
(2023) 07 CESTAT CK 0044

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 1755 Of 2011

Nandji Mishra, Contractor

APPELLANT

Vs

Commissioner Of Central Excise, Chandigarh-I

RESPONDENT

Date of Decision : 27-07-2023

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzzza), 97, 98
Special Economic Zones Act, 2005 — Section 2(g), 26 (1)(e)

Citation : (2023) 07 CESTAT CK 0044

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : R.K. Hasija, Shivang Puri, Rajeev Gupta, Shivam Syal

Final Decision : Allowed

Judgement

P. Anjani Kumar, Member (T)

1. Shri Nandji Mishra, the appellant, is a Contractor to the Government Departments and is engaged in providing services relating to construction and maintenance of roads, buildings and bridges; the appellant was issued a show-cause notice dated 20.10.2010 demanding Service Tax of Rs.64,98,510/-, for the period 2005-2010 for the services rendered by them; Adjudicating Authority vide OIO dated 02.09.2011 confirmed the duty demanded along with interest and imposed penalties. The appellants are before this Bench contesting the allegations of the Department that the services rendered by them to Government Departments were taxable in the category of "Commercial or Industrial Construction Service", "Management, Maintenance or Repair Service", Manpower Recruitment or Supply Agency Service" and "Supply of Tangible Goods".

2. Shri R.K. Hasija, assisted by Shri ShivangPuri, learned Counsel appearing for the appellants submits, as far as the demand on "Management, Maintenance or Repair Service" is concerned, that the same is exempted for roads by Notification No.24/2009 dated 27.07.2009; for the period prior to this, Section 97 was

introduced vide Finance Bill, 2012 to exempt the service of maintenance, repair of roads for the period 16th June, 2005 to 26th July, 2009 and therefore, the demand on this count, which forms the major portion of the total demand, is liable to be set aside.

3. Coming to the demand of Service Tax on "Management, Maintenance or Repair Service" related to non-commercial Government buildings, he submits that the same has been exempted by insertion of Section 98 of Finance Act, 1994, through Finance Bills, 2012 and therefore, services rendered to Government buildings such as SDM Office, Government Schools, Government Residential Quarters etc. is liable to be set aside for the entire period of dispute.

4. On the demand of Service Tax on construction of Government parking lots and public parks, he submits that the maintenance of parking lots and parks is incidental to the functioning of the Government and is for non-commercial purpose; Circular No. 80/10/2004-ST dated 17.09.2004 already clarified that the leviability of Service Tax would depend on primarily whether the building or civil structure "is used or to be used" for commerce or industry; therefore, the activity undertaken by the appellant resulting in a non-commercial activity, they are not liable to pay Service Tax; he relies on B.G. Shirke Construction Technology Limited- 2014 (33) STR 77 and submits that even if some amounts are charged for parking, they do not become buildings for commercial use; he submits that, moreover, the show-cause notice is issued for "Commercial and Industrial Construction Service", it is no open to the Revenue to confirm tax on any other category; the show-cause notice is liable to be dropped as held in URC Construction (P) Ltd.- 2017 (50) STR 147 (Tri. Chennai) and National Building Construction Corporation Ltd.- 2022 (66) GSTL 476 (Tri. Kolkata). He submits that Composite Services are classifiable under Taxable Category of Works Contracts Service as held in the following cases:

- Bajrang Lal Gupta Vs CCE, Delhi; Service Tax Appeal No. 560 of 2011 (CESTAT Chandigarh)
- Kumar Builders Vs CST, Service Tax Appeal No. 1453 of 2010 (CESTAT Chandigarh)..
- National Building Construction Corporation Ltd.-2022 (66) GSTL 476 (Tri. Kolkata)

He further submits that the demand raised for the period after 01.06.2007 is also not sustainable as being demanded under wrong taxable category as held in Diebold Systems (P) Ltd.- 2008 (9) STR 546 (Tri. Chennai).

5. Learned Counsel further submits that they have provided services to Sunny View Estates Pvt. Ltd., Shapoorji and Pallonji and Co. Pvt. Ltd. during the period 2008-09 and 2009-10; Section 26 (1) (e) of Special Economic Zones Act, 2005 exempts Service Tax on services provided to developer; in terms of Section 2(g) of the Act, developer includes a co-developer.

6. Learned Counsel submits that the impugned order confirms Service Tax liability on "Commercial or Industrial Construction Service", "Management, Maintenance or Repair Service", Manpower Recruitment or Supply Agency Service" and "Supply of Tangible Goods"; however, these services can be taxable only when they are provided to "any person"; the service recipient being the Government, cannot be held to be "any person" as held in the following cases:

- Deputy Commissioner of Police, Jodhpur VS CCE-2017 (48) STR 275 (Tri. Del.) affirmed by the Hon'ble Supreme Court - 2018 (11) GSTL J133 (SC).
- Shiv Prasad Vs State of Punjab- 1956 (9) TMI 57 (P&H).
- Karnataka Bank Ltd. Vs State of A.P [Appeal (Civil) 1994 of 2002]

7. Learned Counsel submits that the period involved in the case pertains to 2005-2008 and the show-cause notice has been issued on 20.10.2010; no cogent reason to invoke the extended period of limitation is specified and no evidence of wilful mis-statement or wilful suppression of facts was made available; the appellant was under the bona fide belief that the activity undertaken by him for roads and bridges was excluded from the purview of Income Tax; Service Tax on Management, Maintenance or Repair is a general provision whereas the exemption is a specific provision as held in Nirma Limited-2006 (200) ELT 213, a specific provision prevails over a general provision; where interpretation of law is involved, extended period cannot be invoked as held in Gangadhar Bulk Movers Pvt. Ltd.- 2011 (11) TMI 358 (CESTAT Mumbai); moreover, the appellants are a Government contractor and most of the work undertaken by the appellant is in the public domain; therefore, no suppression of facts can be alleged on the appellant ; as clarificatory circulars were issued from time to time on the very same issue, it can be reasonably presume that the appellants had a bona fide doubt as to the taxability of the service; extended period cannot be invoked in view of Ashoka Infraways Pvt. Ltd.- 2011 (32) STT (CESTAT Mumbai). Relying on Uniflex Cables Ltd.- 2011 (27) ELT 161 (SC) and Vijay Television (P) Ltd., C.M.A No. 3292 of 2009 (Madras HC).

8. Shri Rajeev Gupta, assisted by Shri Shivam Syal, learned Authorized Representative for the Department reiterates the findings of the impugned order, takes us through the provisions of law regarding various services and submits that the appellants have not provided the copies of the contracts, details of material supplied in various services, payments received etc. even after asking many times during the relevant period or during the proceedings with the Adjudicating Authority. Now, they have produced copies of a couple of contracts before the Bench; the Adjudicating Authority did not have an occasion to go through the same. He submits that the findings of the impugned order are elaborate and reasoned; for the facts and circumstances explained therein, extended period has been invoked correctly and penalties have been suitably imposed; there is no merit in the appeal and therefore, is liable to be rejected.

9. Learned Counsel for the appellants submits a written rejoinder dated

21.07.2023 to the submissions of the learned AR; he submits that the Department has considered the amounts as received by the appellant as per Form-16A and/or the balance sheet as the total amounts received for the services provided; Department compared the same with the contracts and excluded the amounts pertaining to exempted services; the Department was already aware of most of the contracts as at Column-4 in Annexure-B to the show-cause notice; a few contracts were missing; however, the same can be reconciled as shown in year-wise table submitted by them with the rejoinder. He submits that out of taxable value of Rs,5,78,42,572/-, contracts are missing only for Rs.86,46,587/-. He submits that the Adjudicating Authority did not exclude VAT component from the amount received; the Department could have investigated instead of merely saying that some contracts are missing. Regarding the Pontoon Bridges, he submits that these bridges qualify to be structures as per Section 65 (105) (zzzza) as the Section does not exclude temporary structures from the purview of works contract.

10. Heard both sides and perused the records of the case. We find that the Department has issued a show-cause notice and Annexure-2 was prepared to the show-cause notice. We find on going through the Annexure that at various places under Column-6, it was mentioned that "Contract not provided". We find that the Adjudicating Authority gives a finding that: "Further, it has been mentioned in the show-cause notice that majority of services provided by the Noticee fall under the category of Management, Maintenance or Repair Services; that as such in all the cases where the Noticee has failed to provide copies of contract, which could have been enabled to classify the exact nature/ category of taxable services, the same have been classified under the category of Management, Maintenance or Repair Services; that however, classification of service can be re-determined in adjudication proceedings based on copies of contract details etc. if provided by the Noticee in adjudication proceedings.

11. We find that during the course of proceedings before the Bench, the appellants have submitted copies of the following:

- Contract dated 16.08.2007 between the Appellant and S.P. Singla Construction Pvt. Ltd.
- Contract dated 25.11.2009 between the Appellant and S.P. Singla Construction Pvt. Ltd.
- Contract dated 23.07.2009 between the Appellant and Sunny View Estates Pvt. Ltd.
- Relevant portion of the accounts register of the Executive Engineer Prov. Div Mohali pertaining to the work conducted by the Appellant for the period of 2009-10.
- Approval dated 22.05.2008 of M/s Sunny View Estates Private Limited as Co-developer in the IT SEZ, Mohali.

- Copy of the CARE ratings press release dated 22.05.2018 pertaining to Sunny View Estates Pvt. Ltd.

12. Moreover, after the hearing was concluded, the appellants have submitted rejoinder dated 21.07.2023, in which they have attempted a reconciliation/ explanation to various works undertaken by them year-wise and party-wise. The Adjudicating Authority did not have the opportunity to go through the reconciliation as given in the rejoinder. Further, we find that most of the defence of the appellants is on the basis of the amendments to the Finance Act, 1994, by way of insertion Section 97 and Section 98, through Finance Bill, 2012. The Adjudicating Authority had no occasion to follow these amendments. Moreover, considerable number of issues has been since settled by various judgments delivered in this regard. Moreover, copies of certain agreements and details of accounts were not submitted to the Adjudicating Authority. Under these circumstances, it will be in the fitness of things and in the interest of justice, the matter should go back to the Adjudicating Authority. Therefore, we are of the considered opinion that the case requires to be remanded back to the Adjudicating Authority, to examine the issue afresh in the light of copies of the documents submitted by the appellant, changes brought out in the provisions of Service Tax and the ratio of the cases decided by this Tribunal and various Courts in this regard.

13. In the result, the appeal is allowed by way of remand. It is directed that the Adjudicating Authority may decide the matter within sixteen weeks of receipt of this order, as far as it may be practicable, taking into account the observations as above and the submissions of the appellant. The appellants are directed to cooperate with the Adjudicating Authority.