(2014) 06 CHH CK 0031

In the Chhattisgarh High Court

Case No : Tax Case Nos. 57-58 of 2011

SEW Infrastructure Ltd. APPELLANT

Vs

Commr. of C. Ex. & Cus. RESPONDENT

Date of Decision : 19-06-2014

Acts Referred:
Finance Act, 1994 — Section 75, 76, 77, 78, 78

Citation : (2015) 37 STR 984

Hon'ble Judges : Yatindra Singh, C.J;Pritinker Diwaker, J

Bench : Division Bench

Advocate : M.P. Devnath and Raja Sharma, Advocates for the Appellant; Maneesh Sharma and Gary Mukhopadhyay, Advocates for the Respondent

Judgement

1. There is no equity about tax but then Government cannot be shylock, are two conflicting principles. The question whether M/s. SLW Infrastructure Limited (the Assessee) is liable to pay Service Tax depends upon the adjustment of the two. It arises in these two tax cases from the order dated 2-11-2010 [2011 (22) S.T.R. 666 (Tribunal)] passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (the Tribunal) in Service Tax Appeal - 92 and 851 of 2008.

The Facts

Bhilai Electric Supply Company Pvt. Ltd. (the BESCL) gave a contract to set up an electric power plant to Bharat Heavy Electricals Limited (the BHEL) on 8-7-2005.

2. Out of the work awarded to the BHEL, the BHEL sub contracted the work relating to work of land development (earth excavation, back Filling, site levelling, grading, disposal) etc. to the Assessee.

3. The Assessee developed the land during the period 8-7-2005 to 7-8-2006 and received payment from the BHEL. However, it neither got itself registered during the period under the Finance Act, 1994 (the Act) nor deposited any Service Tax under the Act.

4. The Adjudicating Officer (the AO) issued a notice on 29-8-2006 to the Assessee requiring as to why the Service Tax amounting to Rs. 1,51,14,126/- alongwith penalty and interest be not levied upon it.

5. The Assessee filed its reply on 26-2-2007 explaining that:

"? The BHEL was the main contractor and the Assessee was merely a sub-contractor;

? As the taw was understood at that time, the contractor was supposed to pay the Service Tax; and

? The Assessee neither got itself registered, nor paid the Service Tax as the BHEL, the main contractor had paid the Service Tax."

6. The AO by his order dated 30-7-2007, rejected the explanation filed by the Assessee and confirmed the demand of Rs. 1,51,14,126/- along with interest as well as penalty and fine under Sections 75 to 78 of the Act.

7. Aggrieved by the aforesaid order, the Assessee filed a Service Tax Appeal-92 of 2008 before the Tribunal.

8. The Assessee paid the Service Tax partly by cash and partly by Cenvat credit on the capital goods and input services. The AO, by his order dated 13-9-2008, refused to give Cenvat credit as there was some doubt regarding the documents on the basis of which credit was claimed. The Assessee filed the Appeal Number - 851 of 2008 against this order.

9. The Tribunal, by order dated 2-11-2010 partly allowed the Appeal-92 of 2008 and remanded it back to the AO. Nonetheless, it recorded the following findings against the Assessee:

"(i) The sub-contractor is liable to pay Service Tax even if the contractor has paid Service Tax;

(ii) The extended period of time is invokable;

(iii) Apart from other penalties and fine, penalty under Section 78 of the Act was also payable."

10. Against the aforesaid order, the Assessee has filed Tax Case - 58 of 2011.

11. Appeal - 851 of 2008 was consequential to other Appeal - 92 of 2008. As the other appeal was being remanded, the Appeal - 851 of 2008 was also remanded back to the AO by the same order for fresh adjudication. The Assessee has filed Tax Case - 57 of 2011 against the same.

The Decision

12. We have heard Counsel for the parties.

13. Tax Case No. 58 of 2011 arises from the order passed by the Tribunal in

Service Tax Appeal No. 92 of 2008. It was admitted on 14-3-2013 on the following two questions of law:

"(i) Whether Service Tax is applicable on the services provided by subcontractor when the main contractor is paying Service Tax?

(ii) Whether the Tribunal was correct in holding that extended period was invokable?"

14. Tax Case No. 57 of 2011 was also admitted on 14-3-2013 on the following questions of law:

"(i) Whether the Service Tax demands can be made second time for the same period?

(ii) Whether the credit is admissible on the input service and capital goods?"

15. The Counsel for the Assessee has placed reliance on the circular issued by the Central Board of Excise and Customs (the Board) (see Appendix-I to this judgement) as well as on the decisions of the Tribunal namely Vijay Sharma and Co. vs. Commissioner of Central Excise,2010 (20) S.T.R. 309 (the Vijay-Sharma case), BBR (India) Limited v. Commissioner of Central Excise, Bangalore-III [2006 (4) S.T.R. 269 (Tri.-Bang.)] , ROikos v. Commissioner of Central Excise, Bangalore-III [2007 (5) S.T.R. 229 (Tri.-Bang.)] , Semac Pvt. Ltd. v. Commissioner of Service Tax, Bangalore [2006 (4) S.T.R. 475 (Tri.-Bang.)] and M/s. Selvel Media Service Pvt. Ltd. v. CST, Delhi [2011 TIOL 543 CESTAT Del]. He submits that:

"? In case tax has been deposited by the contractor, then the subcontractor is not liable to deposit the tax,

? The circular issued by the Board are binding upon the Department. They themselves indicate the principle that tax has to be paid only once and in case it has been paid by the main contractor, then it is not necessary for the sub-contractor to deposit the same;

? In this case, the ultimate service receiver was BESCL. The service was provided by the BHEL through the Assessee. On the service provided to the BESCL through the Assessee, the BHEL has paid the Service Tax. The Department is not entitled to receive the tax for the second time;

? Assuming, though not admitting that the Assessee is liable to pay tax, no penalty could be imposed under Section 78 of the Act;

? Even if it is taken that any tax is payable, then it can always be paid by the Cenvat credit."

16. In the Vijay-Sharma case, the Larger Bench of the Tribunal, after discussing the law has directed as follows:

"10. in all the three references before us, it would be proper to send the matter back to the original authority, without being sent to the concerned Benches, to verify as to whether the stock-brokers have paid Service Tax on behalf of the sub-brokers and if so, reduce the demand on sub-broker to that extent and pass fresh orders, granting fair opportunity of hearing to the sub-brokers. All the appeals are allowed by way of remand."

17. A reading of the aforesaid paragraph as well as the circulars (Appendix-I) show that there is substance in the submission of the counsel for the Assessee. However, it is not possible for us to finally decide this point as neither the AO nor the Tribunal has recorded any finding whether the BHEL has paid the Service Tax for the period in question for the services rendered by the Assessee or not.

18. The Tribunal has already remanded the matter back for re-decision; there appears to be substance in the submission of the counsel for the Assessee; in view of the same, all the findings recorded by the Tribunal against the Assessee are set aside. The AO may again decide both the cases afresh in accordance with law, without being influenced by any observations made in the judgment of the Tribunal or in this order. But before deciding the case, he will also record a finding on the following point:

"Whether the Service Tax has been deposited by BHEL for the services provided by the Assessee for the period in question or not."

19. The Assessee will appear before the AO in the week commencing 21st July, 2014 and may file certified copy of this order. The AO may fix up another date for final hearing. We also give liberty to the Assessee to file fresh documents, if necessary. With the aforesaid observations, both the tax cases are partly allowed and remanded back to the AO.

"APFENDIX-I

Relevant part of circular dated 4-11-2003 of the Commissioner of Central Excise, Delhi-IV, Trade Notice No. 26/2003.

Service Tax - Frequently asked questions and their answers

1. General:

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Q.2.3 If there is a total sub-contract of the service, whether sub-contractor is supposed to take out a registration and discharge the tax liability?

Ans. The sub-contractor need not take a registration under Service Tax. In all such cases, Service Tax is to be paid by main service provider.

Relevant part of C.B.E. & C. Circular F. No. B.43/5/97-TRU, dated 2-7-1997

3. Consulting engineers

...

3.4 The services should be rendered to a client directly, and not in the capacity of a sub-consultant/associate consultant to another consulting engineer, who is the prime consultant. In case services are rendered to the prime consultant, the levy of service tax does not fall on the sub-consultant but is on the prime or main consulting engineer who raises a bill on his client (which includes the charge for services rendered by the sub-consultant).

Relevant part of C.B.E. & C. Circular F. No. B-11/3/98-TRU, dated 7-10-1998

5. Architects and Interior Decorators

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5.6 Further, in case where an architect/interior decorator sub-contracts part/ whole of his work to another architect/interior decorator, it is clarified that no service tax is required to be paid by the sub-contractor provided that the principal architect, interior decorator has paid the service tax on the services rendered by him to the client and provided the sub-contracting is in respect is the same service category. In other words, work is subcontracted by one architect to another architect. In such cases, if the principal architect pays the service tax on services rendered by him to his client, the sub-contracting architect is not required to pay the service tax. However, service tax would be required to be paid in a case where sub-contracting is to a different service category, for example, where an architect subcontracts his work to a consulting engineer, then service tax would be required to be paid by both architect and the consulting engineer on the services rendered by them. Similarly, a market research agency would be required to pay service tax on services rendered by it to an advertising agency, even if the advertising agency is also liable to pay service tax on the amount billed to its client for advertising services (which, inter alia, includes the amount paid by the advertising agency for such market research services to the market research agency).

Relevant part of Clarifications Regarding Service Tax on Advertising Agency Extracts of Trade Notice No. 1/96-ST, dated 31-10-1996, Mumbai Commissionerate-I

6.... Under these circumstances a question has been raised whether the film producer is also liable to pay service tax on the documentary or film prepared by him in relation to an advertisement. In this connection, it is relevant to note that taxable service is a service provided to a client by an advertising agency in relation to advertisement in any manner. Client is the advertiser. Therefore, in this case the advertising agency cannot be considered as a client when the definition of taxable service in relation to advertisement is interpreted in proper context. Accordingly, it is clarified that a film producer in this case is not liable to service tax. However the advertising agency will, no doubt include the expenses incurred on getting the film or documentary produced on behalf of the client in the gross amount charged from the client on which service tax will be collected by the agency. It goes without saying that if the film producer chooses to charge the client directly for the film or documentary produced by him then the film producer is to be regarded as having rendered service to the client in relation to advertisement and he will, therefore, be liable to pay service tax accordingly.

Relevant part of Departmental Clarifications on Frequently Asked Questions

Q.9. Is service tax also liable to be paid by an Architect or an interior decorator to whom the work has been delegated by another Architect or Interior decorator?

Ans. No, in cases where an architect/interior decorator sub-contracts part/whole of his work to another architect, interior decorator, no service tax is required to be paid by the sub-contractor provided that the principal architect/interior decorator has paid the service tax on the services rendered by him to the client and provided the sub-contracting is in respect of the same service category.

For instance when the work is sub-contracted by one architect to another architect, if the principal architect pays the service tax on services rendered by him to his client, the sub-contracting architect is not required to pay the service tax. However, service tax would be required to be paid in a case where sub-contracting is to different service category. For example where an architect sub-contracts his work to a consulting engineer, then service tax would be required to be paid separately by both the architect and the consulting engineer on the services rendered by them.

Relevant part of Clarification I on Leviability of Service Tax on Courier Service Extract of Trade Notice No. 1/96-ST, dated 31-10-1996, Mumbai Commissionerate-I

5. In this context, it is clarified that co-loaders provide service to the courier agencies as such. They do not provide directly any service to the customer who gives the documents, goods or articles to the courier agency for their delivery to the consignee. What is chargeable to service tax is the service provided by courier agency to the customer. In this case, the courier agency being not a customer as such, the service provided by co-loader to the courier agency is not chargeable to service tax. It is significant to point out that the charges of the co-loaders to the courier agency for in-transit movement of goods, documents or articles are in any case ultimately recovered by the courier agency from the customer and the charges are included in the gross amount charged by the courier agency from customers on which the service tax is computed.

Relevant part of Trade Notice No. 53-C.E. (Service Tax)/97, dated 4-7-1997 of the New Delhi Commissionerate.

4. Consulting Engineers:

...

4.4 The service should be rendered to a client directly, and not in the capacity of a sub-consultant associate consultant to another consulting engineer, who is the prime consultant. In case services are rendered to the prime consultant, the levy service tax does not fall on the sub-consultant but is on the prime of main consulting engineer who raises a bill on his client (which include the charge for services rendered by the sub-consultant)."