
(2023) 08 CESTAT CK 0055

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40467 Of 2022

M/S. Sivaparameshwari Engineering Construction & Co

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 28-08-2023

Acts Referred:

Service Tax (Determination Of Value) Rules, 2006 — Rule 2A, 3

Point Of Taxation Rules, 2011 — Rule 3, 4, 5

Finance Act, 1994 — Section 102

Central Excise Act, 1944 — Section 9D, 36A, 67, 72A, 73(1), 83

Citation : (2023) 08 CESTAT CK 0055

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

Bench : Division Bench

Advocate : S. Durairaj, Rudra Pratap Singh

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. Brief facts are that the appellant had provided taxable services under the category of 'Works Contract Services' to PWD, Local bodies etc. These services involved construction of buildings for school, colleges, Court building, office buildings hospital etc. The appellant had not obtained service tax registration and had not filed ST-3 returns. As per the provisions of Notification No. 06/2015-ST dated 20.03.2015, the construction services provided to Government departments, except in the case of construction services provided to historical monuments, archaeological site of remains of material importance, archaeological excavation or antiquity specified under the Ancient monuments and archaeological sites of Remains Act, 1958 (24 of 1958) are liable to service tax w.e.f. 01-04-2015, for the contracts entered after 01.03.2015. The appellant had entered into contracts with the Government Department and other local bodies for construction of buildings after 01.03.2015, executed works and collected the amount for the works executed. They failed to discharge the service

tax on the consideration received. Investigation was initiated. Documents were verified and statements were recorded.

1.1 The managing Director of appellant partnership firm deposed inter alia that :-

i. M/S SECC, a partnership firm having Shri P. Senthilkumar (himself), Smt. P Parmeswari, Shri. Ramasamy Gounder, Smt. B. Sampooram, Smt.S.Nandhini, as the partners of the firm. They had not taken service tax registration and are registered only 33AAUFS3608N1ZM; They were engaged in providing services under the category of works contract services to PWD and other Government Departments of Tamil Nadu; the services provided involves construction of buildings to schools, colleges, court building, office buildings and hospitals; they have not done any work to private parties;

ii. The work order issued generally contains the terms and conditions of the contract. They purchased materials / goods required for the construction work services as per the work orders issued to them. Based on the work completion as recorded in the measurement book (M-Book) being maintained by the said departments (Engineers), payments were released through cheque or RTGS. They did not issue bills, raising bills to the said department.

iii. They were not aware that for the contracts entered on or after 01.03.2015, for providing construction works to Government are taxable; they were of the opinion that the service provided to Government would not attract service tax and hence had not taken registration under the service tax regime;

iv. They have not collected service tax for the services provided to the PWD/ and other Government Departments and local bodies; They assured to take steps to collect the applicable service tax;

v. They have only provided service in respect of original construction works and have not provided any repair and maintenance works;

vi. They have paid Value Added Tax under TN VAT Act after adjusting input tax that was paid on the Inputs used for execution of projects; The value of Appeal No.: ST/40467/2022-DB contract executed by them includes materials / goods value and service value could not be vivisected.

vii. The service tax due would be paid after arriving at the same.

1.2 The appellant submitted copy of Balance sheet, profit & loss statements for the Annual Year 2015-16, 2016-17, and 2017-18. The Form 26A statements for the years 2015-16, 2016-17 and 2017-18 and the list of receipts of the contract amounts from the Government Departments.

1.3 On scrutiny and analysis of documents and statements it was seen that the appellant has not discharged their Service Tax liability under works contract services.

2. Show Cause Notice dated 24.12.2020 was issued to the appellant proposing to

demand Service tax along with interest and for imposing penalties.

3. After due process of law, the original authority vide Order-in-Original No. 08/2022-ST (Commissioner) dated 31.05.2022 confirmed the demand of Rs.5,19,81,818/-along with interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

4.1 The Ld. counsel Shri S. Durairaj appeared and argued for the appellant. It is submitted by him that the appellants provided works contract services to various Government departments namely, PWD buildings (C&M) Division, Namakkal, Erode, Tirupur and Coimbatore, Tamil Nadu Livestock Development Agency, Bharathiar University, PWD Buildings at Udhagamandalam, Madukarai Special Grade Town Panchayat, Tamil Nadu Agricultural University at Coimbatore, Technical Education Division and Postal Division, Chennai; Investigation was initiated on 29.11.2018 and the appellant was issued summons. The appellant has promptly appeared before the Department and given statement under Section 14 of the Act. Subsequently, on 02.08.2018, the appellant submitted the balance sheets and P&L statements, Form-26AS for the financial years from 2015-16, 2016-17 and 2017-18. The contract proceeds of the amounts from the Government department was also furnished. The quantification has been done on such documents. However, due to the Covid-19 pandemic, the appellant could not furnish certain vital documents at the time of investigation and adjudication proceedings. The appellant had replied to the Show Cause Notice on 24.08.2021 based on the records available with them. Being works rendered to Government departments, it took some time for the appellant to obtain the records.

4.2 The appellant has now filed a miscellaneous application seeking permission to produce additional documents and also to raise additional grounds. The appellant could not produce such documents before the adjudicating authority due to the Covid-19 pandemic and also because such documents are relating to Government departments.

4.3 The Ld. counsel submitted that the Department has classified the service under works contract services; the valuation of works contract service has to be done under Section 67 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006. However, it is submitted that in the instant case, the adjudicating authority had confirmed the tax liability of Rs.4,84,79,036/- on the value of Rs 32,94,21,693/-, which is inclusive of value of goods for the reason that the appellants had not furnished the relevant details. The value of goods could have been obtained and quantified under Rule 2A based on the profit and loss account (relied upon document), where the value of goods is available. Appellant submitted certain details on 2.8.2019 and the SCN was issued only on 24.12 2020. During the interim period, the Adjudicating Authority could have determined the value of goods consumed in WCS based on the profit and loss account under Rule 2A by appointing a Cost Accountant under Section 72A. Instead, the value was determined without considering Rule 2A. Therefore, value has been determined in excess of jurisdiction. In the case of CC and CE & ST Vs

M/s Interarch Building Products (P) Ltd – 2023 (5) TMI 138 the Hon'ble Apex Court has held that the valuation for works contract services must be under Rule 2A and 100% value cannot be adopted. The Hon'ble Supreme Court in the said case has remanded the matter to determine the value of taxable services under Rule 2A.

4.4 The Appellants have adduced evidence to establish that they have not collected service tax from the government and the value, determined under Rule 2A must be considered as inclusive of service tax. Therefore, cum tax benefits are to be extended to determine the taxable value. Reliance is placed on the decision of Hon'ble Apex Court in the case of Bhavna Construction Co vs CST-2023 (70) GSTL 435(SC).

4.5 It has been further contended by the Ld. counsel that the service involved is works contract services to various departments of State Governments. The managing Director had deposed that based on the work completion as recorded in the measurement book [M-Book] being maintained by the said departments, payments were released through cheque or RTGS. They did not issue bills,. In the instant case, the Point of Taxation is to be determined in terms of Rules 3, 4 and 5 of Point of Taxation Rules, 2011. Rate of service tax during the period was 12.36% [1.4.2015 to 31.5.2015); 14% [1.6.2015 to 15.11.2015), 14.5% [16.11.2015 to 31.5.2016] and 15% [1.6.2016 to 30.6.2017). During the course of investigation. Appellants submitted the Form 26AS and the date wise contract receipts for the entire period. Without considering these documents, the adjudicating authority has considered the total receipts in the profit and loss account and determined the liability by adopting the rate of tax @ 14.5% for 2015-16 and 15% for 2016-17 and 2017- 18 for the reasons that the date wise receipt is not available. Thus, the adjudicating authority has acted in excess of his jurisdiction. The Appellants have now produced the bank statements, wherein the date wise receipts are available, which would definitely help the assessing authority to re-determine the liability based on Point of Taxation Rules, 2011. Under similar circumstances, the Hon'ble High Court of Madras in the case of Firm Foundations & Housing (P) Ltd VS PCST - 2018 (4) TMI 613 [Page 35 of this synopsis] has set aside the assessment order and remanded the matter to be re-done de novo strictly in accordance with the provisions of Rule 3 of the Service Tax Rules.

4.6 With regard to exemption, it has been put forth that the core issue is the applicability of exemption under notification 25/2012 ST SI No: 12A). There was an exemption under notification 25/2012-ST SI No:12 (a, b and c)). It was withdrawn with effect from 1.4.2015 vide notification 6/2015-ST dated 1.3.2015. The exemption was restored with effect from 1.3.2016 by notification 9/2016-ST dated 1.3.2016 Sl. No :12A (a, b & c)] and retrospective exemption was extended vide Section 102 of the Finance Act, 1994 for the period from 1.4.2015 to 29.2.2016. This exemption was denied on the grounds that the condition to avail the exemption is not satisfied. The condition reads as "under a

contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date". Appellants' claim is that the exemption is still available since the condition is applicable only to clause (c) because:

i Clauses (a) and (b) are grouped together and clause (c) is separated by the use of semi colon in Section 102 and by semi colon (3) and 'or' at the end of clause (b) in SI.No:12A of notification 25/2012-ST.

ii The "semi colon (;)" and "or" is used to denote disjunctive context whereby sub-clauses (a) and (b) are distinct from (c): this indicates that the aforesaid condition is applicable only to clause (c).

4.7 Appellant has relied upon the following decisions in support of their claim.

i. Shapoorji Paloonji & Company Pvt. Ltd v. Commissioner. 2016 (42) S.T.R 681 (Pat.) [Page 45 of this synopsis].

ii. Janson Textile Processors Vs Commissioner of Central Excise & ST Salem-2018 (7) TMI 850 CESTAT CHENNAI

The decision @ SI.No: (i) has not considered by the adjudicating authority. Non consideration of decisions rendered by higher forums is an error apparent and the order becomes a non-speaking order. The Hon'ble High Court of Madras in the case of Senior Regional Manager, Tamil Nadu Civil Supplies Corporation Vs Principal Commissioner - 2021 (51) GSTL 360 (Mad) [Page 67 of this synopsis], has allowed exemption for the works contract services rendered to government during the period from October, 2015 to June, 2017 which have been erroneously included in the quantification of tax by the department. The Appellants have furnished the details of work orders, which are related to the period prior to 1.3.2015. These details were not available and could not be furnished earlier due to COVID-19 pandemic. Therefore, the tax liability is to be reconsidered.

4.8 The Ld. Counsel has also submitted that Service Tax liability of Rs.35,02,782/- was confirmed based on the reports from various Heads of State Government Departments. Based on such reports, liability was confirmed and observed that the service tax was collected by the Appellants. It is settled law that, when third party evidences are relied, an opportunity should be given to assessee to explain their stand. It can be done either by making such third party to the proceedings or by examining them during the proceedings. This would satisfy the obligations under Sections 9D and 36A of Central Excise Act, 1944, made applicable to service tax under Section 83 of FA, 1994. In the instant case, the Appellants have now furnished the reports from the same authorities, who stated that in the earlier reports, they have mistakenly mentioned it as Service Tax instead of Sales Tax.

4.9 Another core issue canvassed by the appellant is whether the extended period under the proviso to Section 73(1) can be invoked or not. Adjudicating Authority has held that the extended period can be invoked since the Appellants

have collected the service tax from their customers. This finding is based on the reports of various Heads of Government Departments as mentioned in the previous para. Now, the Appellants are ready to furnish the reports from the same authorities, wherein they have stated that service tax was not collected by the appellant and that they have wrongly mentioned it as Service Tax instead of Sales Tax.

4.10 The Ld. counsel for the appellant thus prayed that the matter may be remanded, affording an opportunity to the appellant to furnish documents to clarify the demand of Service Tax raised in their case.

5.1 Shri Rudra Pratap Singh, Ld. Authorized Representative, appeared and argued for the Department. It is submitted by him that the appellant had sufficient opportunity to furnish evidence and also to reply to the Show Cause Notice and therefore, the documents produced belatedly cannot be accepted or relied.

5.2 He has also argued that the demand has been quantified on the basis of documents submitted by the appellant and also documents recovered from various Government departments. The documents collected from the Government departments revealed that the appellant had collected Service Tax and had not deposited the same before the Government. Such documents wherein available with the appellant at the time of adjudication itself; that this being so, there are no grounds for remanding the matter.

5.3 The Ld. Authorized Representative therefore prayed that the appeal may be dismissed.

6. Heard both sides.

7. The appeal has come up for hearing consequent to the early hearing petition filed by the Department and E.H was allowed on 11.04.2023.

8.1 The appellant has now filed Miscellaneous Application No. 40354/2023 to receive additional documents. It is submitted by the appellant that they could not obtain these documents and submit the same at the time of adjudication due to difficulties faced during the period of Covid-19 pandemic.

8.2 In paragraph 19.3 of the impugned order, it is noted by the adjudicating authority that due to lack of documents, the income as shown in the P&L Statement is taken as the basis for computing the tax liability. The Department has quantified the duty by extending the benefit of abatement, wherever documents are available. Wherever there was no documentary evidence, the quantification of Service Tax was arrived at without extending the benefit of abatement. Needless to say, that in works contract services, as cost of materials also form part of the contract, the benefit of abatement has to be extended to an assessee.

9. The Ld. Counsel for the appellant has argued that the P&L Statement would

show the details of value of purchase of goods. However, the Department, though relied upon the income reflected in the P&L account, has not considered the value of goods reflected in the P&L Statement for extending the benefit of abatement. The Ld. Counsel has submitted that the appellant has been able to obtain relevant documents for quantifying the Service Tax demand.

10.1 Another major ground put forward by the Ld. Counsel is that it is alleged in the Show Cause Notice that the appellant had collected Service Tax and not deposited the same. The letter dated 26.07.2022 issued by PWD shows that it was erroneously mentioned by them earlier that the appellant had collected Service Tax for the works contract services executed by them. The said letter reads as under :-

"M/s.Sivaparameswari Engineering Construction & Co. Namakkal submitted a letter referred at-SI No 65 to the Superintending Engineer. P.WD. Buildings (C&M) Circle. Coimbatore with a copy of the order No. referred at St No.7 requesting this department to sanction the Service Tax amount to be paid for the above mentioned work. In the order copy at page 6 of 44. SI. No.2, date of Agreement is mentioned 27.03.2015 under the heading "Nature of work. Agreement No. & date" But as per this office records the date of Agreement is 25.02 2015 as also mentioned in the details of payment furnished to DGGI Coimbatore in prescribed formal vide this office Letter No.623/ A2/ 2019/ Dated 10.09 2019 Under para 4.6 of the order it is mentioned that the amount was paid to service provider including TDS and Service Tax by referring this office letter dated 10.09.2019 In this regard it is to be mentioned here that the details furnished to DGGL Coimbatore by this office vide this office letter dated 10 09 2019 in which amount of Sales Tax (VAT) TDS (Rs 3.484/-) erroneously shown under Service Tax amount as explained above The amount shown under Service Tax heading in the details furnished by this office may kindly be read as TDS on Sales Tax (VAT).

As the details furnished by this office to DGGL Coimbatore for the amount paid to the contractor was related to the contract entered before 01.03.2015 and Service Tax was not applicable for the agreement entered before 01.03.2015"

10.2 It is clarified in the above letter issued by the Public Works Department that the amount shown under 'Service Tax' heading has to be read as TDS on Sales Tax (VAT).

Such letters have been issued by other Government departments also. The impugned order does not seem to have considered all these aspects. It is also to be borne in mind that in case of works contract services rendered to Government authorities, the amount is paid to the contractor on the basis of work completion as recorded in the Measurement Book (M-book) which is maintained by the departments. The appellant could not obtain such documents due to the outbreak of the Covid-19 pandemic. They have now produced filed miscellaneous application, and produced documents. We are therefore of the considered opinion that the appellant has to be given an opportunity to put their defence on the

basis of the documents furnished by them.

11. In the result, the impugned order is set aside. The matter is remanded to the adjudicating authority for de novo adjudication. All the issues are left open.

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