(2015) 07 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 1075 Of 2010

M/s Skyline Contractors Pvt. Ltd. — APPELLANT

Vs

CST, Delhi — RESPONDENT

Date of Decision : 10-07-2015

Acts Referred:

Service Tax Determination Rules (Determination of Value) Rules, 2006 — Rule 2(a)

Citation : (2015) 07 CESTAT CK 0011

Hon'ble Judges : R. K. Singh, Technical Member;Sulekha Beevi, C.S., J

Bench : Division Bench

Advocate : S.K. Sarwal, Amresh Jain

Final Decision : Disposed Of

Judgement

1. The appeal has been filed against order-in-original dated 20.4.2010 in terms of which service tax demand of Rs.10,62,65,767/- was confirmed along

with interest and penalties. The said demand was confirmed on the ground that the value of material supplied free of cost was not included in the

assessable value.

2. The Id. Advocate for the appellant states that in the light of judgement of CEST AT in the case of Bhayana Builders Vs. CST, Delhi - 2013 (32)

STR 49 (Tri.-LB) value of free supply is not includible for the purpose of discharge of duty liability or for the purpose of claiming abatement. The Id.

Advocate also stated that from 1.6.2007 service was classified under works contract service in which case, although he was not entitled to 670/o

abatement, he was entitled to the benefit of Notification No. 12/2003-ST and Rule 2(a) of the Service Tax Determination Rules (Determination of

Value) Rules, 2006. He also stated that certain period is overlapping between the Show Cause Notice dated 19.6.2008 issued to the appellant and

Show Cause Notice in respect of which the present appeal is filed.

3. The Id. DR, on the other hand agrees that the issue can be remanded to the adjudicating authority in the light of the CESTAT judgement in case of

Bhayana Builders (supra). He however objected to the ground that the service should be classified under works contract from 1.6.2007 in respect of

ongoing contracts where the appellant paid service tax under Commercial or Industrial Construction Service after availing abatement as the said

ground was not taken at the primary level.

4. We have considered the contentions of both sides. As regards the contention that certain period is overlapping in the periods covered by two Show

Cause Notices dated 19.6.2008 and 15.12.2008, it is to be noted that mere overlapping of certain period is no evidence that the service tax has been

demand on the same transactions. Therefore it will be open for the appellant to take this plea during de nova adjudication to show that there is

overlapping of transactions inasmuch as certain transactions have been included in both the show cause notices for charging of service tax. As

regards its plea that in respect of ongoing contracts under which service tax was paid under CICS after claiming 670/o abatement, the classification

should have been changed to Works Contract Service with effect from 1.6.207, we note this plea was not taken at the primary level and therefore as

rightly pointed out by Id. DR, we are not giving any view thereon. We however clarify that any legal plea can be raised at the time of de nova

adjudication. We agree with both sides that this issue is to be remanded to the primary adjudicating authority for de nova adjudication in the light, and

following the ratio of the CEST AT judgement in the case of Bhayana Builders (supra). Accordingly, we remand the case to the primary adjudicating

authority for de nova adjudication taking into account the ratio, of the judgement in the case of M/s Bhyana Builders (supra) after giving the appellant

an opportunity of being heard.

