CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

SERVICE TAX APPEAL NO. 52487 OF 2016

[Arising out of Order-in-Original No. DLI/SV/TAX/002/COM/16-17 dated 27.05.2016 passed by the Commissioner of Service Tax Audit-I, New Delhi]

M/s BCC Contractors & Promoters Pvt Ltd. **Appellant**
H-33, Masjid Moth, Greater Kailash-II
Delhi-110048

Versus

Principal Commissioner of Service Tax, Delhi I **Respondent**
17-B, IAEA House, IP Estate, MG Marg
New Delhi-110002

Appearance:.
Present for the Appellant: Shri A K Batra,Advocate
Present for the Respondent: Shri Ravi Kapoor, Authorised Representative

COARM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJU,MEMBER (TECHNICAL)

Date of Hearing :15.06.2022
Date of Decision: 21.07.2022

Final Order No. 50628/2022

RAJU:

This appeal has been filed by M/s BCC Contractors and promoters Pvt Ltd. against the order confirming the demand of service tax, and interest and also imposed penalty.

2 Learned counsel for the appellant pointed out that there are three issues involved in the instant case.

3 The first issue relates to the demand of service tax in respect of various projects executed in Rajasthan. Learned counsel pointed out that the appellant took registration for their operations in Rajasthan and Chandigarh on 17.01.2008 and 13.11.2006

respectively. The appellant was filing the service tax returns for their operations in Rajasthan and Chandigarh to the respective service tax authorities in Rajasthan and Chandigarh. The appellant took centralised registration in New Delhi on 18.07.2008. The said centralised registration, learned counsel claimed, accidently and by mistake included the address of their offices at Rajasthan and Chandigarh. On realising the said mistake in the centralised registration, the appellant filed the amendment request which was accepted on 12.06.2013 and the address of Rajasthan and Chandigarh offices were deleted from the centralised registration in New Delhi.

4 Learned counsel pointed out that on the first issue the demand confirmed in the order pertains to their operation in Rajasthan. He argued that the show cause notice had been issued by the Principal Commissioner Service Tax, New Delhi on 24.04.2015. He pointed out that Principal Commissioner Service Tax New Delhi did not have any jurisdiction to raise the demand in respect of their operations in Rajasthan since they were independently registered there in Rajasthan and, therefore, show cause notice in respect of demand raised for their operations in Rajasthan is *ab initio* void for lack of jurisdiction. Learned Counsel further pointed out that the appellant had paid the service tax and filed their returns to service tax authorities in Rajasthan and Chandigarh. He pointed out that in respect of their operations in Rajasthan they had paid service tax and part of the said service tax was paid by using CENVAT credit availed on services obtained from various sub-contractors during execution of contract. He pointed out that while the benefit of

service tax paid by the appellant in Rajasthan jurisdiction has been allowed and set off against demand in the impugned order, the benefit of the CENVAT credit obtained on account of the various services received by the appellant for the said project and used for payment of service tax in Rajasthan, has not been allowed. He pointed out that he had produced all the necessary challans, but still the credit has not been allowed. He also submitted copies of the work contracts and VAT returns. Learned counsel pointed out that benefit of credit taken on the strength of challans was rejected by relying on CENVAT Credit Rules, 2004. He points out that Rule 9 of the CENVAT Credit Rules, 2004 permits availment of credit on the strength of challans in certain circumstances and, therefore, challans are valid documents for the purpose of availing CENVAT credit.

5 The second issue relates to the contract entered with GAIL Chainsa and VB Builders. It was argued that the appellant had paid VAT (value added tax) on more than 67 per cent of the total contract value and paid service tax on 33 per cent of the gross amount received in respect of such contracts. Learned counsel pointed out that the abatement available to them under Notification No. 01/2006-ST dated 01.03.2006 has been denied. The appellant has been denied benefit of Notification No. 01/2006-ST on the ground that the contract is in a nature of work contracts and, therefore, assessment has to be done to be done in relation of Rule 2 A of the Service Tax (Determination of Value) Rules, 2006 and, therefore, benefit of Notification 01/2006-ST dated 01.03.2006 cannot be availed. Learned counsel pointed out if two different options are available to the assessee than it is the choice of the assessee which

facility he wishes to take. He pointed out that even in terms of Rule 2A of the Service Tax(Determination of Value) Rules,2006 the appellant have discharged VAT on 67 per cent of the value of the goods and paid service tax on the balance 33 per cent of the value of goods. The impugned order confirms a demand of service tax at the rate of 4.12 per cent in terms of Clause (ii) of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 allowing abatement of 60 per cent and charging duty on 40 per cent of total amount charged.

6 Learned counsel pointed out that third issue involved relates to the projects in respect of which the impugned order claims that the appellant had not provided any works orders and learned counsel submitted that they have now submitted in Tribunal the necessary document to substantiate their claim regarding availment of claim under work contract service.

7 Learned counsel also argued that no penalty can be imposed as there is no short levy in this case.

8 Learned authorised representative relied on the impugned order. He further argued that as far as the first issue regarding jurisdiction is concerned, during the disputed period the appellant was registered in Rajasthan and Chandigarh as well as in Delhi. He argued that in view of above, the Principal Commissioner of Service Tax Delhi had jurisdiction to issue show cause notice. He further argued that the appellant is claiming credit on the strength of only challans of sub-contractors. He pointed out that challans do not display any link between the service provider and service recipient. The challans also do not indicate the nature of service and,

therefore, admissibility of CENVAT credit cannot be determined on the strength of challans.

9 In respect of second issue regarding the quantum of abatement admissible in respect of GAIL Chainsa and VB Builders, learned counsel submitted that the onus of establishing availability of Notification is on the appellant. He further pointed out the necessary document relating to the quantum of VAT paid and value of goods involved in the said contracts have not been submitted and, therefore, there was no option but to rely on clause (ii) of Rule 2(A) of Service Tax (Determination of Value)Rules, 2006.

10 Learned Authorised Representative also pointed out that in respect of third issue also the appellant have provided the necessary documents in Tribunal and the same were not provided to the original Adjudicating authority.

11 We have considered the rival submissions.

12 It is not in dispute that appellant had taken registration in Rajasthan and Chandigarh on 17.01.2008 and 13.11.2006 respectively. It is also not in dispute that the appellant had obtained centralised registration on 18.07.2008 and had included their office of Rajasthan and Chandigarh in the said centralised registration as well. It is also a fact that the appellant had approached the Revenue for deletion of Rajasthan and Chandigarh address from the centralised registration and the same was allowed on 12.06.2013. All along the appellants were also filing their ST-3 returns separately for Rajasthan and Chandigarh and for the centralised registration (for operations other than in Rajasthan and Chandigarh) in Delhi. In the above factual matrix it can be concluded that the Principal

Commissioner of Service Tax, Delhi had no jurisdiction over the activities of the appellant in Rajasthan and Chandigarh. It has not been contested by Revenue that the inclusion of Rajasthan and Chandigarh offices in centralised registration was a mere omission and error on the part of the appellant, which was corrected by the Department. In these circumstances, we are of the opinion that the Principal Commissioner Service Tax, New Delhi had no jurisdiction over the appellant and, therefore, the notice issued to the appellant in respect of the appellants operations in Rajasthan, where they were separately registered and filling returns, is without jurisdiction. Consequently, the demand on the first issue cannot be upheld and is, therefore, set aside.

13 In respect of first issue since the demand itself has been set aside the issue of admissibility of input CENVAT credit on the strength of challans becomes irrelevant.

14 As regards second issue, it is an admitted fact that appellant had not provided any evidence of VAT payment and consequently valuation was done by the impugned order in terms of Clause 2 (ii) of Rule 2 A of the Determination of Value Rules, 2006. Rule 2A reads as under:-

> **"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 architect'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; 1 amended by Service Tax (Determination of Value) Second Amendment Rules, 2012 vide Notification no 24/2012-ST, dated 6.06.2012 w.e.f. 1.7.2012.

(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, not covered under sub-clause (A), including works contract entered into for,-

(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 tiling or

installation of electrical fittings of immovable property,

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) "original works" 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;

(b) "total amount" 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."

15 The appellant has claimed that they had sold materials and goods of value exceeding 67 per cent of the gross amount charged and, therefore, they should have been allowed an abatement to the extent of 67 per cent in terms of Clause (i) of Rule 2A of Determination of Value Rules. The appellant had, however, paid the

service tax by claiming Notification No. 01/2006 which allows similar abatement. It has not been denied by the appellant that the contract entered with GAIL Chainsa and VB Builders was in the nature of works contract and, therefore, the assessment of said transaction should have been done by classifying the said service as works contract. The assertion of the appellant is that it had sold goods and material amounting to more than 67 per cent of the value of the gross amount charged and paid VAT on the same and, therefore, there will be no duty liability even if assessment is made as works contract. The appellant has now filed copies of the work contract and VAT returns in the appeal memorandum. The same were not filed before the lower authorities. In these circumstances, we set aside this finding in the impugned order and remand the matter to the original adjudicating authority to decide afresh after obtaining evidence of the value of goods sold by the appellant in execution of the contract with GAIL Chainsa and VB Builders. Thereafter, assessment can be done under Rule 2 (A) of the Service Tax (Determination of Value) Rules, 2006. If the assertion of the appellant that it had already paid tax on a value higher than that demanded by revenue, no demand would survive.

16 On the third issue also the benefit was denied on account of failure of the appellant to submit necessary documents. The appellant has submitted certain documents in the appeal papers. The demand on the third issue is also set aside, and the matter is remanded to the original adjudicating authority to examine the said documents produced by the appellant and decide the case afresh.

17 In view of above, the demand on the first issue is set aside. The demand on second and third issues are also set aside and the matter is remanded to the adjudicating authority to decide them afresh after examining the documents submitted by the appellant in the Tribunal and any other document that the appellant may submit during the remand proceedings.

18 The appeal is allowed to the extent indicated above.

(Order pronounced on **21.07.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJU)
MEMBER (TECHNICAL)

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