CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>WEST ZONAL BENCH AT AHMEDABAD</u>

<u>REGIONAL BENCH – COURT NO. 03</u>

Excise Appeal No. 10973 of 2014

[Arising out of OIO-VAP-EXCUS-000-COM-068-13-14 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

M/s IMP Powers Ltd **.....Appellant**
Survey No. 263/3/2/2,
Village : Sayli, Umerkuin Road,
Silvassa,
U T Of Dadra & Nagar Haveli.

VERSUS

C.C.E. & S.T.-Vapi **.....Respondent**
4th Floor, Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road,
Vapi, Gujarat

WITH

i. **Excise Appeal No.10959 of 2014 (Aaditya Ramniwas Dhoot)**
ii. **Service Tax Appeal No. 10971 of 2014 (IMP Powers Ltd)**
iii. **Service Tax Appeal No. 10972 of 2014 (Aaditya Ramniwas Dhoot)**
iv. **Service Tax Appeal No. 11200 of 2014 (Sunil Hitech Engineers Ltd)**

[Arising out of OIO-VAP-EXCUS-000-COM-068-13-14 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

<u>APPEARANCE</u>:

Sh. M.H. Patil & T.C. Nair, Advocate for the Appellant
Sh. Sameer Chitkara, AR for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. <u>A/ 11052-11056 /2019</u>

DATE OF HEARING: 02.04.2019
DATE OF DECISION: 03.07.2019

<u>RAMESH NAIR</u>

These appeals have been filed by M/s IMP Powers Ltd, M/s Sunil Hitech Engineers and Aaditya Ramniwas Dhoot against Order-in-Original dated 11.12.2013 wherein the adjudicating authority has confirmed demand of duty along with interest and penalty against the Appellant and also confirmed the demand of service tax and penalty. It also imposed penalty upon Shri Aaditya Ramniwas Dhoot and M/s Sunil Hitech Engineers. The brief facts of the case are that the Appellant M/s IMP power are manufacturer of transformers and has entered into separate contracts for supply of transformer and erection of transformers. The Appellant supplied the transformer on payment of duty and thereafter erected and commissioned the transformer and charged service tax on such services under Works Contract Services under Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. They were issued show cause notice alleging that the supply and erection and commissioning cannot be vivisected. That the Appellant is not eligible to avail the cenvat credit on inputs used in manufacturing of transformers as they have discharged the service tax liability under the Works Contract Composition Scheme thereby making them ineligible from availing cenvat. Accordingly it was proposed to demand duty equal to cenvat credit availed by the Appellants on inputs consumed in the manufacture of transformer as well to impose penalty and recover interest. It was also proposed to demand service tax by including the value of transformer in value of services and accordingly service tax demand of differential service tax was made along with interest and proposed to impose penalty. The adjudicating authority vide impugned order held that M/s Sunil Hitech Engineers were given contract by Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) and Maharashtra State Electricity Transmission Co. Ltd (MESTCL) which has been further splitted in the form of purchase order and works order and where both the goods and services are involved in execution of any contract, this would be treated as Works contract service. That in terms of Notification No. 32/2007 dated 22.05.2007 the valuation of services fall under the works contract services in terms of composition scheme for payment of service tax w.e.f 01.06.2007 and that the Appellant has suppressed the value of services by non inclusion of value of transformer. Also the credit of inputs used in manufacture of transformer is not available under composition scheme. He therefore vide impugned order confirmed the demand of cenvat and service tax along with equal amount of penalties and penalty on M/s Sunil Hitech Engineers, hence the present appeals.

2. Ld. Counsel Shri M.H. Patil & T.C. Nair appearing for the Appellant submits that they were given separate contracts for supply of

transformer as well as erection and commissioning of same. In purchase order also both the values are appearing separately. They have paid central excise duty on value of transformers and therefore are eligible for the credit being input. Under Works Contract (Composition Scheme for payment of service tax) Rules, 2007 as existed prior to 06.07.2009 there was no requirement of including the free issue material used for carrying out works contract. All supplies and erection were prior to 07.07.2009. That free issue materials were not includible for the composition scheme. He relies upon the following:

(i) Rule 3 of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 as existed prior to 06.07.2009
(ii) Rule 3 of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 as existed w.e.f 07.07.2009
(iii) Para 5.1 of CBEC Circular No. 334/13/2009 -TRU dt. 06.07.2009
(iv) CBEC Circular No. 150/1/2012 – ST dated 08.02.2012
(v) Essar Projects (India) Ltd. 2014 (33) STR 696 (T)
(vi) Essar Projects (India) Ltd. 2014 (36) STR 681 (T)
(vii) Mosaic India Pvt. Ltd. 2015 (38) STR 577 (T)
(viii) Bhayana Builders (P) Ltd. 2018 (10) GSTL 118 (SC)

He also submits that even if the entire value of all the four contract involved are taken together and service tax at full rate i.e. 12.36% is worked out and the credit of duty paid on transformers and service tax paid by them is adjusted against such liability, it would be clear that the Appellant has paid excess service tax than required and hence the demands are not sustainable. He submits that they were of bonafide belief about tax on supply and services separately being two independent contracts and hence there is no reason to impose penalty upon them.

3. Shri Sameer Chitkara Ld. AR appearing for the revenue submits that since the supply and erection of transformers is a composite activity, hence the impugned order has rightly confirmed the demands. He supports the findings of the impugned order.

4. Heard both the sides and perused the records. We find that the Appellant has supplied the transformer under separate contract on

payment of central excise duty and the erection, commissioning of transformer was under separate contract. When the value of both the activity is separately shown, both the activities cannot be clubbed to make it taxable under the Works contract composition scheme. The revenue has nowhere disputed the payment of central excise duty on transformer and therefore once excise duty payment is made on the transformer, the Appellant is eligible for availing credit of cenvat charged on the inputs used in manufacture of Transformers. The inputs used for manufacture of transformer are not inputs for execution of works contract. There is no allegation that the Appellant has taken cenvat credit of duty paid on Transformer which was erected/ commissioned by them. Hence the demand of cenvat against the Appellant is absolutely illegal. Further we find that Transformer was not used in execution of works contract but it itself was installed/ commissioned and hence there is no meaning of including the value of transformer in value of works contract service. The value of any material which is being used in providing the services can be included. The transformer is not used/ consumed in providing service so as to include its value in assessable value of Works contract. Further even assuming so prior to 06.07.2009, for the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007, there was no requirement of including the value of free issue of material used for carrying out the works contract. Our views are also based upon the CBEC Circular No. 150/1/2012 – ST dated 08.02.2012 and Tribunal's order in case of Essar projects (India) Ltd. 2014 (33) STR 696 (TRI) wherein the Tribunal held as under:

> ***2.*** *Brief facts of the case are that appellant entered into two contracts with M/s. Vadinar Power Company Limited and M/s. Essar Power Gujarat Limited. One of the contracts was for supply of indigenous equipment and materials (supply contract) and the other one for the Construction/Erection/Installation of plant (construction contract). In addition, the service recipient also procured imported equipment and materials which was also supplied to the appellant for completing the construction contract. It is the case of the Revenue that both the contracts entered into by the appellant and the service recipients are artificially bifurcated and are required to be considered as one. Revenue in their cross-objection under ST/CO/10461 of 2013 mainly argued that explanation to Rule 3(1) of the works contract (Composition Scheme for Payment of Service Tax) Rules, 2007, substituted under Notification No. 23/2009-S.T., dated 7-7-2009, is not applicable to the applicant's case and both contracts should be treated as one.*
>
> ***3.*** *Learned advocates Shri V.K. Jain and Ms. Dimple Gohil appeared on behalf of the appellant and argued that both the contracts were executed on 24-8-2007. Learned Shri Jain (advocate) made us go through the*

supply contract dated 24-8-2007. He contended that as per the definition of agreement clause of Supply Contract, the balance of plant constitutes all such machinery, permanent plant and equipment, materials, etc. other than the imported plant and equipment separately provided by the recipient of services. The balance of plant was required to be supplied by the appellant under the supply contract. On the other hand, appellant was required to provide services of erection, installation and commissioning of the facility under the construction contract, in which all the imported material supplied by the service recipient along with the indigenous material was required to be used for making the facility functional. He emphasized that the balance of plant procured by the appellants from different vendors was supplied to service recipient and as per the clause 15 of the Supply Contract the title and risk for the balance of plant in each item is transferred to the owner/recipient of the services by the supplier of that item of balance of plant at the time of receipt at site by suitable endorsement of documents. It was also emphasized that clause 18 of the supply contract deals with defects liability with respect to the balance of plant. It was argued by the learned advocate that there is a separate corresponding defect liability clause under clause 34 of construction contract but that defect liability is only for the defects or damages to the facility provided by the appellant. Shri V.K. Jain made us go through the definition of 'unit' and 'facility' given under relevant construction contract. It was thus argued that it is incorrect on the part of the adjudicating authority to hold that defect liability under the construction contract is used for rectifying the defect liability under the supply contract.

4. *Shri Jain also relied upon the C.B.E. & C. Circular No. 150/1/2012-S.T., dated 8-2-2012 and argued that as per Para-3 of this Circular, the explanation to Rule 3(1) to the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 has been held to be made applicable with effect from and for contracts entered after 7-7-2009 and will not be applicable to the contracts entered prior to 7-7-2009 and accordingly, the gross amount does not include the value of free of cost supply goods by the service recipient. It was his case that as per the contract, the title of balance of plant is transferred to service recipient on receipt at site and it is not correct as held by the adjudicating authority that ownership/title of the balance of plant is transferred to the service recipient only at the time of completion of the facility. He also relied upon Para-5 of the Circular No. 334/13/2009-TRU, dated 6-7-2009 issued by C.B.E. & C. wherein, it has been clarified that certain tax payers are not including the full value of the goods required for execution of works contract for working out Service Tax liability under the Composition Scheme by either excluding the value of goods received free of cost from their clients or splitting the contract into a sale contract (for a portion of goods required to execute the works contract) and works contract (only a portion of the total value of goods and the labour charges). It was emphasized that as per this clarification, in order to plug loopholes, explanation appearing in sub-rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was introduced with effect from 7-7-2009 under Notification No. 23/2009-S.T., dated 7-7-2009. It was, therefore argued by him that both the contracts have been executed before 7-7-2009 and the said amendment will not be applicable to their case. It was also emphasized that there is no evidence on record to show that supply contract/construction contract were entered after 7-7-2009 and were artificially bifurcated on an earlier date to claim lesser value for the purpose of Service Tax payment.*

5. *Shri K. Sivakumar, learned AR appearing on behalf of the Revenue argued that both the contracts are dated 24-8-2007 and have been made operational simultaneously in order to make facility for the service recipient. He thus argued that both these contracts have to be read as one in view of the judgment dated 28-2-2010 given by ITAT in the case of appellant itself wherein it was held that such contracts are required to be considered as one composite contract only.*

6. *We have given our anxious thoughts to the arguments made by both sides and also perused the records. The issue required to be decided in these proceedings is whether two contracts dated 24-8-2007, executed by the appellant with service recipients can be considered as separate contracts or as one contract. It has been argued by the appellant that both the contracts are independent and cannot be considered as one for the purpose of determining taxable value of the service provided. It was further argued that even if two contracts are treated as one, still appellant's case will not be covered under the Explanation added with effect from 7-7-2009 in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The adjudicating authority in Para 30 of the impugned order has held that appellant is responsible for installation of the whole facility under the construction contract by using the indigenous machinery procured by appellant and, therefore, both the contracts have to be considered as one. In this regard, it is observed that both, supply contract and construction contract have separate defects liability clauses under Clauses 18 and 34 of the respective contracts. Relevant clause 18.1 of the supply contract and 34.1 of construction contract are reproduced below :-*

"Article 18 - Defects liability

18.1 - The owner shall have the right, but not the obligation, to instruct the Supplier, in writing to perform such additional supply or remedy any Defects or damage in the Balance of Plant or in the Supplier's Documents and any part thereof, as the case may be, during the Defects Notification Period or within 14 (fourteen) days after the expiration as a result of an inspection made by or on behalf of the Owner at any time or times prior to the expiration of the Defects Notification Period."

"Article 34 - Defects liability

34.1 - The owner shall have the right, but not the obligation, to instruct the Contractor to perform such additional Supply or remedy any Defects or damage in the Facility (or any Unit thereof) or any Contractor's Documents and any part thereof arising out of or in relation to the Works, during the Defects Notification Period or within 14 (fourteen) days after the expiration as a result of an inspection made by or on behalf of the Owner at any time or times prior to the expiration of the Defects Notification Period."

7. *It is evident that clause 18.1 of the Supply Contract talks about remedy of defects or damage in the balance of plant. As per the definition of the supply contract, balance of plant includes all such machinery permanent plant, equipment, material, etc. required for commissioning and maintenance of the balance of plant. On the other hand, 'defects liability' mentioned under clause 34 of the Construction Contract talks of the remedy of defects/damages in the 'facility' or to any unit thereof. The word 'facility' is defined under the Construction Contract to mean a Thermal Power Project in relation to which the works are required to be carried out in accordance with the contract. The word 'defect' as per the definition clause means any defect, imperfection, deficiency or other fault in the facility or part thereof arising from or in relation to the execution of work.*

8. *From the above clauses of the contracts, it is clear that there are separate defects liability clause under the contracts separately provided for the defects in balance of plant and the defects that can creep in the working of the facility by the service provider for the service recipient. Therefore, it is not correct to hold that defects liability clause of the construction contract also make provisions for maintenance and repair of balance of plant.*

9. *The arguments made by the appellant, that the explanation added to Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 is applicable only for those contracts which are entered after 7-7-2009, has got some force. The clarification issued by*

C.B.E. & C. under Circular No. 150/1/2012-S.T., dated 8-2-2012, in Para 3, has clarified as follows :-

"3. The explanation appended to Rule 3(1) with effect from 7-7-2009, categorically says in the proviso that "...nothing contained in this Explanation shall apply to a works contract where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009." Where execution of works contract has commenced prior to 7-7-2009 or where any payment (except payment through credit or debit) has been made towards a works contract prior to 7-7-2009, then in those cases 'gross amount' for the purpose of payment of Service Tax does not include the value of free of cost supplies."

9.1 *It is clear from the above Circular issued by C.B.E. & C. that where execution of works contract has commenced prior to 7-7-2009, in those cases gross amount, for the purpose of payment of Service Tax, will not include the free of cost supply by the service recipient. In this regard, appellant has argued that as per clause 15.4 of the Supply Contract, reproduced below, full rights/title/ownership in respect of each item of the Balance of Plant stand transferred to the owner on delivery by the supplier at the site :-*

"15.4 - The full right, title, ownership and interest and all risks (except for those specifically retained by the Supplier in accordance with the terms of this Contract) in each item of the Balance of Plant shall be transferred to the Owner upon Delivery by the Supplier of that item of the Balance of Plant at the Site and upon endorsement of the documents required under Article 15.1."

9.2 *In view of the above clause of the supply contract, the findings of the adjudicating authority that ownership of the Balance of Plant and items stands transferred only at the time of completion of work, is not correct. In the case of imported equipments as well as the Balance of Plant equipment, the ownership/title lies with the service recipient when the same are received at site. Accordingly, it has to be held that after receipt of balance equipment, the title/ownership of the same is transferred to the service recipient. Accordingly, adjudicating authority cannot go beyond the C.B.E. & C. Circular No. 150/1/2012-S.T., dated 8-2-2012 wherein it has been clarified that for the works contract executed before 7-7-2009, free of cost supplies are not required to be added to the gross amount, for the purpose of payment of Service Tax. There is no evidence on record to convey that both, the supply contract and the construction contract were artificially bifurcated after introduction of explanation to Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.*

10. *The Hon'ble Supreme Court in the case of UOI v. Mahindra and Mahindra Limited [1995 (76) E.L.T. 481 (S.C.)] in Para 5 has held as follows :-*

"5. The main thrust of the arguments of the learned Solicitor General before us was that the price for the sale of CKD packs by the foreign collaborator to the respondents is not the true price. In other words, the price fixed or mentioned in the invoices was not the sole consideration for the sale of CKD packs, for the various reasons stated by the Assistant Collector in his order. According to the learned Solicitor General, the price mentioned in the invoices was (or should have been) determined by taking into consideration the lumpsum of 15 million French Francs (nearly three crores of Rupees) paid by the respondents to the foreign collaborator under the agreement. It is on this basis Section 14(1)(a) was excluded and resort to Section 14(1)(b) of the Customs Act was sought to be justified by the revenue. In appreciating the above plea we have to bear in mind certain basic principles. The bargain between the respondents and the foreign collaborator is evidenced by written agreements, (dated 6-11-1979 & 6-3-1980). There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that

the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs. It is, no doubt, open to the revenue to allege and prove that the apparent is not the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million French Francs. The short question is whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price and so Section 14(1)(b) of the Act was properly invoked."

11. *In view of the law laid down by the Hon'ble Supreme Court, a contract has to be interpreted in a manner from the apparent tenor of the agreement and apparently it has to be accepted as the real state of affairs.*

12. *The judgment of ITAT relied upon by the Revenue is not applicability to the facts of this case because the Income Tax law is applied in altogether in a different sphere of taxation whereas, the Service Tax liability and determined of value under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, constitute an altogether a different area of operation. Based on the above observations, it is concluded that both the contracts dated 24-8-2007 for Supply of equipments and Construction of works has to be treated as distinct and separate contracts and value of supply contract cannot be added to the value of the construction contract for the purpose of Service Tax liability.*

13. *In view of the above, appeal filed by the appellant is allowed and cross-objection filed by the Revenue is rejected."*

5. In view of our above observations and findings we are thus of the view that the impugned order is not sustainable and we accordingly set aside the same. All the appeals are allowed with consequential reliefs, if any.

(Pronounced in the open court on 03.07.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Seema