

No service tax on repair of Roads - Commissioner (Appeals)

**OFFICE OF THE COMMISSIONER, CUSTOMS, CENTRAL EXCISE & SERVICE
TAX (APPEALS)
4th Floor, CUSTOM HOUSE; PORT AREA, VISAKHAPATNAM - 530 035**

APPEAL NO.5/2008(V-I) S.Tax Dated: 16.03.2009

ORDER- IN-APPEAL NO.27/2009(V-I) ST

**PASSED BY Shri P.J.R. SEKHAR, I.R.S., COMMISSIONER (Appeals),
VISAKHAPATNAM]**

PREAMBLE (ST)

This copy is granted free of cost for the private use of the person to whom it is issued.

2. Any assessee aggrieved by this Order, may appeal in Form ST-5 to the Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, 1st Floor, WTC Building, FKCCI Complex, Kempe Gowda Road, Bangalore - 560 009 against it, under Section 86(1) of the Finance Act, 1994 (The Act), read with Rule 9(1) of the Service Tax Rules 1994 (The Rules).

3. Under Section 86(2A) *ibid*, the Commissioner of Central Excise may, if he objects to any order passed by the Commissioner of Central Excise (Appeals) under Section 85 *ibid*, direct the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

4. Under Section 86(3) *ibid*, Every appeal under sub-section (1) or Sub-Section (2) or sub-section (2A) of Section 86 of the Act shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.

5. Under Section 86(4) *ibid*, read with Rule 9(3) of the Service Tax Rules, 1994. The Commissioner of Central Excise or Assistant Commissioner of Central Excise or Duty Commissioner of Central Excise or the assessee, as the case may be, on receipt of a notice that an appeal against the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) or Sub-Section (2A) by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, in Form ST-6 in quadruplicate, against any part of this order, and such memorandum shall be

disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3) of Section 86 *ibid*.

6. Under Section 86(5) *ibid*. The Appellate Tribunal may admit an appeal or permit the filling of a memorandum of Cross-objections after the expiry of the relevant period referred to in sub-section (3) or Sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

7. Under Section 86(6) *ibid* read with Rule 9(1) of Service Tax Rules 1984, an appeal to the Appellate Tribunal shall be made in Form ST-5 in quadruplicate and shall be accompanied by a copy of the Order appealed against (one of which shall be a certified copy); and shall, except in the case of an appeal referred in sub-section (2) or sub-section (2A) or a memorandum of cross-objections referred to in sub-section (4), be accompanied by a fee-

(a) Where the amount of Service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) Where the amount of Service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal related is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) Where the amount of Service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupee, ten thousand rupees.

BRIEF FACTS OF THE CASE:

The appellant M/s. G.R. Constructions are contractors engaged in the activity of construction and laying of roads. On gathering intelligence that the assessee evaded payment of service tax, the officers of the Head Quarters Anti-Evasion, Visakhapatnam-I Commissionerate conducted investigations and come across evidence showing the appellant have indulged in rendering construction service and management, maintenance or repair services and thereby evaded payment of service tax. The officers found that the appellant rendered construction service to M/s. HPCL, Visakhapatnam and management, maintenance or repair service to various clients like R & B department of Andhra Pradesh State Government APIIC and other clients.

2. During the course of investigation, the appellant agreed with his liability to service tax on the commercial construction carried out and paid an amount of Rs.9,20,046/- in two branches towards service tax. The appellant has not agreed with the view of the department that the activity carried out by him in respect of roads fall under management, maintenance or repair of immovable property but contended that the same fall under commercial or industrial construction service as evidenced by the letters issued by the authorities who have awarded the contracts and the same is exempted from service tax in the Act itself. The appellant also contested that in as

much as the activity of laying road itself is exempted the activity of repairs to roads cannot be subjected to levy.

3. A notice has been issued to the appellant and the adjudicating authority has confirmed the demand in respect of both the services. The adjudicating authority has also demanded interest and imposed penalties under various provisions of the Finance Act, 1994. In respect of commercial construction service there is no dispute between the department and the appellant. The dispute is with regard to demand of service tax in respect of activities carried out by them in respect of roads under management, maintenance or repair service and imposition of penalties under various provisions of the Finance Act, 1994.

4. The adjudicating authority has confirmed the demand under management, maintenance or repair service on the ground that the activity carried out by them does not amount to Construction of a Road as the same involves 1.Stripping of the top soil within the road reserve; 2.Removal of in-situ ground using a heavy motorized greater to a specified level (Road-bed level); 3. Compacting the road-bed level using a heavy vibratory road roller (to the required density) after which the pavement layers can be imported; 4.Importing of the first pavement layer-a selected sub-grade (SSG) - which is usually a gravel type material; 5.Levelling off the placed material by a grader and compacting to a required density using a road roller; 6.Importing of the next layer - a sub-base (higher quality than the selected sub-grade - which is usually a gravel type material having higher California Bearing Ratio (CBR); 7.Working the material of the sub-base by a grader and simultaneously mixing with water to aid compaction; 8. Importing of the final layer, the base course consisting of gravel or crushed stone; 9. Levelling and compacting of the base course and 10.Placing of a surface course on the top of the base course, consisting of asphalt concrete or a seal consisting of a mixture of similar sized small stones, bitumen and Portland cement. Based on the above process mentioned in www.wikipedia.com the adjudicating authority concluded that though the authorities issued letters indicating the activity carried out by the appellant is not repairs since they have not carried out the processes enumerated above, the same does not fall under commercial or industrial construction service.

5. The appellant has contended that the activity carried out by them amount to laying of roads and produced the letters issued by the authorities who awarded the contracts; that the same is exempted from tax vide Section 65(25b) of the Finance Act, 1994; that when the main activity of laying road is not liable to tax the activity of repair to roads does not attract tax and that non payment of tax on their part is due to bona fide error of interpretation of statute and requested to set aside the order of lower authority. The appellant has attended the personal hearing on 12.02.2009 and reiterated the contentions put forth vide grounds of appeal. No cross objections are filed by the department or any body attended the personal hearing.

FINDINGS:

6. I have gone through the entire case records and the contentions put forth by the appellant.

7. I find from the records the appellant has not disputed his liability to tax on the construction service carried out by him but resisted the penalties imposed under various provisions of the Finance Act, 1994. The dispute is with regard to demand of tax under the head management, maintenance or repair service on the activities carried out by them in respect of roads. The adjudicating authority has confirmed the demand on the sole ground that the appellant has not carried out of the processes of 1. Stripping of the top soil within the road reserve; 2. Removal of in-situ ground using a heavy motorized grader to a specified level (Road-bed level); 3. Compacting the road-bed level using a heavy vibratory road roller (to the acquired density) after which the pavement layers can be imported; 4. Importing of the first pavement layer-a selected sub-grade (SSG) - which is usually a gravel type material; 5. Levelling off the placed material by a grader and compacting to a required density using a road roller; 6. Importing of the next layer -a sub-base (higher quality than the selected sub-grade) - which is usually a gravel type material having higher California Bearing Ratio (CBR); 7. Working the material of the sub-base by a grader and simultaneously mixing with water to aid compaction; 8. Importing of the final layer, the base course consisting of gravel or crushed stone; 9. Levelling and compacting of the base course and 10. Placing of a surface course on the top of the base course, consisting of asphalt concrete or a seal consisting of a mixture of similar sized small stones, bitumen and Portland cement. Construction of road alone is exempted vide Section 65(25b) of the Finance Act, 1994 and going by the activities carried out by the appellant it can not be termed as construction of road but only repairs.

8. As seen from the definition of Commercial or Industrial Construction Service given vide Section 65(25b) of the Finance Act, 1994 the same has been defined as

"Commercial or industrial construction service" means-

- a Construction of a new building or a civil structure or a part thereof; or
 - b Construction of pipeline or conduit; or
 - c completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
 - d repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is -
 - (i) used, or to be used, primarily for; or
 - (ii) occupied, or to be occupied, primarily with; or
 - (iii) engaged, or to be engaged, primarily in,
-

an intention to evade payment of tax. One can understand intention to evade tax if the liability is on the appellant but when it is reimbursable at actuals by the principals how any body can say there is an intention to evade tax. It is not the case of the department that the appellant received the service tax amount from their principals and appropriated the amount. A standard format of contract generally contains the sharing of liabilities of taxes and that does not mean that they are aware of tax liability. Moreover, service tax is a new levy and not every body is thorough with the provisions. The appellant has paid the tax in two branches on 11.8.2006 and 10.10.2006 and the notice is issued on 17.01.2007. This shows that the appellant has paid the tax amount as soon as he came to know about his tax liability. The contention of the appellant that non payment of tax is due to bonafide error is acceptable. In accordance with the provisions of Section 80 of the Finance Act, 1994, the appellant is not liable for penalties under Sections 76, 77 and 78 of the Finance Act, 1994.

12. Keeping in view the above discussions, I pass the following order.

ORDER

1. The appellant is not liable for tax on the activity of repairs carried out on roads. Consequently, the demands confirmed under paras III & IV of the order under challenge are set aside.
2. The penalties imposed under Sections 76, 77 and 78 of the Finance Act, 1994 under paras VI, VII & VIII of the order under challenge are set aside.
3. The appellants are liable to pay interest on the amounts confirmed vide paras I & II of the order under challenge.

(P.J.R. SEKHAR)
Commissioner (Appeals) Central Excise, Customs & Service Tax
Visakhapatnam

By RPAD/SPPED POST/COURIER

1. M/s. G.R. Constructions, Flat No.104, MIG-II/A, Opp. Coromandel gate sriharipuram, Visakhapatnam-1.
2. Copy submitted to the Chief Commissioner of Central Excise & Customs, Visakhapatnam Zone, Visakhapatnam .

Copy to

3. The Commissioner of Customs, Central Excise & Service Tax Visakhapatnam -I
Commissionerate// By name to Supdt.(Trib.)//
-

4. The Additional Commissioner of Customs, Central Excise & Service Tax,
Visakhapatnam - I Commissionerate

5. M/s. GR Kumar & Co., No.9 Merry Life Apartments, Doctor's Colony, Peda Waltair,
Visakhapatnam- 17.