REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7933 OF 2012
(Arising out of S.L.P.(C) No.26260 of 2010)

M/S. NAGARJUNA CONSTN. CO. LTD. …APPELLANT

VERSUS

GOVERNMENT OF INDIA & ANR. ....RESPONDENTS

J U D G M E N T

ANIL R. DAVE, J.

1. Leave granted.

2. This appeal arises from the judgment and final order dated 7th June, 2010, passed by the High Court of Andhra Pradesh in Writ Petition No. 6558/2008, whereby the High Court dismissed the petition filed by the appellant and upheld the validity of the Circular No. 98/1/2008-ST, dated

4.1.2008 (hereinafter referred to as 'the Impugned Circular') issued by respondent no. 1 herein.

3. The appellant had executed various contracts which were in the nature of composite construction contracts. The appellant had paid Sales Tax/ VAT on those contracts under the Andhra Pradesh General Sales Tax Act, 1957, Andhra Pradesh Value Added Tax Act, 2005 and other State enactments. Service tax was imposed on various services which had come into effect from different dates. Prior to 1.6.07, the appellant had paid service tax under the following categories of taxable services, namely:

(a) Erection, commissioning or installation service under Section 65(105) (zzd) of the Finance Act, 1994 (hereinafter referred to as 'the Act'),

b) Commercial or industrial construction service under Section 65(105) (zzq) of the Act,

c) Construction of complex (residential complex) service under Section 65(105) (zzzh) of the Act.

4. Sub-sections 39(a), 25(b) and 30(a) of Section 65 of the Act define the above mentioned services as under:

"39(a): erection, commissioning or installation; means any service provided by a commissioning and installation agency, in relation to,--

(i) erection, commissioning or installation of plant machinery, equipment or structures whether pre-fabricated or otherwise; or

(ii) installation of -

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services;"

This definition, with reference to the taxable service, is dealt with by Clause (zzd).

5. The taxable services covered by Clause (zzq) (commercial or industrial construction services) are defined in sub-section 25(b) of Section 65 of the Act, which reads as under:

"(25b): commercial or industrial construction service means-

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor or wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is-

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;"

6. The taxable services covered by Clause (zzzh) (construction of complex) are defined in sub-section 30 (a) of Section 65 of the Act, which reads as under:

"30(a): "construction of complex" means –

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex."

7. The appellant, while paying service tax prior to 1.6.07 under the above mentioned categories of taxable services, instead of paying full rate of service tax after availing of CENVAT credit of excise duties paid on inputs, had opted to claim the benefit of Notification No. 1/2006 –ST dated 1.3.06, whereby service tax was required to be paid only on 33% of the total value, subject to the condition of non availment of CENVAT credit on inputs, capital goods and input services.

8. With effect from 01.06.2007, vide Notification No. 23/2007 dated 22.05.2007, sub-section (105) of Section 65 of the Act was amended and Clause (zzzza) was introduced. This clause reads as follows:

"(zzzza) Taxable service means any service provided or to be provided 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 pre-fabricated 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. Section 65A of the Act provides that the classification of taxable services shall be determined according to the terms of the sub-clauses of Clause (105) of Section 65 of the Act and when, for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of Clause (105) of Section 65 of the Act, the classification shall be effected as follows:

"(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) When a service cannot be classified in the manner specified in clause (a) or clause (b) it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration."

10. In exercise of the powers conferred under Sections 93 and 94 of the Act, the Central Government introduced the Works Contracts (Composition

Scheme for Payment of Service Tax) Rules, 2007 (hereinafter referred to as 'the 2007 Rules'). Under this scheme, an option of composition was offered @ 2% of the gross amount charged on the works contract. Prior to the composition, the effective tax rate under the other category of services would work out to be approximately 3.96% of the gross amount.

11. Rule 3 of the 2007 Rules, being relevant, is extracted below:

> "3. (1) Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to four per cent of the gross amount charged for the works contract.
>
> Explanation:-- For the purpose of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.
>
> (2) 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.

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."

12. The appellant wanted to opt for the afore-stated scheme but the department, through the Impugned Circular had clarified that "Classification of a taxable service is determined based on the nature of service provided whereas liability to pay service tax is related to receipt of consideration. Vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable."

13. In view of the above, the appellant, who had paid service tax prior to 01.06.07 for the taxable services, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, was not entitled to change the classification of the single composite service for the purpose of payment of service tax on

or after 01.06.07 and hence, was not entitled to avail of the Composition Scheme.

14. In view of the fact that the appellant had classified the ongoing contracts entered into prior to 1.6.2007 under the category of 'works contract service' and had started discharging the service tax liability at the rates specified in the 2007 Rules, show cause notices were issued to the appellant for recovery of difference of service tax payable by it alongwith applicable interest and penalty.

15. Aggrieved by the same, the appellant filed a Writ Petition before the High Court challenging the vires of the Impugned Circular. The High Court, while dismissing the petition, held that in respect of a works contract, where service tax had already been paid, no option to pay service tax under the Composition Scheme could be exercised. The High Court also held that the Impugned Circular (to the extent it was challenged i.e., in relation to Reference Code 097.03) was wholly in conformity with the provisions of Rule 3(3) of the 2007 Rules and that the Impugned Circular merely reiterated the eligibility criterion specified in Rule 3(3) of the 2007 Rules. As per the provisions of the afore-stated Rule, for claiming benefit of paying service tax at the rate of 4% of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66 of

the Act, the appellant ought to have exercised its option before payment of service tax in respect of the works contract. The appellant had not exercised its option before payment of service tax and the taxable services, which were falling within Clauses (zzd), (zzq) and (zzzh) of Section 65 (105) of the Act, were falling within the newly introduced Clause (zzzza) of Section 65(105) of the Act. In these circumstances, the petition was dismissed by the High Court.

16. It is against the dismissal of the said petition that the present appeal has been filed by the appellant. The learned counsel for the appellant submitted before us that upholding the view taken by the High Court would result in gross discrimination between assessees who had paid tax @3.96% prior to 1.6.2007, as opposed to the contractors who are similarly placed but did not pay any tax prior to 1.6.2007 and who would now be paying tax at a lower rate.

17. The learned counsel appearing for the appellant submitted that the Impugned Circular is contrary to the provisions of Rule 3 (3) of the 2007 Rules and Section 65 (105) (zzzza) of the Act. He submitted that by virtue of the Impugned Circular, the appellant and other similarly situated persons would be deprived of the benefit under the Rules. He submitted that under Rule 3 (3) of the 2007 Rules, the appellant is entitled to opt for payment of

4% of the gross amount charged for the works contract but by virtue of the Impugned Circular, the appellant would not get an opportunity to avail of the option provided under Rule 3 (3) of the 2007 Rules.

18. Thereafter he submitted that by virtue of the Impugned Circular, the respondent authorities cannot take away the benefit given to the appellant under Rule 3 (3) of the 2007 Rules and therefore, the Impugned Circular is bad in law.

19. He thereafter submitted that Rule 3 (3) of the 2007 Rules cannot be interpreted in a way so as to deprive the persons who had already paid tax under the old provisions. He submitted that the appellant had already started making payment @ 2% of the gross amount charged for the works contract at the relevant time and, therefore, the appellant cannot be constrained to change the method of payment of tax after 1st June, 2007.

20. In order to substantiate his submission that a circular cannot override a statutory provision, he relied on the judgments delivered in the cases of **Tata Teleservices Ltd.** v. **Commissioner of Customs** 2006 (1) SCC 746 and **Commissioner of Central Excise, Bolpur** v. **Ratan Melting & Wire Industries** (2008) 231 ELT 22. He, therefore, submitted that the Impugned Circular is bad in law and the High Court committed an error by not

quashing the same and, therefore, the appeal deserves to be allowed and the Impugned Circular should be quashed.

21. On the other hand, the learned Additional Solicitor General appearing for the respondents submitted that the view expressed by the High Court is just and proper. He submitted that reclassification is always permitted and he further submitted that by virtue of the amended legal provisions, after 1st July, 2007, the classification had been amended and by virtue of the Impugned Circular the provisions of Rule 3(3) of the 2007 Rules have been explained.

22. He submitted that the Impugned Circular is explanatory in nature and the appellant had preferred to challenge the Impugned Circular and not the provisions of Rule 3 (3) of the 2007 Rules. Even without giving effect to the Impugned Circular, the provisions of the amended Rules would remain and force which would not permit the appellant to change the method with regard to payment of tax which was in vogue prior to 1st July, 2007. He submitted that there was no dispute to the fact that the agreement with regard to the works contract had been entered into before 1st June, 2007 i.e. when the amended provision of Rule 3 (3) of the 2007 Rules was not in force. As the appellant had already paid service tax before 1st June, 2007 on the basis which was applicable at the relevant time i.e. before 1st June, 2007, the

appellant is not entitled to opt for the scheme provided under the provisions of Rule 3 of the 2007 Rules.

23. He lastly emphasized on the fact that reclassification is always permitted and the State has a right to reclassify services and only in pursuance of the said reclassification, the provisions of Rule 3 (3) of the 2007 Rules would not apply to the case of the appellant. He further added that not availing CENVAT credit is not a relevant issue. He emphasized on the fact that because of the reclassification, in the light of Rule 3 (3) of the 2007 Rules, the appellant cannot be permitted to avail of the benefit of paying tax as per an option given under Rule 3 of the 2007 Rules.

24. We have heard the learned advocates and have considered the contents of the impugned judgment and the provisions of the relevant rules.

25. In our opinion the High Court did not commit any mistake while upholding validity of the Impugned Circular.

26. In our opinion the Impugned Circular has only explained the contents of Rule 3 (3) of the 2007 Rules so as to provide guidelines to the Revenue Officers.

27. On perusal of Rule 3 (3) of the 2007 Rules it is very clear that the assessee who wants to avail of the benefit under Rule 3 of the 2007 Rules

must opt to pay service tax in respect of a works contract before payment of service tax in respect of the works contract and the option so exercised is to be applied to the entire works contract and the assessee is not permitted to change the option till the said works contract is completed.

28. In the instant case it is an admitted fact that the appellant-assessee had already paid service tax on the basis of classification of works contract which was in force prior to 1st July, 2007. In the circumstances, it cannot be said that the appellant had exercised a particular option with regard to the mode of payment of tax after 1st July, 2007 with regard to reclassified works contract. We are in agreement with the submissions made by the learned counsel appearing for the respondents that not availing of CENVAT credit is absolutely irrelevant in the instant case.

29. We do not accept the submission of the learned counsel appearing for the appellant that the Impugned Circular is discriminatory in nature. Those who had paid tax as per the provisions and classification existing prior to Ist June, 2007 and those who opted for payment of tax under the provisions of Rule 3 of the 2007 Rules and paid tax before exercising the option belong to different classes and, therefore, it cannot be said that the Impugned Circular or the provisions of Rule 3(3) of the 2007 Rules are discriminatory.

30. The appellant has not challenged the validity of Rule 3 (3) of the 2007 Rules and, therefore, we do not go into the said issue. In our opinion, the Impugned Circular is not contrary to the Act or the statutory rules made thereunder and the Impugned Circular only provides guidelines as to how the provisions of Rule 3 (3) of the 2007 Rules are to be interpreted. Even if the Impugned Circular is set aside, the provisions of Rule 3 (3) of the 2007 Rules would remain and that would not benefit the appellant. In view of the above facts, we are of the view that the High Court did not commit any error while upholding the Impugned Circular and, therefore, we dismiss the appeal with no order as to costs.

…….....J.
(D.K. JAIN)

…….....J.
(ANIL R. DAVE)

New Delhi

November 09 , 2012