CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.40667 of 2015

(Arising out of Order-in-Original No.17/2014-Commr dt. 26.11.2014 passed by Commissioner of Central Excise, Customs and Service Tax (Adjudication), 6/7, A.T.D. Street, Race Course, Coimbatore 641 018)

M/s.R.R. Constructions, **.... Appellant**
No.87, Ponnurangam Road (West)
R.S. Puram,
Coimbatore 641 002.

VERSUS

The Commissioner of CGST & Central Excise **... Respondent**
Coimbatore Commissionerate
6/7, A.T.D. Street, Race Course,
Coimbatore 641 018.

APPEARANCE :

Shri G. Natarajan, Advocate, for the Appellant
Shri M. Ambe, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40617/2024

DATE OF HEARING : 03.06.2024
DATE OF DECISION : 03.06.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is proprietary concern holding service tax registration for providing construction services in the nature of Construction of Complex Service (CCS), Commercial or Industrial Complex Service (CICS), and Works Contracts Service (WCS). The appellant discharged service tax liability for the period April 2009 to June 2012 under Construction of Complex Service by claiming 67% abatement under Notification No.1/2006-ST dt. 1.3.2006. After perusal of documents of the appellant, the department was of the view that as the constructions were composite in nature the services have to be rightly classified under WCS in terms of Section 65 (105) (zzzza) of the Finance Act, 1994. Show cause notice was issued to the appellant proposing to demand differential service tax for the disputed period along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

2. The Ld. Counsel Shri G. Natarajan appeared and argued for the appellant. Ld. Counsel made the following submissions :

2.1 It is submitted that the appellant had discharged service tax entirely during the disputed period. In respect of three residential projects, undertaken during this period, the appellant had paid Service Tax under "construction of complex service – CCS", after availing 67 % abatement from value, as per Notification 1/2006 ST Dt. 01.03.2006. It is the allegation of the department that the activities undertaken by the appellant involves transfer of property in goods and hence merits classification under Works Contract Service, as defined under Section 65 (105) (zzzza) of the Finance Act, 1994. Under Works Contract service, in order to levy Service Tax only on the service component of the works contract, two methods have been prescribed; Method (i) Rule 2 A of the Service Tax (Determination of Value) Rules, 2006, by which, from the gross amount, the value of transfer of property on actual basis (value on which VAT is paid) to be excluded

and on the remaining value, Service Tax at appropriate rate has to be paid; Method (ii) Under Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 - Service tax can be paid at a reduced rate of 4 % on the gross amount. While quantifying the service tax after classifying the services under WCS, the department has not given any abatement or reduction as to the value of materials which forms part of the consideration received by appellant. The department has alleged that the appellant had neither furnished the value of transfer of property in goods as per VAT law nor exercised their option for the composition scheme and thus Service Tax has been demanded on the entire value received by the appellant, after excluding only the amount received towards land value. In other words, Service Tax has been demanded on the value which includes value of services as well as value of transfer of property in goods which is erroneous.

2.2 With regard to the classification of service, it is submitted that after the decision of the Hon'ble Supreme Court in the case of CCE Vs L & T ltd.2015 (39) STR 913 SC (rendered on 20.08.2015), the law is settled that composite contracts, involving transfer of property in goods shall be classifiable only under Works Contract Service and not under CCS / CICS (which would cover only pure services). Thus, the appellant is not disputing the classification under Works Contract Service.

2.3 The appellant wishes to submit that as the issue is only classification of service and as appellant has paid the entire service tax, demand of Service tax for the period from April 2009 to June 2012 invoking the extended period under Section 73 of the Finance Act, 1994 is not sustainable. The said provision requires the presence of ingredients like fraud, suppression of facts, wilfull misstatement with an intention to evade payment of tax, etc. There is no evidence

brought out by department to prove these ingredients. The show cause notice has been issued on 15.04.2014.

2.3.1 The appellant wishes to submit that the above ingredients required for invocation of extended period of demand are completely absent in this case. Till the issue was settled by the Hon'ble Supreme Court in *L & T* case supra, the issue of classification of construction service was under huge confusion. In fact, several show cause notices have been issued by the department, demanding Service tax on construction activities under CCS / CICS for the period post 01.06.2007 also and after the decision of the Hon'ble Supreme Court, so many such decisions have been set aside by the Tribunal and various Courts. So the payment of Service Tax by the appellant under CCS is only due to the bonafide belief and in accordance with contemporaneous view entertained by the department in many cases. Further, this is not a case of non-payment of Service Tax. The appellant had paid Service tax and also filed their ST-3 returns, by indicating the category of service and the benefit of abatement claimed. Thus, the appellant had not suppressed any facts from the knowledge of the department. The issue is purely one of interpretation of classification of service.

2.3.2 The CBIC itself has issued a circular bearing No. 98/1/2008 ST Dt. 04.01.2008, wherein it has been clarified that ongoing contracts, which were classified under CICS / CCS prior to introduction of works contract service, shall continue to be classified under CICS / CCS and vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of consideration is not legally sustainable. Though this was stated in the context of ongoing contracts as on 01.06.2007, it led to a belief that such construction activities can be classified under CCS even after 01.06.2007 also. Thus the invocation of extended period of demand is not at all sustainable in this case and

hence the demand upto March 2012 is hit by time bar, as tabulated below:

Period	**Relevant date, i.e the due date for filing ST3**	**Normal period would end on (SCN issued on 15.04.2014)**
April 2009 to Sep 2009	25.10.2009	24.10.2010 (one year from relevant date)
Oct 2009 to Mar 2010	25.04.2010	24.04.2011(one year from relevant date)
Apr 2010 to Sep 2010	25.10.2010	24.10.2011(one year from relevant date)
Oct 2010 to Mar 2011	25.04.2011	24.04.2012(one year from relevant date)
Apr 2011 to Sep 2011	25.10.2011	24.04.2013 (18 months from relevant date, as amended from 28.05.2012)
Oct 2011 to Mar 2012	25.04.2012	24.10.2013 (18 months from relevant date, as amended from 28.05.2012)
Apr 2012 to Jun 2012	25.11.2012 (extended vide 03/2012 dated 15.10.2012 F.No. 137/99/2011	24.05.2014 (18 months from relevant date, as amended from 28.05.2012)

2.3.3 The appellant further wishes to submit that the ST-3 returns filed by the department are scrutinized by the department and the department is not prevented from calling for any additional information to check the correctness of the tax paid. The appellant had declared all the required details, as required in the ST-3 format. Further, the appellant was being audited regularly by the department during which all their records, agreements, VAT returns are scrutinized by the department. Hence, no suppression of facts can be alleged against the appellant, to justify the invocation of extended period of demand.

2.4 Further, the appellant wishes to submit that the demand of Service Tax in this case has been made on the total amount received by the appellant, after excluding only the value of land being transferred. Thus, Service Tax has been demanded on the value of

transfer of property in goods also. As per the constitutional scheme of separation of taxing powers, the Union Government cannot levy Service Tax on the activity of transfer of property in goods. The benefit of composition scheme has been denied to the appellant on the only ground that the appellant had not opted for the same.

2.4.1 The appellant wishes to submit that since they have been paying Service Tax under CCS, there is no occasion for them to opt for the composition scheme. Once the demand of Service tax is made under WCS, the benefit of either Rule 2A of the Service Tax (Determination of Value) Rules, 2006 or the benefit of composition scheme must be extended to the appellant as otherwise, it will lead to levy of Service Tax on the value of transfer of property in goods and hence the entire demand of Service tax confirmed on the appellant would be without the authority of law, as the Union Government cannot levy Service Tax on the value of transfer of property in goods, which falls within the exclusive domain of the State Governments as per S.no. 54 of List II of seventh schedule to the Constitution. In other words, the failure of the appellant to opt for the compositions scheme cannot enable the Union Government to levy Service Tax on value of transfer of property in goods, which is constitutionally impermissible. In this connection reliance is placed on the decision of the Hon'ble Supreme court in the case of *BSNL Vs UOI* – 2006 (2) STR 161 (SC).

2.4.2 If the benefit of composition scheme is extended, the appellant's service tax liability for the period April 2012 to Mar June 2012 (which is within the normal period of demand) would be as below:

Gross amount received	:	Rs.1,39,75,813
Taxable value under CCS	:	Rs.46,12,018 (after 67 % abatement)
Service tax paid @ 12.36%	:	Rs.5,70,045

Service Tax payable under composition Scheme @ 4.12 % on gross amount : Rs.5,75,804

Tax payable : Rs.5,759

2.4.3 In the following cases it has been held that the benefit of composition scheme has to be extended, even if the taxpayer has not opted for the same:

(i) Bridge & Roof Co. (I) Ltd. Vs CCE – 2012 (27) STR 406 (Tri-Del).

(ii) ABL Infrastructure Pvt. Ltd. Vs CCE – 2015 (38) STR 1185 (Tri-Mumbai).

2.4.4 Otherwise, as per Section 5 of the TN VAT Act, 2006 read with Rule 8 of the TN VAT Rules, 2007, in case of construction contract, after excluding 30 % of the gross value towards labour component, 70% of gross amount is treated as value of transfer of property in goods, leviable to VAT. Thus, Service Tax can be demanded only on 30 % of the value, whereas the appellant have paid Service Tax on 33 % of value. Further, the appellant wish to submit that the details of VAT paid by them, copies of VAT returns have been furnished by them during the course of audit by the department. Ld. Counsel prayed that the appeal may be allowed.

3. Ld. A.R Shri M. Ambe appeared and argued for the Department. The discussions and findings in paras 31 to 40 of the impugned order were reiterated by Ld. A.R. It is submitted that on perusal of records, the appellant had not furnished details of VAT paid by them. Therefore, the department has not applied method (i). The method (ii) under Rule 2A of Service Tax (Determination of Value) Rules, 2006 has not been applied for the reason that appellant had not obtained permission for applying composition scheme. The Department has rightly assessed the service tax at the rate of 12% on the taxable value for the disputed period. It is prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issue that arises for consideration is (i) whether the classification of service under WCS for the disputed period is legal and proper (ii) whether the quantification of service tax demand is sustainable or not. (iii) whether the invocation of extended period is sustainable or not.

6. The Ld. Counsel has argued that during the disputed period the appellant has classified the services rendered by them under Construction of Complex Service (CCS) and discharged the service tax correctly. The Ld. Counsel does not dispute that the works executed were composite in nature involving both use of materials and rendition of service. The services are therefore correctly classifiable under Works Contract Service. The issue of classification is not disputed by the appellant.

7. The Ld. Counsel has put forward arguments on limitation. It is submitted that during the relevant period there was much confusion as to the classification of construction services and only by the decision of the Hon'ble Apex Court in the case of *Commissioner of C.Ex & Cus., Kerala Vs Larsen & Toubro Ltd*. – 2015 (39) S.T.R 913 (SC), it was settled that composite contracts can be classified only under WCS. The appellant had classified the services under CCS on bonafide belief and had discharged service tax by availing abatement under Notification No.1/2006-ST. The appellant has thus paid service tax on 33% of the consideration received. It is indeed correct that the issue of classification of construction services was doubtful and the issue of classification of services being interpretational in nature, we are of the view that the demand raised for the extended period cannot sustain and requires to be set aside. The department has not brought out any positive act of suppression on the part of the appellant. The entire figures have been taken from the accounts of the appellant and the Department reclassified the services under WCS. The appellant has

correctly discharged service tax and the allegation is only with regard to the classification of the construction services.

8. The demand for the period April 2012 to June 2012 would fall within the normal period and the appellant is required to pay service tax for this period under the category of WCS. However, the demand raised by the department @ 12% denying abatement and composition scheme is not sustainable. The reason for denying the benefit of composition scheme is that the appellant has not obtained permission from the Department for applying composition scheme. When the appellant has classified the services under construction of Complex Services, there is no situation that appellant would apply for permission to adopt composition scheme. The Tribunal in the case of *ABL Infrastructure Pvt. Ltd. Vs CCE Nashik* - 2015 (38) STR 1185 (Tri-Mumbai) has held that even if the assessee has not obtained permission from the Department for opting the composition scheme, the benefit of the said scheme has to be extended to the assessee. Relevant paragraphs of the decision are reproduced below :

> "**6.3** Having viewed that the appellant have executed the new contract w.e.f. 5-6-2007 and the activity is eligible to be classified as a Works Contract Service, we may now examine whether they are eligible for paying duty at the lower rate under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The objection of Revenue is that the appellant has not fulfilled the condition of Rules. For convenience, Rule 3 is extracted below: -
>
> "The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."
>
> The above Rule requires that the provider who opts to pay tax under the Rule shall exercise such option prior to payment of Service Tax. We find force in the appellant's contention that the fact that they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-9-2007, the substantial benefit cannot be denied for procedural deficiency of delay in opting for Works Contract Service by a specific declaration under Rule 3. More so, when no format has been prescribed for making/exercising an option

nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme. Reliance is placed on the case of *Bridge and Roof Company* (supra), wherein it was held as under: -

"After hearing both sides, duly represented by Shri Bipin Garg, learned Advocate appearing for the appellant and Shri K.K. Jaiswal, learned AR appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract. However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."

We have also seen Board's Circular and the judgment of *Nagarjuna Construction* (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 1-6-2007 and after 1-6-2007. In the present case, we have held above that the appellant was executing work in a new contract from 5-6-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax."

9. We therefore hold that the quantification of service tax has to be done applying the composition scheme. The details of the service tax that has to be paid by applying the composition scheme is calculated by the appellant in para 2.4.2. It is noted that after deducting the amount of service tax that has already been paid by appellant, the amount of service tax payable for the normal period would be Rs.5,759/-. We hold that the appellant has to discharge this differential amount of service tax along with interest. Penalties for the normal period are set aside for the same reason which we have discussed for invocation of extended period.

10. In view thereof, the impugned order is modified to the extent of (i) confirming the service tax for the normal period and setting aside the demand raised invoking the extended period. Penalties are set

aside entirely. The appeal is partly allowed in above terms with consequential reliefs, if any.

(Order dictated and pronounced in the open court)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)

gs