CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 2388 of 2011 [DB]

[Arising out of Order-in-Original No. 98/2011 dated 29/04/2011 passed by the Commissioner of Service Tax, Bangalore]

M/s MFAR CONSTRUCTION PRIVATE LIMITED
NO.8 & 8A, AVS COMPOUND, 80 FEET,
KORMANGALA, BANGALORE 560 034

Appellant(s)

VERSUS

C.C.E & C.S.T.-BANGALORE SERVICE TAX- I
1ST TO 5TH FLOOR,
TTMC BUILDING, above BMTC BUS STAND,DOMLUR
BANGALORE,
KARNATAKA
560071

Respondent(s)

Appearance:

Shri M.S. Nagaraja, Advocate for the Appellant

Shri P.Rama Holla, Authorised Representative for the Respondent

CORAM: HON'BLE SHRI P.ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE SHRI P DINESHA, JUDICIAL MEMBER

FINAL ORDER NO.20224/2022

Date of Hearing: 14/02/2022
Date of Decision:05/05/2022

Per : P.ANJANI KUMAR

MFAR Construction Private Limited, the appellants are engaged in construction of complexes and have obtained registration for rendering 'Commercial or Industrial Construction' and 'Construction of Complex Services'; with the introduction of levy of Service Tax on 'Works Contract Service' w.e.f. 01.06.2007, the appellant sought classification, of the

composite contract of 'Construction of Residential Complex' under Works Contract, vide letter dated 14.06.2007 and opted for composition scheme under Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and started paying duty as applicable. During the conduct of audit in the year 2008, Revenue observed that in terms of Circular No.98/1/2008-ST dated 04.01.2008 a service provider who paid service tax prior to 01.06.2007 for the taxable services like Erection, Commissioning and Installation Service, Commercial or Industrial Construction Service or Construction of Complex Service is not entitled to change the classification of the Single Composite Service for the purposes of payment of service tax on or after 01.06.2007 and therefore, the appellants are not entitled to avail the Composition Scheme. A show cause notice dated 20.04.2010 was issued to the appellants denying the classification of the services rendered by the appellants under Works Contract Service and demanding a service tax of Rs.28,08,44,455/-; the show cause notice also demanded service tax on client's disputed amount before 01.06.2007 and mobilization advance Cess after 01.06.2007; the show cause notice further demanded service tax on the services rendered by the appellant as a sub-contractor during the period April 2006 to March 2007. The proposals in the show cause notice were confirmed by Order-in-Original No.98/2011 dated 29.04.2011. Hence, this appeal.

2. Shri M.S. Nagaraja, learned Advocate appearing for the appellants submits that the appellants were executing 'Construction of Residential Complex' as a Composite Contract; the appellants had obtained VAT Registration discharged the applicable VAT on the value of the goods or material involved and paid service tax on the balance amounts. He extracts

Section 65 (105) (zzzza) of the Finance Act, 1994 and submits that it is a settled legal position that the construction of residential complex being a works contract is liable to service tax only from 01.06.2007 as held by the Apex Court in the case of *Larsen & Toubro Limited 2015 (39) STR 913 (SC).* He submits that the contention of the Department that the execution of composite contracts/ projects classified earlier under Commercial and Industrial Construction Service/ Construction of Complex Service cannot be classified under Works Contract is contrary to the law enunciated by the Hon'ble Supreme Court.

3. Learned Advocate submits that Commissioner's contention, in the impugned order, that in a few cases, the clients had supplied certain materials and the value of the same was deducted from the gross value and hence, the contract cannot be treated as Works Contract, is not correct; there is no dispute that the appellant was registered in various trades and was paying VAT on the value of the goods and material involved in execution of Works Contract; the supply of material by the clients in respect of two RA Bills cannot be the sole basis to conclude that the construction of residential complexes was not a Composite Contract as the fact of payment of VAT on the value of the goods involved is not in dispute. He submits that Tribunal in the case of *ABL Infrastructure Limited Vs CCE & C & S.T., Nashik 2018 (11) GSTL 106 (Tribunal Mumbai)* held that for the purpose of value of goods used in or in relation to the execution of the Works Contract value of all supplies for a consideration or otherwise should be added; Apex Court has affirmed this judgment *2018 (19) GSTL J161 (SC).*

4. Learned Advocate submits that the finding that the appellants had

taken service tax registration on 13.10.2004 and have been paying service tax under Construction of Commercial/ Industrial Complexes Service as defined under Section 65 (30a) and therefore, they cannot switch over to Works Contract Scheme is clearly in contradiction of the legal provisions. He extracts Rule 3(1) of the Works Contract Rules and submits that the said Rule specifically refers to "the person liable to pay service tax in relation to Works Contract Service" has an option to pay service tax under the Composite Scheme; w.e.f. 01.06.2007 the person liable to pay service tax on Works Contract become entitled to exercise the option before payment of service tax in respect of the said Works Contract; in the instant case, the appellants sought re-classification of the Composite Contracts of 'Construction of Complex' under Works Contract and exercise the option on 14.06.2007 prior to payment of service tax. He submits that payment of service tax on composite contracts executed before 01.06.2007 cannot be construed as payment of tax on taxable service as the said composite contracts were not liable to pay service tax before 01.06.2007 in view of the L&T judgment. He further relies on the following case laws and submits that denial of option to pay service tax under Composite Scheme is not legal and proper:

- *B R Kohli Constructions Pvt. Ltd. Vs CST, New Delhi, 2017 (5) GSTL 182 (Tri. Delhi).*
- *Indu Projects Ltd. Vs CCE & C & ST, Hyderabad IV, 2020 (34) GSTL 466 (Tri. Hyd.).*
- *Mehta Plast Corporation Vs CST, Jaipur, 2016 (44) STR 651 (Tri. Delhi).*

5. Learned Advocate for the appellants submits that the impugned order confirms the demand of service tax of Rs.28,08,44,455/- on Commercial or Industrial Construction/ Construction of Complex Service; it is alleged that service provider who has paid service tax prior to 01.06.2007 is not entitled to change the classification of the Composite Service from 01.06.2007 and

the appellants are not entitled to pay tax under the Composition Scheme and also not eligible for abatement under Notification No.01/2006-ST dated 01.03.2006 as they have availed CENVAT credit. He submits that as per L&T Judgment (supra) Composite Works Contract were liable to service tax from 01.06.2007; the appellants have correctly classified the service and exercise the option before payment of service tax; therefore, the demand is not sustainable; there is also duplication of demand as mobilization advances and the remuneration for the contracts have been considered. He submits that the demand of service tax on client disputed amount is not sustainable as the appellants have exercised the option and paid service tax at the rate of 2.06% for the period July 2007 to November 2007; therefore, the demand of differential duty of Rs.4,20,860/- is also not sustainable.

6. Learned Advocate submits that the SCN propose payment of service tax on the advance amounts received for the reason that service was to be provided; advances were received from 2005 onwards; advances received before 01.06.2007 for Works Contract is not liable to service tax; advances received after 01.06.2007 are liable to pay service tax under Works Contract and the appellants have paid tax of Rs.1,22,79,233/- out of Rs.1,42,78,233/- as recorded in the show cause notice; balance amount of Rs.19,99,033/- is confirmed by the impugned order; this balance is on account of denial of the Composition Scheme and for the reasons discussed above, the same is not maintainable.

7. Learned Advocate submits that service tax of Rs.41,44,069/- was confirmed on the Works Contract Service provided by the appellant as a sub-contractor to M/s Akkayya Consultancy Service, during the period April 2006

to March 2007. The main developer i.e. M/s Akkayya Consultancy Service have sub-contracted the construction of residential flats to the appellants named as Vasundhara, Meghana and Shalini etc; the principal contractor vide letter dated 03.09.2010 have clarified that they have paid the entire service tax for the impugned period; moreover, the same being Works Contract not liable to pay service tax before 01.06.2007; demand of duty by relying on a Circular No.967/7/2007-ST dated 28.03.2007 is not sustainable.

8. Learned Advocate submits that the SCN issued on 20.04.2010 proposing to recover duty for the prior period 01.06.2007 and denying the option for the period June 2007 to September 2009 is time barred. The appellant has been paying service tax 2006-07 onwards even on Composite Contracts; the issue is classification of a service and interpretation of a question of law, giving rise to various interpretations which were finally settled by the Apex Court in the L&T case (supra); therefore, it cannot be alleged that the appellants have suppressed any material fact with an intent to evade payment of duty; lapses, if any, on the part of the appellant are bona fide and therefore, longer period cannot be invoked in view of the following case laws:

- *Kiran Ispat Udyog Vs CCE, Rajkot- 2015 (321) ELT 182 (SC).*
- *Jaiprakash Industries Ltd. Vs CCE, Chandigarh- 2002 (146) ELT 481 (SC).*
- *Larsent & Toubro Ltd. Vs CCE, Pune-2007 (211) ELT 513 (SC).*

9. Learned Authorized Representative for the Department reiterates the findings of the impugned order. He refers to Circular 98/1/2008-ST dated 04.01.2008 and submits that 'a service provider who paid service ta prior to 01.06.2007 for the taxable service, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, as the case may be, is not entitled to

change the classification of the single composite service for the purpose of payment of service tax on or after 01.06.2007 and hence, is not entitled to avail the Composition Scheme'; he submits that Apex Court upheld the Circular in the case of *Nagarjuna Construction Co. Ltd. 2012 (28) STR 561 (SC)*; on the issue of payment of service tax by sub-contractor, he relies on *Sunil Hi-Tech Engineers Ltd. Vs CCE, Nagpur, 2014 (36) STR 408 (Tri. Mumbai).*

10. Heard both sides and perused the records of the case. Brief issue that requires our consideration in the case is whether the appellants having been paying service tax on Construction of Complex Services, facility of composition can be denied to them from 01.06.2007 in view of the judgment of Apex Court in the L&T case. The case of the Department is that the appellant cannot switch over to payment of service tax under Works Contract Scheme from the earlier services of Construction of Residential Services. We find that Works Contract has been defined as follows:

> *Section 64 (105) (zzzza) of the Finance Act, 1994 defines taxable service of "Works Contract" as under:*
> *"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*
> *Explanation: For the purposes of this sub-clause, "works contract" means a contract wherein,*
> *(i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
>
> *(ii) such contract is for the purposes of carrying out,-*
> *(a) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*
> *(b) Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*
> *(c) Construction of a new residential complex or a part thereof; or*
> *(d) Completion and finishing services, repair, alteration, renovation*

> *or restoration of, or similar services, in relation to (b) and (c); or*
> *(e) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"*

11. We find that various disputes were raised regarding the taxability of Works Contract prior to 01.06.2007 all the disputes got settled in view of the judgment of the Apex Court in the case of L&T. Apex Court has observed as follows:

> *43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.*
> *44. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.*

It is evident from the above that the Composite Contracts involving goods and services are liable to service tax only from 01.06.2007 as submitted by the appellants. We find from the facts of the case that it is not disputed that the services rendered by the appellants are not in the nature of Composite Services. The Department also does not deny the fact that the services rendered by the appellants are Works Contract Services.

12. We find that the Department mainly relies upon the Circular No. 98/1/2008-ST dated 04.01.2008 wherein it was clarified that a service provider who paid service tax prior to 01.06.2007 for the taxable services like Erection, Commissioning and Installation Service, Commercial or Industrial Construction Service or Construction of Complex Service is not

entitled to change the classification of the Single Composite Service for the purposes of payment of service tax on or after 01.06.2007 and therefore, the appellants are not entitled to avail the Composition Scheme. The adjudicating authority relies on the same and concludes that the appellants have no option to switch over to the Works Contract Service and the Composition Scheme thereof. The adjudicating authority in the impugned order as well as learned Authorized Representative in his submissions relies on the ratio of *Nagarjuna Construction Co. Ltd.* (supra). We, however, find that the facts of the case therein are different. The issue before the Apex Court in the said case was as to whether the above cited circular was discriminatory. The Apex Court has held that the Circular is not discriminatory. Hon'ble Court has also held that the appellant has not challenged the validity of Rule 3(3) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and therefore they did not go into the said issue. However, it is worthwhile to note that the above decision was rendered before the landmark judgment in the case of L&T was rendered. Therefore, the same cannot take precedence over the judgment in L&T wherein it was categorically held that Composite Contracts were not taxable before 01.06.2007. We find that neither the CBEC nor the adjudicating authority had the benefit of this judgment at the material point of time. Therefore, in our considered opinion ratio of the judgment of *Nagarjuna Construction Co. Ltd.* (supra) cannot be relied upon in this case.

13. In the instant case, the appellants have been paying service tax under Construction of Complex Services etc. before 01.06.2007. On introduction of service tax on 'Works Contract', the appellants had written

to the Department for clarification. They have submitted a letter on 14.06.2007 that they will be opting for Composition Scheme. The Department has demanded the duty denying the opportunity. We find that the Rule 3 (1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provide as follows:

> *Rule 3 (1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent of the gross amount charged for the works contract.*
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> *Explanation- For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.*
>
> *…*
>
> *(3) 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.*

14. It is clear from the Rule that the person providing Works Contract can pay service tax under Composition Scheme if he opts for the same before payment of service tax. The appellants have exercised the option to go under Compensation Scheme vide letter dated 14.06.2007, the same is not disputed by the Department who sought to deny the benefit in view of the Circular discussed above and the Circular loses its relevance after the judgment in the case of L&T. We find that Tribunal has gone into very same issue in the case of B.R. Kohli Construction Pvt. Ltd. Vs CST, Delhi, 2017 (5) GSTL 182 (Tri. Delhi) and held that Composition Scheme cannot be denied to the appellants merely on the ground of discharge of service tax under different Head prior to 01.06.2007. The Tribunal held in Paragraph 4 as under:

> ***4.*** *We have heard both the sides and perused the appeal records. Admittedly, the contracts executed by the appellants are composite in nature and are rightly to be classified under tax entry "works contract service". As held by Hon'ble Supreme Court in Larsen & Toubro Limited (supra) there is no liability to service tax in respect of indivisible, composite works contract prior to 1-6-2007. The appellants are not contesting their service tax liability under works contract service after 1-6-2007. The dispute is only relating to their entitlement to pay the said tax in terms of the composition scheme of 2007. The Original Authority held that the appellants switched over from 'construction service' to 'works contract service' without intimating the service tax department and thus contravened the provisions of the said scheme. We note that the activities carried out by the appellants are taxable only w.e.f. 1-6-2007. In such situation, it is clear that their payment of tax in terms of composition scheme should be examined for correctness based on the said provisions only. It is seen that there is no format or prescribed specific procedure for exercising separate option under the scheme. After the introduction of new tax entry when the appellants discharged service tax in terms of the applicable provisions, it is clear their entitlement cannot be denied. We note that in terms of calculation in Annexure B to the show cause notice, the differential service tax is only relatable to denial of the said composition scheme to the appellant. We find that the denial of composition scheme by the Original Authority is mainly on the ground that the appellant cannot exercise option under the scheme as the contracts were taxable under 'commercial or industrial construction service'/'construction of complex service' prior to 1-6-2007 and accordingly after 1-6-2007 they cannot opt for payment of service tax under works contract service under composition scheme. We find that in view of the legal position settled by the Hon'ble Supreme Court in Larsen & Toubro Limited (supra) the appellant is not liable to any service tax in respect of these indivisible, composite works contract prior to 1-6-2007. As such, subject to fulfilment of the conditions, the appellants are eligible to discharge service tax on such works contract, after 1-6-2007, in terms of composition scheme of 2007. The reason for denial of the benefit recorded in the impugned order is not sustainable. We find, considering the facts and circumstances of the case, the imposition of penalties on the appellant is not justified. The tax liability of the composite works contract has been a subject matter of large number of litigations and the final legal position was clarified only after the decision of the Hon'ble Apex Court, as above. In such situation, no penalty can be imposed on the appellant, especially when they have discharged service tax in terms of the provisions, as applicable during the relevant time and as per the understanding of such provision during the relevant time. As noted above, the appellants only contested this differential duty and penalties. No other issue is pressed during the submission by the appellant. Accordingly, we allow the appeal with reference to this differential service tax and the penalties. The appeal is accordingly disposed of.*

15. In view of the above, we are of the considered opinion that the benefit cannot be denied to the appellants. We find that Tribunal and Courts have been setting aside the demands raised in respect of Composite Works Contracts after the judgment in the case of L&T. The appellants have been paying duty albeit under a different Head before 01.06.2007. It would be miscarriage of justice if the appellants are

denied the compounded scheme of payment of duty under Works Contract after 01.06.2007 which could have been easily exercised by those who were not paying duty before 01.06.2007. The appellants cannot be put to jeopardy for the reason that they have been paying service tax before 01.06.2007 though they were not legally required to pay in view of the judgment in the case of L&T.

16. Coming to the other issues regarding demand of duty on advances, client held disputed amounts and liability to service tax as a sub-contractor, we hold that as the service itself is not taxable before 01.06.2007, the demands pertaining to the period before 01.06.2007 are not sustainable. The demand on service rendered as a sub-contractor is prior to 01.06.2007. Liability to duty on other two counts after 01.06.2007 requires to be verified as the appellants claimed that they have paid duty at the compounded rates as per the option exercised by them. Moreover, we find that the show cause notice has been issued invoking the extended period. Looking into the fact that the appellant had been a regular service tax payer and have informed the Department vide letter dated 14.06.2007 and as the issue involves interpretation of statute, no *mala fides* can be imputed to the appellants. Therefore, we hold that for this reason also, the demand for the extended period needs to be set aside.

17. The appellants claimed that after 01.06.2007, they have paid duty at the compounded rate of 2.06% or 4.08% as the case may be. It is not forthcoming from the calculation sheets attached to the show cause notice, whether the appellant has paid the same as the Department has

not given any deduction from the duty payable by the appellants. This is required to be verified by the lower authorities along with the verification of the fact of payment of duty on other counts though at the compounded rate.

18. In view of the above, the impugned order is set aside and the appeal is allowed by way of remand to the lower authority with the following directions:

(i) The appellants shall be allowed the option to pay service tax under Composition Scheme at the rates as applicable from time to time.

(ii) Demand is limited to the normal period.

(iii) The service tax paid by the appellants shall be adjusted towards the service tax payable by them under the Composition Scheme and the appellants shall pay the difference in service tax, if any.

(Order pronounced in the Open Court on **05/05/2022**)

(P.ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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