CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court - I

Appeal No. ST/1777/2011

(Arising out of Order-in-Original No.24/2011-Adjn. (Commr) (S.Tax) dated 30.03.2011 passed by CCCE, Hyderabad - IV)

Indu Eastern Province Projects Pvt Ltd ..... Appellant(s)

Vs.

CCCE & ST, Hyderabad - IV ..... Respondent(s)

Appearance
Shri G. Natarajan, Advocate for the Appellant.
Shri N. Bhanu Kiran, Asst. Commissioner/AR for the Respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 26.12.2018
Date of Decision: 16.01.2019

FINAL ORDER No. A/30061/2019

[Order per: P.V. Subba Rao.]

1. This appeal has been filed against Order-in-Original No. 24/2011-Adjn. (Commr) (S.Tax) dated 30.03.2011.

2. The facts of the case are as follows:

M/s Indu Embassy Consortium represented by its lead member M/s Indu Projects Ltd submitted a bid to the Andhra Pradesh Housing Board (APHB) for development of 50 acres of their land into a residential complex and were awarded the contract. The development agreement was entered into between Indu Embassy Consortium and APHB who are the owners of the land. This agreement was assigned by Indu Embassy Consortium to Indu Eastern Province Projects Pvt Ltd (IEPPL) (appellant herein) for execution of the project. In turn, the appellant have sub-contracted the entire construction activity to M/s Indu Projets Ltd (IPL). IPL paid service tax on the amounts which they received for the construction from the appellant. The appellant, in turn, availed CENVAT

credit of such service tax paid by IPL and utilized it for payment of service tax. The appellant were registered as 'works contract service' provider with the department and they charged their customers service tax and paid service tax under Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 by utilizing the CENVAT credit so taken and also partly in cash. The appellant, vide their letter dated 20.04.2008, explained to the department that as per CBEC circulars they are not liable to pay service tax but they continued to collect from their clients service tax and paid it to the department partly using the CENVAT credit and partly in cash. A show cause notice was issued to the appellant in which it was alleged that they are not liable to pay service tax as they were not rendering any service at all. As the appellant was not rendering any service to their clients, they were not liable to pay service tax on 'works contract service' or under commercial construction service. It was further alleged that since they were not liable to pay service tax, they should not have collected service tax from their customers. However, since they did collect amounts as representing service tax, the same needs to be deposited with the Government as per Sec.73A of the Finance Act, 1994. It was further alleged that they could not avail CENVAT credit of the service tax paid by IPL because they were not liable to pay service tax at all. Therefore, the CENVAT credit was wrongly taken by them and the CENVAT credit so taken cannot be used for depositing amounts in terms of Sec.73A of the Finance Act, 1994. Accordingly, after following due process, the impugned order was issued demanding from the appellant an amount of Rs.1,84,54,252/- under Sec.73A of the Act and adjusting an amount of Rs.14,87,505/- already paid by them in cash against the demand. It also denied CENVAT credit of Rs.2,11,97,776/- taken by them. Interest was also demanded on the short deposit of amounts under Sec.73A in terms of Sec.73B of the Act. Penalty was also imposed under Sec.77 of the Finance Act, 1994.

3. Aggrieved by this order, the appellant filed this appeal. The period of dispute is July, 2007 to September, 2008. The grounds of appeal were as follows:

(1) The appellant is liable to pay service tax as per CBEC circulars dated 01.08.2006 and 23.08.2007.

(2) Even if the appellant is held not liable to pay service tax they are entitled to take CENVAT credit and use it for making deposits against demands under Sec.73A of the Finance Act.

(3) The demand of interest and imposition of penalties are not sustainable.

4. Learned counsel for the appellant submits that there are broadly two types of transactions with respect to construction of residential complexes. One, in which the buyer approaches the builder to purchase residential apartment and an agreement to sell the flat is entered into and consideration is paid in stages. In another model of transaction, the undivided share of land along with semi-finished structure is sold by the builder or the promoter to the buyer and thereafter, the construction agreement is entered into between them. While the sale of undivided share of land with or without semi finished structure is transaction of sale of immovable properties, the construction agreement gives rise to a relationship of service provider and service recipient between the builder and promoter. In this case, APHB is selling the undivided share of land along with semi finished structures to the buyers and thereafter the buyers entered into construction agreement with the appellant/builder or promoter. Hence, there is a service provider and recipient relationship and circulars, dated 01.08.2006 and 23.08.2007 are not applicable to their case. The extracts of these circulars are below:

Sr. No.	Issue	Legal Position
1.	Is service tax applicable on Builder, Promoter or Developer who builds a	In a case, where the builder, promoter or developer builds a residential complex, having more

	residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one P/Y?	than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder/ promoter/ developer under 'construction of complex' service falling under Section 65(105)(zzzh) of the Finance Act, 1994. If no other person is engaged for construction work and the builder/ promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. Service tax exemption for small service providers up to an aggregate value of taxable services of Rs.4 lakh provided in any financial year vide Notification No.6/2005-Service Tax, dated 1-3-2005 is applicable for 'construction of complex' service also.
079.01/ 23-8-07	Whether service tax is liable under construction of complex service [section 65(105)(zzzh) on builder, promoter, developer or any such person,- (a) who gets the complex built by engaging the services of a separate contractor, and (b) Who builds the residential complex on his own by employing direct labour?	(a) In a case where the builder, promoter, developer or any such person builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (to the builder/promoter/developer/any such person) shall be liable to pay service tax on the gross amount charged for the construction services under 'construction of complex' service [section 65(105)(zzzh)]. (b) If no other person is engaged for construction work and the builder/promoter/developer/any such person undertakes construction work on his own without engaging the services of any other person, then in such cases,-

		(i) Service provider and service recipient relationship does not exist, (ii) Services provided are in the nature of self-supply of services. Hence, in the absence of service provider and service recipient relationship and the services provided are in the nature of self-supply of services, the question of providing taxable service to any person by any other person does not arise.

5. Interestingly, the appellant had themselves in their letter dated 20.04.2008 to the Commissioner cited these circulars and claimed that they are not liable to pay service tax but anyway would like to pay it. In the impugned order the Commissioner held that they are not liable to pay service tax.

6. Learned counsel would also argue that in terms of CBEC Circular No. 108/2/2009-ST dated 29.01.2009 exemption is available only if the builder constructs and such construction is for the personal use of the ultimate owner. He would further submit that although the appellant is not liable to pay service tax in the instant case, in view of lack of clarity they chose to pay service tax under protest and avail CENVAT credit of the service tax paid by their contractor M/s IPL. He would argue that any demand under Sec.73A can be paid using CENVAT credit. In support of his argument they have relied on the following case laws:

(i) Inductotherm India Pvt Ltd [2007 (216) ELT 40] in which appellant voluntarily paid Central Excise Duty than so required using CENVAT credit and the demand under Sec.11D was set aside by the Tribunal.

(ii) Oosypine Mar-Pack Ltd [2010 (255) ELT127] in which appellant paid excess Excise Duty using CENVAT credit and the demand under Sec.11D was set aside by the Tribunal.

(iii) Rasoi Ltd [2009 (247) ELT 174] in which duty was paid using money credit for a demand under Sec.11D.

(iv) Unison Metals [2006 (204) ELT 323]

(v) Sterlite Industries India Ltd [2008 (225) ELT 397]

(vi) Silvassa Wooden Drums [2005 (184) ELT 392]

(vii) Syndet India [2004 (166) ELT 349]

(viii) Super Forgings and Steels Ltd [2007 (217) ELT 559]

(ix) MPI Exports Pvt Ltd [2008 (225) ELT 511]

(x) Stumpp, Scheule & Somappa Ltd [2005 (191) ELT 1085]

(xi) Indian Seamless Metal Tube Ltd [2006 (196) ELT 418]

(xii) Shivali Udyog India Ltd [2006 (204) ELT 94]

(xiii) Narmada Chmatur Pharamaceuticals Ltd [2005 (179) ELT 276]

(xiv) Crompton Greaves Ltd [2008 (230) ELT 488]

7. Learned Departmental Representative reiterates the findings of the lower authority. He asserts that in terms of CENVAT Credit Rules, 2004, the credit cannot be used for deposit of amounts under Sec.73A of the Finance Act, 1994. Accordingly, the demand, interest and penalties are sustainable.

8. We have considered the arguments on both sides and perused the records. The first issue to be decided is whether or not the appellant is liable to pay service tax on works contract service as per the Construction Agreement which they entered into to complete the incomplete houses of their clients. The definition of works contract service (under which the appellant claims to have paid service tax) reads as follows:

Sec.65(105)(zzzza):

"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation – For the purposes of this sub-clause, "works contract" means a contract wherein, –

(i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) Such contract is for the purposes of carrying out, –

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) Construction of a new residential complex or a part thereof; or

(d) Completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects"

9. The appellant has undertaken to complete semi-built houses as per the copies of Construction Agreement produced by them before us. They are neither residential complexes nor new buildings or civil structures for commerce or industry. Therefore, they are clearly, not covered under the definition of Works Contract Service. The five member Constitutional Bench of the Hon'ble Supreme Court in their judgment in Civil Appeal No.3327 of 2017 (CC, Mumbai Vs M/s Dilip Kumar & Co and others) ruled:

> *"43. ..... There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. ....."*

10. In this case since construction/ completion of incomplete houses is not squarely covered by the 'Works Contract Service', the appellant is not liable to pay service tax. Therefore, we hold that the appellant was not liable to pay service tax. We have considered if such an interpretation might cause inconvenience or hardship to the appellant. However, as held by the Hon'ble Supreme Court in Para 20 in the case of M/s Dilip Kumar & Co and others (supra), "In applying rule of plain meaning, any hardship and inconvenience cannot be the basis to alter the meaning of the language employed by the legislation. This is especially so in fiscal statutes and penal statutes." We,

therefore, hold that the appellant is not liable to pay service tax in this factual matrix and any amount which they collected as representing service tax is liable to be deposited with the Government under Sec.73A(2) of the Finance Act, 1994. Since, they were not required to pay service tax, they were not entitled to take CENVAT credit and they have wrongly done so.

11. Having taken CENVAT credit which they were entitled to, the appellant debited the credit so taken as "payment of service tax". An argument of the learned counsel for the appellant is that if it is held that they are not liable to pay service tax and the amount which they have collected is held to be liable to be deposited under Sec.73A, the amount which they debited in their CENVAT account should be considered as deposit under Sec.73A. We find nothing in the CENVAT Credit Rules, 2004 which entitles someone who is not liable to pay service tax to claim CENVAT credit. There is also nothing in the CCR, 2004 which entitle such a person to use the CENVAT credit so wrongly availed to discharge their liability to make a deposit under Sec.73A. We have considered the case laws relied upon by the appellant and none of them pertain to Sec.73A of the Finance Act, 1994. However, on a similar provision, viz., Sec.11D of the Central Excise Act, in the case of Inductotherm India Pvt Ltd (supra), CESTAT, Ahmedabad upheld such utilisation of CENVAT credit for making deposits under Sec.11D. On an appeal by the Revenue, Hon'ble High Court of Gujarat has reversed this decision – CCE, Ahmedabad-II Vs Inductotherm India Pvt Ltd [2012 (283) ELT 359 (Guj.)]. The questions of law framed by the Hon'ble High Court were:

> *"a. Whether, in the facts and in the circumstances of the case, the Tribunal is justified in holding that provision of Section 11D are not applicable in the instant case?*
>
> *b. Whether, in the facts and in the circumstances of the case, the Tribunal is justified in holding that the amount deposited by the respondent by making a debit entry as Cenvat Credit account amounts to payment of duty as required under Section 11D of the Central Excise Act, 1944?"*

Both the above questions were answered in negative i.e., in favour of the department and against the assessee by the Hon'ble High Court. Thus, the

appellant has to deposit the amount collected from its clients under Sec.73A(2) and cannot use CENVAT credit for the purpose. The amount already collected in cash gets adjusted against this amount and the appellant is liable to deposit the rest.

12. As we have already held that the appellant is not entitled to take CENVAT credit, the same needs to be recovered from them. As they have already reversed the same (as payment of 'service tax' through CENVAT account), nothing more needs to be recovered on this account. Interest, if any, under Rule 14 of CCR, 2004 needs to be paid.

13. As far as the demand of interest under Sec.73B is concerned, it applies to cases where an amount has been collected in excess of tax assessed or determined referred to Sec.73A(1). There does not appear to be a corresponding provision for collection of interest under Sec.73B where any amount has been collected as tax which is not required to be collected [Sec.73A(2)]. In the absence of any statutory provision, the demand of interest is not sustainable.

14. As far as the penalties imposed on the appellants are concerned, we find that they have disclosed their operations to the department and also expressed their doubts if they were liable to pay service tax at all. We find sufficient reason to invoke Sec.80 to set aside the penalties and we do so.

15. In conclusion;

a) The demand under Sec.73A(3) read with Sec.73A(2) of the amounts collected by the appellants from their clients as representing service tax is confirmed. The amounts already deposited in cash will be set off against this amount.

b) The demand of interest under Sec.73B on the above amount is set aside as the amounts under Sec.73A(2) are not liable to interest under Sec.73B.

c) The demand of reversal of ineligible CENVAT credit taken by the appellant is confirmed and the amount reversed as payment of service tax will be treated as reversal.

d) Interest under Rule 14 of CCR is confirmed for the period between the taking of credit and its reversal.

e) All penalties are set aside invoking provisions of Sec.80 of the Finance Act, 1994. The appeal is disposed of as herein above.

(Pronounced in the Open Court on 16.01.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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