

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.297 of 2012

(Arising out of Order-in-Original No.29/Commissioner/CE/Haldia/Adjn/2012 dated 30.03.2012 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata.)

M/s. Blue Star Civil Engineering Company Private Limited

(Vill-Shantipur, P.O.-Mecheda, Dist.Purba Medinipur,
West Bengal, Pin-721137.)

...Appellant

VERSUS

Commissioner of Central Excise, Haldia Commissionerate

.....Respondent

(25, Princep Steet (3rd Floor), Kolkata-700072.)

APPEARANCE

Shri L.Samtani, Chartered Accountant for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI C.J.MATHEW, MEMBER(TECHNICAL)

FINAL ORDER NO. 75362/2020

DATE OF HEARING : 23 September 2019

DATE OF DECISION : 17 March 2020

P.K.CHOUDHARY :

The present appeal has been filed by the appellant against Order in Original No. 29/Commr./CE/Hal/12 dated 30/03/2012 passed by the Commissioner of Central Excise, Haldia.

2. Briefly stated, the facts of the case are that the assessee M/s. Blue Star Civil Engineering Co. Pvt. Ltd. Mecheda was engaged in evacuation of ash pond for Durgapur Projects Ltd., Purba Medinipur Zilla Parishad, Rites Ltd. for railway and McNally Bharat for Sagardigi

Projects. That the period of dispute as per the Show Cause Notice dated 07-10-2010 related to Financial Year 2007-08 to 2009-2010.

2.1 The work was directly obtained by the assessee from DPL Ltd. That the allegation in the Show Cause Notice was that during the period of 2007-2010, the assessee was engaged in evacuation of ash pond by deployment of earthmoving machine, dumper and transportation to the designated places. The classification of service in respect of the Show Cause Notice was "Cleaning Service" under section 65(24b) of the Finance Act, 1994. The demand against this contract was for Rs. 15,12,055/- (Fifteen Lakhs Twelve Thousand Fifty Five Rupees only).

2.2 That the assessee had also performed services as a sub contractor for McNally Bharat Engineering Co. Ltd., Purba Medinipur Zilla Parishad and Rites Ltd. for total value of work done amounting to Rs. 7,97,44,713/- against which a demand of Rs. 93,92,847/- (Ninety Three Lacs Ninety Two Thousand Eight Hundred Forty Seven) and Education Cess of Rs. 1,87,857/- (One Lakh Eighty Seven Thousand Eight Hundred Fifty Seven) and S & H Edu. Cess of Rs. 93,929/- (Ninety Three Thousand Nine Hundred Twenty Nine). That considering the above two demands, a total demand of Rs. 1,08,80,860/- (One Crore Eight Lacs Eighty Thousand Eight Hundred Sixty), Education Cess of Rs. 2,17,219/- (Two Lacs seventeen Thousand Two Hundred Nineteen) and S & H Edu. Cess of Rs. 1,08,609/- (One lakh Eight Thousand Six Hundred Nine)

2.3 The Adjudicating Authority vide Order in Original dated 30/03/2012 confirmed the demand of Service Tax amounting to Rs. 1,11,86,688/- (One Crore Eleven Lakhs Eighty Six Thousand Six hundred Eighty Eight) and imposed penalty under section 78 and 76 of the Finance Act 1994. The Commissioner also confirmed the provision of section 73(1) of chapter (v) of the Finance Act 1994.

3. The appellant assessee preferred an appeal before the Tribunal with the following grounds of appeal:

3.1 That the assessee took up the matter contract wise as the activities under taken were different in different contracts.

3.2 That the learned Counsel appearing on behalf of the Appellant, filed written submissions and a compilation of statutory provisions, Board's Circular, and relied upon decisions and contended that as per the definition of "Cleaning Activity" under Section 65 (24b) of the Finance Act, "cleaning" would include Specialized cleaning such as disinfecting, exterminating or sterilizing of objects or premise or tanks or reservoirs of such Commercial or industrial building. He further submitted that the term "Cleaning" has not been defined anywhere in the Finance Act, and therefore, in order to define the term, he referred to Concise Oxford Dictionary which defines it as 'free from dirt', marks or pollutants. The cleaning activity defined under Section 65 (24b) extends to normal sweeping, dusting and mopping of buildings, factory premise, plant or machinery, tank or reservoir and restricts specialized cleaning services only to three activities i.e. disinfecting, exterminating or sterilizing of object or premise.

3.3 The learned Counsel vehemently argued that in the present case, the activity of excavation and transportation of fly ash from the pond, for channelling the slurry water-flow cannot be termed as a cleaning activity in terms of 65 (24b) of the Finance Act. The appellant assessee is not removing the fly ash with the objective of cleaning the pond or free the pond from contamination. Fly ash is being excavated and transported to the specified areas as per the contract and the same cannot be termed as a cleaning activity.

3.4 The learned Counsel also contended that the fly ash is a saleable good, which is used in the manufacture of ceramic tiles, mineral wool, etc. and is not a waste since, it is capable of being sold in the market. It is his submission that the removal of fly ash from the pond cannot be termed as "Cleaning activity" under Section 65 (24b) of the Finance Act, and accordingly, no Service Tax would be attracted in this case. He relied upon the decision of the Tribunal in the case of "Commissioner of Central excise & Service tax – Ranchi Vs. M/s. Hindustan Steel works Construction Ltd. 2018 (11) TMI 1217 – CESTAT Kolkata".

4. The second issue placed by the learned Counsel was the work done as a sub contractor for McNally Bharat Engineering Co. Ltd., Purba Medinipur Zilla Parishad and Rites Ltd. The contention of the appellant assessee is that the value of work done in respect of the three aforesaid contracts has been executed during F.Y. 2005-2006 to 2007-2008 and the assessee submitted bill wise details in order to substantiate the same. This issue was also taken up in the reply to the Show Cause Notice dated 07/10/2010 by the assessee.

4.1 The learned Consultant submitted a copy of the letter dated 20/06/2008 issued by the audit department that a sum of Rs. 6,30,92,249/- (Six Crores Thirty Lakhs Ninety Two Thousand Two Hundred Forty Nine) pertaining to financial year 2005-2006 to 2007-2008 which was brought forward to bring it within the purview of the present Show Cause Notice dated 07/10/2010.

4.2 In response to the above contention of the appellant assessee, the Commissioner in the Order in Original no. 30/Commr./CE/Hal/2012 dated 30/03/2012 observed the following in para 4.22 – “In regard to the work claimed to be started prior to the period involved in the instant demand, I find that the work pertains to the contract in agreement of which either it has been continued extending to the material period or it has been completed during the impugned periods. Moreover, none of the services was exempted either during the material period or immediately prior to the material period. However, in all cases, the service value has been received by the assessee during the period 2007-08 to 2009-10.”

4.3 That in respect of the three contracts as referred above, the department has referred to Circular no. 96/7/2007 dated 23/08/2007 wherein the sub contractor was liable to pay tax. The Appellant all along was under the bonafide belief that no Service Tax is payable by the sub contractor in view of various conflicting decisions by different Benches of the Tribunal. On this account the matter had to be referred to a larger bench. Hence, it was mentioned by the learned consultant that the extended period of limitation cannot be invoked.

5. It is the submission of the appellant assessee that the 1st Show Cause Notice bearing no. 643 dated 28/01/2008 for the period 2005-2006, 2006-2007 was issued in respect of the DPL Contract. The department was aware in this Show Cause Notice that the assessee had worked as a sub contractor with McNally Bharat, Rites Ltd. and Purba Medinipur Zilla Parishad. The Show Cause Notice attained finality by order dated 20/11/2008.

5.1 The appellant assessee also submitted the copy of another Show Cause Notice dated 06/09/2007 in respect of services for evacuation of ash pond for the period 2005 to 2007. The present Show Cause Notice dated 07/10/2010 although relates to the period 2007-08, 2009-10 on the same issue which has been brought forward from earlier period i.e. 2005-2006 to 2007-2008 to bring it within the ambit of 2007-08 to 2009-10 i.e. present Show Cause Notice.

5.2 It was held in the case of "Nizam sugar Factory vs. CCE. A.P. 2008 (9) STR 314 (SC)" that when all relevant facts were within the knowledge of the department, the second and third Show cause Notice with similar facts could not raise suppression of facts and hence, extended period and penalty cannot be invoked/levied.

6. Heard both sides and perused the appeal records.

7. We find that the cleaning activity has been defined under Section 65(24b) of the Finance Act. *"Cleaning activity" means cleaning, including specialized cleaning services such as disinfecting, exterminating or sterilizing of objects or premises, of-*

(I) commercial or industrial buildings and premises thereof: or

(ii) factory, plant or machinery, tank or reservoir of such commercial or industrial buildings and premises thereof,

But does not include such services in relation to agriculture, horticulture, animal husbandary or dairying;]

We find that cleaning service has been also defined in the Board's Notification F. No. B1/6/2005-TRU dated 27/07/2005.

8. We also find that in the present case, the activity of excavation and transportation of fly ash from the pond, for channeling the slurry

water-flow cannot be termed as "cleaning activity" in terms of Section 65 (24B) of the Finance Act. The Respondent is not clearing the fly ash with the objective of cleaning the pond or free the pond from contamination. Fly ash is being excavated and transported to the specified areas as per the contract.

9. We observe that fly ash is a saleable good, which is further used in manufacture of bricks etc. and hence it is not waste, which is being removed from the pond. It has specific utility and capable of being sold in the market.

10. We find that the issue in the present case is covered by the decision of this Bench in the case of M/s. Calcutta Industrial Supply Corporation Vs. Commissioner of Service Tax, Kolkata.

11. That we are in agreement with the contention of the Learned Consultant in respect of the letter dated 20/06/2008 by the audit department that a sum of Rs. 6,30,92,249/- pertains to Financial Year 2005-2006 to 31/03/2008 which is self admission and which cannot be ignored. It is also not permissible in law to bring the value of earlier years forward to bring it within the period of Show Cause Notice. The Learned Commissioner has not justified this aspect in his Order in Original no. 29/Commr./CE/Hal/2012 dated 30/03/2012.

12. As far as the contention of the appellant assessee regarding the work done as a sub contractor is concerned, the contracts of railway in respect of Rites Ltd. under section 65(25b) of the Finance Act 1994. In the case of Purba Medinipur Zilla Parishad which relates "evacuation of ash pond" and it's transportation, this bench has already decided the issue in the case of the same assessee vide Purba Medinipur Zilla vs. CCE., Haldia 2010 (20) STR 355 (Tri.- Kolkata)". In the case of Mackintosh Burn Ltd. the principal contractor had paid service tax which is within the knowledge of the department as early as March'2007.

13. Regarding the liability as a sub contractor in respect of three contracts is concerned, We find substance in the submission advanced by the learned counsel for the appellant. It cannot be urged that there was any wilful suppression of facts with an intention to evade payment of duty as is the requirement of Section 73(1) of the Act. There were

conflicting decisions of the Tribunal in this regard and it is for this reason that the matter had been referred to a Larger Bench of the Tribunal, which came to a conclusion in May'2019.

14. The appellant assessee mentioned that the three Show Cause Notices for the same issue as well for the same period is liable to be set aside on the ground of limitation alone.

The appellant assessee had referred to "Nizam sugar Factory vs. CCE. A.P. 2008 (9) STR 314 (SC)" stating there was no suppression of facts with an intention to evade duty.

15. It is our considered view that the Learned Commissioner has erred in confirming the demand and invoking the provision of 73(1) of the Finance Act 1994 as well as in imposing the penalty u/s. 78 and u/s. 76 of the Finance Act 1994.

16. In view of the above discussions, the impugned order cannot be sustained and the same is set aside. The appeal filed by the appellant is allowed on the grounds of limitation as well as on merits.

(Order pronounced in the open court on 17 March 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(C.J.MATHEW)
MEMBER (TECHNICAL)