IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 688 of 2012

(Arising out of Order-in-Original No. 30/2012 dated 17.09.2012 passed by the Commissioner of Central Excise, Chennai-III Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. R.S. Constructions **: Appellant**
No. 567, 17th Street,
4th Sector, 20th Street,
K.K. Nagar, Chennai – 600 078

VERSUS

The Commissioner of Service Tax **: Respondent**
Newry Towers, No. 2054-I, 2nd Avenue,
Anna Nagar, Chennai – 600 040

APPEARANCE:

Shri S. Durairaj, Learned Advocate for the Appellant

Shri M. Ambe, Learned Deputy Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40088 / 2023

DATE OF HEARING: 21.02.2023

DATE OF DECISION: 27.02.2023

Order : [Per Hon'ble Mr. P. Dinesha]

This appeal is filed by the appellant-taxpayer against the Order-in-Original No. 30/2012 dated 17.09.2012 passed by the Commissioner of Central Excise, Chennai.

2. The appellant is engaged in civil construction work and had obtained Service Tax registration under the following categories, namely: -

(i) Cargo Handling Service

(ii) Commercial or Industrial Construction Service

(iii) Site Preparation & Clearance Service

(iv) Mining Service

3. It appears that there was an audit of accounts of the appellant by the Internal Audit Group of the Service Tax Commissionerate, Chennai wherein it was noticed that the appellant had not paid the Service Tax of Rs.32,14,641/- on the value of taxable services realized by them for the period from July 2008 to December 2008. Upon being pointed out, it appears that the appellant had paid Rs.2,78,779/- on 18.12.2008 for the half year ending September 2008. Further, it is also borne on record that the Internal Audit Party had noticed that the appellant had not paid the Service Tax on Site Formation Service, Cargo Handling Service and Commercial or Industrial Construction Service provided to various clients.

4. Accordingly, a Show Cause Notice dated 07.04.2010 was issued alleging, *inter alia*, various violations and consequently proposing to demand: -

(i) Service Tax of Rs.1,79,07,643/- under Section 73(1) of the Finance Act, 1994;

(ii) Rs.9,83,960/-, being the CENVAT Credit wrongly taken and utilized by the appellant, to be recovered under Rule 14 of the CENVAT Credit Rules, 2004;

(iii) Rs.2,78,779/- paid by the appellant, to be appropriated;

(iv) Interest under Section 75 of the Finance Act, 1994; and

(v) Penalty under Sections 76 and 78 of the Finance Act, 1994 read with Rule 15(2) of the CENVAT Credit Rules, 2004.

5. The appellant filed a detailed reply dated 24.11.2011 thereby rebutting the proposal made on each count and thereby contending that there was no liability to Service Tax for the various reasons given by them therein. They had also filed a rejoinder to their reply by enclosing additional documents as well in support of their claim that they were not liable to pay Service Tax.

6. During adjudication, the Commissioner-Adjudicating Authority having considered the replies filed by the appellant, however, has vide impugned order confirmed the demands proposed in the Show Cause Notice along with interest under Section 75 *ibid.* and penalty under Section 78 *ibid.* It is against this demand in the impugned order that the appellant has preferred the present appeal before this forum.

7. Heard Shri S. Durairaj, Learned Advocate for the appellant and Shri M. Ambe, Learned Deputy Commissioner for the Revenue.

8.0 The Learned Advocate for the appellant submitted at the outset that the Show Cause Notice is *ex facie* illegal since the issuing authority has not relied upon any evidence to propose the various demands against the appellant and that the Show Cause Notice is contrary to the C.B.E.C. Master Circular No. 1053/2/2017-CX. dated 10.03.2017. He also seriously contended that the authority has also not mentioned in the Show Cause Notice the relied upon documents, whereby the appellant was deprived of proper defence. He further contended that though the appellant had filed documents / additional documents vide its replies to the Show Cause Notice, during adjudication proceedings, the Commissioner has only considered those very documents filed by it, called for a verification report and proceeded to conclude the adjudication proceedings based on such report obtained, without furnishing the above report to the appellant, which, according to the

Learned Advocate, is in serious violation of the principles of natural justice.

8.1 He would further contend, without prejudice to the above legal grounds, that the (1) first issue is that the appellant had made a belated payment of Service Tax along with interest even prior to the issuance of Show Cause Notice, but the same was not at all considered by the authority below in the adjudication proceedings; that the demand pertaining to the belated payment, therefore, could not stand for the above reason and consequently, no penalty could also be exigible on this.

8.2 On the second issue of Site Formation Work, it is the case of the appellant that it had entered into an agreement with M/s. Nuclear Power Corporation of India Ltd., Kudankulam, which involved even construction of roads and that the above contract was an infrastructural project for the generation of electricity. He thus pleaded that the above contract was a Works Contract prior to 01.06.2007 and hence, the benefit of the decision of the Hon'ble Apex Court in the case of *Commissioner of C.Ex. & Cus., Kerala v. M/s. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)]* was available. He would further place reliance on the exemption Notification No. 17/2005-S.T. dated 07.06.2005 whereby even the construction of roads has been held to be exempted insofar as the same related to Site Formation Services and relied on the order of the co-ordinate Chandigarh Bench of the CESTAT in the case of *M/s. Ludhiana Builders v. Commissioner of C.Ex. and S.T., Ludhiana [2020 (37) G.S.T.L. 231 (Tri. – Chandigarh)]*

8.3 The next issue is relating to the demand on Cargo Handling Services, against which it was contended that the work orders were issued by M/s. India Cements Ltd. and M/s. Hindustan Construction Co. Ltd. wherein the service involved was transportation *per se*, which was duly taken note of even in the Show Cause Notice, as mentioned in Annexure-II therein. The above transportation,

according to the Learned Advocate, was ancillary and incidental, which did not attract Service Tax. In this connection, he would place reliance on the cases of *M/s. Jain Carrying Corporation v. Commissioner of C.Ex., Jaipur [2019 (24) G.S.T.L. 376 (Tri. – Delhi)]* and *M/s. M.L. Agro Products Ltd. v. Commissioner of Cus., C.Ex. & S.T., Guntur [2017 (6) G.S.T.L. 94 (Tri. – Hyderabad)]* which was affirmed by the Hon'ble Supreme Court in *2018 (18) G.S.T.L. J38 (S.C.)*

8.4 The next issue is relating to the demand on construction services rendered to M/s. Petron Civil Engineering (P) Ltd., against which the Learned Advocate for the appellant contended that the nature of the service was construction or earth work evacuation and that the principal contractor itself had paid the Service Tax during 2006-07. This, however, was not accepted by the Adjudicating Authority who, by placing reliance on the Board Circular No. 96/7/2007-S.T. dated 23.08.2007, had denied the same. The Learned Advocate thus contended that the said Circular was not applicable retrospectively in the light of the decision of the Hon'ble Apex Court in the case of *M/s. Suchitra Components Ltd. v. Commissioner of C.Ex., Guntur [2008 (11) S.T.R. 430 (S.C.)]*

8.5 The next issue pertains to the alleged wrong availment of CENVAT Credit on capital goods which, according to the appellant, were used for providing taxable services on which appropriate taxes were paid. Thus it is the case of the appellant that when the taxes were paid, the payer had every right to avail the CENVAT Credit.

8.6 The Learned Advocate for the appellant would conclude his arguments by stressing upon the invocation of extended period by contending that the Show Cause Notice did not bring out any suppressed documents and that the allegations were made upon verification / audit of the appellant's accounts by the Internal Audit Group.

9. *Per contra*, the Learned Deputy Commissioner for the Revenue relied on the findings in the impugned Order-in-Original.

10.1 Hence, first, we take up the issue of Show Cause Notice *vis-à-vis* the non-reliance of documents in support to propose tax liability. There is no dispute that a Show Cause Notice is the foundation on which the Revenue would build its case and hence, it is quintessential that a Show Cause Notice should reflect all such supporting evidences in support of each proposal for demand of respective duty / tax. We have seen a copy of the Show Cause Notice and there is no dispute even by the representative of the Revenue that nowhere in the Show Cause Notice is it mentioned as to the relied upon documents nor is there any averment about supplying such relied upon documents to the noticee.

10.2 Further, it is also clear from a perusal of the Show Cause Notice that it has been alleged that the appellant provided the services mentioned thereunder, that they did not pay the Service Tax on those services and that the verification carried out by the audit party warranted the invocation of extended period for demanding the tax due. Thus, it is very clear from the Show Cause Notice that there is not even a single assertion proposing to levy and collect Service Tax on the basis of any specific document / evidence.

10.3 We have gone through the impugned Order-in-Original wherein the Adjudicating Authority has referred to copy of challans produced as evidence by the appellant, purchase orders (1) No. NPCIL/KKNPP/TS/2007/S/3113 dated 28.02.2007 issued by NPCL in favour of the noticee and (2) No. NPCIL/KKNPP/TS/2006/S/2184 dated 29.05.2006 issued by NPCL in favour of the noticee, invoices raised by M/s. India Cements Ltd. and M/s. ACC Ltd. and invoices raised for the purchase of capital goods from M/s. Schwing Stetter (India) Pvt. Ltd. The

Commissioner has also placed reliance on the verification report of the jurisdictional Service Tax authority, which report admittedly was not provided to the appellant for rebuttal.

10.4 From the discussions in the impugned Order-in-Original, we find that it was the appellant who furnished most of the documents voluntarily, though no mention about any of the documents finds place in the Show Cause Notice. It is these very documents that were sent for verification to the jurisdictional Service Tax authority and hence, it would be incumbent upon the lower authority to have provided such report obtained from the jurisdictional Service Tax authority before fastening the appellant with tax liability.

11. From the above discussions, we are satisfied that the liability was fastened on the appellant without following the principles of *audi alteram partem* and clearly, the consequential demands raised cannot sustain.

12. We also deem it necessary to examine the merits of the demand in respect of each issue.

13.1.1 The demand at Sl. No. 1 relates to belated payment of Service Tax. At paragraph 12.4 of the impugned order, the lower authority has noted as under: -

> *"12.4 …..*
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> .
> .
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> *……The Assistant Commissioner of Service Tax Chennai II division had reported vide C.No.IV/11/16/211.2009 – IA-SFO 205 dated 28.08.2012 that the noticee had paid a sum of Rs.27,26,650/- towards the service tax by challans and paid Rs.4,99,540/- in the Cenvat credit account and enclosed copy of the credit documents…"*

14.1.2 Against the above, the Adjudicating Authority has proceeded to appropriate only the sum of Rs.27,26,650/- paid by the appellant by ignoring the payment of tax in the CENVAT Credit account to the extent of Rs.4,99,540/-.

13.2.1 The demand at Sl. No. 2 pertains to the Site Formation Services for which the appellant has relied on exemption Notification No. 17/2005-S.T. dated 07.06.2005, a copy of which is placed in the paper book filed by the appellant. From the above Notification, we find that exemption has been granted for site formation and clearance, excavation and earth moving and demolition and such other similar activities referred to in sub-clause (zzza) of clause (105) of Section 65 of the Finance Act, provided to any person by any other person in the course of construction of roads, airports, railways, etc., which Notification was interpreted by the co-ordinate Chandigarh Bench of the CESTAT in the case of *M/s. Ludhiana Builders (supra)* wherein the Learned Bench has held as under:-

> *"7. …..*
>
> *…..*
>
> *…….We find that Notification No. 17/2005-S.T., dated 7-6-2005 does not say that if it is not a public road then it is liable to be taxed. Therefore, we hold that the appellant is engaged in the construction of road and the same is exempt as per the Notification No. 17/2005-S.T., dated 7-6-2005, therefore, no service tax is payable by the appellant."*

13.2.2 Thus, the appellant is well within its right to claim *bona fides* as to the non-payment of Service Tax on the above.

13.3.1 In respect of the demand pertaining to Cargo Handling Services, Learned Advocate for the appellant would draw our attention to Annexure-II to the Show

Cause Notice wherein the issuing authority has extracted the description of work as *per se* transportation. If the Adjudicating Authority had any doubts that the appellant did undertake any other activity other than transportation inviting tax liability, then the same should have been put across to the appellant for rebuttal / explanation thereby providing an opportunity to the appellant to meet the allegations levelled against it. Contrary to this, the Adjudicating Authority refers the matter to the jurisdictional tax authority, obtains a report and proceeds to confirm the demand based solely on such report obtained behind the back of the appellant. Moreover, the name of the party as mentioned at Annexure-II to the Show Cause Notice refers to ICL and HCC whereas in the Order-in-Original, the lower authority has referred to ICL and ACC, which was perhaps based on the unrebutted report obtained by the lower authority.

13.3.2 In the above peculiar facts, we propose not to confirm the above demand as we find that there are serious inconsistencies, that the conclusion arrived at by the Adjudicating Authority appears to be in a haste and without proper application of mind and also that the principles of natural justice have not been followed.

13.4.1 The next demand pertains to the construction services rendered to M/s. Petron Civil Engineering (P) Ltd., against which it was claimed by the appellant that the principal contractor had paid the Service Tax, which fact has been brushed aside by the lower authority by relying upon the Master Circular No. Circular No. 96/7/2007-S.T. dated 23.08.2007.

13.4.2 We find substance in the contentions of the Learned Advocate for the appellant that the said Circular can operate only prospectively, as clarified by the Hon'ble Supreme Court in the case of *M/s. Suchitra Components Ltd. (supra)* wherein the Hon'ble Court has followed its earlier judgement and held as under: -

> *"2. We have heard Mr. A.R. Madhav Rao, learned counsel for the appellant and Mr. K. Radhakrishna, learned Senior Counsel for the respondent. We have perused the orders passed by the lower Authorities and also of the Tribunal. The point raised by the learned counsel for the appellant is covered by the recent judgment of this Court in Civil Appeal No. 4488 of 2005, Commissioner of Central Excise, Bangalore v. M/s. Mysore Electricals Industries Ltd., reported in 2006 (204) E.L.T. 517 (S.C.). In the said Judgment, this Court held that a beneficial circular has to be applied retrospectively while oppresive circular has to be applied prospectively. Thus, when the circular is against, the assessee, they have right to claim enforcement of the same prospectively."*

13.5 The last demand at Sl. No. 5 pertains to the denial of CENVAT Credit on capital goods which has been denied on the ground that the noticee did not turn up with documents for verification by the jurisdictional Service Tax authority. It is the settled position of law that no CENVAT Credit shall be allowed on capital goods used exclusively in the manufacture of exempted goods or in providing exempted services; but from a perusal of the Show Cause Notice or the impugned Order-in-Original, nowhere do we see that the lower authority has placed reliance on any evidence to support that the appellant was indeed engaged in the manufacture of exempted goods or was providing exempted services.

14. From the above discussions, it is clear to us that even on merits, the demands proposed in the Show Cause Notice, which thereafter have been confirmed in the impugned Order-in-Original, are without any basis or without any documentary evidence and that there is serious violation to the principles of natural justice and hence, no part of the demand can be sustained.

14.1 We are not going into the other technical grounds urged by the appellant as we are satisfied that the appellant has made out a case on merits.

15. Consequently, we set aside the impugned order and allow the appeal on both legal grounds as well as on merits, with consequential benefits, if any, as per law.

(Order pronounced in the open court on **27.02.2023**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sdd