CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11157 of 2018-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-COM-31-17-18 dated 12.02.2018 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Wagad Infraprojects Pvt Limited .... **Appellant**
24 Village Gokulpura Samiyala To Bhimpura Road Tal And
Dist Vadodara, VADODARA, GUJARAT-394410

VERSUS

Commissioner of Central Excise & ST, Vadodara .... **Respondent**
1st Floor...Central Excise Building,
Race Course Circle, Vadodara, Gujarat-390007

APPEARANCE :

Shri Willingdon Christian, Advocate for the Appellant
Shri S.N. Gohil, Superintendent (AR) for the Respondent

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

FINAL ORDER NO. A/12558 / 2021

DATE OF HEARING : 05.08.2021
DATE OF DECISION : 01.12.2021

RAMESH NAIR :

The brief facts of the case are that the appellant are engaged in the manufacture of Ready Mix Concrete (RMC). While supplying their RMC, they are also undertaking the activity of laying of RMC using of concrete pumping at the site of the buyer of RMC. On removal of RMC from the factory, the appellant are paying Central Excise duty since March 2011 at the rate 1.03% and since 17 March 2012 at the rate of 2.06%. Having entered into contract with the buyer of RMC which is of works contract which include supply of RMC and laying of RMC at the buyer's site. The case of the department is that it is a composite contract for supply and laying of RMC to the laying of RMC falls under works contract and liable to service tax. Accordingly, a show cause notice dated 02.05.2016 was issued. The said show cause notice was re-adjudicated as per the directions of Hon'ble Gujarat High Court and accordingly, the impugned order-in-original dated 12.02.2018 came to be passed wherein it was held that activity of the appellant i.e. supply of RMC along with laying of RMC at buyer's site is classifiable as Works Contract service upto 30.06.2012 and from 01.07.2012, under the category of declared service under Section 66E of Finance Act, 1994. Consequently demand of service tax amounting to Rs. 4,37,21,517/- for the period 01.04.2011 to 31.03.2015 was confirmed under sub-Section 2(2) of Section 73 of Finance Act, 1994. Interest under Section 75 was demanded and imposed penalty on the appellant and also on the director and employee of the appellant Company. Therefore, the appeal is filed by the appellant M/s Wagad Infrastructure Pvt. Limited.

2. Shri Willingdon Christian, learned Counsel appearing on behalf of the appellant submits that the entire activity of the appellant is of manufacturing in terms of Central Excise Act, 1944. The appellant used their own raw material and final product RMC is classifiable under CETH 38245010 which is not under dispute in terms of CBIC Circular No. 601/38/2001/CX dated 20.11.2001 and Hon'ble Supreme Court judgment in the case of Larsen & Toubro vs. CCE – 2015 (324) ELT 646 (SC). Accordingly, the appellant have rightly considered the activity as manufacture and have taken the registration and have been paying Central Excise duty on RMC and also filing regularly monthly ER-1 returns. He submits that as per the delivery method of RMC to the consumers site, in order to avoid hardening of RMC after certain period of time due to exposure to moisture, RMC is invariably supplied on FOR destination basis in a specifically designed transit mixture. After the RMC reaches the customer's site, the delivery part is completed by carrying out activities of pumping and laying (pouring/ placing) of the RMC at the given floor or part

of the customer's premises. The extra charge for such extended delivery is about Rs. 200/- to Rs. 300/-, which forms about 3 to 5% of the total assessable value. All the expenses incurred for the aforesaid delivery at site including cost of pumping and laying, is included in the assessable value of RMC for the purpose of payment of excise duty thereon. No VAT is paid but composition tax under works contract was paid. He further submits that aforesaid method of extended delivery is effected only in case of 50-60% of the total sales, whereas for the remaining 40-50% of total sales, the delivery is effected by simply unloading RMC at the customer's place i.e. without pumping. VAT is paid in this case at appropriate rate.

3. He further submits that the basis of department for treating the activity as taxable service under works contract is the purchase order from the concerned buyer contains the description such as order for RMC under the condition Works Contract which includes laying of concrete as per design mix including mixing, transporting, laying using a concrete pump and finishing the concrete with your machineries. Concrete shall be with all your material, labors, tools and plant etc. The terms of the supply also under the condition of works contract. For sales tax/ VAT purposes, the activity is considered and allowed by VAT authority as works contract. He submits that the department has made the aforesaid terms and condition the sole ground for treating the activity as Works contract for levy of service tax as per show cause notice and impugned order while disregarding the fact that the product is excisable goods. He submits that department has raised demand of service tax on all the 100% clearances even though in case of 40-50% of total sales, the delivery is simply effected by unloading RMC at customer's given premises i.e. without pumping etc. Therefore, in respect of this 40-50% of total sales, in any case, will not fall under the category of

works contract service. He submits that the entire basis for treating the transaction as works contract is the purchase order dated 01.04.2014 from BRG Group. In the said contract, apart from the fact about supply of the RMC, there are stipulated additional requirements of transporting, laying, using concrete pump and finishing concrete with machineries. As a matter of fact, when the RMC is to be placed at the rooftop or first floor etc, then only the appellant is required to discharge the delivery by using a pump. For this purpose, they used diesel operated pump and tools like steel pipes, bends, joints, clamp and hammer. With these machinery and tools, the process of laying the RMC by pumping is carried out. The pumped out RMC also requires to be equally distributed on the given floor as it cannot be discharged for technical reasons on the single spot in the form of heap. For the purpose of such spreading of RMC on the floor area, a Rubber Hose Pipe is attached at the end of the pump for equal distribution while discharging RMC at the place. In short, the appellant have not used any plant or machinery or tools to carry out any process of construction etc. other than the aforesaid process of laying of RMC by concrete pump. He submits that appellant have also not deployed any manpower, like mason, concrete punner, plasterer or similar such tradesman/ artisans or skilled workers except few laborers who handled the aforesaid work of laying of RMC by pumping.

4. He referred to the definition of Works Contract in the Central Sales Tax Act, 1956 and Gujarat VAT Act, 2003. He submits that as per the above VAT Act, it is evident that definition of works contract service in the VAT law is very wide which includes among others even manufacturing and processing work. He further submits that the process of laying of RMC by pumping and placing it at the given floor area is only an integral part of

delivery that is required due to solely to the peculiar nature of the product and its short shelf-life. The dominant activity in the whole transaction is that of manufacture and sale of RMC on FOR destination basis. Therefore, such a pre-dominant activity of manufacture cannot ceased to be so just because the manufacturer performs some extra work for due discharge of the goods in the extent peculiar situation. He refers to the definition of Works Contract under Service Tax in Section 65 (54). He also refer to Section 65(105)(zzzza) which provides definition of taxable service. He submits that from the definition of works contract under service tax, manufacturing and sale of excisable goods is not covered under Works Contract. He submits that in various cases, assessee has treated the transaction to manufacture of RMC with pumping and laying as Works Contract even than verdict of the Hon'ble Tribunal is upheld by the Hon'ble Supreme Court in favour of the assessee in the case of *GMK Concrete Mixing Pvt. Limited vs. CST. – [2012 (25) STR 357 (Tri.)] 2015 (38) STR J113 (SC).* He submits that in the case of *Ultratech Concrete vs. CST – 2016 (44) STR 274 (Tri. Del.),* the Revenue's contention was to treat the transaction as Commercial and Industrial Construction Services, however, the Tribunal held in favour of the assessee. He also placed reliance on the following judgments:-

(a) 2016 (42) STR 866 (Tri.) – Vikram Ready Mix Concrete (P) Limited vs. CST – 2016 (42) STR J282.

(b) 2018 (11) TMI 1470 – CESTAT Chennai – CCE vs. Larsen & Toubro Limited

(c) 2011 (8) TMI 1037 – Karnataka HC – ACC Limited vs. State of Karnataka

5. He further submits that mere payment of Sales tax/ VAT can not bring the activity under Works Contract Service since for Service Tax purpose, the definition given in Finance Act, 1994 will alone be applicable. In this regard, he referred to the CBEC Clarification in Para 6.8.6 of CBEC Education guide. He further submits that it is settled law that definition of works contract and VAT law cannot be applied under Service Tax law. Reliance was placed on the following judgments:-

(a) 2019 (10) TMI 534 – CESTAT – Nova Tech Engineers vs. CCE

(b) 2017 (7) GSTL 195 (MP) - State of MP vs. Vicco Products (Bombay)

6. He submits that definition of Works Contract service in Service Tax law contains several clauses but neither the show cause notice nor the impugned order specify the particular clause attracted in the present case. In such a case, the Tribunal have consistently set-aside the orders in the following judgments:-

(a) 2020 (33) GSTL 97 (Tri.) Balaji Enterprises vs. CCE

(b) 2018 (10) GSTL 479 (Tri.) – CCE vs. Swapnil Asnodkar

(c) 2011 (22) STR 571 (Tri.) – United Telecoms Limited vs. CST

(d) 2019 (10) TMI 534 – CESTAT - Nova Tech Engineers vs. CCE

7. Without prejudice to the above, he alternatively submits that the value was wrongly adopted. According to Section 67 read with rule 2A(i) of Service Tax (Determination of Value) Rules, 2006, only the value of service portion in execution of Works Contract shall be the value of service portion and the property in goods should be reduced. He submits that value of RMC and charges towards pumping and laying of RMC is clearly bifurcated. The service portion is given as Rs. 200/- to Rs. 300/- per Cubic Meter which

alone should be taken as value of service. Hence, the value was wrongly calculated.

8. He without prejudice further submits that there is fundamental error in calculating total duty amount of service tax in Annexure 'A' to show cause notice. According to rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006 works contract service attract service tax on only 40% of the total amount charged, the department has demanded service tax on 60% of the total amount charged by allowing 40% instead of 60%. As a result of this mistake, the department has wrongly demanded service tax of Rs. 4.37 crores instead of correct amount of Rs. 1.85 crores approx.

9. He also submits that show cause notice dated 02.05.2016 covering the period from 01.04.2011 to 31.03.2015 is partly time barred inasmuch as the entire issue is of interpretational nature. Moreover, the RMC was admittedly cleared on payment of excise duty on the full value including the extended delivery cost. Their bonafide belief is also well supported by several judgments including that of Hon'ble Tribunal, High Court and Supreme Court. In fact, in judgments, the department has taken a contradictory stand that whether the activities are Works Contract service or Manufacturing. Therefore, there is no malafide on the part of the appellant. Accordingly, the demand for extended period is not sustainable. With the above various submissions, the appellant pray that their appeal be allowed by setting aside the impugned order.

10. Shri S.N. Gohil, learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that appellants with their client has agreement in respect

of works contract which includes supply of RMC along with some services such as laying of RMC at the recipient's site and therefore, it is correctly falls under the service of works contract. He submits that all the judgments relied upon by the appellant are in respect of supply of goods unlike in the present case, the contract of supply of goods as well as service. Therefore, the judgments relied upon by the appellant are not applicable in the present case. He placed reliance on the following Board Circular and as well as judgments:-

(a) F.No. B1/16/2007-TRU dated 22.05.2007.

(b) Larsen & Toubro Limited vs. State of Karnataka – 2014 (34) STR 482 (SC)

(c) UB Engineering Limited vs. CCE, Pune – 2015 (37) STR 999 (Tri. Mumbai)

11. We have carefully considered the submissions made by both the sides and perused the record. The entire case of the department is based only on the contract between the supplier of RMC i.e. appellant and buyer of RMC. As per the contract, the entire transaction is of Works Contract. However, the appellant is mainly engaged in the manufacture of Ready Mix Concrete and selling the same to various buyers. As per the nature of product, it is necessary to supply RMC in a specialized container and after reaching at the customer's site RMC is delivered by carrying out the process of pouring, pumping and laying of concrete at the customer's place. The RMC cannot be unloaded at a particular place and thereafter shifted the same to the particular place at site. Due to peculiar nature of RMC, it is unavoidable to deliver at particular place where the RMC is required to be laid-down. It is also the fact that appellant being manufacturer of RMC, paying excise duty not only on the value of the goods but also on the value of service of

pumping, laying of concrete and the same is included in the sale value. Therefore, no value is escaped from payment of excise duty. Accordingly, the entire activity right from the manufacturing of RMC and delivery at the site of the customer is excisable activity. Merely because the contract says that it is works contract, the actual nature of transaction cannot be over looked. The appellant is treating the transaction of Works Contract in terms of VAT Act only. However, there is a specific definition of Works Contract in the Finance Act, 1994 which reads as under:-

> "(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;"

12. From the above definition, it is clear that manufacturing activity of RMC cannot be covered under Works Contract by any stretch of imagination. Therefore, even though there is contract of Works Contract basically for the purpose of VAT Act, cannot be applied in the present transaction of manufacture and sale of goods in terms of Section 2(f) of Central Excise Act, 1944. The department has very much accepted the activity of the appellant as manufacturing and collected the excise duty on the entire value of RMC which includes the pumping and laying of RMC at site. Therefore, the department cannot take two stands, in one hand manufacturer for demanding excise duty and on the same activity, on the other hand demanding service tax under Works Contract. In various judgments this issue has been considered time and again. Some of the judgments are cited below:-

(1) GMK Concrete Mixing Pvt. Limited vs. Commissioner of Service Tax – 2012 (25) STR 357 (Tri. Del.)

> **"5.** Record does not reveal involvement of any taxable service aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service

contract. In absence of cogent evidence to the effect of providing taxable service, primary and dominant object of the contract throws light that contract between the parties was to supply ready mix concrete (RMC) but not to provide any taxable service. Finance Act, 1994 not being a law relating to commodity taxation but services are declared to be taxable under this law, the adjudication made under mistake of fact and law fails.**"**

The above decision of the Tribunal was upheld by the Hon'ble Supreme Court, reported at – Commissioner vs. GMK Concrete Mixing Pvt. Limited – 2015 (38) STR J113 (SC).

(2) Vikram Ready Mix Concrete (P) Limited vs. Commissioner of Service Tax

"Both sides agreed that the short issue involved in the present appeal is as to whether supply of ready mix concrete and carrying out the ancillary and incidental activities of pouring, pumping and laying of concrete would call for service tax liability or not.

2. Tribunal in the case of *GMK Concrete Mixing Pvt. Ltd.* v. *CST, Delhi* reported in *2012 (25) S.T.R. 357 (Tri. - Del.)* has held that the entire exercise is sale of ready mix concrete and there is no service element involved so as to create service tax liability against the assessee.

3. By following the said decision, we set aside the impugned order and allow the appeal with consequential relief to the appellant."

The above decision of the Tribunal was also upheld by the Hon'ble Supreme Court, reported at – Vikram Ready Mix Concrete (P) Limited vs. Commissioner of S.T., Delhi – 2016 (42) STR J282 (Supreme Court)

(3) ACC Limited vs. State of Karnataka – [2012] 52 VST 129 (Kar.) –

In this case, the assessee wanted to avoid pumping charges as part of sale transaction of RMC. The Hon'ble High Court of Karnataka held as under :-

"In the instant case, the facts are not in dispute. The assessee is a manufacturer of ready mix concrete. The said ready mix concrete is

manufactured with its ingredients like jelly, cement, sand, etc., and in order to avoid hardening of the RMC after certain period of time due to exposure to moisture, chemicals are added to keep the RMC in a liquefied stature till its delivery to the customers depending upon the distance the vehicle carrying RMC is to reach the customer's place. If the RMC is hardened it becomes un-usable. As is clear from the material on record, the assessee transports the RMC from the manufacturing place to the customer's site. Therefore, in the case of RMC, transportation charges invariably forms part of the sale consideration. After it reaches the site of the customer, the RMC is to be delivered to the customer. The choice of taking the delivery is given to the customer. He has the option of getting the entire RMC dumped at the site from the lorry or he has also been provided an option to get the RMC to a particular place such as roof top or any floor. Therefore, the RMC is delivered by pumping the RMC from the lorry to the specified place by the customer. All expenses incurred till the delivery constitutes sale price. In order to deliver the RMC at the specified place, if the assessee uses the pump, then the charges collected by the assessee from the customer as pumping charges form part of the sale price. If the RMC is not delivered through pumping, then the charges is not collected from the customer and it will not form part of the sale price. Therefore, the sale transaction of the RMC gets completed only when it is delivered at the point where it is finally put to use. All expenses incurred till such stage, if such delivery includes the service of pumping then the pumping charges are also included in the pre-sale expenses and hence, form part of the taxable turn over.

In a contract of this nature, there is no dual role played by the assessee. He is not pumping the RMC for and on behalf of the customer. He has to pump the RMC to the specified place as shown by the customer in order to deliver the RMC. Therefore, even if the pumping charges are collected separately as is clear from the invoice produced before us, or as per terms of the contract, still the said pumping charges invariably form part of the sale transaction which facilitates the delivery of the goods and it would form part of pre-sale expenses. In the aforesaid judgment of the apex court, there were two contracts one is manufacturing fanta and coco-cola and the assessee was delivering those products at his site. The customer had an option to transport those goods from the site of the manufacture to his site. either by using his own transportation or by using the transportation facility provided by the assessee. The transportation provided by the asses see is including taking delivery of the goods from the manufacturing place to the customer's site, which contract is conspicuously missing in this case.

The assessee at no point of time will take delivery of RMC from the customer and then pumps it to the specified place at the site. Therefore, the ratio of the judgment has no application to the facts of this case. Having regard to the totality of the circumstances, the terms of the contract, the intention of the parties, it is clear that the sale of the product, viz., RMC and transporting it from the manufacturing place up to the customer’s site and pumping it to the place where the customer specifies, the pumping charges become part of the sale transaction. In that view of the matter, we do not see any merit in this appeal. Hence we pass the following :

ORDER

The petitions are accordingly dismissed. The impugned order passed by the Tribunal, is hereby confirmed.”

13. In view of the above judgments, it is clear that as per nature of product of RMC, every manufacturer who needs to supply RMC to the customer, apart from manufacturing, transportation, pumping and laying of concrete is inevitable for delivery of RMC. Therefore, all the activities, particularly when the value of such activities are integral part of the assessable value, which is determined in terms of Section 4 of Central Excise Act, 1944. The activities cannot be vivisected for the purpose of

charging service tax on the same activity which is part and parcel of manufacturing activity. In view of this settled position, merely because the contract showing as Works Contract, the physical nature of transaction cannot be overlooked.

14. As per above view, which is clearly supported by various judgments reproduced above, we are of the clear view that the activity of the appellant is pre-dominantly of manufacture and sale of goods. Accordingly, the same cannot be charged with service tax under Works Contract service.

15. The appellant have made alternate submissions about quantification of demand inasmuch as the impugned order confirmed the demand on the 60% of the value of contract whereas, as per rule 2A(i), the value of goods should be adopted and only service portion should be charged for service tax. The relevant Rule 2A(i) is reproduced below:-

> **"2A.** Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-
>
> (i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.**"**

In view of the above rule, for the purpose of determination of value, we find that the value of goods needs to be deducted from the gross value charged by the appellant. As per the facts, it is clear that there is clear identification of value of goods and charges for pumping and laying of RMC which is ranging from Rs. 200 to Rs. 300. In this position, the department should have taken the service portion for calculating the service tax. Accordingly, the service tax was wrongly calculated to the above extent.

16. It was also the submission of the appellant that alternatively the Revenue should have calculated the service tax only on 40% of the gross value by allowing abatement of 60%, in terms of rule 2A(ii). The said rule is reproduced below:-

> **"2A(ii)** Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-
>
> (A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;
>
> (B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;
>
> (C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;**"**

17. From the above Rule, we find that firstly, in the facts of the present case, the value should be in terms of Rule 2A(i). Therefore even by any stretch of imagination Rule 2A(ii) is applicable, in such cases the value should be determined as per clause (A) of rule 2A(ii). Accordingly, the value at the most should have been arrived at by allowing 60% abatement and only 40% of the gross value should be chargeable to service tax. Therefore, the calculation of service tax is incorrect.

18. The appellant also made submissions on time-bar. We find that the appellant admittedly paid the excise duty on the entire transaction and this excise duty paid by the appellant was charged and collected by the Revenue. Therefore, the entire activity of manufacture, supply and manner of delivery of goods is very much on record. Accordingly, no suppression or mis-declaration can be attributed to the appellant for invoking extended period of demand. Accordingly, the demand for longer period in the show

cause notice dated 03.05.2016 is not sustainable on the ground of limitation also.

19. As per our above discussion and findings, we are of the clear view that activity of the appellant is entirely of excisable activity. Therefore, the same will not fall under Works Contract service in terms of Finance Act, 1994. Accordingly, the demand of service tax raised under Works Contract service is clearly not sustainable. Therefore, the impugned order is set-aside, appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 01.12.2021*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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