CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 1668 of 2011 [DB]

[Arising out of Order-in-Original No. 37/2011(ST)-Comm. dated 16.08.2011 passed by the Commissioner of Central Excise, Jaipur – I]

M/s. Avas Vikas Ltd. **...Appellant**
4-SA-24,
Jawahar Nagar, Jaiur

VERSUS

Commissioner of Central Excise,
Jaipur - I **...Respondent**
NCR Building, C-Scheme,
Jaipur - 302005

WITH

Service Tax Appeal No. 1709 of 2011 [DB]

[Arising out of Order-in-Original No. 37/2011(ST)-Comm. dated 16.08.2011 passed by the Commissioner of Central Excise, Jaipur – I]

Commissioner of Central Excise,
Jaipur - I **...Appellant**
NCR Building, C-Scheme,
Jaipur - 302005

VERSUS

M/s. Avas Vikas Ltd. **...Respondent**
4-SA-24,
Jawahar Nagar, Jaiur

APPEARANCE:

Mr. Bipin Garg & Ms. Jwaria Kainaat, Advocates for the assessee
Mr. Harshvardhan, Authorised Representative for the Department

CORAM: HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: **07.10.2022**
DATE OF DECISION: **02.12.2022**

FINAL ORDER No. 51131-51132 / 2022

DR. RACHNA GUPTA

Present order disposes of two cross appeals arising out of same show cause notice and same Order-in-Original. The facts in brief relevant for the present adjudication are as follows:

1.1 During scrutiny of the appellant's records, department observed that the appellant is engaged in construction services, construction of commercial and industrial buildings, civil structure services or/and construction of complex services. From the scrutiny of the Balance Sheets, it was observed that the appellant had received a sum of Rs.2,02,72,30,561/- (amount being on higher side as per appellant's records) during the years 2004-05 to 2008-09 on account of providing construction services. The appellant was also found engaged in providing services to the non-commercial concerns which were not taxable. The department further observed that the conditions of Notification No. 15/2004-S.T. dated 10.09.2004 as amended by Notification No. 19/2005-S.T. dated 07.06.2005 and Notification No. 01/2006-S.T. dated 01.03.2006 were not complied with. Hence, the abatement permissible under the said notification in respect of commercial or industrial construction services which were composite in nature was not available to the appellant.

1.2 Accordingly, vide Show Cause Notice No. 531 dated 23.04.2010, service tax amounting to Rs.22,09,97,113/- was proposed to be recovered from the appellant under the head "Construction Services" [Section 65 (105) (zzq)] upto 16.06.2005 and under the head "Commercial and Industrial

Construction Services" [Section 65 (105) (zzzh)] after this date along with the interest and the penalties under Section 70, 76, 77 and 78 of the Finance Act, 1994.

1.3 The proposal was partly confirmed vide Order-in-Original No. 37/2011 dated 16.08.2011 and the demand of Rs.1,48,89,011/- was confirmed to be recovered from the appellant along with the interest. However, the penalties under any of the sections were not imposed, invoking provisions of Section 80 of the Act. Subsequent thereto has been the corrigendum of the Order-in-Original dated 11.10.2011 vide which the adjudicating authority has carried out the major changes in Order-in-Original inasmuch as non-taxable services were made taxable and final demand of Rs.1,48,89,011/- was enhanced to Rs.1,64,04,586/- without any notice of hearing being given to the appellant. The same was objected as far as it brought the major changes. Hence, there had been a Review Order No. 23 dated 16.11.2011. Pursuant thereto department has filed the present appeal praying for determination whether the adjudicating authority has not erred in issuing Corrigendum dated 11.10.2011 to carry out major changes in the impugned Order-in-Original dated 17.08.2011 and thus have prayed for remand of matter. Appellant on the other hand has prayed for setting aside the said Order-in-Original qua confirmation of demand and enhancement thereof vide Corrigendum of Order-in-Original.

2. We have heard Shri Bipin Garg and Ms. Jwaria Kainaat, learned Counsels for the appellant/assessee and Mr. Harshvardhan, learned Authorized Representative for the department.

3. Learned Counsel for the appellant has submitted that the appellant is a State Government Company being run by Government Officers on no profit basis. The appellant is doing the civil construction work for the government departments, however, through the sub-contractor and to meet out the administrative/establishment expenses that the appellant has been charging 7.5% or 7.77% or 9% of the work orders. The value of orders was inclusive of the material. It is submitted that all the services during the respective relevant period have been tabulated by the appellant in para 9 of the appeal. The same reveals that no private work has been done by the appellant. It is further mentioned that since the work was being executed by the sub-contractor engaged by the appellant, the appellant actually was not the service provider.

3.1 The adjudicating authorities below have not considered the work orders being submitted by the appellant. Initially the demand was confirmed to Rs.1,48,89,011, later vide corrigendum dated 11.10.2011, the said demand was enhanced to Rs.1,64,04,586/- without any notice to the appellant. The order is not sustainable seen from the nature of the services involved herein, which are purely in the form of work contracts which have been made taxable w.e.f. 1st July, 2007.

3.2 Above all the entire demand is alleged to have been time barred. The findings of adjudicating authority below are alleged to be contradictory as at one point of time in para 46 of adjudication

order, the appellant's case is held fit for waiver of penalty in terms of Section 80 of the Act. However, in subsequent findings appellant is alleged to have suppressed the material facts. It is submitted that appellant is a State Government Undertaking, there is no question of any benefit out of evasion of service tax. Above all appellant had already deposited Rs.30,30,872/- voluntarily, there appears no question of alleged fraud or suppression. The extended period has thus been wrongly invoked by the adjudicating authority below. With these submissions learned Counsel has prayed for the order under challenge to be set aside and his appeal to be allowed. Department's appeal is objected as there is no case of remand.

4. To rebut these submissions learned DR has submitted that adjudicating authority has meticulously examined the work contracts and all relevant documents and it is thereafter that the authority has determined the taxability of construction activities of the appellant. There seems no infirmity to the findings in para 34 to 36 of the order under challenge. In terms of Section 67(1)(i) of Finance Act, 1994, the service tax is held leviable on the total value of the contract receipts. The benefit of cum tax has rightly been in denied terms of Section 67 (2) of the Finance Act. Learned DR further impressed upon that there is the sufficient reasoning for invoking the extended period of limitation in para 45 of the Order-in-Original. Appeal filed by appellant is prayed to be dismissed.

4.1 With respect to the Corrigendum for Order-in-Original dated 11.10.2011, as enquired in departmental appeal, it is mentioned that correction in Corrigendum of holding a service as taxable from

non-taxable and resultantly increasing the tax liability, cannot be termed as apparent mistake on record. Such Corrigendum order actually tantamount to a review of its own order by the adjudicating authority, also, for the reason that the assessee was not given the notice and the opportunity of being heard prior the said corrigendum order. Decision of Rajasthan High Court in the case of Banswara Syntex Ltd. reported as 2007 (6) S.T.R. 299 (Raj.), has been relied upon. It is prayed that question framed in review order dated 16.11.2011 be determined as to whether the adjudicating authority has not erred in issuing the Corrigendum dated 11.10.2011 to carryout major changes in Order-in-Original dated 16.08.2011. However, it is prayed that appeal may be remanded to the adjudicating authority for fresh consideration.

5. Having heard the rival contentions and perusing the entire records, we observe following to be the admitted facts in the present case:

(i) The services in question as detailed in para 36 of the Order-in-Original are all for the government departments.

(ii) The nature of services is that of construction of complexes along with the material.

(iii) The services are actually been provided by the sub-contractor of the appellant.

6. These admissions when read in the light of the definition of commercial or industrial construction as defined under Section 65

(25b) and construction of complex service as defined under Section 65 (30a) of Finance Act, 1994, it is clear that impugned are the services used or to be used for non-commerce/governmental purposes and as such are not taxable. From the above admissions, the another apparent fact is that the said construction services actually have been provided by the sub-contractor of the appellant. The Larger Bench of this Tribunal in the case of **Commissioner of Service Tax, New Delhi Vs. Melange Developers Private Limited reported as 2020 (33) G.S.T.L. 116 (Tri-LB)** has held that the liability of sub-contractor is independent of the liability of the main contractor.

7. The above admissions also make it clear that the services in question were actually the work contracts as stands under Section 65 (105)(zzzza) of Service Tax Act. Hon'ble Apex Court in the case of **Commissioner of Central Excise, Kerala Vs. Larsen and toubro Ltd. [2015 (39) STR 913 (SC)]**, it was held that: "there was no charging section specifically, prior 01.07.2007, for levying service tax only on works contracts, and measure of tax with service element derived from gross amount charged for works contract less value of property in goods transferred in execution of works contract. Section 65(105)(g), 65 (105)(zzd), 65(105)(zzh), 65(105)(zzq) and 65(105)(zzzh) ibid were not sufficient for levying Service Tax on indivisible composite works contracts. Exemption notifications for impugned services were immaterial, and had to be disregarded, since levy itself of Service Tax was non-existent, no question of any exemption would arise. Hence, we are of the opinion that the question of demanding service tax on such

contracts does not at all arises." These findings are sufficient for us to hold that the entire demand for the period prior to July 2007 is liable to be set aside. For the period post July 2007, works contracts could be changed only under "Works Contract Service" [Section 65 (105) (zzzza)] and there is no demand under this head at all. Therefore, the demand for this period also cannot be confirmed.

8. The demands also need to be set aside for the reason that the revenue has failed to produce any evidence to prove a positive act on the part of the appellant to have an intent to evade the payment of tax. The appellant rather is a government undertaking being managed by the Government Officers itself, there can be no intent to evade its own revenue. The extended period is therefore held to have been wrongly invoked by the adjudicating authority below.

9. Coming to the demand for the normal period, as already noted above, the admissions/undisputed facts on record are sufficient to show that the appellant has not provided any service at all. The services were being provided by the sub-contractor appointed by the appellant. In the said circumstances, the service tax liability cannot be fastened upon the appellant that too for such services which were purely for non-commerce/industry purposes. The construction services being provided to the Government authorities as that of Nagar Pallika, Traffic Police, Government Universities & law Colleges, Rajasthan Housing Boards, Development Authorities etc., for construction of structures like hospitals, colleges, mandies, dairies etc., for the Government.

There is no evidence produced by the department to prove that the complexes constructed were meant for generating government revenue. On the contrary, the Show Cause Notice itself contain the details of service recipients who are none but government functionaries who received construction services for public welfare. Accordingly, the construction services were for non-commercial purpose and thus, were non taxable even if they were services simpliciter. However, the services in question are alleged to involve both supply of goods and services and hence cannot be changed under CICS at any rate.

10. As a result of above discussion, the entire demand is held to have wrongly been confirmed. Once the very basis of confirmation of demand goes, the question of legality of enhancement and question of competence to enhance thereof without affording opportunity of hearing to the appellant becomes redundant. Similarly the question of invoking Section 80 waiving off the penalties of Section 70, 76 and 77 of the Finance Act, 1994, becomes redundant. No purpose left anymore for remanding the matter.

11. For determining the query raised in department's appeal, we observe that department itself is of the opinion that converting the non-taxable services to taxable ones and then enhancing the quantum of demand cannot be called as error apparent on record. The change is admitted to not to be the one which is covered under Section 74 of the Finance Act, 1994. Otherwise also the basic principle of natural justice is enshrined under Latin phrase 'Audi

Alteram Partem' means one shall not be condemned unheard. Enhancement of demand amount without hearing assessee cannot, therefore, withstand. As already discussed, the order of imposition of duty has been set aside as being not warranted for services being rendered for non-commerce purpose and otherwise were not reduced by appellant, question of remanding the matter does not arise.

12. Consequent to discussion, as above, the order under challenge is hereby set aside. Resultantly, the Appeal filed by assessee stands allowed and the appeal filed by the department stands partly allowed where the question raised has been determined, however, the prayer for remand of matter is rejected.

[Order pronounced in the open Court on **02.12.2022**]

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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