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IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –II

Service Tax Appeal No.ST/53500/2014-CU [DB]
[Arising out of Order-in-Original No.58-59/ST/SRB/2014 dated 26.03.2014 passed by the Commissioner, Service Tax, New Delhi]

Service Tax Application No. ST/Misc./50356/2018 ST [DB] in &
Service Tax Appeal No.ST/52331/2016-DB
[Arising out of Order-in-Original No.C.No.IV (16)HQ /Adj/ NBCC/280/S.Tax/2014/541546 dated 25.04.2016 passed by the Commissioner, Service Tax, New Delhi]

M/s. National Building Construction Corporation Limited ...Appellant

Vs.

C.S.T., Delhi ... Respondent

Present for the Appellant : Mr.Atul Krishna, Advocate
Present for the Respondent: Mr. Amresh Jain, D.R.,
Mr.A.K. Singh, D.R.

Coram: HON'BLE MR. **V.PADMANABHAN, MEMBER (TECHNICAL)**
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 21.06.2018
Pronounced on :23.07.2018

FINAL ORDER NO. 52577-52578/2018

PER: RACHNA GUPTA

The present order disposes of above two appeals, issue involved in both the appeals being same and findings there upon being concurrent. These appeals are however, against the Order- in- Original No.59/ST/SRB/14 dated 26th March,

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2014 and Order-in-Original No. 541-546 dated 25th April, 2016 respectively.

2. The facts relevant for the purpose of both the appeals are:

The appellants are registered with Service Tax Commissionerate, New Delhi for providing Maintenance or Repair Services. After an audit conducted by the Offices of the said Commissioenrate for the period 2006-07 to 2009-10 in Appeal No.53500/2014 and for the period 2006-07 to 2010-11 in Appeal No.52331 / 2016, it was observed that the appellants are rendering taxable services without discharging their liability qua the same. The adjudication in both the cases got initiated based on multiple show cause notices in each of the appeal as detailed below.:-

S. No.	**Issue and Category**	**1st SCN dated 24.04.2012**		**2nd SCN dated 19.12.2012**	
		Period	**Amount (in Rs.)**	**Period**	**Amount (in Rs.)**
1.	'Commercial or Industrial Construction Services' a) Construction of woman hostel for and on behalf of the Ministry of Women and Child Development, Government of India b) Construction of Civil Services Officers Institute	2007-08 to 2010-11	3,74,12,761	2011-2012	Rs.1,83,12,196
2.	Maintenance and power back up expenses recovered from the clients in the form of fixed charges, operator charges, fuel consumption/running expenses	2006-07 to 2009-10	5,38,393	NA	NA

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3.	Payment of service tax for the period prior to registration through CENVAT credit not admissible.	April 07 to September 2007	10,61,710	NA	NA
4.	Inadmissible Cenvat Credit of common input services on account that assessee is providing taxable and exempted services	2008-09 to 2009-10	9,80,365	NA	NA
5.	Interest U/S 75 on Delayed payment of service tax for the period April 2007 to March 2008	2007-08	2,13,051	NA	NA
6.	Alleged Providing skilled/semi-skilled workmen to assist the contractor in the execution of works. 'Manpower recruitment or supply agency services'	2007-08 to 2010-11 (2010-11- on the basis of BJA)	68,59,938	2011-2012	46,04,367
	TOTAL		**4,70,66,218**		**2,29,16,563**

S.No.	**Issue and Category**	**1st SCN dated 21.05.2014**		**2nd SCN dated 17.04.2015**	
		Period	**Amount (in Rs.)**	**Period**	**Amount (in Rs.)**
1.	Alleged Providing skilled/semi-skilled workmen to assist the contractor in the execution of works. 'Manpower recruitment or supply agency services'	2012-2013 (2010-11- on the basis of BJA)	82,87,861	2013-2014	1,24,31,791
	TOTAL		**82,87,861**		**1,24,31,791**

3. Since several services have been observed to have been provided by the appellant, we take the services one by one.

(1) <u>Commercial or Industrial Construction Services:</u>

3.1 With respect to this service, it is submitted on behalf of the appellant that the liability of appellant qua this services

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have already been denied by the adjudicating authority in original order dated 25th April 2016 of Appeal No.52331 and since the said findings has not been challenged by the Department, it is prayed that the benefit thereof be given to the appellant in appeal No.53500 as well for doing away the levy on the ground of commercial or industrial construction services. Ld. DR has conceded the same.

3.1.1 After hearing both the parties and perusing the order dated 25th April, 2016 specifically in para 15 and 16 thereof, we hold that services of construction of women hostel for and on behalf of Ministry of Women and Child Development, Government of India and construction of Civil Services Offices Institute are not commercial in nature. In furtherance of the decision of Hon'ble Supreme Court in the case of **Commissioner, Kerala vs. L & T Ltd. – 2015 (39) STR 913 (SC),** wherein it was held:-

> ³WKDW D ZRUNV FRQWUDFW LV D VHSDUDWH VSHFL
> distinct from contracts for services simpliciter recognized
> by the world of commerce and law as such, and has to
> EH WD[HG VHSDUDWHO\ DV VXFK´ And further observed in
> para ³ In the aforesaid judgment, it was held that
> the levy of service tax in Section 65(105)(g), (zzd),
> (zzh), (zzq) and (zzzh) is good enough to tax indivisible
> FRPSRVLWH ZRUNV FRQWUDFWV´ and in para held that ³
> A close loo k at the Finance Act, 1994 would show that
> the five taxable services referred to in the charging

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> Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which GHILQHV ³WD[DEOH VHUYLFH´ DV ³DQ\ VHUYLFH
> Therefore, now it is settled that section 65 (105)(zzq) read with section 65(25b) of the Finance Act do not cover composite contract, it only covers contracts for services simpliciter, whereas, in the present case, it is undisputed facts that all contracts are composite contracts"

3.1.2 Since the demand under commercial or industrial construction for a period upto 30th June, 2012 has been dropped and the period for both the appeals is prior the said date and that the Department has not filed an appeal challenging those findings by virtue whereof the demand in appeal No.52331 had already been dropped. The benefit thereof is extended in favour of the appellant qua appeal No. 53500/2014 as well. The order under challenge confirming the levy qua this service is therefore set aside.

(2) **Maintenance and Power Back up Expenses Recovered from the Clients**:

3.2 It is submitted on behalf of the appellant that the Order-in-Original has considered electricity as goods, but still has failed to extend the benefit thereof rather has confirmed the liability of paying Service Tax on providing power backup by the appellant to the sub-contractor. It is alleged that the

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ground taken by the adjudicating authority below about absence of any proof or discharging liability of VAT is not at all justified. The order to this extent is prayed to be set aside.

3.2.1 Ld. DR has relied upon the findings in para 21 of the order under challenge submitting that appellant is not the pure agent, who otherwise is providing the power backup to the sub-contractor. Since the appellant has failed to provide any document qua discharging his liability of sales-tax, the benefit of electricity being goods cannot be extended in his favour. The only exemption as can be claimed by the appellant can be for the diesel used in the Generator Sets for providing power backup, but no bill of purchase is provided by the appellant. Hence, the same has rightly been denied. It is impressed upon, once there is the liability to pay the duty and the same is payable with delay, the interest has mandatorily to follow. It is impressed upon that not a show cause notice is required to be issued for the same justifying the findings qua confirming the liability of appellant for the impugned service. The ld. DR has prayed for upholding the levy.

3.2.2 After hearing both the parties, we are of the considered opinion that as apparent from the show cause notices in both the appeals, it was not at all disputed by the Department as to whether on the power supply/power back up any sales tax has been paid by the appellant or not. Thus, in the impugned

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order the respective adjudicating authorities have tried to make out a new case against the appellants. The law has been settled that the adjudicating authority cannot go beyond the show cause notice, as it was held by Hon'ble Supreme Court in the case of **CCE, Bhubaneswar-I vs. Chambdany Industries Ltd.** – **2009 (9) SCC 466.** In another decision of **Precision Rubber Industries Pvt. Ltd. vs. CCE, Mumbai** – **2016 (334) ELT 577,** the Hon'ble Apex Court has held that no new case would have been set up or decided contrary to the show cause notices and that the Department is not allowed to travel beyond the show cause notice. Accordingly, we are of the opinion that the adjudicating authority has committed an error while confirming the impugned remand solely on the basis of lack of evidence qua discharging liability of VAT by the appellant when the same was not the issue in the show cause notices. Otherwise also once the adjudicating authority has held the supply of electricity as goods, there seems no reason for confirming the impugned demand. It was incumbent for the adjudicating authority below to give reasonable explanation about the impugned activity to fall within the corners of the taxable service. The same are absolutely missing. Resultantly, the findings qua confirming the impugned demand are also hereby set aside.

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(3) <u>Payment of Service Tax for the Period Prior to Registration through Cenvat Credit, whether admissible or not:</u>

3.3. It was alleged that the appellant has not paid Service Tax for the period w.e.f. April, 2007 to September, 2007 and also for the period October, 2007 to December, 2007 on due dates, rather he got himself registered in January 2008. The case of the Department is that there was no Cenvat Credit balance available during this period as such the Service Tax for April, 2007 to September, 2007 should have been paid in cash and not from the Cenvat Credit. The payment on the basis of credit availed in the month of January, 2008 for the prior period of April 2007 to September, 2007 is alleged as a wrong credit. The ld. Counsel on this issue had submitted that the appellant in the year 2008 had transferred the utilization, but the adjudicating authority below had failed to consider the same and thus, has committed an error holding the said Cenvat Credit as being wrongly availed.

3.3.1 Ld. DR has justified the order submitting that the discharge of Service Tax liability for the period out of the Cenvat Credit of a subsequent period is not legally correct and the impugned order has rightly hold that the same has wrongly been utilized in terms of proviso to Rule 4 of CCR, 2004. The Commissioner has rightly treated the same as non-payment of Service Tax holding the appellant liable to pay the same

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alongwith upto-date interest as recoverable under proviso to Section 73 to sub-section (1) of the Finance Act, 2004 read with Rule 14 of the Cenvat Credit Rules, 2004. Finally impressing upon that the Service Tax liability has since been already discharged, the interest liability on account of the late payment of the same has rightly been affirmed vide the impugned order. The demand qua this issue is prayed to be upheld.

3.3.2 After hearing both the parties qua this issue, we are of the opinion that it is the apparent and admitted case that the appellant has not discharged the Service Tax for the impugned periods within the stipulated time. Irrespective the payment of the same through the Cenvat Credit availed post the said periods, the fact still remains is that the deficiency has already been made good qua Service Tax for the said periods, however with delay. As a result, interest on delayed payment thereupon in accordance of Section 73 (1) of Finance Act, 2004 read with Rule 14 of Cenvat Credit Rules, 2004 is recoverable from the appellants. The findings to said aspect are hereby accordingly upheld by us.

(4) **Inadmissible Cenvat Credit of Common Input Services on account of Appellant being providing Taxable and Exempted Services**.

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3.4 It is submitted by the appellant that there are number of input services also falling under Rule 6 (5) of Cenvat Credit Rules, 2004 (CCR) (as applicable at the relevant time) where 100% credit was allowed on the input services, which are used both for taxable and non-taxable purposes, the onus was upon the Department to come with the details of common input services for which the impugned Cenvat Credit has been disallowed. It is impressed upon, that there is no single finding to this aspect. The impugned order on this aspect is liable to be set aside on this simple scope.

3.4.1 Ld. DR has justified the order.

3.4.2 We are of the opinion that in terms of Rule 2 (1) (i) of CCR, input service means, any service used by provider of taxable service for providing an output service". Thse Rules are applicable to the activity of rendering taxable services and the manufacturing activities only which are taxable under the respective statutes i.e. the Finance Act, 1944 and the Central Excise Act, 1944. The non-taxable activities do not attract any Central Excise duty or Service Tax and thus, do not appear to be covered under either of the said Acts. Rule 3 of the CCR allows Cenvat Credit on Central Excise duty paid on any input and input services received by the manufacturer of final products or by the provider of output services, as defined in Rule 2 (k) and Rule 2(l) of CCR respectively. Rule 6 of CCR

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stipulates that no credit is allowed on input or input services used in the manufacture of exempted goods or for provision of exempted services. Rule 6 (3) (i) as effective from 1st April 2008, provides for availment of proportionate Cenvat Credit i.e. the availment only on such quantity of inputs/input services, which are used in or in relation to the manufacture of dutiable final products or used for providing taxable services. From the above provisions, it is clear that Cenvat Credit on input services used for exempted services is not admissible. Any credit taken by the appellant on such input services, as were meant for rendering exempted services, is rightly been denied to the appellant by the adjudicating authority below. It is appellant's admitted case that despite discharging taxable as well as exempted services no separate accounts were maintained. No proper option as enshrined under Rule 6 (3) of CCE, 2004 has been availed. The liability, therefore is held to have rightly been affirmed. The order to this extent is upheld.

(5) "Services for **providing skilled/semi-skilled workmen to assist the contractor in the execution of works as Manpower Recruitment or Supply Agency S**ervices" **:**

3.5 This service has been alleged to have been rendered by the appellants and the levy is confirmed by the impugned order in both the appeals. Ld. Counsel for appellant has submitted

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that appellant is not a manpower supply agency. It simply has recruited few people to supervise the quality of work to be executed on its behalf by the sub-contractor. However, the said recruited people were kept under the administrative authority of sub-contractor only. Salaries to these people were paid after deducting it from sub-contractor. Ld. Counsel has relied upon **Commissioner, Customs and Excise, Bhopal vs. State of Madhya Pradesh - 2015 (38) STR 954 (M.P.**) to impress upon that when a supervisory staff is appointed by the State Government, who is not appointed to provide any service on behalf of the State Government to the contractor but to ensure that all the activities as agreed to be done by the contractor are carried out in the proper manner, such State Government while appointing such supervisor do not fall within the purview of providing service by a service provider. The ld. Counsel has also impressed upon a Circular No.190/9/2015-ST dated 15th December, 2015 to impress upon that for a person to be a service provider of manpower supply has to charge for supply of manpower, even if, the manpower remains ideal. Since it is not the case of the present appellant, as the people recruited by the appellants were under control of the contractor, the levy under this head is prayed to be set aside.

3.5.1 While rebutting these arguments, it is submitted by the ld. DR that the case law relied upon by the appellant is not applicable to the facts and circumstances of the present case.

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Because it is not merely supervisors, who are recruited by the appellant for his sub-contractor but even masons, wire-men, and other skilled or semi skilled work force has been provided by the appellant itself to the contractor that too against a fixed fee. The case law relied upon by appellant is not applicable as to the present case. Appeal is prayed to be rejected.

3.5.2 After hearing both the parties, we are of the considered opinion that as rightly pointed out by the ld. DR the appellant, apparently has not only provided the supervisors for merely keeping a check on the quality of the work to be done by the contractor, but even the skilled and semi-skilled work force to execute the impugned work as that of Masons, Wire-men etc. has also been recruited by the appellant to work at the site of execution for the contractor. It is also apparent as well as admitted fact that an amount of Rs.18,500/- P.M. is being deducted by the appellant from the money due towards the contractor for providing the said work force. Thus, the contention of the appellants that his own officers have been deputed at the site of the contractor is not tenable from his own documents on record. The adjudicating authority below has rightly appreciated the terms of the agreement for the purpose, which clearly stipulates that the supply of work force by the appellant is to assist the contractor irrespective the work force provided by the appellant is for the execution of appellant's own work to be executed through the contractor

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but once it is provided to assist the contractor while executing the said work and an amount as consideration for providing the same is being received by the appellant from the contractor on monthly basis, the transaction is apparently the one of supply of manpower services. Irrespective the appellant is not an agency for the purpose, but apparently is providing voluminous manpower at different sites of its execution to various contractors at those sites, appellant being a big building constructor handling various building contracts by the Government. Rule 2 (1) (d) (F) (e) of Service Tax Rules, 1994 as stands amended w.e.f. 1st July, 2012 is also been rightly held to be not applicable to the case of the appellant. This Rule list out the persons liable to payment of Service Tax in the cases where persons other than the service providers have been made liable to pay Service Tax under reverse charge mechanism as already held above, the activity of appellant is that of providing a taxable service in accordance of Section 65 B (44) of the Finance Act, 1994. The above said Rule of Service Tax which otherwise has a very limited application, is not applicable in the given circumstances. The activity apparently is not in the negative list i.e. in the entries of Section 66 D nor is the one of mega Notification No. 25/2012-ST dated 20th June, 2012. We are of the opinion that the activity has rightly been held taxable for the period w.e.f. 30th June, 2012. Resultantly, we do not find any infirmity in the

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order under challenge while confirming the levy on this ground. The case law as relied by appellant is opined to be not applicable to the present case as the manpower provider in the case relied upon by the appellant is a State Government, which is not true for the appellant irrespective he might be executing work for and on behalf of the Government.

The order to this effect is upheld.

4. Finally coming to the issue of show cause notices being time barred for want of any such circumstance, which may entitle the Department to invoke the extended period of 5 years, it is held that the appellant is held to have been providing services as that of supply of manpower but they have only got themselves registered for providing maintenance or repair services. The appellant is a big company and is involved in execution of big construction contracts on behalf of the Government. Hence the ignorance on the part of the appellants sounds unreasonable. Thus, rendering taxable services without getting themselves registered for discharging their liability qua those services, the same is held to be positive act on part of the appellant with sole intention to evade tax. The order under challenge is therefore held to have rightly imposed the penalties under Section 76, 77 & 78 of the Finance Act for the reasons that the appellant has failed to discharge the mandatory liability of Service Tax in accordance with the provisions of Section 68 of Finance Act 1944, in

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accordance with the provisions of Section 69, intend to evade the tax liability by not furnishing the value of taxable services and for failing to take registration respectively.

5. As a result of entire above discussion, the order under challenge is hereby upheld in the appeal No.52331 holding appellant liable to have been rendering Manpower Recruitment and Supply Agency Services. The said appeal is accordingly, hereby rejected.

6. However, since the liability of the appellant as confirmed vide the impugned order for rendering commercial or industrial construction service for providing maintenance and power back up services have been set aside. The appeal No.53500/2014 is hereby partly allowed. Consequential benefit to follow.

[Pronounced in the open Court on 23.07.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(V.PADMANABHAN)
MEMBER (TECHNICAL)

Anita