CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60175 of 2023

[Arising out of Order-in-Original No. 19/ST/Pr.Commr./SP/RTK/2022-23 dated 26.12.2022 passed by the Commissioner of CGST & CE, Rohtak]

M/s Shreejee RMC Private Limited **……Appellant**
56/11/2, Village Wazirpur,
Sector 95-A, Gurugram,
Haryana 122505

VERSUS

Commissioner of C.G.S.T. & C.E., Rohtak **……Respondent**
2nd Floor, Pacific City Centre,
Near Jat Bhawan,
Delhi Bypass
Rohtak, Haryana 124001

APPEARANCE:

Present for the Appellants: Mr. Atul Kumar Gupta, C.A.

Present for the Respondent: Mr. Siddharth Jaiswal & Mr. Aneesh Dewan, Authorized Representatives

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60233/2024

DATE OF HEARING: 09.05.2024
DATE OF DECISION: 14.05.2024

PER P. ANJANI KUMAR

The present appeal is directed against the impugned order dated 26.12.2022 passed by the Commissioner of Central GST & Central Excise, Rohtak.

2. Briefly stated facts of the case are that the appellant is engaged in the business of manufacture and supply of Ready Mix Concrete to various projects; acting upon an intelligence received from DGARM, the appellant was asked to furnish details of the gross amounts received by them as shown in ST-3 returns and 26AS statements; investigation was conducted and a show cause notice dated 21.04.2022 was issued to the appellant demanding service tax of Rs.4,43,84,102/- along with interest and penalty; the proposal in the show cause notice was adjudicated vide the impugned order dated 26.12.2022 by the Commissioner of Central GST & Central Excise, Rohtak who confirmed the demand of service tax under Section 73(1) of the Finance Act, 1994 along with interest under Section 75 ibid and equal penalty under Section 78 ibid, penalty of Rs.10,000/- under Section 77(a) ibid and penalty of Rs.10,000/- under Section 77(b) ibid. Hence, the present appeal.

3.1 Shri Atul Kumar Gupta, the learned C.A., appearing on behalf of the appellant submits that the issue of leviability of service tax on supply of ready mix concrete is no longer *res integra* having been decided by various judgments; the learned adjudicating authority confirmed the demand based on the gross receipts in Profit & Loss account; as per the agreement entered by them with M/s Signature Global (India) Pvt Ltd, the appellant is not engaged for rendition of any service but the appellant has to manufacture ready mix concrete and deliver the same at various construction sites; it is made clear in the CBEC Circular dated 06.01.1998 that ready mix concrete is a

excisable product. In this regard, he relies on the following judgments:

- ***GMK Concrete Mixing Pvt Ltd vs. CST, Delhi – 2012 (25) STR 357 (Tri. Del.)***
- ***CST vs. GMK Concrete Mixing Pvt Ltd – 2015 (38) STR J113 (SC)***
- ***Wagad Infra Projects Pvt Ltd vs. CCE & ST, Vadodara – 2022 (59) GSTL 95 (Tri. Ahmad)***
- ***Commr. vs. Vikram Ready Mix Concrete Pvt Ltd – 2016 (42) STR J282 (SC)***
- ***Perfect Ready Mix Concrete vs. CCE & ST, Vadodara – 2022 (1) TMI 862***

3.2 The learned C.A. further submits that the appellant has paid central excise duty as well as VAT on the impugned products and therefore, charging service tax is not sustainable. In this regard, he relies on the following judgments:

- ***Agarwal Metal Works Pvt Ltd vs. Commr of CGST, Alwar – 2022 (65) GSTL 372 (Tri. Del.)***
- ***Osnar Chemical Pvt Ltd vs. Commr of C.E., Bangalore-II – 2009 (240) ELT 115 (Tri. Bang.)***
- ***Brindavan Bottlers Pvt Ltd vs. CCE & CGST, Lucknow – 2022 (58) GSTL 330 (Tri. All.)***

3.3 The learned C.A. also submits that though the appellant has submitted the copy of the agreement and other documents to the Department, the adjudicating authority confirmed the demand of service tax by holding that no documents were submitted to satisfy that no service was provided by the appellant.

3.4 The learned C.A. submits in addition that the show cause notice has been confirmed invoking extended period, assuming that the appellant is chargeable under some service; it is a settled principle that the service tax cannot be demanded merely on the basis of balance sheet without examining or analyzing the activity carried on by the assessee; demand based on difference between balance sheet and ST-3 returns is also not sustainable; there was no suppression etc by the appellant with the intent to evade payment of duty and therefore, extended period is not invokable; no concrete allegation has been made in the impugned order or in the show cause notice to prove any malafide intention on the part of the appellant. In support of his submissions, he relies on the following case-laws:

- ***Kush Construction vs. CGST, Nacin, ZTI, Kanpur – 2019 (24) GSTL 606 (Tri. All.)***
- ***CST, Service Tax, Delhi vs. Convergys India Services Pvt Ltd – 2018 (1) TMI 1174 CESTAT CHANDIGARH***
- ***M/s Indian Machine Tools Manufacturers Association vs. CCE, Panchkula – 2023 (9) TMI 815 CESTAT CHANDIGARH***
- ***Rajasthan State Road Transport Corporation vs. CCE & ST, Jaipur – 2024 (3) TMI 1103 CESTAT NEW DELHI***
- ***Khandwala Securities Ltd vs. CST, Mumbai-I - 2015 (40) STR 738 (Tri. Mumbai)***
- ***CST, New Delhi vs. Kamal Lalwani – 2017 (49) STR 552 (Tri. Del.)***
- ***Shri Balaji Industrial Products Ltd vs. CCE, Jaipur – 2019 (370) ELT 280 (Tri. Del.)***
- ***Uniworth Textiles Ltd vs. CCE, Raipur – 2013 (288) ELT 161 (SC)***
- ***Simplex Infrastructure Ltd vs. CST, Kolkata – 2016 (42) STR 634 (Cal.)***

3.5 The learned C.A. further submits that the duty was confirmed without giving the benefit of cum-duty which is due to the appellant. He also submits that demand has been confirmed wrongly taking the higher rate of duty of service tax. He also submits that in view of the fact that there is no suppression etc with the intent to evade the payment of duty, no penalty can be imposed. In this regard, he relies on the following judgments:

- ***Global Vectra Helicorp Ltd vs. CST, Mumbai-II – 2016 (42) STR 118 (Tri. Mumbai)***
- ***Commr vs. Advantage Media Consultant – 2009 (14) STR J49 (SC)***
- ***Commr of CE, Delhi vs. Maruti Udyog Ltd – 2002 (141) ELT 3 (SC)***

4. On the other hand, the learned Authorized Representative for the Revenue Shri Siddharth Jaiswal assisted by Shri Aneesh Dewan reiterates the findings of the impugned order and submits that a look at the agreement reveals that appellant had to provide some services to M/s Signature Global (India) Pvt Ltd; the appellant did not produce any documents to evidence their claim; moreover the figures in different returns like ST-3 returns, VAT returns and 26AS statements are not tally and therefore the adjudicating authority has correctly confirmed the duty of service tax. He further submits that as the appellant did not get registered and did not pay service tax, intention to evade payment of service tax is evident, therefore, extended period is also invoked correctly.

5. Heard both sides and perused the records of the case.

6. It is the claim of the Department that the appellant has rendered some services to M/s Signature Global (India) Pvt Ltd as evident from the agreement; however, the appellant submits that they have only supplied the ready mix concrete which is an excisable product and has also paid VAT; as they have rendered no service, therefore, no service tax is payable.

7. On going through the records of the case, we find that the Department though alleges that the appellant has rendered some services to M/s Signature Global (India) Pvt Ltd, it has not been made clear what was the classification of the service and what was the consideration received for the same. In the absence of specific service being identified, it is not open for the Department to assume that some service was made and therefore service tax is payable. This approach is not legally sustainable; it is the responsibility of the person alleging to prove the allegation with evidence; the Department failed to do so; moreover, an attempt has been made to confirm the duty of service tax on the basis of discrepancy in various statements and figures. It has been held in number of cases that such confirmation of tax is not legally sustainable. This bench in the case of ***M/s Indian Machine Tools Manufacturers Association*** (supra) has held as under:

> ***"11****. Coming to third and final issue as to whether any demand can be sustained on the basis of difference between the figures of ST-3 Returns and the balance sheets, we find that it is a settled principle of law that service tax can be levied only when there is a clear identification of service provider, service recipient*

and consideration paid for the same. In the absence of any such evidence of the service recipient and the service provided, service tax cannot be demanded and confirmed. For this reason, we are of the considered opinion that it is not open for the Department to raise demands on the basis of other statutory returns like Income Tax Returns or balance sheets without proving that such service has been rendered by the assessee and consideration thereof has been received. Similarly, no service tax demand can be raised and confirmed on the basis of notional income. We find that Tribunal in the case of Synergy Audio Visual Workshop (P) Ltd.- 2008 (10) STR 578 (Tri. Bang.) held that:

> *5.1 The other ground is for confirming demands is that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeeds on this ground also. The impugned order is set aside and the appeal is allowed.*

***12**. We also find that Tribunal in the case of Indian Oil Corporation - 2020 (32) GSTL 350 (Tri. Kolkata) held that:*

> *8. Having heard both the sides, we are of the view that the entire operation of transportation of the crude from Haldia port to BRPL is covered by a single contract. The terminal facilities are only intermediate operation of the transportation of the goods through pipeline. Since, the requisite amount of the service tax has already been paid on the service of transportation through pipeline provided by the respective parties, we feel that the*

> *terminal facilities being the integral part of the entire pipeline facilitating the transportation of the liquid crude, it will not be legally correct to consider the terminal facilities as independent facilities for which no real transaction of service charges have actually taken place and therefore demanding a service tax on the notional value taken by the appellant only for the purpose of accounting of the cost of the different units working under the appellants, will be not in the interest of the service tax law. Since, service tax has already been paid on the entire amounts which have been charged for transportation of the crude through pipeline, we think that charging service tax separately for the terminal facilities is legally not sustainable.*

In view of the above, we are of the considered opinion that demand of service tax cannot be confirmed without identify the service and it cannot be confirmed on basis of difference of documents.

8. Further, the issue of exigibility of supply of ready mix concrete to service tax has been decided in number of cases as cited above. We find that the Tribunal in the case of ***GMK Concrete Mixing Pvt Ltd*** (supra) has observed as under:

> *"**5.** Record does not reveal involvement of nay taxable service aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service contract. In absence of cogent evidence to the effect of providing taxable service, primary and dominant object of the contract throws light that contract between the parties was to supply ready mix concrete but not to provide any taxable service. Finance Act, 1994 not being a law relating to commodity taxation but services are declared to be taxable under this law, the adjudication made under mistake of fact and law fails."*

9. In view of the above, we do not find any merit in the impugned order; accordingly, the same is liable to be set aside and we do so.

10. The appeal is accordingly allowed.

(Order pronounced in the open court on 14.05.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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