Commissioner of Service Tax, Delhi East Vs M/s Navnirman Construction Company

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

Date of Decision: Jan. 15, 2025

Acts Referred: Finance Act, 1994 â€" Section 66, 76, 77, 78
Cenvat Credit Rules, 2004 â€" Rule 2(a)

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

Bench: Division Bench

Advocate: Anand Narayan, Kamal Gupta

Final Decision: Partly Allowed

Judgement

Rachna Gupta, J

1. The present appeal has been filed by the department pursuant to review order No. 11/ST/2017-18 dated 05.12.2017. The facts relevant for the

present adjudication, succinctly are as follows that:

2. The respondent was registered for providing the construction services for constructing commercial/industrial buildings or civil structures, for

providing works contract services, supply of tangible goods services etc. CERA conducted the audit of M/s VSK Infrastructure Private Limited for

the period 2010-2011 to 2013-2014 and it got revealed that M/s VSK Infrastructure had received various services through contractors/sub-contractors

service providers. Later, did not charged service tax on the bills/invoices against those services provided. M/s Navnirman Constructions Company,

being one of the such contractor was observed to have charged Rs. 68 lakhs during the disputed period from M/s VSK Infrastructure, without

charging any service tax.

3. The records of the appellant were also called. On the scrutiny thereof, it was observed that the appellant has neither paid the service tax nor had

filed ST-3 returns. However, appellant had prepared a reconciliation chart for the period 2010-2011 to 2013-2014 showing the exempted amount but

without any documentary evidence. Following discrepancies were also noticed from comparison of taxable amount in ST-3 returns with that of

balance sheet:

(i) Short payment of service tax of an amount of Rs. 5,82,06,760/-.

(ii) For the period 2012-2013, the appellant had availed 60% abatement on works contract services. Hence, was not entitled to avail and utilized

Cenvat credit of Rs. 6,180/-.

(iii) On scrutiny of details of project this were not found in relation with the balance sheet and profit and loss account;

(iv) The registration for service tax was taken on 09.02.2012 however the construction services were being provided much prior the said date.

4. The said discrepancies are alleged to be an act of suppression of facts and of mis-representation on part of the appellant. Thus while invoking the

extended period of limitation, a show case notice bearing No. 23/2015-16 dated 15.10.2015 was served upon the appellant proposing the recovery of

service tax amounting to Rs.5,82,06,760/- along with the proportionate interest. Wrongly availed and utilized Cenvat credit amounting to Rs. 6,180/-

was proposed to be disallowed and to be recovered from the appellant. Imposition of penalty under Section 76, 77 and 78 of the Finance Act, 12994

was also proposed. Another show cause notice on the similar allegations bearing No. 2/2015-2016 dated 10.05.2016 for the period 2014-2015, as a

subsequent follow up show cause notice was also served upon the appellant proposing the recovery of service tax amounting to Rs. 53,08,119/- along

with proportionate interest and the appropriate penalties under Section 76 and 77 of the Finance Act.

5. Both these show cause notices have been adjudicated vide the impugned order in original No. 96/2016-2017 dated 21.06.2017 confirming the

demand of Rs. 1,99,080/- out of the total amount of Rs. 5,82,06,760/- as was proposed under Show Cause Notice No. 23/2015-2016 along with the

interest and the penalties as mentioned in the said order. The demand of Rs. 9,94,450/- out of total demand of Rs. 53,08,119/- has also been confirmed

with respect to show cause notice No. 23/2015-16 dated 10.05.2016 along with the interest and the penalties as mentioned therein. The said order was

got reviewed by the Committee of Commissioners vide the aforementioned review order dated 05.12.2017. The present appeal has been filed pursuant

to the directions of the said review order.

6. We have heard Shri Anand Narayan, learned Authorised Representative for appellant/department and Shri Kamal Gupta, learned Chartered

Account for the respondent.

7. Learned departmental Representative for the appellant Ã¢â‚¬"department has submitted that the adjudicating authority erred in dropping the demand in

respect of service provided by the noticee to M/s PGCIL and M/s VSK Infrastructure Private Limited, before 01.07.2012 i.e. before introduction of

negative list under Works Contract service which otherwise were related to site preparation activities at various sites for the period from 2010-11 to

2011-12 as was raised in show cause notice dated 15.10.2015. Also erred in consequently not imposing commensurate penalty under Section 78 of the

Act. The adjudicating authority erred in dropping the demand in respect of Hire charges income shown in balance sheet amounting to Rs. 1,00,55,536/-

for the period 2010-11 to 2011-12 as was raised vide show cause notice dated 15.10.2015 and consequently not imposing commensurate penalty under

Section 78 of the Act.

8. The original adjudicating authority also observed that M/s Power Grid Corporation of India Ltd. (M/s PGCIL), is the Government of India

Enterprises and the activities carried out by them are not covered under commercial or industrial activities. It is submitted that on the contrary, M/s

PGCIL though is established by Government but it is a profit making body and indulges in commercial activities too. Hence those findings are also

been wrongly arrived at by the adjudicating authority. Similarly the services provided by the appellant to Municipal Corporation, Delhi are also wrongly

concluded to be such activities of MCD which are not covered under commercial or industrial activities. The dropping of demand on those activities

for the period prior coming into effect of negative list on 1st July 2012 merely on the basis of service receiver being the Government body without

looking into the nature of the service provider, the adjudicating authority is alleged to have committed an error. The only demand confirmed with

respect to both the show cause notices is in respect of road work on L&NT, Raipura project. However, said confirmation of the order along with the

order of appropriating the demand of Rs. 5,00,592/-in respect of road work is also alleged to be a wrong finding. Finally, alleging that the order in

original is a non-speaking order which is passed in the absence of the documents as that of agreement/work orders etc., the same is prayed to be set

aside and the appeal filed by the department is prayed to be allowed.

9. While rebutting these submissions, learned counsel for the respondent submitted that the department in the present appeal has raised an additional

ground of appeal while alleging that the activity of the respondent is taxable under the category of Ã¢â‚¬Ëœ Site Preparation ServicesÃ¢â‚¬Ëœ despite that it was

never the case made out even in the show cause notice nor has been discussed anywhere by the original adjudicating authority. The department-

appellant is not allowed to make a new case against the respondent at this stage of appeal. Learned counsel has relied upon the decision of HonÃ¢â‚¬Ëœble

Gujarat High Court in the case of Commissioner Vs. Reliance Ports and Terminal Ltd. reported as 2016 (334) ELT 630 (Guj). It is further submitted

that the respondent is not denied to have rendered works contract services to M/s PGCIL which is a government authority still the show cause notice

alleged it to be taxable being in the category of commercial or industrial construction services. The adjudicating authority below has rightly considered

the admitted fact and thus there is no infirmity in dropping of the demand qua services provided to M/s PGCIL.

10. Learned counsel has relied upon para 13.2 of Circular No. 80/10/2004-ST dated 17.09.2004 which clarified that leviability of service tax would

depend primarily upon whether the building is used or to be used for commerce or industry. The appellant Ã¢â‚¬"department has otherwise failed to

produce any evidence to prove that the services provided by the respondent are primarily for commerce or industry. M/s PGCIL is otherwise engaged

in setting transmission for electricity and the respondent has provided services of site preparation for setting up of transmission tower/sub-station i.e.

for setting up of the transmission infrastructure for transmission of electricity. Notification No. 11/2010-ST dated 27.02.2010 exempts the taxable

service provided to any person by any other person for transmission of electricity from whole of service tax leviable thereupon in terms of Section 66

of Finance Act. Similarly, the services rendered to MCD was in the nature of constructing parkings which was also not in the nature of the

commercial or industrial activity. No infirmity is found in the order. Finally relying upon the decision of this Tribunal in the case of Madhya Pradesh

Power Transmission Company Ltd. Vs. Principal Commissioner of CGST & Central Excise, Bhopal reported as 2023 (385) ELT 152 (Tri.-Del.) and

in the matter of Kedar Constructions Vs. CCE, Kohlapur reported as 2015 (37) STR 631 (Tri.-Mumbai), the respondent has prayed for dismissal of

the present appeal.

11. Having heard both the sides at length perusing the entire record we observe and hold as follows:

Ã¢â‚¬Å“The impugned order in original has adjudicated two show cause notices for two consecutive period but on the same allegations. The demand was

proposed on several counts vide the impugned order, the authority has confirmed the following demands:

(a) Demand of Rs. 1,87,106/- for providing excavation services;

(b) Demand of Rs. 5,00,592/- towards providing construction of road services/L&T;

(c) An amount of Rs. 9,94,450/- vis-Ãƒ -vis providing construction of a education building;

(d) Demand of Rs.1,19,737/- on another government project meant for commerce holding it to be a tax liability of the respondent for works contract

executed for M/s PGCIL after introduction of negative list. However, the authority has dropped the following demands vis-Ãƒ -vis both the show cause

notices:

(1) The service tax demanded with respect to projects executed for Power Grid Corporation of India Ltd.

(2) Tax demand on the amount received as the income from higher charges;

(3) The service tax liability vis-Ãƒ -vis construction of parking for MCD.

12. The respondent assessee is not in appeal against the confirmation of demand. However, the department has challenged the dropping of demand on

the ground that the construction services provided to M/s PGCIL and to MCD both are the constructions meant for the commercial activity having

commerce/profit element. Hence this activity is not liable for the exemption. The demand is alleged to have wrongly been dropped with respect to M/s

PGCIL. The activity is not for construction of infrastructure for electricity transmission lines but is actually a site preparation services. We observe

that in none of the show cause notices the respondent assessee is alleged to have rendered site preparation services to either to M/s PGCIL or to

MCD or any other of its clients including M/s VSK Infrastructure. Thus we hold that this ground of appeal raised by the department is beyond show

cause notice hence cannot be dealt with at this stage of appeal. We are drawing our support from the decision relied upon by the assessee Ã¢â‚¬

respondent of HonÃ¢â‚¬Ëœble Gujarat High Court in the case of Reliance Ports and Terminal Ltd. (supra).

13. Further, from the departmental Circular No. 80/10/2004 dated 17.09.2004 as brought to notice by the respondent, it is clear that the leviability of

the service tax would depend primarily upon whether the building is used or to used for commerce or industry. In the present case, respondent has

provided services to M/s PGCIL a public sector undertaking which admittedly is engaged in setting up of transmission lines for transmission of

electricity and the respondent has provided the infrastructure for the same. Any service provided in relation to transmission of electricity stands

exempted from whole of the service tax liability in terms of Notification No. 11/2010-ST dated 27.02.2010. This notification has been relied upon by

the original adjudicating authority while dropping the demand vis-Ãƒ -vis the demand of service tax vis-Ãƒ -vis projects executed for M/s PGCIL. There

is no evidence produced by the department to prove that the service provided by appellant is not for electricity transmission infrastructure. Hence, we

do not find any infirmity in the order to that extent.

14. The demand of hire charges on account of giving DG sets, motor graders, hydraulic, excavator etc. has been dropped holding that the amount on

account of sale of goods is not taxable under service tax and, therefore, the respondent is not liable to pay service tax on account of amount booked

for sale of goods. The amount was proposed to be recovered holding that the sale/purchase of goods and trading is included in the exempted service

as defined under Rule 2(a) of Cenvat Credit Rules, 2004 which is applicable for the period in dispute.

15. The original adjudicating authority has observed that one condition in each of the contract for giving various equipment on Hire, is common

wherein it has been stated that both possession and effective control or equipment will be lying with the client and client may use the equipment in any

manner, he likes. The moment the goods are transferred with the right of possession and effective control the activity goes out of the ambit of taxable

service classifiable as Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢. It rather stands classified as Ã¢â‚¬Ëœ Deemed SaleÃ¢â‚¬â„¢ in terms of sub-clause 29(A) of Article

366 of Constitution of India as was introduced with 42nd amendment of the Constitution. The Government of India proposed to amend the Constitution

to include in Article 366, a definition of Ã¢â‚¬Ëœ tax on the sale or purchase of goodsÃ¢â‚¬â„¢ by inserting a new clause (29A) which reads as :

Ã¢â‚¬Å“29(A) ""tax on the sale or purchase of goods"" includesÃ¢â‚¬

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable

consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or

other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or

other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for

human consumption or any drink whether or not intoxicating, where such supply or service, is for cash, deferred payment or other valuable

consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery

or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is madeÃ¢â‚¬â€‹

16. Giving goods on Hire with effective control and possession thereof thus stands ousted from the scope of service tax leviability. Since there is no

evidence produced by the department on record showing that right to possession and effective control of the equipments given on hire was retained by

the respondent Ã¢â‚¬"assessee, we do not find any infirmity in the order under challenge where the demand on hire charges has been dropped.

17. Finally coming to the demand dropped with respect to the charges received for constructing parking for MCD, the adjudicating authority has held

that the main contractor of MCD was M/s VSK Infrastructure and the respondent Ã¢â‚¬" assessee was the sub-contractor. Since the main contractor

was exempted from paying any service tax, the sub-contractor cannot be held liable to tax for the same project of renting works contract services.

However, we are not in agreement with those findings, the Larger Bench of this Tribunal in the case of Commissioner of Service Tax, New Delhi Vs.

M/s. Melange Developers Pvt. Ltd reported as 2020 (33) GSTL 116 (Tri. LB), has while referring the earlier decision in Max Tech. Oil & Gas

Services Pvt. Ltd. Vs. Commissioner of 92, Delhi reported in 2017 (52) STR 508 (Tri.-Del.), the Division Bench has held:

Ã¢â‚¬Å“6. Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will

amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the

appellant The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is

covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered

by main contractor is of no consequence to determine the tax liability of each and every service provider. If at all, the service tax paid by a

sub-contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the Cenvat

Credit Rules, 2004 will come into play subject to fulfillment of conditions therein. It is nobody's case that the sub-contractors per se are not

liable to service tax even if they rendered taxable serviceÃ¢â‚¬Â¦Ã¢â‚¬Â¦..Ã¢â‚¬â€‹

18. In the light of the said decision, the services provided by the respondent are not the services provided to the governmental authority (MCD) but it

was provided to a private company viz. M/s VSK Infrastructure Ltd. Otherwise, also the parking for MCD being a paid parking and as such the

construction thereof was meant for making profit/revenue generation for the MCD. These facts are sufficient for us to hold that the mega exemption

No. 25/2012-ST dated 20th Jun 2012 Entry No. 12(a) which exempts the activity in relation to construction provided to the Government or

governmental authorities from service tax levy is not applicable to the respondent Ã¢â‚¬" assessee. Said entry 12(a) reads as follows:

Ã¢â‚¬Ëœthe civil structure or any other original work meant predominantly for use other than for commercial industry or any other business or

provision shall remain exemptedÃ¢â‚¬â€‹.

19. As already discussed above, the MCD parkings are for generating Revenue hence construction thereof is the construction for a building meant for

commerce. Resultantly, irrespective the MCD is a governmental authority meant to carry out the functions entrusted in Article 243(w) of Constitution

of India but the parking being meant as a commercial project of MCD. Above all the respondent has not provided the said service to MCD but to the

main contractor. M/s VSK Infrastructure which is not Governmental authority hence we hold that the original adjudicating authority has wrongly relied

upon the said notification while dropping the demand for the construction services being provided by the respondent to M/s VSK Infrastructure

Ltd,/MCD. The impugned order in original is, therefore, set aside to this extent.

20. In light of the entire discussion above the order under challenge has been confirmed/upheld dropping of demand with respect to the services

provided to M/s PGCIL and with respect to the Hire Income is concerned. However the order is set aside with respect to dropping the service tax

demand with respect to construction of MCD parking. The order is, therefore, partly set aside. Consequent thereto, the departmental appeal is partly

allowed.

(Pronounced in open Court on 15/01/2025)