

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

Service Tax Appeal No. 245 of 2012

(Arising out of Order-in-Original No. 80/Commr./ST/Kol/2011-12 dated 29.02.2012 passed by Commissioner of Service Tax, Kolkata.)

M/s Uttam Chand Sethia,
Module T-02, 3rd Floor, Shilpanagan, CFB, Plot No. LB-1,
Sector-III, Salt Lake, Kolkata-700098/.

...Appellant (s)

VERSUS

Commissioner of Service Tax, Kolkata.
180, Shanti Pally, Rajdanga, Main Road, Kolkata-700107.

..Respondent(s)

APPERANCE :

Shri Surabhi Bohra, Chartered Accountant for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

**HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)**

FINAL ORDER No...76708/2023

DATE OF HEARING : 14.09.2023

DATE OF PRONOUNCEMENT: 21.09.2023

PER K. ANPAZHAKAN :

The Appellant Mr. Uttam Chand Sethia, (now represented by his wife Mrs. Indu Devi Sethia, after his demise on 28.09.2021), was a proprietorship firm engaged in the activities of construction of civil structures and roads. A show cause notice dated 20.10.2010 was issued to the Appellant on the basis of an investigation conducted by the officers of DGCEI, Kolkata, demanding service tax of Rs.5,24,85,909/- along with interest and penalty. The Notice was adjudicated by the Commissioner Service Tax vide Order-in-Original dated 29.02.2012, wherein the Service tax of Rs.2,36,31,139/- including Education Cess was confirmed along with interest and the remaining demands made in the Notice was dropped. Penalty equal to service tax confirmed was also imposed under Section 78 of the Finance Act, 1994. Rs.5000/- was imposed under Section 77 of the Act, on the Appellant. Aggrieved against the impugned order, the Appellant has filed the present appeal.

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2. In their grounds of appeal, the Appellant stated that were engaged in the business of the following services during FY 2005-06, 2006-07-08,2008-09-10:

- i) Construction of roads
- ii) Management, Maintenance & Repair of Roads
- iii) Construction of Building for HUDCO
- iv) Supply of Machinery
- v) Renting of house property
- vi) Construction of CRPF Quarters
- vii) Construction of BSF Quarters
- viii) Construction of Hostel Building for IIHM
- ix) Widening & Strengthening of Road
- x) Construction of Indo-Bangladesh Border Fencing

3. They did not obtain registration under the service tax regime, under the bonafide belief that the services provided during the relevant period, as mentioned above, were exempted from service tax. In the impugned order, the service tax demand has been confirmed only on the following services provided by them for the period FY 2005-06, 2006-07, 2007-08 and 2009-10:

i. Management, Maintenance & Repair or Roads- The services include resurfacing, renovation, strengthening, relaying, filing of potholes etc. the services were all provided to National Highways Authority of India (NHAI) for repairing the roads.

ii. Construction of Government (HUDCO) Office Building.

iii. Supply of Machinery of hire

iv. Renting of immovable property

4. The appellant submits that the service of management, maintenance and repair of roads of National Highway was provided to National Highway Authority of India, which is a statutory body under Ministry of Shipping, Road Transport & Highway. Out of the total demand of Rs.2,36,31,139/- confirmed in the impugned order Rs.2,17,05,694/- pertains to the services of management, maintenance and repair of roads . They contended that Service Tax on activity of management, maintenance and repairs of roads has been exempted retrospectively for the period 16.06.2005 to 26.07.2009, by insertion of Section 97 in the Finance Act, 1994 by the Finance Act, 2012. They stated that various decisions given by the Tribunals dropped the demands of service tax on maintenance of roads. Reliance has been placed on the decision made by CESTAT in the case of **Anand Ashok Budhraj Vs. CCE, 2012-TIOL-1600-CESTATE-MUM** wherein it has been held that the

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demand of service tax on maintenance of roads was not sustainable. Similarly, the demands for the earlier periods were dropped in the case of **J.K. Construction V. CCE, Chennai 2012 (10) TMI 519-CESTAT, Chennai and K Seerangan V. CCE, Sal 2012 (8) TMI 467-CESTAT, Chennai.**

5. On the basis of the above submission, they contended that the demand of Rs.2,17,05,694/- confirmed in the impugned order on the of management, maintenance and repairs of road service is not sustainable and hence it is liable to be dropped.

6. The Appellant submits that the service of construction of office building for HUDCO at D.J. Block, Salt Lake, Kolkata was provided to CPWD (Central Public Works Department) which is the Indian government authority in charge of public works headed by a Director General. Construction services rendered to Government of India for their own use were exempted from Service Tax and hence the demand of Rs. 14,86,562/- confirmed in the impugned order on this count is not sustainable.

7. Service tax of Rs.3,99,282/- was confirmed in the impugned order on the charges received for machinery hiring. Since the machinery was supplied with rights of possession and effective control thereof, it would not fall under the taxable service of 'Supply of tangible goods.

8. Regarding service tax demand of Rs.39,601/- under renting of immovable property service, they stated that the property does not belong to the firm. It was jointly owned by him and his brother. The Appellant received rent towards his share of the rent on the property. As the rent received was well within the exemption limit, no service tax was payable.

9. In view of the above submissions, they submitted that the demands confirmed in the impugned order is not sustainable.

10. The Ld.A.R. reiterated the findings in the impugned order.

11. Heard both sides and perused the appeal records.

12. We observe that the impugned order has confirmed service tax of Rs.2,36,31,139/- including Education Cess, along with interest and Penalty. The demands confirmed can be categorized under the following headings:

(i) Service tax on Maintenance and repair of roads – Rs. .2,17,05,694/-

(ii) Service tax on construction service rendered to HUDCO - Rs. 14,86,562/-

(iii) Service tax on hiring of machinery – Rs. 3,99,282/-

(iv) Service tax on renting of immovable property – Rs.39,601/-

13. We observe that Service Tax on the activity of management, maintenance and repairs of roads has been exempted retrospectively for the period 16.06.2005 to 26.07.2009, by insertion of Section 97 in the Finance Act, 1994

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by the Finance Act, 2012. For ready reference the said provision which was inserted vide Section 97 in Chapter V of the Finance Act, 1994 , on 28.05.2012 is reproduced below:-

“(I) Notwithstanding anything contained in Section 66, **no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive).**

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (I) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.”

14. We observe that the impugned order was passed by the Commissioner, Service Tax, Kolkata on 29.02.2012 and that the amendment was made on 28.05.2012, providing special exemption to the management, maintenance or repair of roads. Such exemption has been specifically provided to the service provided between 16th June, 2005 to 26th July, 2009. In view of the amended provision made applicable with retrospective effect, we hold that the demand of service tax of Rs. 2,17,05,694/-confirmed in the impugned order is not sustainable.

15. Regarding demand of service tax of Rs. 14,86,562 on construction service rendered to HUDCO , we find that the Appellant has constructed Office building for HUDCO at D.J. Block, Salt Lake, for their own use. During the relevant period, service tax was chargeable on construction services when the building is used for commercial and industrial purpose.

16. As per clause 25(b) of Section 65 of the Act “Commercial or industrial construction” 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 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,

In relation to building or civil structure; or

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(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"

17. The construction of office building for HUDCO was done based on the tender issued to the Appellant by the Executive Engineer, Kolkata Central Division No-VIII, CPWD. The Tender was signed on behalf of the President of India. HUDCO is a Government of India Enterprise incorporated with an intent to undertake housing and urban development of the country. HUDCO undertakes its activities for the upliftment of society and for urban development of the country. Hence the office building constructed for HUDCO cannot be considered for industrial or commercial purpose. As the building is used by HUDCO for official purpose it cannot be equated with a building for commercial, trade and industry. Accordingly, we hold that the demand of service tax of Rs. 14,86,562/-confirmed in the impugned order is not sustainable.

18. Regarding the demand of service tax of Rs. 3,99,282/-on hiring of machinery, we observe that the Appellant has claimed that the machinery was supplied with rights of possession and effective control thereof and hence it would not fall under the taxable service of 'Supply of tangible goods. However, we observe that the claim of Appellant was not supported by any documentary evidence. We find that the impugned order has confirmed the demand on this service only for the period 16.05.2008, ie, after introduction of supply of tangible goods service. Accordingly, we uphold the demand of service tax on this count, along with interest.

19. Regarding service tax of Rs.39, 601/-on renting of immovable property, the Appellant stated that the property does not belong to the firm. The property under discussion was jointly owned by the Appellant and his brother. The Appellant received the rent towards his share of the rent in the ratio of his ownership of the property. We observe that the rent was received in the name of the proprietary firm during the relevant period. After expiry of Mr. Uttam Chand Chethia, the wife of the Appellant has taken over the responsibility as the legal heir. Hence, she is liable to pay service tax on the rent received

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during the relevant period. Accordingly, we uphold the demand confirmed in the impugned order on this count, along with interest.

20. Regarding penalty imposed under Sections 77 and 78 of the Finance Act, 1994, we observe that there was no evidence brought on record to establish suppression of fact with an intention to evade payment of service tax. Accordingly, it is a fit case for invoking section 80 of the Finance Act, 1994 to waive the penalties imposed in the impugned order.

21. In view of the above discussions, we uphold the demand of service tax of Rs. 3,99,282/- on hiring charges and Rs.39, 601/-renting of immovable service along with interest. We set aside the demand pertaining to Service tax of Rs. 2,17,05,694/-on maintenance and repair of roads and service tax of Rs. 14,86,562/-on construction service rendered to HUDCO, confirmed in the impugned order . The impugned order is modified as above. The appeal filed by the appellant is disposed of on the above terms.

(Pronounced in the open court on.....21.09.2023...)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar