

2014 (2) ECS (248) (Tri - Del.)

In the Customs, Excise & Service Tax Appellate Tribunal

West Block No. 2, R.K. Puram, New Delhi-110066

Principal Bench, New Delhi

M/S. BRAHMPUTRA INFRASTRUCTURE LTD.

VS.

CST, DELHI

Date of Hearing: 29.04.2014

Date of Decision: 27.05.2014

Appeal Nos. ST/56258-56261/2013 along with Service Tax Stay No. 56733-56736/2013 and Misc. No. 60944-60947/2013

Appearance:

Shri A.K. Batra, CA

for the appellant

Shri Amresh Jain, DR

for the respondent

CORAM

Hon'ble Mr. Justice G. Raghuram, President

Hon'ble Mr. Rakesh Kumar, Member (Technical)

Stay Order No. 51898-51901/2014

The excavation work carried out by the appellant is in respect of the Hydro-electric Power Generation Plant, which is part of the Hydro-electric dam. We are, therefore, of the prima facie view that this `excavation job, though done for excavating the earth to create ample space for building cemented structure for powerhouse and tunnel (tailpool), which is an essential part of the Hydro-electric dam, has to be treated as in course of construction of dam, and would be eligible for exemption under notification no.17/2005-ST. (Para 6)

The service provided to WBHIDC is the site preparation for housing project of West Bengal Government. Since the nature of this work is the Site properties by filling up low lying lands with earth, the same prima facie is covered by Section 65 (105)(zzza) of the Finance Act, 1994 and therefore, would attract service tax. (Para 7)

We find that so far as the service of site preparation provided to WBHIDC is concerned, there is no explanation from the appellant as to why the value of this service was not declared in the ST-3 Returns and why the service tax was not paid. The non-payment of service tax on the service provided to WBHIDC was detected only during scrutiny by the

Department in course of audit conducted during June, 2010. Therefore, we are of the prima facie view that the appellant have suppressed the relevant facts from the department and hence, extended period would be invocable. (Para 8)

Per Rakesh Kumar:

The facts leading to filling of these appeals and stay applications are, in brief, as under:-

1.1 The appellant are providing various taxable services such as Consulting Engineers Service, Management, Maintenance or Repair Service, Survey and Exploration of Mineral, Site preparation, clearance excavation earthmoving and demolition Services mining Services, Works Contract Service, Supply of Tangible Goods Service, etc. The period of dispute in this case is from 1.4.2005 to 31.3.2012 and the dispute is in respect of the certain services provided by the appellant to M/s. Larsen & Toubro Ltd. (M/s L&T Ltd.) in connection with a Hydroelectric dam project and to West Bengal Housing Infrastructure Development Corporation (WBHIDC) in relation to site preparation for construction of a housing complex by filling-up of low lying lands with earth. The services provided to M/s L&T Ltd. were for carrying out Open Excavation of Surface Powerhouse and Tail Pool of a Hydro Electric Project and the purpose of excavating was to create ample space for building cemented structure for power house and tunnel, which is an essential part of a hydro-electric dam. According to the department, all the services provided by the appellant company to M/s. L&T Ltd. and WBHIDC are "Site Formation and Clearance, Excavation and Earthmoving and Demolition Services" taxable under Section 65 (105) (zzza) read with Section 65 (97a) of the Finance Act, 1994. The Department views that since the services of "Excavation" provided to M/s. L & T Ltd. are not in the course of construction of dam but are in connection with the construction of Hydro-electric Generations Station, the same would not be exempt from service tax under notification no.17/05-ST dated 17.06.2005. It is on this basis that four show cause notices dated 30.09.2010 for demand of service tax for the period from 1.4.2007 to 31.3.2009 dated 14.09.2011 for demand of service tax for the period from 1.4.2005 to 31.3.2007 dated 11.10.11 for demand of service tax for the period from 1.4.2009 to 31.3.2011 and dated 8.10.2012 for demand of service tax for the period from 01.4.2011 to 31.3.2013 were issued under proviso to Section 73 (1) of the Finance Act, 1994. These show cause notices, besides demand of service tax, also demanded interest on the same under Section 75 and sought imposition of penalty on the Appellant under Sections 76, 77 & 78. The longer limitation period under proviso to Section 73

(1) has been invoked on the basis of the allegation that the appellant had suppressed the relevant facts in respect of the services provided to M/s. L & T Ltd. and WBHIDC and the value of these services was not reflected in the ST-3 Returns.

1.2. The four show cause notices were adjudicated by the Commissioner by a common Order-in-original dated 30.11.2012 by which he confirmed service tax demands of Rs.1,72,76,204/-, Rs.3,11,34,335/-, Rs.49,63,761/- and Rs.3,63,417/- in respect of the periods from 1.4.2007 to 31.3.2009, 1.4.2005 to 31.3.2007, 1.4.2009 to 31.3.2011 and 1.4.2011 to 31.3.2012 respectively. The Commissioner confirmed these demands by invoking extended period of limitation under Section 73 (1) and also demanded interest on the service tax under Section 75 of the Finance Act, 1994. While penalty under Section 77 and 78 were imposed on the appellants, in respect of the show cause notice dated 30.09.2010 and thus in respect of this show cause notices, penalty of Rs.1,72,76,204/- under Section 78 was imposed besides penalty of Rs.10,000/- under Section 77, in respect of other show cause notices, only penalties under Section 76 and 77 were imposed and the penalty under Section 78 was not imposed.

1.3 Against the above orders of the Commissioner, these four appeals have been filed along with the stay applications.

1.4. The misc. applications have been filed for early hearing of the stay applications as the Department is pressing hard for recovery.

2. The Misc. application for early hearing of the stay application are allowed and accordingly, the matter was heard in respect of the stay applications.
3. Shri A.K. Batra, CA., Id. Counsel for the appellants, pleaded that the work of Open Excavation of Surface Power House & Tail Pool at the Project being executed by M/s. L& T Ltd. is the work in course of construction of a Hydro-electric dam, as tailpool is a tunnel constructed below the surface area, that leads water from power house to river and power house is a closed heavy physical structure constructed below the surface where turbines are located, that in a hydro electric dam project, power house and tailpool constitute an integral part in course of construction of the hydroelectric dam structure to hold back the water and generate electricity, that in view of this, the services provided to M/s, L&T Ltd would be exempt from service tax under exemption notification no.17/2005-ST dated 7.6.2005, which exempts site formation and clearance, excavation and earthmoving and demolition services and such other similar activities referred to in sub-section (1) of Section 65 (105) (zzza) of Finance Act, 1994 provided to any person

by another person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports from the whole of the service tax leviable thereon, that the department's contention that the job of open excavation of surface power house & tailpool is not in course of construction of dam but is the job in course of execution of a Hydro-electric power project is not correct, that the Commissioner has grossly erred in denying the exemption under notification no. 17/2005-ST on the ground that the activity undertaken by the appellant in respect of the project of M/s. L & T Ltd. is not in course of construction of dam, but is in the process of construction of dam, that this finding of the Commissioner is absolutely incorrect; that the services provided to WBHIDC, as is clear from the work order placed by the service recipient, involve filling a low paying area with earth to make the same suitable for housing projects and the requisite quantity of earth was to be procured from places not more than 8 kms from the work site, preferably from Bheries (fish ponds), that this service provided to WBHIDC involves dredging of fish ponds so as to desilt them and using the earth for filling up low lying areas to make them suitable for housing projects to be undertaken by the Government of West Bengal, that this service is a composite service of restoration of Bheries (fish ponds) by dredging and hence no service tax would be leviable on the value of the service for restoring of the bheries, that is in the show cause notice dated 30.09.2010, in respect of which the service tax demand of Rs.1,72,76,204/- has been confirmed. an amount of about Rs.90 Lakhs is in respect of the services provided to M/s. L & T Ltd. which are exempt from service tax under notification no.17/2005-ST and only the remaining demand of about Rs.80 Lakhs is in respect of the services provided to WBHIDC, a major portion of which is in respect of restoration of bheries, which is not taxable, that the show cause notice dated 14.09.2011 for demand of service tax of Rs.3,11,34,335/- for the period 1.4.2005 to 31.3.2007 in respect of the services provided to M/s.L & T and WBHIDC is time barred, as this demand would survive only if the extended period under proviso to Section 73 is invocable, and the same is not invocable in view of the judgement of the Apex Court in the case of Nizam Sugar Mills reported in 2006(177) ELT-465(SC) as on the basis of the same facts an earlier show cause notice dated 30.09.2010 for the period 1.4.2007 to 30.3.2009 had been issued by invoking extended limitation period and hence, all the facts were known to the department, and that as regards the show cause notice dated 11.10.11 and 8.10.2012 for demand of service tax of Rs.49,63,761/- and Rs.3,63,417/- respectively, service tax demand confirmed in respect of these show cause notices also include the service tax demanded on the amount charged for dredging of the fish pond which is not

taxable. Shri Batra, therefore, pleaded that the appellant have strong prima facie case in their favour and hence, the requirement of pre-deposit of service tax demands, interest thereon and penalty may be waived for hearing of the appeals and recovery thereof may be stayed till the disposal of the appeals.

4. Shri Amresh Jain, Id. Departmental Representative, opposed the stay applications by reiterating the findings of the Commissioner in the impugned order. With regard to service tax demand on the service of open excavation of surface power house and tailpool provided to M/s. L & T Ltd. he pleaded that this excavation activity is not in course of construction of dam but in course of construction of Hydro-electric Power Plant and hence, this activity of the appellant is not covered by exemption notification no.17/2005-ST, this exemption notification covers only the services of site formation and clearance, excavation, earthmoving and demolition, provided in the course of construction of dams, tunnels, roads, ports, railways, transport terminals, bridges, etc., that as regards the service of earth filling to make the site suitable for construction of housing complexes provided to WBHIDC, though the appellant's contract with WBHIDC provides that the requisite quantity of earth required for raising the level of the land for housing projects is to be arranged from the 'bheries', there is no evidence to show that the earth was really brought from bheries and therefore the appellant's plea that the of the amount charged for this service is for dredging of the bheries (fish ponds) is not acceptable. He pleaded that the services provided to WBHIDC is covered by Section 65 (105) (zzza) of the Finance Act, 1994 and hence, the same would attract service tax. He also pleaded that the longer limitation period has been correctly invoked, as the appellant did not reflect the value of these services provided to M/s. L&T Ltd. and WBHIDC in ST-3 Returns" J filed by them. With regard to the appellant's plea that the show cause notice dated 14.09.2011 for demand of service tax for the period from 1.4.2005 to 31.3.2009 is time barred, he pleaded that the delay in issue of the show cause notices was only on account of delay on the part of the appellant in furnishing the required information and in any case since during the period from 1.4.2005 to 31.3.2009, the appellant in respect of providing the taxable services to M/s. L & T Ltd., and WBHIDC, had not disclosed the same to the Department and had not declared their value in the ST-3 Returns filed by them, they are guilty of suppressing the relevant facts from the department and hence, the longer limitation period has been correctly invoked and penalty under Section 78 also has been correctly imposed. He, therefore, pleaded that this is not the case for waiver from the requirement of predeposit.

5. We have considered the submissions from both the sides and perused the records.
6. The service tax demands covered by the form show cause notices for the period from 1.4.2005 to 31.3.2012 are in respect of the services provided by the appellant to M/s L & T Ltd. in respect of their Hydro- electric dam Project, wherein the appellant had provided the services of Open Excavation for Surface Power House and Tailpool and to WIHIDC in respect of their housing projects where the services provided by the appellant was filling up of low lying lands by earth to make the same suitable for housing projects. We are of the view that the activity of the appellant in both the projects is covered by "site formation and clearance, excavation, earth moving and demolition and such other similar activities" taxable under Section 65 (105) (zzza) of the Finance Act, 1994. However, in respect of the services of excavation provided in respect of the Hydro-electric Dam Project being executed by M/s. L & T Ltd. , the appellant's plea is that this service is fully exempt from service tax under exemption notification no.17/2005-ST dated 7.6.2005 which exempts from the whole of the service tax leviable thereon, the service of "site formation and clearance, excavation, earthmoving and demolition and such other similar activities" provided to any person by any other person in course of construction of roads, airports, railways, transporter terminals, bridges, tunnels, dams, roads and ports. The excavation work carried out by the appellant is in respect of the Hydro-electric Power Generation Plant, which is part of the Hydro-electric dam. We are, therefore, of the prima facie view that this `xcavation job, though done for excavating the earth to create ample space for building cemented structure for powerhouse and tunnel (tailpool), which is an essential part of the Hydro-electric dam, has to be treated as in course of construction of dam, and would be eligible for exemption under notification no.17/2005-ST.
7. The service provided to WBHIDC is the site preparation for housing project of West Bengal Government by filling up low lying landf with earth, which in terms of the contract was t preferably brought from bheries (fish ponds). Since the nature of this work is the Site properties by filling up low lying lands with earth, the same prima facie is covered by Section 65 (105)(zzza) of the Finance Act, 1994 and therefore, would attract service tax.
8. Another plea of the appellant is that duty demand of Rs.3,11,34,335/- for the period from 1.4.2005 to 31.3.2007 in respect of the services provided to L & T Ltd. and WIHIDC raised vide show cause notice dated 14.09.2011 is totally time barred inasmuch as on the basis of

the same facts, show cause notice dated 30.09.2010 for demand of service tax for period from 01.04.2007 to 31.03.2009 had been issued by invoking the proviso to Section 73 (1) of the Finance Act, 1994 and, therefore, in view of the Apex Court's judgement in the case of Nizam Sugar Ltd.(supra) , the extended period in respect of the subsequent show cause notice dated 14.09.2011 for the period from 1.4.2005 to 31.3.2007 would not be invocable. The department's plea on this point is that the appellant had never reported the services provided by them to M/s. L &T Ltd. in respect of their Hydra-electric Dam Project and to WBHIDC in respect of site preparation for housing projects and value of these services was never declared in the ST-3 Returns filed by them from time to time and the Department came to know about these transactions only in course of audit by the Directorate General of Audit (DGA) during June, 2010 and since at that time, the appellant had not furnished information in respect of the amounts received by them from M/s. L&T Ltd. and WBHIDC for the period 1.4.2001 to 31.3.2005, the service tax demand for this period could not be included in the show cause notice dated 30.09.2010 and the demand for this period had to be issued by the subsequent show cause notice dated 14.09.2011. It has, therefore, been pleaded on behalf of the department that the judgement of the Apex Court in the case of Nizam Sugar Ltd. (supra) would not be applicable in respect of the show cause notice dated 14.09.2011. Prima facie, we find that so far as the service of site preparation provided to WBHIDC is concerned, there is no explanation from the appellant as to why the value of this service was not declared in the ST-3 Returns and why the service tax was not paid. The non-payment of service tax on the service provided to WBHIDC was detected only during scrutiny by the Department in course of audit conducted during June, 2010. Therefore, we are of the prima facie view that the appellant have suppressed the relevant facts from the department and hence, extended period would be invocable and the show cause notice dated 14.09.2011 would not be hit by the ratio of the Apex Court's judgement in the case of Nizam Sugar Mills Ltd. (supra) as the show cause notice for the period 1.4.2005 to 31.03.2012 had to be issued separately in September, 2011, as the information for this period was not provided by the appellant earlier. As regards the show cause notice dated 11.10.11 and 8.10.12 in respect of site preparation services provided to WBHIDC, the same are within time. Thus even if the service provided by the appellant to M/s. L & T Ltd. in respect of their Hydro-electric Dam Project are held as exempt from service tax under Notification No.17/2005, still there would be service tax liability to the tune of about Rs.3 Crores in respect of service of site preparation provided to WBHIDC and hence, while granting waiver

from the requirement of pre-deposit, Revenue's interests have to be safeguarded to this extent. Accordingly, we direct the appellant to deposit an amount of Rs.3 Crores (Rupees Three Crores only) within a period of 8 weeks from the date of this order. On payment of this amount within the stipulated period, the requirement of pre-deposit of balance amount of service tax demand, interest thereon and penalty would stand waived and its recovery stayed till the disposal of the appeals. Compliance to be reported on 6th Aug 2014.

(Order pronounced on 27/05/2014).