(2020) 12 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 41437 Of 2015, 41996 Of 2017, 41056, 41129, 41985 Of 2018, Service Tax Miscellaneous Application No. 42067 Of 2018

M/s. Sundaram Industries Limited @Hash Commissioner Of GST And Central Excis

Date of Decision : 04-12-2020

Acts Referred:
Service Tax (Determination of Value) Rules, 2006 — Rule 2A, 2A(i), 2A(i)(B), 2A(ii)(B)
Finance Act, 1994 — Section 65(44), 65(54), 66E(h), 67, 67(1)
Constitution Of India, 1950 — Article 366

Citation : (2020) 12 CESTAT CK 0023

Hon'ble Judges : Sulekha Beevi C.S., J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : S. Muthuvenkataraman, T. Sridevi, Arul C.Durairaj

Final Decision : Allowed/Dismissed

Judgement

Appeal Nos.,Details of Show Cause Notice,Period Involved,,,,,

ST/41437/2015,S. No. 78/2014 JC (ST) dated 24.9.2014,"July 2012 to March 2013 / April 2013

to March 2014",,,,,

ST/41996/2017,Sl. No. 78/2014 JC (ST) dated 24.9.2014,April 2014 to Jul 2015,,,,,

ST/41056/2015,"S. No. 08/2017-ST-COMMR-TRY dated

9.11.2017",July 2012 to March 2016,,,,,

ST/41129/2018,"S. No. 12/2016/COMMR-MDU dated

14.12.2016",July 2012 to Sep. 2015,,,,,

ST/41985/2018

(Deptt. Appeal)","S. No. 8/2017-ST-COMMR-TRYd ated

9.11.2017",July 2012 to March 2016,,,,,

S.

No.",Particulars,"July 12 to

Mar 13","April 13

to Mar 14","April 14

to May 15","June 15

to Oct.

15","Nov. 15

to Mar16",Total

1.,"Service tax

liability paid

by our

company

(Ref. 1

below) in

terms of sec.

67 of the Act",5867539,7331697,8277777,4697576,4732657,30907246

2.,"Service tax

liability

calculated by

adopting

valuation as

per Rule

2A(i) (Ref. 2

below",4061405,5870063,6429566,3493408,3128910,22983353

3.,"Additional

service tax

paid by us in

comparison

with

valuation as

per Rule

2A(i) (1 â?

2)",1806134,1461633,1848211,1204168,1603747,7923894

,,,,,,,

S.

No.",Particulars,"Jul 12 to

Mar 13","Apr 13 to

Mar 14","Apr 14 to

May 15","June 15

to Oct 15","Nov 15

to Mar

16",Total

1.,"Actual

service tax

paid details",,,,,,

,In cash,5662803,6967708,7797357,4424992,4522299,29375159

,Input Service,204736,363989,480420,272584,210358,1532087

,"Total service

tax paid",5867539,7331697,8277777,4697576,4732657,30907246

,,,,,,,

2.

S.

No.","Wor

Particulars","king of Servic

Jul 12 to

Mar 13","e Tax liabilit

Apr 13 to

Mar 14","y by adopting

Apr 14 to

May 15","valuation a

June 15

to Oct 15","s per Rule 2

Nov 15

to Mar

16","A(i)

Total

1.,"Gross value

charged to

customer",104782010,142414603,157284368,66388122,56977943,527847046

2.,"Taxable

value

declared for

Service Tax",104782010,142414603,157284368,66388122,56977943,527847046

3.,"Material

portion",71922744,94922183,105284368,41435207,35350631,348895989

4.,"Service

portion",32859266,47492420,52019144,24952915,21627312,178951057

5.,"Service tax

liability",4061405,5870063,6429566,3493408,3128910,22983353

,"Additional

service tax

paid by us in

comparison

with

valuation as

per Rule

2A(i)",1806134,1461633,1848211,1204168,1603747,7923894

Appeal No.,Tax assessed u/s 67(1),,,,Tax assessed u/r2(A),,"Difference

in cash

payment

of tax

(Revenue

loss)

,"Gross

value",Total Tax,"Adjusted

in

CENVAT

Credit","Paid in

cash","70% of

gross

value","Tax

payable",

ST/41437/2015,"4,45,42,073","21,66,647","1,80,496","19,86,151","3,11,79,451
","38,53,780","18,67,629

,"6,25,98,864","33,05,941","1,08,998","31,96,943","4,38,19,205","54,16,054","
22,19,111

ST/41996/2017,"9,07,06,341","51,15,711","3,28,490","47,87,221","6,34,94,439
","80,24,820","32,37,599

ST/41056/2018,"52,78,47,046","6,76,62,202","3,82,87,043","2,93,75,159","36,9
4,92,932","4,72,67,922","1,78,92,763

ST/41129/2018,"25,93,55,786","3,25,22,032","1,92,20,822","1,33,01,210","18,1
5,49,050","2,27,65,878","94,64,668

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the",,,,,,,

value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.",,,,,,,

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after",,,,,,,

provision of such service.,,,,,,,

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.",,,,,,,

Explanation. â?" For the purposes of this section, â?"",,,,,,, (a)â??considerationâ?? includes â?",,,,,,,

(i) any amount that is payable for the taxable services provided or to be provided;,,,,,,,

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a",,,,,,,

taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;",,,,,,,

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or,,,,,,,

commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price",,,,,,,

at which the distributor or selling agent gets such ticket.,,,,,,,

(c) â??gross amount chargedâ? includes payment by cheque, credit card, deduction from account and any form of payment by issue of",,,,,,,

credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called",,,,,,,

â??Suspense accountâ? or by any other name, in the books of account of a person liable to pay service tax, where the transaction of",,,,,,,

taxable service is with any associated enterprise.â??,,,,,,,

8.4 The contention of the assessee is that they have discharged the service tax on the gross amount charged for the taxable service of WCS provided,,,,,,,

by them. While doing so, this gross amount charged takes in the value of goods and consumables also. This means when assessee received Rs.100/-",,,,,,,

for execution of contract (retreading tyres / WCS) it included the value of vulcanized rubber, tread rubber etc. used by them. The assessee paid",,,,,,,

service tax on the whole of Rs.100/-. While doing so, they availed CENVAT credit on the duty paid on vulcanized rubber tread rubber which are",,,,,,,

inputs for providing the output service. The credit so availed was utilized / adjusted to pay part of the service tax.,,,,,,,

8.5 It has to be noted that the taxable service in the works contract is only the service portion and not the value of the goods involved. Since there is,,,,,,,

an element of transfer of property of goods involved (sale) while providing the works contract service which may always not be easy to segregate.,,,,,,,

Service tax (Determination of Value) Rules, 2006 would help to determine the value of service portion in the execution of works contract. Rule 2A of",,,,,,, the said Rules reads as under:-,,,,,,,

â??2A. Determination of value of service portion in the execution of a works contract.-,,,,,,,

Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section",,,,,,,

66E of the Act, shall be determined in the following manner, namely:-",,,,,,,

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less,,,,,,,

the value of property in goods transferred in the execution of the said works contract.,,,,,,,

Explanation.- For the purposes of this clause,-",,,,,,,

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any,",,,,,,,

on transfer of property in goods involved in the execution of the said works contract;,,,,,,,

(b) value of works contract service shall include, -",,,,,,,

(i) labour charges for execution of the works;,,,,,,,

(ii) amount paid to a sub-contractor for labour and services;,,,,,,,

(iii) charges for planning, designing and architectâ??s fees;",,,,,,,

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;",,,,,,,

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;",,,,,,,

(vi) cost of establishment of the contractor relatable to supply of labour and services;,,,,,,,

(vii) other similar expenses relatable to supply of labour and services; and,,,,,,,

(viii) profit earned by the service provider relatable to supply of labour and services;,,,,,,,

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the,,,,,,,

works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of",,,,,,,

property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution,,,,,,, of works contract under this clause.,,,,,,,

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of",,,,,,,

the works contract shall determine the service tax payable in the following manner, namely:-",,,,,,,

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount",,,,,,,

charged for the works contract;,,,,,,,

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax",,,,,,,

shall be payable on seventy percent of the total amount charged for the works contract;,,,,,,,

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing",,,,,,,

services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be",,,,,,,

payable on sixty per cent. of the total amount charged for the works contract;,,,,,,,

Explanation 1. - For the purposes of this rule,-",,,,,,,

(a) â??original worksâ?? means-,,,,,,,

(i) all new constructions;,,,,,,,

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;,,,,,,,

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;",,,,,,,

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or,,,,,,,

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tilling or installation of,,,,,,,

electrical fitting of immovable property,",,,,,,,

Service tax shall be payable on seventy per cent of the total amount charged for the works contract.,,,,,,,

(d) â??total amountâ? means the sum total of the gross amount charged for the works contract and the fair market value of all goods and,,,,,,, services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other",,,,,,,

contract, after deducting-",,,,,,,

(i) the amount charged for such goods or services, if any; and",,,,,,,

(ii) the value added tax or sales tax, if any, levied thereon:",,,,,,,

PROVIDED that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted,,,,,,,

accounting principles.,,,,,,,

Explanation 2.--For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess",,,,,,,

paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.â??",,,,,,,

8.6 According to ld. counsel for assessee, Rule 2A is subject to the provisions of section 67 and therefore the assessee can opt for payment of service",,,,,,,

tax under section 67 also. On bare perusal of the provisions of law noticed above, it would show that section 67 is the charging section which lays",,,,,,,

down the liability to pay service tax on the consideration received for providing taxable service. Rule 2A provides for a mechanism to chalk out that,,,,,,,

part of the consideration in a WCS which can be subjected to service tax.,,,,,,,

8.7 Be that as it may, the very same issue was analyzed by the Tribunal in the case of S.V.Jiwani cited supra which categorically held in para 17 that",,,,,,,

the discharge of service tax liability at full rate by the appellant by applying the provisions of section 67 of the Finance Act, 1994 cannot be called in",,,,,,,

question by the Revenue. The issue was thus held in favour of the assessee. The appeal filed by the department against this order was dismissed by,,,,,,,

the Hon'ble High Court of Bombay as reported in 2016 (42) STR 409 (Bom.). The Tribunal in Interarch Building Products Pvt. Ltd. reported in 2018,,,,,,,

(10) GSTL 330 (Tri. All.) has followed the decision in S.V. Jiwani case. It is pertinent to mention that the decision of the Hon'ble High Court of,,,,,,,

Bombay in S.V. Jiwani was accepted by the Department vide their circular dated 16.2.2018. The relevant portion is reproduced as under:-,,,,,,,

â??3. Decision of the High Court of Bombay dated 01.02.2016 in the matter of M/s SV Jiwani in Central Excise Appeal No. 252/2014,,,,,,,

[2016-TIOL-503-HC-MUM-ST].,,,,,,,

3.1 Department has accepted the order of the Hon'ble High Court of Gujarat in the case of M/s SV Jiwani in Central Excise Appeal No.,,,,,,,

252/2014 where the Hon'ble High Court had inter alia held on the question framed, whether input service credit could have been availed",,,,,,

without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 or whether CENVAT credit can",,,,,,

be claimed after discharging the liability in full, that having paid the service tax in full, Revenue is not incurring any loss of revenue, hence",,,,,,

the Court should not undertake an academic exercise.,,,,,,,

3.2 In the matter the issue that was examined by the Honâ??ble Court was that, whether input service credit could have been availed",,,,,,

without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 after having discharged the tax",,,,,,

liability in full. It was held by the Honâ??ble Court that that having paid the service tax in full, Revenue has not incurred any loss of",,,,,,

revenue hence Court should not undertake an academic exercise.â??,,,,,,

8.8 By judicial discipline, we are bound to follow the decisions of the Tribunal and also accepted by the Department. Needless to say that Circular",,,,,,

issued by department is binding on them.,,,,,,,

8.9 The ld. AR Shri Arul C. Durairaj has made a strong effort to argue that the assessee cannot be said to have discharged the entire service tax,,,,,,,

liability and that there is loss suffered by the Revenue when the tax is paid under section 67 of the Finance Act, 1994. On perusal of the worksheet",,,,,,

given by the ld. AR, it is seen that if Rule 2A is applied, the assessee would not be able to avail CENVAT credit and therefore would have to pay",,,,,,

entire service tax by cash and thus there is revenue loss. This contention of the department that if no CENVAT credit is availed, the assessee would",,,,,,

not be able to adjust payment of service tax from CENVAT account and therefore there is short-payment of service tax cannot be accepted since in,,,,,,,

the above decisions, it has been decided and concluded that the assessee can avail CENVAT credit and discharge service tax under section 67 of the",,,,,,

Finance Act. The argument of revenue loss also fails. We hold that the demand raised alleging short payment of service tax cannot sustain. The,,,,,,,

impugned orders in Appeal Nos. ST/41437/2015; ST/41996/2017; ST/41056/2018; ST/41129/2018 are set aside.,,,,,,, 8.10 The issue with regard to whether assessee is eligible to avail CENVAT credit by discharging service tax under section 67 having been held in,,,,,,,

favour of the assessee, consequently, the appeal filed by the department alleging wrong availment of credit is without any merits.",,,,,,,

8.11 The ld.counsel for assessee has argued on the ground of limitation also. The issue is in the nature of interpretation of provisions of law. The very,,,,,,,

same issue was under litigation and issue is held in favour of assessee which has been accepted by department. The assessee has indeed discharged,,,,,,,

service tax as determined under section 67. There is no evidence of deliberate act of intention to evade service tax placed before us. We therefore,,,,,,,

are of the considered view, that the demand raised invoking extended period cannot sustain. The assessee succeeds on the issue of limitation also.",,,,,,,

9. The appeals filed by the assessees are allowed with consequential relief, if any. The appeal filed by department/Revenue is dismissed. The cross-",,,,,,,

objection filed by the assessee in No. ST/CO/42067/2018 in Appeal No. ST/41056/2018 stands disposed of accordingly.,,,,,,,

(Pronounced in open court on 4.12.2020),,,,,,,

