(2024) 05 CESTAT CK 0040

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40619 Of 2015

M/s. K.P. Constructions APPELLANT

Vs

Commissioner Of GST And Central Excise RESPONDENT

Date of Decision : 29-05-2024

Acts Referred:
Finance Act, 1994 — Section 77, 78

Citation : (2024) 05 CESTAT CK 0040

Hon'ble Judges : Sulekha Beevi C.S., Member (J);Vasa Seshagiri Rao, Member (T)

Bench : Division Bench

Advocate : Ajay Kumar Gupta, Harendra Singh Pal

Final Decision : Partly Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. Brief facts are that the appellants are engaged in providing construction services. On information received that the appellant though provided construction services have not discharged service tax, the officers attached to the Headquarters Preventive Unit of Madurai Central Excise Commissionerate visited the site at which the appellant was rendering construction services and collected details. The officers also visited the premises of the appellant and scrutinized the records. It came to the notice of the Department that the appellant has provided service to Titan Education Trust for construction of NPR College of Engineering and Technology and also to Prist Trust for construction of Prist University, Tanjore. After 2013, the appellant commenced constructing a factory for M/s. Sai Biogrow India Pvt. Limited., which is a commercial activity. The appellant though obtained service tax registration on 11.02.2013 had not filed any ST-3 returns. After investigations, Show Cause Notice dated 22.04.2014 was issued proposing to demand the service tax under Works Contract Services for the period from 01.10.2008 to 31.12.2013 along with interest and also for imposing penalties. After due process of law, the Original Authority confirmed the

demand, interest and imposed penalties. The amount of Rs.27,63,797/-paid by the appellant before issuance of the Show Cause Notice was ordered to be appropriated. Aggrieved by such order, the appellant has preferred the present appeal.

2.1 The Ld. Counsel Shri Ajay Kumar Gupta appeared and argued for the appellant. It is submitted that the period involved is from 01.10.2008 to 30.06.2012 and from 01.07.2012 to 31.03.2013. It is submitted that for the period up to 30.06.2012, the demand of service tax on the construction services provided by the appellant cannot sustain for the reason that the appellant has constructed engineering colleges and university buildings which are educational institutions. The Circular No. 80/10/2004 dated 17.09.2004 issued by the Board was adverted to by the appellant to argue that the Board has clarified that construction services provided to educational institutions is exempt from the levy of service tax. The Tribunal vide the decisions in the case of M/s. Vijayadeepa Constructions Private Limited Vs. Commissioner of CGST & Central Excise, Coimbatore [2024 (5) TMI 667-CESTAT CHENNAI] had held that the demand under Works Contract Services for the period prior to 01.07.2012 cannot sustain when the construction are for establishing educational institutions. It is also pointed out by the Ld. Counsel that the huge demand is totally erroneous as the same has been quantified by the Department without granting abatement for the period prior to 01.07.2012. If benefit of abatement is granted for the use of materials, the amount would be very less.

2.2 For the period after 01.07.2012 up to 31.03.2013, the Ld. Counsel submitted that the appellant is not contesting this demand on merits. The appellant has actually paid the entire service tax to the tune of Rs.27,63,797/- (before issuance of Show Cause Notice) and Rs.6,12,595/-(after the issuance of Show Cause Notice). This demand has been quantified by the Department after allowing abatement. The appellant having paid major part of the demand much before issuance of the Show Cause Notice, the Department ought not to have imposed penalties. Further, it is argued by the Ld. Counsel that there are no grounds alleged in the Show Cause Notice to impose penalty under Section 77 as well as Section 78 of the Finance Act, 1994. It is merely stated in the Show Cause Notice that the appellant has suppressed fact of providing the taxable service. The appellant had already taken registration on February, 2013 and therefore it cannot be said that the appellant had suppressed fact of providing taxable services from the Department. The issue as to whether the appellant has to pay service tax on the construction services under WCS and other categories was under confusion as there was change of law w.e.f. 01.07.2012. The Circular issued by the Board dated 17.09.2004 clarified that when construction services are provided for education purposes it cannot be considered as commercial constructions and therefore not taxable. However, after 01.07.2012, there was a change in the law, which did not give clarity as to whether the construction provided for educational institutions are subject to levy of service tax or exempted. The issue being doubtful the appellant though had taken registration had not discharged the service tax. Moreover, immediately after the raid, the officers had taken away the documents and this prevented the appellant from filing the returns also. The Ld. Counsel prayed that the penalties imposed may be set aside.

3. The Ld. Authorised Representative Shri Harendra Singh Pal appeared and argued for the Department. It is submitted by the Ld. Authorised Representative that the Department has quantified the demand after 01.07.2012, giving the benefit of abatement as the contract was of composite in nature using materials as well as rendition of service. The non-payment of service tax would not have come to light but for the verification done by the Department. Therefore, the penalties imposed are legal and proper. The Ld. Authorised Representative prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issues to be decided are (i) whether the demand raised for the period prior to 01.07.2012, on construction services done for educational purposes is subject to levy of service tax or not? (ii) whether the demand for the period after 01.07.2012 upto 31.03.2013 is sustainable or not? (iii) whether the penalties imposed are sustainable or not?

6.1 The first issue is with regard to demand of service tax for the period prior to 01.07.2012. It is brought out form the records that the appellant has provided construction services for Titan Educational Trust to construct an engineering college as well as to Prist Trust for construction of Prist University. The Board vide its Circular dated 17.09.2004 had clarified that construction for educational purposes does not fall under commercial constructions and therefore is exempted from levy of service tax. The Tribunal in the case of M/s. Vijayadeepa Constructions Private Limited (supra) had considered the very same issue and set aside the demand for the period prior to 01.07.2012. The relevant paragraph reads as under:-

"12. The second issue is with regard to demand under 'Works Contracts Service' provided for construction of Engineering College to M/s.KTVR Siddhammal Charitable Trust. The department does not dispute that the building has been used solely for the purpose of Engineering College. So also, the said college is recognized by the AICTE. The appellant has relied upon CBEC Circular No.80/10/2004 - ST dt. 17.09.2010 wherein the Board has clarified in para 13.2 as under :

"13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.”

Following the above decision as well as per the Circular issued by the Board, we are of the opinion that the demand for the period up to 01.07.2012 cannot sustain and requires to be set aside. Ordered accordingly.

6.2 The second issue is with regard to demand of service tax for the period from 01.07.2012 to 31.03.2013. The appellant has submitted that they are not contesting the demand and is only contesting the penalty imposed. The appellant has paid major part of the demand prior to issuance of the Show Cause Notice. However, an amount of Rs.6,12,595/- was paid after the issuance of the Show Cause Notice and much before passing of the order by the Adjudicating Authority. The appellant having paid the amount before passing of the adjudication order and also having co-operated with the Department in providing all details, we find that there has been no suppression of facts on the part of the appellant. Even in the Show Cause Notice at paragraph 17, it is merely alleged that the appellant has suppressed the fact of providing the taxable service. The said allegation is erroneous for the reason that the appellant has taken registration under WCS on 11.02.2013. In paragraph 28 of the impugned order, the Original Authority has considered the issue of imposing penalty. Apart from stating that the appellant is required to voluntarily pay the service tax and disclose their value by filing ST-3 returns, there is no other positive act or willful suppression brought out by the Department. In such circumstances and taking note of the fact that the appellant has paid the entire service tax before passing of the adjudication order, we are of the opinion that the penalty imposed under Section 78 alone requires to be set aside. The penalty under Section 77 is upheld. The order of appropriation of the amount already paid by the appellant is also sustained.

7. In view thereof, the impugned order is modified to the extent of:-

i. setting aside the demand, interest and penalties for the period from 01.10.2008 to 30.06.2012.

ii. the demand of service tax along with interest for the period from 01.07.2012 to 31.03.2013 is upheld.

iii. the penalties imposed for this period after 01.07.2012 under Section 78 is entirely set aside without disturbing the penalty imposed under Section 77 of the Finance Act, 1994.

8. The impugned order is modified as above. The appeal is partly allowed as above with consequential reliefs, if any, as per law.