the department has alleged that since the appellant has filed Nil ST-3 returns despite the service tax liability and has wrongly declared the services in those returns the said act amounts to 'Suppression of Facts'. But from the discussion arrived at Issue No. 1 above it is clear that the appellant has rightly classified the service rendered by them as works contract service with effect from 1.6.2007 and commercial and industrial construction service for the prior period i.e. from March 2006 to May 2007. We hold that there is no mis-representation in their returns vis-à-vis the nature of services.

22. The findings under the said issue have also held that the appellant is not liable to pay service tax as confirmed against him, for the services being provided to airport and non commercial governmental authority hence there is no willful, misstatement when Nil return has been filed by the appellant. No other evidence has been produced by the department to prove any other positive act of the appellant resulting into alleged suppression nor any evidence is produced to prove the mala fide act of the appellant committed or omitted with an intent to evade payment of service tax. With these observations we hold that the extended period of limitation has wrongly been invoked by the department. The demand for the period 2006-07 to 2011-12 has wrongly been raised vide the show cause notices as mentioned above. We draw our support to the decision of Hon'ble Apex Court in the case of Anand Nishikawa Co. Ltd. Vs. CCE – 2005-TIOL-118-SC-CX, the Hon'ble Supreme Court held as under:

"28. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay 1995 Suppl. (3) SCC 462, 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 not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above 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 proviso to section 11A 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 the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts".

In view of this discussion the show cause notice in appeal No.59894 of 2013 is held barred by limitation. Though for Appeal No.60130 of 2013 the period in dispute is well within the period of limitation. Since the issue No. 1 is decided in favour of assessee, the demand under this appeal also stands set aside.

23. Resultantly, it is held that the impugned demand has wrongly been confirmed in Appeal No. 59894 of 2013 it being time barred and in Appeal No. 60130 of 2013, it is not sustainable even for the normal period for the reasons discussed above. Both the appeals have wrongly confirmed the demand. The order under challenge dated 18.06.2013 is accordingly, hereby set aside. Consequent thereto both the appeals are hereby allowed.

(Pronounced in open Court on 11.12.2024)