
(2023) 06 CESTAT CK 0047

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.51950 Of 2017

M/S. Pile Foundation Construction Co

APPELLANT

Vs

Commissioner, Service Tax, Delhi-II

RESPONDENT

Date of Decision : 30-06-2023

Acts Referred:

Finance Act, 1994 — Section 65 (25b), 65 (39)(a), 65(39)(b), 65(39)(c), 65(39)(d), 65(39)(e), 65, 65 (39)(f)B(54), 65(105)(zzzza)

Citation : (2023) 06 CESTAT CK 0047

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

Bench : Division Bench

Advocate : Vinod Kumar, Dr. Radhe Tallo

Final Decision : Allowed

Judgement

Dr.Rachna Gupta, Member (J)

1. The appellants in the present case are engaged for providing construction services in respect of commercial or industrial buildings and civil structures. The Anti-evasion staff of Delhi Service Tax Commissionerate got an intelligence about some contractors who were not discharging their service tax liability despite providing taxable services in respect of commercial or industrial constructions. Based thereupon an investigation was initiated against the appellant vide Summon dated 27.10.2006. The appellant vide their letter dated 09.11.2006 and 28.11.2006 had provided the requisite details. Based on those details, Department formed an opinion that services rendered by the appellant as that of "installation of structures" in the shape of "piling work" for the main construction work either of bridges, roads or schools are appropriately classifiable under Erection, Commissioning or Installation Service taxable with effect from 01.05.2006. It was also found that in terms of master Circular No.96/7/2007-ST dated 23.08.2007, the appellant despite being a subcontractor is liable to pay service tax. The appellant even though had taken service tax registration but was

found to have been filing "NIL" returns. Accordingly, vide Show Cause Notice (SCN) No.06/23732 dated 15.09.2011 the service rendered by the appellant was proposed to be called as Erection, Commissioning and Installation Service (ECIS) instead of Commercial or Industrial Construction Service (CICS). Service Tax amounting to Rs.19,43,878/- alongwith the proportionate interest and the appropriate penalties were also proposed to be recovered from the appellant.

2. The said proposal has been confirmed vide Order-in-Original No.89/2016 dated 06.12.2016 holding that the services rendered by the appellants are in nature of Erection, Commissioning and Installation Service (ECIS) as contrary to Construction Services for which the appellant got himself registered. The appellant as subcontractor is thus held liable to discharge the service tax liability under the ECIS. Due to the above noticed contradiction committed by the appellant as far as the nature of services rendered by him are concerned, the penalty has been imposed and the invocation of extended period of limitation has been justified. Against the said order the appellant filed an appeal before Commissioner (Appeals), who vide his order OIA No.2/2017/590 dated 20.09.2017 has observed that nature of services of pile foundation work as provided by the appellants are the services classifiable under Commercial or Industrial Construction Services or under works contract service. With these observations, Commissioner (Appeal) has remitted the matter back to the adjudicating authority with the direction to re-determine the amount of demand of service tax , interest and penalties as per the analysis made by Commissioner (Appeal) and after verification of the material on record and other relevant record to be produced by the appellant. The "cum-tax value" plea raised by of appellant has also been directed to be re-considered. Still being aggrieved the appellant is before this Tribunal.

3. We have heard Shri Vinod Kumar, Id. Consultant for the appellant and Dr. Radhe Tallo, Id. Authorized Counsel for the Revenue.

4. It is submitted by Id. Counsel for the appellant that appellant though was a subcontractor with respect to all the work awards as mentioned in the Show Cause Notice but was not liable to pay any service tax as they were doing the activity of pile foundation work for construction of bridges, flyovers etc pertaining to Government, Schools/ Industrial Units. Such services are exempted in view of definition of Commercial or Industrial Service under section 65 (25b) of Finance Act. It is mentioned that in very few cases the work awards were for the private parties, in that cases, the main contractors had discharged the entire service tax liability of the projects as whole. Id. Counsel has relied upon the Boards Circular dated 23.08.2007. Resultantly, the appellant was not liable to discharge any service tax liability. It is mentioned that the original adjudicating authority has wrongly held the services in question to fall under the category of ECIS as classified under section 65 (39a) of the Act. Though Commissioner (Appeals) simultaneously admitted that service rendered by appellant is in the nature of CICS under section 65 (25b) and are exempted too but still he has not ordered

the setting aside of demand. Commissioner (Appeals) has rather committed further error by holding the services in question as works contract service. The findings of Order under challenge are therefore, beyond the scope of Show Cause Notice and the order under challenge is liable to be set aside on this score itself.

5. Finally, it is submitted that the extended period of limitation has wrongly been invoked. The appellant was duly registered with Service Tax Commissionerate. The returns were also duly been filed as NIL Returns purely on the ground that the services rendered by appellant either were exempted or liability was being discharged by the main contractor. It is also brought to the notice that during the period in question i.e. 2004-2011 there was a huge confusion about the liability of the subcontractors to pay service tax. There were several decisions supporting the case of subcontractors that they are not liable. However, there were few decisions holding that even subcontractor is liable to pay the service tax. Ld. Counsel has impressed upon that such confusion and contradiction is sufficient to hold that there was no intent of the appellant to evade the payment of duty. Extended period has wrongly been invoked while issuing the Show Cause Notice. With these submissions the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

6. While rebutting these submissions, Id. D.R. has mentioned that just because the main contractor is providing services in respect of the projects involving construction of roads, bridges, tunnels etc. it would not automatically lead to the classification of services being provided by the subcontractor to the main contractor. The classification would have to be independently done as per the Rules and the taxability would get decided accordingly. Hence, the plea of the appellant for escaping from the service tax liability on the ground that activity is exempted, is not sustainable. The plea might be available to the main contractor. But the fact remains is that the appellant, as subcontractor, was rendering the taxable services. It is mentioned that services were rightly proposed to be that in the nature of Erection, Commissioning or Installation Services as was confirmed by the Original Adjudicating Authority. It is mentioned that appellant has taken registration under Construction of Commercial or Industrial Complexes Service which is sufficient to be called as mis-representation and suppression of facts. Hence there is no infirmity when the invocation of extended period has been justified and penalty has been imposed while confirming the demand. It is conceded that department is not in appeal against the impugned Order-in-Appeal. The appeal is, however, prayed to be dismissed.

7. Having heard the rival contentions and perusing the entire record, we observe and hold as follows:-

Vide the impugned Show Cause Notice, the appellant was alleged to have been involved in rendering services as that of Erection, Commissioning and Installation Service as subcontractor, for piling work whereas the appellant has got itself registered under the category of providing Construction of Commercial or Industrial services. We also observe that Commissioner (Appeals) in the Order -

under- challenge has gone a step ahead confirming the services rendered by appellant to be as that of works contract service. Accordingly, the foremost adjudication for us is the nature of the service rendered by the appellant. For the purpose we need to look into the definitions of these services. Erection, commissioning or installation services is defined under section 65 (39a) of Finance Act, 1994 which reads as follows:-

“(39a) “erection, commissioning or installation” means any service provided by a commissioning and installation agency, in relation to, –

(i) erection, commissioning or installation of plant, [machinery, equipment or structures, whether pre-fabricated or otherwise]; or

(ii) installation of –

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services;]

Section 65 (25b) of Finance Act, 1944 defines commercial or industrial construction service to mean as follows:-[“commercial or industrial construction”] means –

(a) construction of a new building or a civil structure or a part thereof;

or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,

which is –

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;]"

Section 65 (105) (zzzza) of Finance Act 1994 defines "Work Contract Service" to mean "any service provider or to be provided to any person by any other person in relation to execution of work contracts excluding the works in respect of Roads, Airports, Railways, Transport, Terminals, Bridges, Tunnels and Dams.

Section 65B (54) defines work contract to mean a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property. CICS is defined under Section 65 (25b) of Finance Act, 1994 and is taxable under Section 65(105) (zzzza) of the Act to mean

"commercial or industrial construction" means (a) construction of a new building or a civil structure or a part thereof

which is –(i) used, or to be used, primarily for; or (ii) occupied, or to be occupied, primarily with; or (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams".

8. Reverting to the facts of the present case, we observe that the appellant as subcontractor has executed the work orders as tabulated below:

Sl.No.

Name of the Contractee

Work Order No. & Date

Work allotted

1

Gammon India Ltd.

8514/17 dt.01.06.2006

Initial Pile Load Test

2

Gammon India Ltd.

8514/15 dt.

02.07.2006

Boring of test pile

3

Sanyukt Nirmata

Letter dated 19.05.2006

Bored pile for school of charitable
trust

4.

Swastik Construction Co.

Noticee's letter dated

30.08.2005

Piling work for nallah

5.

PWD, New Delhi

23(13) SJHPD/2005/47

dated 17.01.2006

Initial load testing of piles

6.

Gangotri Enterprises Ltd.

Letter dated 07.06.2006

Laying of bored pile

7.

Aanav Construction

Company

Noticee's letter dated

22.02.2005

Piling bore holes at

Ludhiana

Sl.

No.

Name of contractee

Letter

No. & date

1.

JMC

Ltd.

Project

(India)

Dated

03.12.2008

2.

Gammon India Ltd.

Dated

07.11.2008

3.

Sand

Ltd.

Plast

(India)

Dated

21.11.2008

4.

Subhash Projects

and Marketing Ltd.

Dated

05.12.2008

5.

Nagarjuna Construction

Ltd.

Co.

Dated

18.11.2008

6.

DTM Construction

(Inddia) Ltd.

Dated

18.11.2008

7.

Swastik Construction

Co.

Dated

07.10.2008

8.

Ambalika

Construction Ltd.

Dated

14.11.2008

9.

Sadhu Singh &

Company (P) Ltd.

Dated

23.10.2008

10.

Gangotri Enterprises

Ltd.

Dated

14.10.2008

11.

Sanyukt Nirmata

Dated

07.11.2008

12.

Bahl

Ltd.

Builders

(P)

AWHO/G.Noida/ 08/2003/

THURS/ DATED 27.11.2008

9. From the statement of facts in the appeal we also observe that the status of appellant had remained exclusively as a subcontractor or a job worker in all contracts which are mainly for pile foundation works which involves boring of ground to a particular depth and installing cast-in-SITU vertical pipes in these bores. The method adopted by appellant for the purpose is mentioned to be either DMC method i.e. direct mud circulation method or Auger Method i.e. rotatory spiral moving machine is drilled into the soil to desired depth. It has also been stated that the main use of the pile foundation is to withstand higher loads of infrastructure or building more effectively to the hard soil.

10. When these facts are analyzed in the light of above definitions, we are of the opinion that the activity of appellant is of pre-casting a concrete structure or the steel body of a specific shape to be fixed underground either by pre-casting it on the ground level and then inserting it under the ground or by constructing the pillar under the ground itself by a special technique. Thus, the activity of the appellant is dominantly in relation of a building or a civil structure meant for construction of a new building/civil structure. We are therefore of the opinion that this activity cannot be called as the activity of Erection, Commissioning or Installation Services which is about installation of several things as mentioned in the definition in clause (a) to clause (f) of section 65 (39a) of Finance Act in an already constructed building or civil structure. With these observations, we are of the opinion that the activity /service provided by the appellant is precisely a service of providing commercial or industrial construction/construction services as has been held by Commissioner (Appeals) in the order under challenge.

11. We further observe that in the order under challenge, the Commissioner (Appeals), in addition, has classified the service as works contract service. But from the definition as mentioned above, the basic mandate for any activity to be called as works contract service is that the activity should involve the transfer of property in goods which are involved in the execution of such contract. In the present case, the appellant was acting as a sub-contractor/a job worker. The question of him being the owner of the goods used in pile formation works does not at all arise. The main contractor / service recipient himself was the owner of the goods. Commissioner (Appeals) has failed to appreciate the basic mandate of the definition of works contract service. Hence we hold that the services have

wrongly been classified as works contract services. Commissioner (Appeals) has otherwise nowhere denied that the structure constructed by the appellant is in relation to the construction of bridges etc. which is different from structure mentioned in the definition of ECIS. He has also appreciated that the pile foundation works is classifiable under Commercial or Industrial Construction Service and from the definition of this service it is clear that when it is provided in relation to construction of roads, airports, Bridges etc. the activity is not taxable. We hold that despite observing these apparent facts of the present case and the above discussed statutory provision, the Commissioner (Appeals) has committed an error while classifying the service under work contract service. While doing so he has gone beyond the scope of Show Cause Notice.

12. From the table above it is otherwise observed that most of the period for the service is prior 1st July, 2007 when came into existence the concept of work contract service. The decision of the Hon'ble Supreme Court in the case of Larsen and Toubro vs. State of Karnataka reported as 65 VST (1) of S.C. it has been held that the composite contracts have to be classified as works contract service but since the concept came into existence with effect from 1st July 2007, the demand on composite contracts prior the said date is liable to be set aside. These observations of the Apex Court have miserably been ignored by Commissioner (Appeals) while confirming the demand for the period prior 2007 under works contract service. As already held above, the activity in question is otherwise not of works contract service.

13. In the light of above discussion, it is clear that services provided by the appellant are purely the services of CICS as defined under section 65 (25b) of the Act and when such service is provided with respect to road, bridges, tunnels etc. these are exempted from the tax liability. Hence no question arises for any service tax liability even on the main contractor. Though the Department has relied upon Mega Circular No.96/2007 dated 23.08.2007 wherein it has been held that services provided by sub-contractors are in the nature of input services, service tax is therefore leviable but we hold that the said circular is not applicable in the given set of circumstances, where the activity of subcontractor is not a deviation of the exempted activity of the main contractor. The main contractor has been awarded the contract of constructing Roads, Pillars, Bridges etc. and appellant as sub-contractor is constructing support to said construction.

14. As already held above, his activity falls under construction services, we accordingly, hold that there is neither any misrepresentation nor any suppression of fact on part of the appellant. The extended period has wrongly been invoked while issuing the impugned Show Cause Notice. For the same reason, there appears no circumstance for the imposition of penalty. Resultantly the entire demand otherwise gets barred by time.

15. In the light of entire above discussion, we hold that the order of Commissioner (Appeals) while remitting back the matter to the Original Adjudicating Authority after classifying the impugned activity as works contract

service is beyond to what was proposed in the Show Cause Notice, is not sustainable. At this stage, we refrain ourselves to delve into the competence of Commissioner (Appeal) for remitting back the matter as the same is not necessary for the impugned adjudication. Consequent to the entire above discussion, the order under challenge is hereby set aside and the appeal stands allowed.