

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10452 of 2014-DB

[Arising out of Order-in-Original/Appeal No RJT-EXCUS-000-APP-504-13-14 dated 31.10.2013 passed by Commissioner of Central Excise and Service Tax-RAJKOT]

Jay Kishan Engineers

313, Sanskar , Opp. KKV Hall,
150 Ft Ring Road, RAJKOT, GUJARAT-360001

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Rajkot

Central Excise Bhavan, Race Course Ring Road,
Income Tax Office, Rajkot, Gujarat -360001

.... Respondent

APPEARANCE :

Shri R. Subramanya, Advocate for the Appellant
Shri SS Vikal, Assistant Commissioner AR, for the Respondent

**CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 02.04.2024

DATE OF DECISION: 05.04.2024

FINAL ORDER NO. 10767/2024

C.L. MAHAR :

The brief facts of the matter are that appellant are engaged in providing taxable services under the category of Construction service, Site formation, Clearance, Excavation and Earth moving and demolition services, Erection, Commissioning and Installation Service etc. During the course of audit of the appellant's financial records on 07.09.2009, for the period April 2007 to March 2009, it was observed by the department that the appellant has not paid service tax on the services rendered by them to the main contractors. The details of these contracts are as follows:-

No.	Name of Main Contractor	Invoice No. & Date	Value as per Invoice (Rs.)	Service Tax 12.36% (Rs.)
1	M/s. Buildcon K.P.	R/20/22-11-2008 For Construction Wall at Pipavav	11,36,680-	1,40,494

		Port		
2	M/s. K.P. Buildcon	R/33/21-3-2009 For Civil Work for Tower Erection	5,12,947/-	6,340/-
3	Dhenu Developer	R/17/27-11-2008 For Construction of Drainage (RMC Project) Pipeline	27,20,916/-	3,36,305/-
4	Dhenu Developer	R/13/3-7-2007 For Construction of Drainage (RMC Project) Pipeline	22,05,154/-	2,72,557/-
		Total	65,75,697/-	8,12,756/-

A show cause notice dated 01.10.2012 was issued to the appellant which got adjudicated by the original adjudicating authority and same was also upheld by the Commissioner (Appeals). The appellant are before us against the impugned order-in-appeal dated 08.11.2013.

2. Shri R. Subramanya, learned advocate appearing for the appellant submitted that for the work undertaken by the appellant for the main contractor namely M/s. K.P. Buildcon was for construction of a compound wall at the Pipavav Port and since the construction activity undertaken by them for the main contractor was for the Port and same is covered by exemption Notification No. 25/2007-ST dated 22.05.2007. With regard to work undertaken by the appellant for the main contractor M/s. Dhenu Developer, Rajkot for which the appellant had issued invoice Nos. R/17/27-11-2008 and R/13/3-7-2007 which pertains to the work undertaken by them for construction of Drainage Pipelines for Municipal Corporation. Since the use of drainage pipeline is primarily non-commercial purpose, the construction of drainage pipeline falls under the category of exempted service and therefore not subject to service tax. The learned advocate has drawn our attention to the CBEC Circular No. 147/16/2011-Service Tax dated 21.10.2011 which has clarified that the when the service itself is exempted, the sub-contractor providing the service to main contractor shall also be entitled for exemption from service tax. On the basis of this argument, the appellant has contended that no service tax liability arises on

them and therefore, the impugned order-in-appeal is legally not sustainable. The learned advocate has relied upon the following decisions on the issue:-

(a) 2010 (19) STR 259 (Tri-Bang) - Nagarjuna Construction Co Limited vs. CCE

(b) 2008 (12) STR 363 (Tri.-Chennai) - Indian Hume Pipe Co Limited vs. CCE - upheld by Hon'ble Madras High Court reported in 2015 (40) STR 214 (Mad)- CCE vs. Indian Hume Pipes Co Ltd, and further upheld by Hon'ble Supreme Court reported in 2016 (44) STR 171 (SC)- Commissioner vs. India Hume Pipes Co Limited.

3. The learned advocate has also drawn our attention to the fact that the impugned show cause notice has been issued under Section 73(1) of Finance Act, 1994 for the period 2007-08 and 2008-09 on 01.10.2012 by invoking extended time period as provided under section 73 of the Finance Act, 1994. It has been the contention that audit of the appellant's financial record took place on 07.09.2009 and all the transactions were duly entered into their financial record and the appellant were also filing ST-3 returns regularly with the department and therefore as such there is no suppression of facts or mis-statement etc. with intent to evade payment of service tax and therefore, the impugned show cause notice dated 01.10.2012 is barred by period of limitation.

3. We have heard Shri SS Vikal, learned Assistant Commissioner (AR) who reiterated the findings given in the impugned order-in-appeal.

4. Having heard both the sides, we find that the work undertaken by the appellant for the main contractor namely M/s. KP Buildcom was for construction of boundary wall for Pipavav port, within the port area and civil work for erection of tower. We find that Notification No. 25/2007-ST dated 22.05.2007 provides as follows:-

“G.S.R. (E). In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts commercial or industrial construction service, referred to in sub-clause (zzq) of clause (105) of section 65 of the Finance Act, and services provided in relation to the execution of works contract, referred to in sub-clause (zzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person in relation to construction of port or other port, from the whole of the service tax leviable thereon under section 66 of the Finance Act.

Explanation. - For the purposes of this notification, it is hereby declared that, -

- (i) commercial or industrial construction service or services provided in relation to the execution of works contract in relation to construction of port or other port shall not include services of completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port; and
- (ii) "port" and "other port" have the meanings respectively assigned to them in clauses (81) and (76) of section 65 of the Finance Act.

5. It can be seen from the provisions of the above exemption notification that activities pertaining to construction of Port are exempted by the above mentioned exemption notification. Since the construction of boundary wall and tower within the port area are very much part of the port area therefore, we are of the view that provisions of Notification No. 25/2007-ST dated 22.05.2007 will certainly be applicable to the appellant being sub-contractor of the main contractor and therefore appellant shall not be liable to pay any service tax on such activity.

6. As regards to the construction activity undertaken by the appellant for M/s. Dhenu Developers, the same was for construction of drainage pipe line for Rajkot Municipal Corporation. We take note of the fact that Hon'ble Supreme Court in its decision dated 29.04.2016 reported under 2016 (44) STR J71 (SC) has held as under:

"..... that assessee is engaged in laying of long distance pipelines to enable State Water Supply and Drainage Board to supply water in public interest and to take care of civil amenities. Tribunal order that aforesaid activity is a part of 'construction activity' not commercial in nature and accordingly not covered under erection, commissioning or installation service is accordingly agreed with. Assessee not liable to pay Service Tax."

Since the activity of construction of drainage pipeline for Municipal Corporation is not for commercial purpose and therefore, the construction activity pertaining to construction of drainage pipeline for Rajkot Municipal Corporation is not liable to service tax by virtue of the fact that same is not

in the nature of commercial activity and therefore same is also not liable to service tax.

7. In view of our above observation, we hold that impugned order-in-appeal is without any merit, we set-aside the same and the appeal is allowed.

(Pronounced in the open court on 05.04.2024)

(Somesh Arora)
Member (Judicial)

(C L Mahar)
Member (Technical)

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