Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10188 of 2013

(Arising out of OIO-56-COMMR-2012 dated 03/10/2012 passed by Commissioner of Central Excise-RAJKOT)

Patel Construction Co ....**Appellant**
Neelkanth, B B Z, S-60,
Zanda Chowk, Gandhidham
Kutch, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot ....**Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

APPEARANCE:
Shri Amal Dave, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU
Final Order No. A/ 10856 /2023

DATE OF HEARING: 15.12.2022
DATE OF DECISION: 10.04.2023

RAMESH NAIR

The present appeal is directed against the impugned Order-In-Original No. 56/Commr/2012 dated 03.10.2012 passed by the Commissioner, Customs &Central Excise, Rajkot.

02. The brief facts of the case are that during the course of audit of financial records of the Appellant by the officers of Central Excise, Rajkot, it was observed that the Appellant has also shown value of service charged against exempted services in their ST-3 returns filed for services under the taxable category of 'Commercial or Industrial Construction Service.' On being asked, appellant informed that they had earned the said income against service provided viz. 'Commercial or Industrial Construction Services'

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and 'Renting of Immovable Property' Services and contended that the said income was on account of providing services to Kandla Port Trust which they believed to be exempted from the payment of Service tax, as per the Notification No. 25/2007-ST dated 22.05.2007. As regard renting of immovable property, they stated that they had allowed other parties to use their warehouse for storage and warehouse of the goods and charged rent against the same and paid service tax from FY 2008-09 onwards under the category of 'Renting of Immovable Property'. Verification and scrutiny of the records revealed that the so called exempted services shown in their ST-3 returns actually pertained to various services provided by them to Kandla port and their residential colony which are classifiable under 'Commercial or Industrial Construction Services', 'Erection, Commissioning & Installation Services', 'Construction of Complex Services', 'Dredging Services' , ' Cleaning Activity Services' , 'Supply of Tangible goods Services' and ' Storage & Warehousing Services'. It appeared that the Appellant by showing the payment received against such services under 'Commercial & Industrial Construction service' tried to take the undue benefit of Notification No. 25/2007-ST dated 22.05.2007. As such the benefit of exemption provided under the said Notification was not available to the services provided by the Appellant to Kandla Port Trust. Further services provided by the appellant for storage/ warehouse of goods of other persons, covered under the category of 'Storage and warehouse services', which has been taxable from the year 2002. It was alleged that the appellant by wrongly showing various taxable service provided by them under exempted service category had not paid the Service tax amounting to Rs. 62,89,128/-during the period from 2005-06 to 2009-10. Accordingly, show cause notice dated 15-04-2011 was issued proposing the Service tax demand along with interest and penalty. The Adjudicating authority vide impugned order confirmed the demand of

service tax along with interest and penalty. Aggrieved by the impugned order present Appeal has been filed.

03. Shri Amal Dave, Learned Counsel appearing on behalf of the appellant submits that the Learned Commissioner has confirmed Service tax on the amount of Rs. 16,17,443/- which is the amount received by the Appellant from the Kandla Port Trust for constructing Watch Tower. The activity done by the Appellant is squarely covered under exemption Notification No. 25/2007-ST dated 22.05.2007, whereas exemption has been given to any person which does an activity in relation to the construction of port or other port. The Commissioner has denied the exemption on the ground that the activity done by the appellant falls under the exclusion clause whereby the exemption is not available when the services are provided in relation to finishing, repair, alternation, renovation, restoration, maintenance etc. in relation to the existing port. The activity undertaken by the appellant is a completely new construction and hence when the construction is new it cannot be said that such activity is in the nature of finishing/ repair, alternation etc. of the existing part and hence the demand is not sustainable.

3.1 He also submits that Learned Commissioner has confirmed the demand of Service tax of Rs.9,66,262/- on the activity of replacement of central underground drainage line along National Highway on the grounds that such activity falls under the definition of erection, commissioning/installation services. However such confirmation is completely erroneous. The activity of laying pipelines for transmission of water for sewage disposal undertaken for government undertaking is in nature of Commercial or Industrial Construction Service and the activity of laying pipelines if done for government undertaking is covered under the

exclusion clause to Section 65(25b) of the Finance Act inasmuch as such activities are not commercial in nature. Therefore, the Commissioner could not have confirmed the demand under the head of erection, commissioning or installation services. Since the appellant undertook the activity of laying down the Central underground drainage line for Kandla Port trust which is a State Government enterprise, the activity was not commercial in nature and hence even otherwise could not be taxed under the category of commercial –industrial construction services. However, the Commissioner has confirmed the demand under the head of erection, commissioning or installation services and hence when the service tax is confirmed under the wrong category of service, the demand is even otherwise not sustainable. He placed reliance on decision of M/s Lanco Infratech Ltd. – 2015(38)STR 709.

3.2 He further submits that appellant constructed residential colony of kandla Port Trust. The purpose of residential colony was for residence of the employee of Kandla Port Trust. The Commissioner confirmed the demand of Rs. 21,53,044/- under the category of construction of residential complex services without considering the explanation to Section 65(90a) of the Finance Act whereby there is an exclusion clause to eligibility of the activity of constructing the residential complex, if it is indented for personal use. The word personal use including permitting the complex for use as residence by another person on rent without consideration. It is a settled legal position that when a residential complex is constructed for residence of the employee, then it is exempt from the payment of service tax. The Commissioner has erroneously confirmed the demand on the construction activity undertaken by the appellant and hence all the demand is not sustainable. He placed reliance on the following decisions:-

- M/S. NITHESH ESTATES LTD. – 2015(40)STR 815

- M/S. B.L. MEHTA CONSTRUCTION PVT. LTD. – 2018(8) GSTL 92
- MURARILALSINGHAL – 2019(25) GSTL 45
- M/S MALL ENTERPRISE – 2016(41)STR 119

3.3 He also submits that Appellant had entered into contract with the kandla Port Trust for the activity of modifying the port, barge handling, strengthening of the surface and dredging. The appellant entered into such contract for carrying out all the mentioned activities and not for dredging alone. However, the adjudicating authority considered the composite amount as an amount which was recovered towards dredging activity and confirmed the demand under the head of dredging service. When the appellant had entered into such composite contract, the adjudicating authority could not have taken the entire value of such contract as being towards dredging activity and could not have confirmed the demand of all the composite work under the category of dredging. Since the contract was composite one and also involved material required for completion of work, by no stretch of imagination, it could be taxed under the category of dredging. The activity could at most be taxed under commercial or industrial construction service, then the appellant was eligible for 67% abatement under Notification No. 1/2006-ST. However, even if the activity was in the nature of commercial or industrial construction service, the same could never have been taxed under the category of dredging service and hence the demand being erroneously confirmed under the wrong heading, is not sustainable.

3.4 He further submits that the adjudicating authority has confirmed the demand of Rs. 11,09,875/- under the head of cleaning services. The appellant was given a contract by Kandla Port Trust to remove civil and cargo waste periodically from the port to maintain standard of hygiene and

to avoid pollution in the port area. On perusal of the definition of the cleaning activity as per Section 65(24b) of the finance Act, it is clear that whenever cleaning activity is performed in the premises which is a commercial or industrial building or factory, plant or machinery, tank or reservoir such commercial or industrial building and premises thereof then the activity is taxable. In the present case, the activity has not been performed in any commercial or industrial building premises. The activity was performed in the port area for the kandla Port trust, which is owned by the State Government and is not a commercial or industrial building nor can it be called factory, plant or machinery. Therefore, the adjudicating authority could not have confirmed the demand under the scope of cleaning services for such activity.

3.5 As regard the service tax demand of Rs. 6,78,321/- under the category of renting of warehouse services, he submits that appellant had given godowns and warehouse on rent and was collecting periodical rent on such godowns. The activity undertaken by the appellant was hence renting of immovable property service inasmuch as the entire godown was given on rent. Renting of immovable property service become taxable service on 01.06.2007 and not before such date. The appellant had collected the amount of rent by raising bill during the FY 2005-06 and 2006-07 before the levy of such service was introduced. The adjudicating authority has wrongly confirmed the demand under the category of storage and warehousing of goods services. The adjudicating authority could not have confirmed the demand under such category of service inasmuch as the appellant has actually given the godown on periodical rent but has not charged any amount towards warehousing of the goods of a third party or towards storage of such goods. Hence the services are categorically classified under the head of renting of immovable property service and not storage and

warehousing service. Therefore, the action of the adjudicating authority to confirm the demand under storage and warehousing services category is erroneous and hence the demand is not sustainable.

04. Shri Rajesh Agarwal, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

05. We have carefully considered the submissions made by both sides and perused the records. We find that Appellant claims that most of demands have been raised under the wrong category of services hence not sustainable. We also find that in the present matter service tax demand has been confirmed by the Learned Commissioner on the activity related to the drainage line/ pipe line under 'Erection, commissioning/installation services. However as per the Larger Bench decision in the case of M/s LancoInfratech Ltd. *supra* the said activity of laying pipelines is not covered under the 'erection, commissioning/ installation service. Appellant herein also claimed that Learned Adjudicating authority wrongly confirmed the demand under the head of cleaning services, whereas their activity is not covered under the scope of cleaning services. We also find that the appellant claimed that renting of immovable property services become taxable service on 01.06.2007 and they had collected the amount of rent by raising bills during the period FY 2005-06 and 2006-07 before the levy of such service. However such facts require verification.

5.1 We have also observed that the submission of the learned Counsel as well as submission made in the appeal memorandum that the adjudicating authority has not dealt with issue of service provided under the category of 'construction of complex service services in proper perspective. Appellant claimed that they had not constructed any building or part thereof, having

more than 12 residential units. Further the bunglow constructed by the appellant at KPT colony for use by the employee of M/s Kandla Port Trust is for personal use hence not taxable. We find that the issue needs to be remanded back to the adjudicating authority for re-appreciation of the claim of the appellant.

5.2 In view of above facts and circumstances of the case, we are of the view that this is a fit case for remand the matter to Learned Adjudicating authority for re-consideration of the overall case. The appellant is directed to submit all the necessary documents/ supporting document before the adjudicating in support of their claims and related to their activity. We keep all issues open, including the right of the appellant to submit and rely upon such other additional material as they may opt to do so in the remand proceedings. The Adjudicating Authority is directed to decide the matter afresh after giving an effective opportunity to the appellant.

06. The appeal is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 10.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul