CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO.50967 of 2017

[Arising out of Order-in-Appeal No.520(AK)ST/JPR/2016 dated 29.12.2016 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Jaipur]

M/S. Bhardwaj Construction and Electricals, **....APPELLANT**
Rampura, Bhatapara, Kota,
Rajasthan-324 004.

Vs.

Commissioner of CGST and, **.....RESPONDENT**
Service Tax, Excise and Customs,
142-B, Sector-11, Hiran Magri,
Udaipur,
Rajasthan-313 002.

Appearance:
Present for the Appellant : Shri Vijai Kumar, Advocate
Present for the Respondent: Ms. Jaya Kumari, Authorised Representative

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.50514 /2025

Date of Hearing :04.03.2025
Date of Decision :23.04.2025

BINU TAMTA:

1. Challenge in the present appeal is to the Order-in-Appeal No.520(AK)ST/JPR/2016 dated 29.12.2016 confirming the service tax amount of Rs.6,23,561/- along with interest and penalty under the provisions of the Finance Act, 1994 [1].

2. M/s. Bhardwaj Construction and Electricals, Kota [2] is engaged in providing services to Nagar Nigam, Kota of labour supply for street light

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[1] The Act
[2] The Appellant

maintenance, laying cables, New light fittings on poles, erection of PCC/RCC Poles and drawing cables under various work orders, the details whereof are as under:-

"(i) Labour supply for ARC street light maintenance **(Work Order dated 3.8.2005 & 13.02.2007);**

(ii) Supply and installation of ARC PCC Poles and Cables **(Work Order dated 20.08.2009);**

(iii) Installation of PCC Poles and ABC cables on annual **rate contract (Work Order dated 6.9.2010); and**

(iv) Installation of submersible pumps on annual rate **contract (Work Order dated 19.01.2011)**"

3. The Department observed that the appellant is providing taxable services to Nagar Nigam, however, they neither obtained Service Tax Registration nor filed the Service Tax Returns. As the appellant failed to provide necessary information and other relevant documents, the Department proceeded on the basis of the information received from the Nagar Nigam and issued show cause notice dated 20.04.2012 demanding a sum of Rs.7,62,639/- on the services provided under the category of 'Manpower Recruitment and Supply Agency', 'Management, Maintenance or Repair Service' and 'Erection, Commissioning or Installation Service'. The Adjudicating Authority classified the services in respect of Work Order dated 31.08.2005 and 13.02.2007 under 'Management, Maintenance or Repair Service' as defined under Section 65(64) and the remaining services under 'Erection, Commissioning or Installation Service'. On Adjudication, the demand was confirmed for a sum of Rs.7,15,712/-along with interest and penalty. The demand of Rs.46,927/- was dropped by way of abatement in terms of Notification No.1 of 2006 dated 01.03.2006.

4. On appeal, the Commissioner (Appeals) re-classified the services under the category of 'Manpower Recruitment and Supply Agency' as defined

under Section 65(68) of the Act. At the same time, the abatement was allowed in respect of Work Order dated 06.09.2010 in terms of Notification No.1/2006. The benefit of cum-tax duty was granted only in respect of contract dated 19.01.2011 as it was inclusive of taxes. Penalty under Section 78 was maintained and the appeal was, accordingly disposed of. Being aggrieved, the present appeal has been preferred before this Tribunal.

5. Heard Shri Vijay Kumar, Advocate for the appellant and Ms. Jaya Kumari, Authorised Representative for the respondent and perused the records of the case.

6. Learned counsel for the appellant has submitted that the services provided by the appellant to Nagar Nigam, Kota and Electricity Board were in the nature of providing civic amenities/facilities and, therefore, no service tax was payable on the value of the services. Learned counsel also relied on the provisions of the Article 243 W of the Constitution of India read with 12th Schedule of the Constitution of India. Learned counsel has argued that the Commissioner (Appeals) has erred in classifying the services in a different category from the one, which has been decided by the Adjudicating Authority. The submission is that the Commissioner (Appeals) could not have challenged the classification and relied on the decisions as under:-

(i) **Commissioner of Service Tax, Mumbai-I Vs. Traffic Manager, Mumbai Port Trust**[3]

(ii) **Commissioner of Customs Vs. Kronos Systems India Pvt. Ltd.** [4]

The issue of cum-tax duty and the erroneous invocation of the extended period of limitation under the proviso to Section 73(1) was also challenged.

[3] 2019 (28) GSTL 55 (Tri.-Mumbai)
[4] (2024) 15 Centax 39 (Tri.-Bang.)

7. Learned Authorised Representative for the respondent has reiterated the findings of the Authorities below.

8. One of the objections taken by the learned counsel for the appellant was to the effect that the show cause notice has been issued in a composite manner without specifying the details of the services and in support has relied on the decision of this Tribunal in case of **O.P. Khinchi Vs. CCE, Jaipur**[5]. We do not find any merits in the submissions made, as noted above, the appellant had not cooperated with the investigation and have not submitted any documents, as a result, the Department had no recourse but to rely on the documents procured from the Nagar Nigam. In absence of the relevant documents, the show cause notice classified the services under 3 categories, i.e. 'Manpower, Recruitment and Supply Agency' as defined under Section 65(68),'Management, Maintenance or Repair Service' as defined under Section 65(64) and 'Erection, Commissioning or Installation Service' defined under Section 65(39a) of the Act. The decision in **O.P. Khinchi (supra)** is not applicable as from the order, it does not appear that the party had not cooperated or the show cause notice has been issued in the absence of the documents by the appellant.

9. We may now deal with the submissions of the learned counsel that the Commissioner (Appeals) has committed an error in changing the classification as confirmed by the order-in-original. The Adjudicating Authority had classified the services of execution of maintenance work of street lights, within the ambit of 'Management, Maintenance or Repair

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[5] 2011 (24) S.T.R. 579 (Tri.-Del.)

Service'. Being aggrieved, the appellant had preferred an appeal, *inter alia,* submitting that the Work Orders dated 3.8.2005 and 13.02.2007 were not covered under the category of ''Management, Maintenance or Repair Service' because prior to 23.08.2007, a labour contractor engaged in supply of labour work contractor is not liable to pay service tax and thus, the activity of the appellant in respect of labour is not covered by service tax during the period 1.10.2006 to 23.08.2007. In view of the findings recorded by the Adjudicating Authority and the grounds of appeal taken by the appellant, the Commissioner (Appeals) was required to examine whether the service in question would be covered under the category of "Management, Maintenance or Repair Service' or not. On the contrary, the learned Commissioner erroneously formulated the question whether the work done of labour supply for ARC street light, maintenance under Work Orders dated 3.8.2005 and 13.02.2007 are covered under the ''Management, Maintenance or Repair or 'Manpower, Recruitment & Supply Agency' services. The question formulated and the findings recorded by the Appellate Authority are, therefore, erroneous as the scope of the appeal was limited to classification under ''Management, Maintenance or Repair Service'. We, therefore, set aside the order of the Commissioner (Appeals) to the extent it had classified the services rendered in relation to the Work Orders dated 3.8.2005 and 13.02.2007 within the purview of ''Manpower Recruitment and Supply Agency Service" and remand the issue of classification to be reconsidered as referred above.

10. With reference to Work Orders dated 20.08.2009 and 06.09.2010 for installation of PCC Poles and ABC Cables, etc., the Adjudicating Authority had classified the services to be taxable under Section 65(105)(zz) as "Erection, Commissioning and Installation Services" defined under Section

65(39a) of the Act. Referring to the provisions of CBEC Circular No.332/5/2010-TRU dated 24.05.2010, however, the Commissioner has not recorded any finding thereto. The learned counsel for the appellant referring to the said circular has pointed out that the present activity of laying cables, etc. would fall under the Sl.No.2 and 3 where the taxable status has been given as 'not taxable'. The same is quoted below:-

3. The taxable status of various activities, on which disputes have arisen-

Based on the foregoing, the following would be the tax status of some of the activities in respect which disputes have arisen:

Sl.No.	**Activity**	**Status**
1.	Shifting of overhead cables/wires for any reasons such as widening/renovation of roads.	Not a taxable service under any clause of sub-section (105) of Section 65 of the Finance Act, 1994.
2.	**Laying of cables under or along side roads.**	Not a taxable service under any clause of sub-section(105) of Section 65 of the Finance Act, 1994.
3.	**Laying of electric cables between grids/sub-stations/transformer stations enroute.**	Not a taxable service under any clause of sub-section(105) of Section 65 of the Finance Act,1994
4.	Installation transformer/sub-stations undertaken independently.	Taxable service namely 'Erection, Commissioning or Installation' services [Section 65(105)(zzd)]
5.	Laying of electric cables up to distribution point of residential or commercial localities /complexes.	Not a taxable service under any clause of sub-section (105) of Section 65 of the Finance Act, 1994.
6.	Laying of electric cables beyond the distribution point of residential or commercial localities /complexes.	Taxable service namely'Commercial or Industrial Construction' or 'Construction of Complex' service [Section 65(105)(zzq)(zzh)], as the case may be.
7.	Installation of street lights, traffic lights, flood lights or other electrical and electronic appliances/devices or providing electric connections to them.	Taxable service, namely 'Erection, Commissioning or Installation' services [Section 65(105)(zzd)]
8.	Railway electrification, electrification along the railway track.	Not a taxable service under any clause of sub-section (105) of Section 65 of the Finance Act, 1994.

11. We are of the opinion that the Commissioner (Appeals) may also examine the issue of taxability of the services rendered with reference to the Work Orders dated 20.08.2009 and 06.09.2010 with reference to the provisions of the Circular.

12. The learned counsel for the appellant has claimed the benefit of cum-duty tax, which has been rejected by the Commissioner (Appeals) on the ground that if the invoice does not say that the gross amount charged includes services tax, it cannot be treated as cum-service tax and the benefit thereby cannot be extended. The learned counsel has referred to the Work Orders dated 20.08.2009 and 06.09.2010, 'terms & conditions' of which provided:-

"(8) Above rates are including all taxes".

We, therefore, hold that the appellant is entitled to the benefit of cum-tax duty and the matter is remanded to the Commissioner (Appeals) for quantification of duty element granting the benefit of cum-tax duty.

13. On the issue of extended period of limitation, the appellant has submitted that they were under the bonafide belief that no service tax was payable on the value of the services rendered by them to Nagar Nigam as the services were not for commercial or industrial use and, therefore, non-payment of service tax is not intentional. The law on the issue of invocation of extended period of limitation has been settled that something positive other than mere inaction or failure on the part of the assessee is proved. Conscious or deliberate withholding of information by the assessee is necessary to invoke the extended period of limitation. Without multiplying too many decisions, we would refer to the case of **Savira Industries**

versus Commissioner of Central Excise, Chennai–II [6]**,** where it was held held that the assessee was under bonafide belief that mere cutting, welding of steel pipes and sheets did not amount to manufacture as no new commodity emerges and there was no marketability and therefore would attract excise duty. In the circumstances, the demand was held to be hit by limitation. The Tribunal further observed that the concept of bonafide belief is not unknown in the taxation laws and the assessee has to be given benefit in the facts and circumstances of the case where bonafide belief can be on variant account. We therefore, hold that the invocation of the extended period in the present case is not justified in the absence of any strong allegation or positive act, pointing towards fraud, collusion, or any wilful mis-statement or suppression of facts with intent to evade payment of duty. In view thereof extended period is not invokable and no penalty is imposable on the appellant.

14. The peculiar facts of the present case also do not justify invocation of the extended period of limitation for the simple reason that the Adjudicating Authority had made the services taxable under the category of "Management, Maintenance or Repair Service', whereas the Adjudicating Authority had classified them under "Manpower Recruitment and Supply Agency Service". When the two departmental authorities have differed themselves on the taxability of the services under a specific category, no suppression or wilful concealment with intent to evade payment of duty can be attributed to the appellant.

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[6] 2016 (331) ELT 504 (Tri.-Chennai)

15. We set aside the impugned order to the extent indicated above and remand the appeal to the Commissioner (Appeals) to re-consider the issues as under:-

1) Whether the services rendered in respect of Work Orders dated 3.8.2005 and 13.02.2007 are classifiable under ""Management, Maintenance or Repair Service', as defined under Section 65(64) of the Act.

2) Whether the services with respect to Work Order dated 20.08.2009 and 06.09.2010 are classifiable under 'Erection, Commissioning or Installation Service' as defined under Section 65(39a) of the Act and whether they are entitled to the benefit under the Circular dated 24.05.2010.

3) Re-quantify the duty element after granting the benefit of cum-tax duty.

16. The appeal is accordingly allowed by way of remand.

[Order pronounced on 23rd April, 2025]

(Binu Tamta)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

Ckp.