NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

TAXC No. 17 of 2018

Order Reserved on 30.8.2019
Order Delivered on 20/11/2019

1. M/s Ambalal Chauhan (Proprietor Shri Ambalal Chauhan) Milan Chowk, Kududand Bilaspur (CG)

---- Appellant

Versus

1. Commissioner, Central Excise & Service Tax Raipur Central Excise Bhawan, Dhamtari Road, Tikrapara, Raipur (CG)

---- Respondent

For Appellant	:	Mr. Neelabh Dubey, Advocate
For Respondent	:	Mr. Maneesh Sharma, Advocate

Hon'ble Shri P. R. Ramchandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

CAV Order

Per Parth Prateem Sahu, J

1. Feeling aggrieved by the demand of service tax & education cess raised by the revenue department, the appellant has moved this court in the appellate jurisdiction and prayed for setting aside of the impugned orders and the demand dated 13.3.2012.

2. The appellant is a registered proprietary concern engaged in the business of providing services, such as commercial and industrial construction service, which is specified as taxable service under Section 105 (ZZQ) of the Finance Act, 1994 (henceforth 'the Act of 1994'). Service tax registration was obtained by the appellant on 15.11.2006. During the currency of service tax registration, the appellant was engaged in commercial construction activities with M/s Ind Synergy Ltd.,Raigarh (for short 'the ISL') and therefore raised bills in

the year 2005-06, 2006-07 & 2007-08 for payment towards the work performed by appellant. On the basis of intelligence gathered by the Revenue that ISL had engaged the appellant for the work of site preparation, land development, civil and structural construction, the information was sought from the ISL, who vide letter dated 9.6.2008 provided the information sought for along with the list of contractors to whom they awarded contracts and year-wise details of payments made by them. On receipt of such information, the Superintendent, Central Excise, Range - Service Tax, Bilaspur called upon the appellant to furnish information with respect bills raised on the ISL from beginning, details of amount received and details of service tax paid. When the appellant did not furnish the information as sought for, the ISL was directed to supply the same, but the ISL also not furnished any detail/information despite repeated request letters. Thereafter, copies of ledgers of the appellant, which were maintained by the ISL, were procured and forwarded by the Superintendent, Central Excise, Range-Raigarh to the Superintendent, Central Excise, Range-Service Tax, Bilaspur. From the material available therein, it was revealed to the Revenue that nature of services rendered by appellant are classifiable and taxable under sub-clause (zzq) of Section 105 of the Act of 1994, but the appellant has not furnished any information, document and also not declared the value of taxable service in ST-3 return filed by him. On 18.10.2010 a show cause notice was issued by the Additional Commissioner, Customs & Central Excise, Raipur to appellant calling upon him to explain as to why service tax of Rs.6,92,606/- and education cess amounting to Rs.13,534/- should not be demanded and recovered from appellant.

3. Appellant submitted reply to the said show-cause notice stating that the appellant had not provided any service classifiable and taxable under the Act of 1994. The contract entered between the appellant and the ISL is a composite

contract. It was also stated that earlier the appellant was registered with Service Tax Department, but subsequently the appellant surrendered its service tax registration on 16.1.2009. It was also stated that while assessing tax value in the show-cause notice, the Revenue erred in not considering that the appellant is entitled for abatement of 67% on value available vide Notification No.18/2005/ST dated 7.6.2005. Thus, the appellant prayed for dropping of proceeding/notice issued.

4. The Adjudicating Authority after considering the reply and also hearing the appellant, arrived at a conclusion that award of contract by the ISL to the appellant is primarily and directly related to its business of manufacturing activity which involves civil works in plant/factory premises as well as civil work related to facilities provided by it to its staff, which falls under the ambit of 'commercial or industrial construction service' and not 'construction of residential complex service'. It was also held that as the appellant had obtained service tax registration under the taxable category of 'commercial or industrial construction service', therefore, he was aware of the fact that the services provided by him fall under 'commercial or industrial construction' and not under 'construction of complex service'. For the aforesaid reasons, the Adjudicating Authority held that the amount received for the work performed by the appellant is taxable and service tax is to be paid along with interest. It was also held that despite repeated requests, the appellant failed to submit any material before the authority to establish the contentions raised by him in his reply. The Adjudicating Authority ordered for recovery of Rs.6,92,606/- towards service tax; Rs.13,534/- for education cess and secondary & higher education cess of Rs.2,390/- under Section 73 of the Act of 1994 with a further direction that the service tax already paid shall be adjusted against the demand confirmed, subject to its verification. Interest on the amount of service tax recoverable was also imposed at the prescribed rate under Section 75 of the Act of 1994. In addition, a penalty

of Rs. 200/- per day has been imposed for late payment of the service tax under Section 76 of the Act of 1994.

5. The order of Adjudicating Authority was challenged in an appeal before the Commissioner of Appeal, Customs & Central Excise and the Appellate Authority upheld the order of the Adjudicating Authority for the reasons recorded therein, except the penalty imposed under Section 76 of the Act of 1994. Being dissatisfied with the order passed by the Appellate Authority, the appellant preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi, which came to be dismissed vide order dated 10.7.2017, holding it to be bereft of any merits. The decisions relied upon by the appellant have been held to be not applicable in the facts and circumstances of the case. This made the appellant to approach this Court by filing appeal under Section 35G of the Central Excise Act, 1944.

6. Mr. Neelabh Dubey, learned counsel for appellant submits that the appellant had obtained service tax registration on 15.11.2006 but considering that the work/service which the appellant was rendering at the relevant point of time, was not falling within the purview of ' taxable service', has surrendered the registration vide letter dated 5.1.2009, which was received by the jurisdictional Range Officer on 16.1.2009. He further submits that no service tax is payable for the work contract because it was a 'composite contract' from beginning to end. He also submits that the authorities failed to consider that abatement of 67% on the value was denied to the appellant. He also submits that in the show-cause notice there is no specific mention that which part of the work amounts to 'service' and which comes within the category of 'sale of goods'. He also submits that charging sections under the taxing statute are to be construed strictly and it is for the revenue to bring its case within the definition of 'taxable service'.

7. Mr. Maneesh Sharma, learned counsel appearing on behalf of the respondent Revenue submits that the appellant failed to establish his contentions before the authorities below by producing evidence and material in support thereof. Appellant even after repeated reminders did not submit any document before the authority, even copy of contract agreement was not placed on record to substantiate the contention that contract entered into between the appellant and the ISL was a composite contract. He also submits that on the basis of ledgers maintained by the ISL, which were procured, it was revealed that the appellant had raised bills and realized amount of Rs.57,44,937/- towards services rendered during the period from 1.4.2005 to 30.8.2010. He submits that the appellant was registered with the Service Tax Department and was aware of the fact that the service rendered by him comes within the purview of 'taxable service', but he did not deposit service tax. In fact, the appellant avoided to pay service tax. He also submits that the authorities have also considered the argument with regard to the abatement of 67% of the gross value for the purpose of calculating service tax and it was held that appellant could not be able to furnish any document showing the cost of construction materials included in the amount charged by them or the same were supplied free of cost to the appellant and therefore gross value receipt has been made taxable. It is also contended by learned counsel for the respondent that even the Appellate Authority held that as no document or record was supplied by the appellant to get exemption except the copy of certificate issued by the Chartered Accountant, therefore, service tax charged on the gross value is correct and sustainable in law. He submits that as the appellant is engaged in providing service, the authorities have rightly imposed tax on the amount received by appellant against the service provided by him.

8. We have heard learned counsel for the parties and perused the record.

9. Appellant though entered into contract with ISL and received huge amount against the service provided by him, he deliberately did not submit the contract agreement before the authority concerned. Submission of learned counsel for the appellant with regard to composite contract, can be verified from the contract agreement executed between the appellant and the ISL, which the appellant failed to bring on record. In absence of contract agreement on record, the claim of the appellant that he is entitled for abatement of 67% on value available as per Notification dated 1.3.2006 is not sustainable. There was no material before the authorities to accept the submissions of appellant that the contract entered between him and the ISL was a composite contract. Similarly, the appellant has not produced any document before the Adjudicating Authority to substantiate his submissions. The authorities below have rightly held that no material has been placed on record by the appellant to bifurcate value and nature of work and therefore tax has been imposed on the gross value, which cannot be said to be erroneous. The burden to proof that which part of his work amounts to 'service' and which not, was upon the appellant and not on the revenue, which the appellant utterly failed to discharge. The work cannot be artificially split. It is to be considered on several elements based on it essential features. The course adopted for charging, invoicing or accounting does not by itself determine that the service provided is a single service or multiple service. It is the nature of transaction which will be material and not the form of transaction between the parties is decisive for the purpose of classification, but, as already observed above, that the appellant has not produced any material before the authority in this regard. Judgment rendered in **Larsen & Tourbo Ltd. & anr V. State of Karnataka & anr** reported in **(2016) 1 SCC 170**, which was relied upon by the learned counsel for the appellant, is also of no help to the appellant. In the said judgment the question for

consideration was whether service tax can be levied on individual works contract prior to introduction of the Finance Act, 2007 on 1.6.2007. Present is the case where on intelligence it was gathered that the ISL paid huge amount to the appellant towards the work done by him as one of the contractors and on query being made by the authorities, no document was produced by appellant to prove contents of reply. Even the contract agreement was not filed but for the certificate issued by Chartered Accountant.

10. The Appellate Authority while affirming the findings recorded by the Adjudicating Authority has held as under:-

> "4.5. Section 65A states the principles for classification of taxable services. Classification of a composite service is based on that component of the service which gives the essential character. There is a need to determine whether a given transaction is the one containing major and ancillary elements or the one containing multiple and separate major elements. In the case of a transaction containing a major and ancillary elements, classification is to be determined based on the essential features or the dominant element of the transaction. A supply which comprises a single supply from an economic point of view should not be artificially split. The method of charging or invoicing does not in itself determine whether the service provided is a single service or multiple services. Single price normally suggests a single supply though not decisive. The real nature and substance of the transaction and not merely the form of the transaction should be the guiding factor for deciding the classification.
>
> In the instant case, the predominant character/nature of service being that of

'commercial or industrial construction' service e.g. construction of Bachelor Hostel, PSB, Kiln, Flooring, Building, Extension Work, Kiln III Control Room, TG Control room, Water Tank, MCC Room Kiln, Repairing Works done by the appellant in relation to construction of hostel , quarter and temple is ancillary activities to major transaction of Industrial Construction. Hence, the appellant's contention that they have not provided any taxable service with reference to construction of hostel, quarter and temple is not sustainable under the facts and circumstances of the case. Thus, the appellant is liable to pay service tax under the category of 'commercial or industrial construction' service on the whole transaction entered with the Ind Synergy Ltd.. The gross payments released to the Appellant against the construction services provided by them which are rightly classifiable under the category of 'Commercial or Industrial Construction services' on which they had failed to pay service tax. Thus amounts received by the Appellant for the above civil construction works are taxable on which service tax is to be paid along with interest. Held accordingly.

4.6. The Appellant has also contested in its grounds of appeal that, the department has erred in assessing the tax by denying them the abatement of 67% on value available under notification no.01/2006-ST dtd 01-3-2006 as amended. In this context to get exemption the appellant has to submit documents showing that the work order or tender is including of all materials such Steel and Cement and other materials instead it is on record that steel was supplied by M/s Ind Synergy Ltd. The appellant has not submitted any documents or records in favour of them to materialize their claim neither before me nor before the Adjudicating authority. The appellant have not submitted any copies of bills to substantiate their position and claims. The Chartered Accountant Certificated dated 21/08/2012 issued by Ajay Kumar Chauhan appears to be an eye wash when fact of supply of steel & cement by service receiver though has been mentioned but contract copy for bifurcation of each activity is not made available. Thus impugned order for recovery of service tax on the gross values charged and received by the Appellant is found to be correct and sustainable before the law. Held accordingly.

5. Regarding imposition of penalty I agree with the view of Adjudicating authority as discussed in the para 20 of the impugned order. In the instant case the appellant has wilfully suppressed the facts regarding the activities of providing taxable services. They did not disclose the details of taxable values in ST-3 returns. On the contrary the Appellant mis-stated the facts in ST-3 return and surrendered Service Tax Registration number with an intention to avoid payment of service tax. Further the Appellant also did not furnish the relevant documents and details when asked for by the department. In view of the above, the extended period of five year as provided under proviso to Section 73 (1) of the Finance Act, 1994 was correctly been invoked in this case.

6. With regard to grant of immunity from penalty under Section 80 of the Act. It is noticed that though the appellant has provided construction services to M/s Ind Synergy Ltd., but not disclosed any facts to the department unless investigation has

been done by the Assistant Commissioner (Prev.) Central Excise, Hqrs., Raipur. Thus when nothing was within the knowledge of the department before 09.06.2008 till investigation was conducted, appellant cannot be said to have bonafide belief about his liablity to tax. There is no evidence that the appellant had ever approached to the department and inquired about the liability of his activity. This handicaps to grant any immunity from penalty for the suppression of fact made to the department and contravention of law made cautiously. Thus I do not find any reasonable cause on the part of the appellant to grant it immunity under Section 80 of the Act. Thus I find that, appellant is liable for imposition of penalty for deliberate suppression of vital facts with an intent to evade payment of service tax. Thus, I do not find any infirmity in the impugned order imposing penalty under Section 77 & 78 of the Finance Act, 1994. Held accordingly."

11. For the foregoing discussions and reasons given in the impugned order, we do not find any illegality or infirmity in the orders passed by the authorities below. As recorded earlier that the appellant has not produced any document even to prove the facts pleaded in reply to show cause notice, therefore, we are of the opinion that no question of law much less any substantial question of law is involved in this case warranting interference by this Court in exercise of its appellate jurisdiction.

12. The appeal being bereft of any merit is liable to be dismissed and it is dismissed accordingly.

Sd/-	Sd/-
(P.R. Ramchandra Menon)	(Parth Prateem Sahu)
Chief Justice	Judge

roshan/-