M/s. Jainco Enterprises Private Limited Vs Commissioner of CGST, Customs and Central Excise, Jodhpur - I

Court: Customs, Excise And Service Tax Appellate, New Delhi

Date of Decision: Jan. 9, 2025

Acts Referred: Finance Act, 1994 â€" Section 65(105), 65(105)(zzzza), 73(1), 78
Central Excise Act, 1944 â€" Section 11A, 11A(1), 11AC

Hon'ble Judges: Dr. Rachna Gupta, Member (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: Yash Daddha, S.K. Meena

Final Decision: Allowed

Judgement

Dr. Rachna Gupta, J

1. M/s Jainco Enterprises, the appellant is having service tax registration for providing Commercial or Industrial Construction Service, Works Contract

Service and Construction of Residential Complex Service. During the course of audit of records of the appellant by the officers of Central Excise

Commissionerate, Jaipur, it was observed that the appellant has provided Works Contact Service to M/s Kota Thermal Power Station, Kota (KTPS).

Whereas, on perusal of the contract and scope of the work department observed that the appellant has been awarded work order for civil work for

pollution control includes GWR with pump house for dust suppression in CHP area, RCC & PCC Flooring, Sire & garden work, car parking and cycle

stand, construction of operation & maintenance store, RR stone masonry work, hand railing, drain and misc civil work as required at site of M/s

KTPS, Kota.

1.1 Further the appellant has submitted VAT returns which shows that the assessee has also paid VAT/sales tax on the above said work. The

essential condition of work contract that transfer of property in goods must be involved in the execution of such contract is leviable to tax as sale of

goods. This condition is being fulfilled here as such the service provided by the assessee was Ã¢â‚¬Ëœ Work Contract ServiceÃ¢â‚¬â„¢ and classified under

erstwhile Section 65(105)(zzzza) of the Finance Act, 1994 and not the Ã¢â‚¬Å“Commercial Construction ServiceÃ¢â‚¬â€‹.

1.2 It was observed that the gross value receipt of Work Contract Service during 2010-11 and 2011-12 by the appellant is Rs. 40.81 lakhs and Rs.

96.29 lakhs respectively on which service tax on these amounts was not deposited by the appellant. However, on being of pointed out the appellant

deposited the service tax amounting to Rs.4,36,950/- along with the interest of an amount of Rs.1,86,868/- vide challan dated 28.02.2014. The said

payment was alleged to be a short payment on further calculating the service tax liability of the appellant for the said period department has observed

that despite the aforesaid payment the appellant has still short paid the amount of Rs. 9,75,185. The said amount of service tax along with interest with

the proposal of imposition of penalty on the appellant was proposed vide show cause notice no. 275/2015 dated 29.1.2016.

2. We have heard Shri Yash Daddha, learned Chartered Accountant for the appellant and Shri S.K. Meena, learned Authorized Representative for

the department.

3. Learned Chartered Accountant for the appellant submitted that the impugned order is passed at the second round of litigation. That the first

appellate authority in its order, upheld the classification of service as Ã¢â‚¬Ëœ Works Contract ServiceÃ¢â‚¬â„¢ but allowed the benefit of threshold exemption

along with composition scheme to the appellant and remanded the matter back for re-quantification of tax and penalty after following the principles of

natural justice. That in the remand proceedings, the demand of tax of Rs. 127, 905/- has been confirmed treating the service as works contract service

along with interest thereon and applicable penalty. Ld. Counsel submitted that the said demand is barred by limitation. That the appellant did not have

any mala-fide intention and there is nothing on record which proves that appellant had suppressed anything from the revenue. The transaction were

duly recorded in the statutory records. The tax was paid immediately as pointed out by the audit. Thus extended period in given case should not be

applicable. That further, in the remand proceedings also, no penalty was levied by the revenue as tax along with interest was paid (as per own

ascertainment) before issuance of the SCN. Learned Chartered Accountant has relied upon the following decisions: -

i. Jaiprakash Industries Ltd. v. Commissioner of Central Excise, Chandigarh [2002 (146) E.L.T. 481 (S.C.) = 2002 taxmann.com 171

(S.C.)

ii. Commissioner of Central Excise, Vapi v. Kotety Gum Industries [2016 (335) E.L.T 581 (S.C.)]

iii. Continental Foundation Joint Venture v. Commissioner of Central Excise, Chandigarh [2007 (216) E.L.T. 177 (S.C.) = 2007

taxmann.com 532 (SC)]

With these submissions the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

4. Learned Departmental Representative has acknowledged that the appellant has rendered services to M/s. KTPS by indivisible work contract. Also

the appellant has paid VAT/sales tax on the said work order. Accordingly, the nature of contract is the composite works contract for which legislation

has made specific entry under Section 65(105)(zzzza) of the Finance Act, 1994 w.e.f. from 01.06.2007. Hence, the activity of appellant is rightly

classified as Works Contract Service.

4.1 Learned Departmental Representative while submitting on the issue of invocation of extended period of limitation as the sole ground raised by the

appellant has at the outset reiterated the findings in the impugned order. In Para 18.6 thereof, it is submitted since the appellant was working under

self assessment system, they were bound to file the correct ST-3 returns. The non-disclosure of their liability in the returns is rightly held to be an act

of suppression. Since it resulted into short payment on service tax, there is an intention to evade the payment of tax. Hence, the extended period has

rightly been invoked. With these submissions, the order is prayed to be upheld and appeal is prayed to be dismissed.

5. Having heard both the parties and perusing the records, we observe and hold as follows:

5.1 Since there remains no dispute vis-Ãƒ -vis services being rendered by the appellant to M/s. KTPS, the appellant is no more disputing their liability to

pay service tax for rendering Works Contract Services. The department has accepted the appellant to be eligible for the benefits of Works Contract

composition scheme and also for cum tax benefit. There remains no dispute vis-Ãƒ -vis the amount of demand of Rs.1,27,905/- to have been confirmed

as short paid service tax against the appellant along with the interest. The only point of contention before us is whether the department has rightly

invoked the extended period of limitation while issuing the impugned show cause notice. We observe that the period of dispute is 2010-11 to 2011-12

and the show cause notice is dated 29.01.2016. Hence, the entire period of demand is beyond the normal period of limitation.

5.2 We observe that proviso to Section (1) of Section 11A and 11AC of Central Excise Act which are pari-materia to Section 73(1) and Section 78 of

the Finance Act, 1994 use the expressions Ã¢â‚¬Å“by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of

any of the provisions of this act or of the rules made thereunder with intent to evade the payment of dutyÃ¢â‚¬ as the conditions that would extend the

normal period of one year to five years and as would also attract the imposition of penalty. The adjudicating authority below has justified the invocation

of extended period holding that there is a suppression of facts on part of the appellant.

5.3 We observe that there is no dispute to the fact that during the period of dispute there was confusion about the nature of the services which

involved the transfer of goods also. Despite that the concept of Works Contract Service got coined w.e.f. 01.06.2007 but the confusion remain to exist

till the Year 2015 when HonÃ¢â‚¬â„¢ble Supreme Court while deciding the case titled as Commissioner of Central Excise and Customs, Kerala Vs.

Larsen and Toubro reported as 2015 (39) STR 913 (SC) has held that in case of composite works contracts the service elements should be bifurcated

ascertained and then taxed.

5.4 It is further held that Section 65(105) of the Finance Act, 1994 had levied service tax only on contractÃ¢â‚¬â„¢s simplicitor and not on composite

indivisible work contracts. There was no charging section specifically levying service tax only on Works Contract and measure of tax with service

element derive from gross amount charged for Works Contract less value of property in goods transfered in execution of Works Contract. This

decision had cullet out the prevalent confusion vis-Ãƒ -vis the services simplicitor and the composite services and the taxability thereof which prevailed

during the period from June 2007 till the date of this decision i.e. 23.08.2015. Any short payment of tax during the said period due to the said prevalent

confusion cannot be called as an act of suppression. Otherwise also, it was the duty of department to produce the cogent evidence about positive act

on part of the appellant which would have resulted into evasion of tax but there is no such evidence. We draw our support for the decision of Collector

of Central Excise, Hyderabad Vs. Chemphar Drugs & Liniments, Hyderabad reported as 1989 (40) ELT 276 (SC), wherein it is held that extended

period is applicable only when something positive other than mere in action or failure on the part of the manufacturer is proved. Conscious and

deliberate withholding of the information by manufacturer is necessary for invoking the extended period. If the department had full knowledge or the

manufacturer had reasonable belief that he is not requested to give a particular information, only normal period of limitation i.e. 1 year is applicable.

5.5 The HonÃ¢â‚¬â„¢ble Supreme Court in the case of in Bharat Hotels Ltd. v. Commissioner of C. Ex. (Adjudication) (2018 (12) G.S.T.L. 368 (Del.), a

Co-ordinate Bench of this Court had referred to the decision in Uniworth Textiles Limited and observed as under:

26. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word ""suppression"" in the proviso

to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. ""fraud, collusion, wilful misstatementÃ¢â‚¬â„¢.

As explained in Uniworth (supra), ""misstatement or suppression of facts"" does not mean any omission. It must be deliberate. In other words,

there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee

to avoid paying excise duty. The terms ""mis-statement"" and ""suppression of factsÃ¢â‚¬ are preceded by the expression ""willful"". The meaning

which has to be ascribed is, deliberate action (or omission) and the presence of an intention. Thus, invocation of the extended limitation

period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or more failure to pay duty or take out

a license without the presence of such intention

6. Based on the entire above discussion, we hold that the extended period has wrongly been invoked while issuing the impugned show cause notice.

The show cause notice is held barred by time. Any confirmation of demand also gets hit by the technicality of limitation. The order confirming the said

demand is therefore liable to be set aside irrespective of the discussion therein. Consequent thereto, the appeal is allowed.

[Order pronounced in the open court on 09.01.2025]