Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 240 of 2012

(Arising out of OIA-57/2012/STC/KANPAZHAKAN/COMMR-A-/AHD dated 15/02/2012 passed by Commissioner of Central Excise-AHMEDABAD)

P C Snehal Construction Co **.....Appellant**
Pravesh Apartment, Maha Dev Nagar Society,
Near Sardar Patel Statue, Stadium Road, Naranpura,
Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax - Ahmedabad **.....Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat - 380015

APPEARANCE:
Shri Bishan R Shah & Ms. Kiran Tahelani, Chartered Accountant for the Appellant
Shri R.P Parkh, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No . A/ 11094 /2022

DATE OF HEARING: 10.08.2022
DATE OF DECISION: 06.09.2022

RAMESH NAIR

The brief facts of the case are that the appellant are engaged in providing the construction service to M/s. Torrent power Ltd, Ahmedabad. The department demanded service tax under the head of Commercial or Industrial Construction Service (CICS). Issue arising out of the order whether the service provided by the appellant is Works Contract Service or Commercial or Industrial Construction Service, if the service is of WCS whether the demand raised under the head of Commercial or Industrial Construction Service will survive or otherwise and whether the demand of service tax on works contract till June 2007 was payable or otherwise.

2. Shri Bishan R Shah, Learned Chartered Accountant along with Ms. Kiran Tahelani, Learned Chartered Accountant appearing on behalf of the appellant submits that there is no doubt that their contract is a composite contract which includes both material and service. The said fact has been confirmed in the SCN itself. Therefore, the demand under the Commercial or Industrial Construction Service is not justifiable being the service falls under Works Contract Service. He further submits that in respect of any contract which is a composite contract, service tax cannot be demanded

under CICS/ CCS for the period also after 01.06.2007 for the period in dispute in this appeal. In this regard he placed reliance on the following judgments :

- Real Value Promoters Ltd – 2019 (9) TMI 1149- CESTAT – Chennai
- URC Construction- 2017 (50) STR 147 (Tri. Chennai)
- Mantri Developers – 2014 (36) STR 944 (Tri. Bang.)
- Skyway Infra Projects - 2018 – TIOL- 360- CESTAT- MUM
- Srishti Constrictions – 2018 – TIOL- CESTAT – CHD
- CST Vs. Swadeshi Construction Company – 2018 – TIOL- 1096- CESTAT- DEL
- Logos Constructions Pvt Ltd – 2018 – TIOL- 2716- CESTAT – MAD
- M/s Kunnel Engineers and Contractors Pvt Ltd – 2020 (7) TMI 28 CESTAT- Bangalore.

2.1 He alternatively submits that the benefit of abatement was denied on the ground that the appellant had not included the value of material supply free of cost by the service recipient. He submits that in view of the Hon'ble Supreme court judgment in the case of Commissioner of Service Tax vs. Bhayana Builders (P) Ltd – 2018 (2) TMI 1324 (SC) it was held that for allowing abatement the goods/material that is provided by the service recipient free of charge is not to be included while arriving the taxable value. He also referred to explanation 3 to sub section (1) of section 67 which removes any doubt clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service. Therefore there is no amount charged in respect of the goods which are supplied by the service recipient. Therefore, the value of goods is not to be included in the service. Accordingly, as per the settled position the appellant is otherwise entitled for the abatement to the extent of 67 % of the gross value of the service. He placed reliance on the Supreme court judgment in the case of M/s Jay Engineers Vs. Commissioner of Service Tax, Ahmedabad – 2019 (5) TMI 156- CESTAT Ahmedabad. He further submits that levy of service tax on works contract service till 01st June, 2007 was unconstitutional in view of the Judgment pronounced in case of Larsen & Toubro by the Hon'ble Apex Court reported at 2015 (8) TMI 749 (SC). The said decision was also relied upon in the case of M/s Omega Elevators by the Hon'ble Ahmedabad Tribunal vide order no. A/10915/2019 dated 04.04.2019 and appeal was decided in the favour of the Assesee.

2.2 He further submits that the appellant has not suppressed any material fact from the department. Hence, the demand for the extended period of limitation is not sustainable. He submits that the appellant has maintained necessary books of account, Audit reports etc. Relevant records are available from the Income Tax Department. Hence, bona fide belief of the appellant is established. There is no intention to evade the payment of service tax, it is one of the basic ingredients which needs to be established before the department to invoke the larger period of limitation for enforcing the demand of service tax, it is required something more than mere non –payment of service tax. He placed reliance on the following judgments :-

- Uniworth Textiles Ltd - 2013 (288) ELT 161 (SC)
- Bedmutha Industries Ltd – 2019 –TIOL- 445 CESTAT- MUMBAI

In view of the above decisions and fact that SCN was issued beyond 1 year from the relevant date, demand is time bar.

2.3 He further submits that interest and penalty being consequential to the demand of service tax is not sustainable. Without prejudice he submits that the penalties were imposed under section 76 and 78 are mutually exclusive and cannot be imposed as held in the following judgments:

- CCE Vs. Silver Oak Gardens – 2008 (13) STT 64 (CESTAT – SMB)
- Remac Marketing – 2009 (18) STT 306 CESTAT
- Pannu Property Dealer – 2009 (20) STR STT 78 CESTAT
- Grewal Trading Co. – 2009 (23) STT 384 (CESTAT)
- CCE Chandigarh Vs. City Motors – 2011 (30) STT 191 (Punj.)

2.4 He further submits that Section 78 of the Finance Act, 2008 inserted with effect from 10.05.2008 that if the penalty payable under section 78, the provision of section 76 shall not apply, for this reason also penalty under Section 76 is not imposable.

3. Shri R. P Parekh, Learned Superintendent (AR) appearing on behalf of the Revenue reiterated the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. The first issue to be decided is whether the services provided by the appellant are of Works contract service or Commercial or Industrial Construction Service. As submitted by the Learned counsel and revealed from the SCN itself, no doubt that the appellant had provided the services along with material therefore, the services are clearly falling

under WCS. As regard the issue that whether the free supply material needs to be included in the services of Commercial or Industrial Construction Service , the issue is no longer res- integra as held by the Hon'ble Supreme court in the case of Bhayana Builder Pvt Ltd (Supra) that the value of free supply material need not to be included in the gross value service in order to avail the benefit of abatement. Therefore, as per the fact since the appellant has provided the service along with material their services are clearly classified as works contract service. The appellant subsequently started paying service tax on works contract service which is not disputed by the department. The Works contract service was not taxable prior to 01.06.2007 in the light of the Hon'ble Supreme Court judgment in the case of L&T Ltd (Supra) therefore, the demand prior to 01.06.2007 is clearly unsustainable as held by the Apex Court.

4.1 As regard the demand under Commercial or Industrial Construction Service post 01.06.2207 we find that the SCN as well as the adjudication order was passed classifying the service under Commercial or Industrial Construction Service whereas the service of the appellant is classified under works contract service. On this fact the demand raised under Commercial or Industrial Construction Service will not sustain being proposed and confirmed under the wrong classification whereas the services are correctly classifiable under works contract service. On the issue where duty demand raised under the wrong classification this tribunal in the case of Real Value Promoters Limited (Supra) held that the composite contract can be subjected to service tax only under works contract servoce post 01.06.2007 and any demand raised under CICS/CCS on such composite contracts post 01.06.2007 is not sustainable . In the said decision the Chennai bench of this Tribunal also relied upon the judgment in the identical cases as under:-

- URC Construction- 2017 (50) STE 147 (Tri. Chennai)
- Mantri Developers – 2014 (36) STR 944 (Tri. Bang.)
- Skyway Infra Projects - 2018 – TIOl- 360- CESTAT- MUM
- Srishti Constrictions – 2018 – TIOL- CESTAT – CHD
- CST Vs. Swadeshi Construction Company – 2018 – TIOL- 1096- CESTAT- DEL
- Logos Constructions Pvt Ltd – 2018 – TIOL- 2716- CESTAT - MAD

4.2 As per the above settled position when no demand was raised under Works Contract Service post 01.06.2007, the demand raised under CICS/CCS will not be sustained. Since we have decided the issue on merit of this case, we are not addressing other issues raised by the appellant such as abatement valuation, limitation etc.

5. As per our above discussion and finding the demand of service tax raised by the lower authorities is not sustainable. Hence the impugned order is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 06.09.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Geeta