

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing: 06.03.2018

Appeal No. ST/57730/2013-DB

[Arising Out of Order-in-Original No. 3-2013ST dated 31/01/2013
passed by Commissioner of Service Tax-JAIPUR-I (Appeal)]

Vaishno Associates. ... Appellant

Vs.

C.C.E. & S.T.-Jaipur-I ... Respondent

Appearance:

Present Ms Rinki Arora, Advocate for the appellant

Present Shri Ranjan Khanna, AR for the respondent

Coram: Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

FINAL ORDER No. 50871/2018

Per: V. Padmanabhan

1. The present appeal is against Order-in-Original No. 3/2013 dated 05/02/2013. The appellant is engaged in providing Erection, Commissioning or Installation Service. The disputed period is 2008-09 to 2009-10 and the impugned order confirmed demand of Service Tax amounting to Rs. 23,78,205/- along with payment of interest and penalties under various Sections of the Finance Act, 1994. The appeal has been filed against the said order claiming that the activity of the appellant will be entitled to classification under Works Contract Service and further that they will be entitled to the abatement benefit under Notification No. 01/2006 ST dated 01/03/2006. In the alternative the appellant has claimed that they will be entitled to

make payment of Service Tax under the Works Contract Composition Scheme as per the provision of the Composition Rules notified under Notification No. 32/2007 ST dated 22/05/2007.

2. With the above background we heard Ms Rinki Arora, Ld. Counsel appearing for the appellant as well as Shri Ranjan Khanna, the Ld. DR appearing for the Revenue.
3. The Ld. Advocate for the appellant submitted that the appellant will be entitled to the benefit of the Composition Scheme under Works Contract Service; the same has been denied by the Adjudicating Authority for the sole reason that the appellant has failed to file any intimation or option to the Department opting for the payment of Service Tax under the Composition Scheme. She further submitted that if the benefit of the scheme is extended, the total liability of Service Tax will come down to an amount of about Rs. 10 lakhs which already stands paid by the appellant. In this connection she relied on the Tribunal's decision in the case of **ABL Infrastructure Pvt. Ltd. V/s CCE, Nashik reported in 2015 (38) STR 1185 (Tri.-Mumbai)** in which the Tribunal has held that the assessee will be entitled to the benefit of the Composition Scheme even if the option, there or, is exercised at a later date.
4. The Ld. DR justified the impugned order.
5. Heard both sides and perused the record.
6. The activity carried out by the appellant is in the nature of Erection, Commissioning or Installation and for the disputed period i.e. 2008-09 to 2009-10, the activity will also be covered under the category of Works Contract Service (WCS) which was introduced in

the statute w.e.f. 01/06/2007. Under the WCS, the benefit of payment of Service Tax under the Composition Scheme was notified vide Notification No. 32/2007 ST dated 22/05/2007. The notification provides that the service provider is required to opt for payment of Service Tax under the Composition Rules prior to payment of Service Tax in respect of the Works Contract. But on perusal of the record of the present case we note that the appellant has opted for such Composition Scheme after they started making payment of Service Tax under the Works Contract Scheme. For the sole reason for failure to file the intimation prior to payment of Service Tax under WCS, the Adjudicating Authority has denied the benefit of Composition Scheme.

7. We have gone through Tribunal decision cited by the Ld. Counsel for the assessee. In the case of **ABL Infrastructure Pvt. Ltd.** (supra) where a similar issue was considered by the Tribunal. The Tribunal observed in the above case as follows:-

" 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 fulfilled the condition of Rules. The convenience, Rule 3 is extracted below:-

" The provider to taxable service who opts to pay tax under the Rule 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 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 26-09-2007, 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. "

8. By following the decision of the Tribunal in the above case we conclude that there is no justification for denying the benefit of payment of Service Tax under the Works Contract Composition Scheme. In view of the above discussion the impugned order cannot

be sustained in its present form. We set aside the impugned order and remand the matter to the Adjudicating Authority for deciding the issue de novo after extending the benefit of the Works Contract Composition Scheme and requantify the Service Tax payable thereon. He will decide the issue of penalties also accordingly.

9. The appeal is allowed by way of remand.

[Order Dictated and Pronounced in the open court]

(S.K. Mohanty)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Rekha