CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD
REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11563 of 2016-DB
CROSS Application No.:-**ST/CROSS/10644/2016**

[Arising out of Order-in-Original/Appeal No KCH-EXCUS-000-COM-08-09-15-16 dated 30.03.2016 passed by Commissioner of Central Excise and Service Tax-KUTCH (GANDHIDHAM)]

Commissioner of CE & ST, Kutch (Gandhidham) .... Appellant
Central Excise & Service Tax Commissionerate,
Centeral Excise Bhavan Plot No. 82, Sector 8,
Gandhidham(Kutch), Gujarat

VERSUS

Vidyut Transformers Pvt Limited .... Respondent
Plot No.133,
Ward 1a, Industrial Area, Adipur, Kutch
KUTCH, GUJARAT.

AND

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APPEARANCE :

Shri Anoop Kumar Mudvel, Superintendent (AR) for the Appellant-Revenue
Shri Paritosh Gupta, Advocate for the Respondent-Asessee

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 01.03.2024
DATE OF DECISION: 12.06.2024

FINAL ORDER NO. 11286-11287/2024

RAMESH NAIR :

The facts giving rise to this appeal are, in brief, as under: -

2. M/s. Vidyut Transformers Pvt. Ltd., (Respondent) is a registered service provider of taxable services under the category of Maintenance & Repair Service, Works Contract Service and GTA Service. An inquiry was initiated by the department against the respondent on intelligence that they were not paying appropriate service tax on the services provided to M/s. Pashchim Gujarat Vij Company Ltd. (PGVCL). The Respondent was carrying out repair of electric transformer which included replacement of parts. The said service was classifiable under Maintenance or Repair Service. The respondent was paying service tax after availing the benefit of exemption Notification No. 12/2003-ST dated 20.06.2003. According to department, in the instant case, the goods i.e. replacement were used by the respondent for completion of service and such goods were neither available with him for sale in open market nor M/s. PGVCL purchased such goods without reference to the work order. Hence it appeared that the benefit of said Notification is not available to the respondent and the service tax short paid to the extent of the value of goods and materials consumed during the provisions of service during the period 2009-10 to 30.06.2012 is liable to be recovered. Further with effect from 01.07.2012 the said service was classifiable under 'Works Contract Service'. Rule 2A(1) of the Service Tax Valuation Rules, 2006 provides determination of value of service portion in execution of works contract as equivalent to gross amount charged for works contract less value of property in goods transferred in execution of said works contract. The department alleged that the said rule was not applicable as separate bills for labour and materials were issued and value of materials were not actual but arrived at after considering value of retrieved defective items which were replaced during repairs. These defective items were not returned to PGVCL but retained by the respondent. The value of retrieved items depends upon the nature and quantum of defects and hence cannot be pre-determined. The value of labour and materials were decided after considering average of such retrievals and charges mentioned as labour rate in contract were also adjusted accordingly. Hence, it appeared that the labour rates mentioned in the contract was not the actual consideration of labour works carried out by them and as such Rule 2A(ii) was applicable for arriving at the value which provided for payment of service tax on 70% of the total amount charged for works contact during the period 01.07.2012 to March 2013.

2.1 On completion of investigation, a detailed show cause notice dated 29.09.2014 was issued to the respondent demanding service tax amount along with interest and penalty. Further, a periodic show cause notice dated 24.03.2015 covering the period 2013-14 was also issued demanding service tax along with interest and consequential penalties.

2.2 Respondent contested the show cause notices on merits as well as on limitation. The adjudicating authority after following due process of law vide impugned common Order-In-Original No. KCH-EXCUS-000-COM-08-09-15-16 dated 30.03.2016 dropped the demands. Being aggrieved the revenue is before the Tribunal.

3. On behalf of the Revenue, Shri Anoop Kumar Mudvel, Superintendent (AR) appeared and reiterates the grounds of appeals. He submits that in the present case the adjudicating authority in his finding at para 2.4.1 has recorded that the assessee were paying VAT at the appropriate rate, but no evidence to the effect of has been discussed in the order. The Adjudicating authority has arrived at such conclusion based on assessee’s claim. In absence of any documentary evidence showing actual payment of VAT, it cannot be concluded that the goods have been sold. This aspect is imperative while determining the eligibility of Notification No. 12/2003-ST. The adjudicating authority has ignored this vital aspect while determining the eligibility of exemption notification.

4. He also submits that the adjudicating authority has relied on the rate contract entered between the assessee and M/s PGVCL which prescribes the rate of goods and materials and accepted the same as sufficient documentary proof indicating the value of goods and materials sold by the assessee. The adjudicating authority has not carried out any verification to ascertain whether the cost of retained goods had any impact on the value of labour charges as alleged in the SCN. The adjudicating authority has erred in simply drawing an inference that the value of retained goods did not have any impact on the value of service. Such conclusion based on assumption and presumption has no legal sanctity.

5. He further submits that for the period 01.07.2012 to 2013-14, the adjudicating authority has determined the value under Rule 2A(i) of the Valuation Rules by relying on Explanation (c) to the said Rule which states that the value on which VAT or sales tax has been paid or payable on the actual value of goods transferred in the execution of works contract, shall be adopted as value of property in goods transferred in execution of said works contract for determination of value of service portion. Rule 2A of the Service Tax (Determination of Value) Rules, 2006 provides for determination of value of service portion in the execution of works contract. Rule 2A(i) provides for determining the value of service portion in the execution of a works contract by deducting the value of property in goods transferred in the execution of said works contract from the gross amount charged for the works contract. In other words, the value of service portion in the execution of works contract will be the gross amount charged minus the value of goods sold. The finding on whether the goods have been sold and whether VAT has been paid on such goods remains unsubstantiated by the order. As a consequence, the adjudicating authority has erred in applying Rule 2A (i) of the Valuation Rules. When the valuation of works contract service is not determined under Rule 2A(i) of the Valuation Rules. When the valuation of Works contract service is not determined under Rules 2A(i) of the Valuation Rules, Rule 2A(ii) will apply.

6. On the other hand, Shri Paritosh Gupta the Learned Advocate appearing on behalf of the respondent reiterates the finding of the impugned order. He submits that contention of the revenue in the present matter is not correct. The bills which are produced clearly shows that VAT is paid on the value of material supplied thereunder. Such Bills are also forming part of the relied upon documents in the show cause notice and therefore, it is not open for the department to claim ignorance of such fact. Such fact has not been disputed in the show cause notice and is evident from the said bills.

7. He also submits that the allegation of the department that the documentary evidence shows that the cost of the retained goods have an impact on the value of goods to be replaced and service. The said allegation of the department has been rejected by the authority on a specific finding that Schedule A of the contract distinguishes the value of the material to be replaced and not to be returned, in cases where it is missing and not

available for retention by respondent. It is observed that in cases where the parts are missing and cannot be retained by the respondent, the value of the material is higher. It is also noted that such distinct price are not provided for labour. It is accordingly, held that retention of goods has impact only on value of the goods to be replaced and not the value of service.

8. We have heard both sides and perused the records. We have seen sample invoices issued by the respondent and contracts entered into by the respondent with his client. During the course of repairs, Respondents are replacing Coil, Transformer Oil and other items. They are paying Service Tax only on Labour Charges whereas it is contention of Revenue that Respondent should pay Service Tax on entire cost including of all the goods which are used in repair and Respondents are also not eligible for benefit of exemption Notification 12/2003, dated 20-6-2003 since there is no documentary proof. On going through contract, it is noticed that contracts described the rate of each item of works. Further the invoices issued by the respondent clearly shown that the VAT has been paid by the Respondents on cost of materials which are used in repair & maintenance. We find that the Notification No. 12/2003-Service Tax dated 20-6-2003 provides as under:

> *"In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the Service Tax leviable thereon under Section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."*

Under this Notification value of goods and material sold by the service provider to service recipient is exempted subject to the condition that there is documentary evidence indicating value of goods/material. We note that the value of these goods/material is separately shown in contract itself. Moreover invoices issued by the respondent clearly shown that VAT has been paid on these goods/materials. Therefore there is no reason to deny the benefit of Notification No. 12/2003, dated 20-6-2003 to the Respondent.

9. We find that as regard the demand of Service Tax pertaining to the period from 01.07.2012 the ground of the department is that the reduction of value of the property in goods transferred in execution of the works

contract as provided under Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006 is not admissible to respondent. To examine this issue, it would be appropriate to reproduce said Rule2A:

> ***"2A. Determination of value of taxable services involved in the execution of a works contract.*** *- Subject to the provisions of section 67, the value of taxable service involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in clause (8) of section 66E of the Act, shall be determined by the service provider in the following manner, namely :-*
>
> *(i) Value of works contract service shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.*
>
> *Explanation. - For the purposes of this clause, -*
>
> *(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract;*
>
> *xx xx xx*
>
> *(c) Where value added tax has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under this clause.*

From the perusal of above Rule2A, it will be evident that in respect of the 'works contract' it provides for the determination of the assessable value (i.e. the value of taxable service) by excluding -

(i) the value of transfer of property in goods involved in the execution of the said works contract.

(ii) Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the works contract.

The explanation (c) of the Rule 2A(i) very clearly provides that value adopted for the purpose of payment of VAT shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of value of service portion in the execution of works contract.

10. We find that the essence of the above rule is exactly the same as that of Notification No. 12/2003-ST. Hence looking to the facts of the case present case and also documentary evidence produced by the respondent we don't find any merit in the allegation of the revenue.

11. We have seen that invoices raised by the respondent, where the value of the goods/inputs used by them for replacing the old parts have been shown separately. The Hon'ble Supreme Court in the case of *Xerox Modicorp* vs. *State of Karnataka* - 2005 (142) STC 209 has held that if an assessee, while carrying out of the annual maintenance contract, also used certain goods for the said purpose, the cost of which goods has to be borne by the buyer, it has to be treated as sale of the goods and not part of services.

12. We also find that the identical issue in the case of repair of transformer activity stands considered by the Tribunal in number of decisions. In the case of *Balaji Tirupati Enterprises* v. *CCE, Meerut-II* - ST Appeal No. 161 of 2012 as also in the case of *CCE, Allahabad* v. *M/s. Kailash Transformers* - Appeal No. 446 of 2012 and in the case of *Hindustan Aeronautics Limited* v. *CST, Bangalore* reported in 2010 (17) S.T.R. 249 (Tri.-Bang.), the value of the goods used while carrying out repair activities was taken out of the service cost. Some of the said decisions stand confirmed by the Hon'ble Supreme Court when the appeal filed by the Revenue was dismissed. Reference can be made to the report made in *Wipro GE Medical Systems Pvt. Ltd*. - 2012 (28) S.T.R. J44 (S.C.).

13. We also refer to a decision of Allahabad High Court in the case of *CC&CE* vs. *Balaji Tirupati Enterprises* reported in 2013 (32) S.T.R. 530 (All.) wherein the Hon'ble Allahabad High Court has considered the following questions of law placed before the Hon'ble High Court :

> *"(i) Whether any composite contract for providing service of complete repair of old and damaged transformer may be divided into service portion and goods portion on the basis of payment of VAT on certain goods used during repair?*
>
> *(ii) Whether provisions of Notification No. 12/2003-S.T., dated 20-6-2003 will be applicable in breakup of the total cost into various heads*

including cost of items and labour charges is provided in the contract for the purpose of price variation?

(iii) Service Tax will be payable on total cost of repair package in composite contract as this case?"

After deliberating on the above questions of law the Hon'ble High Court rejected the appeal filed by the Revenue.

14. We find that the issue stands squarely covered by the various decisions of the Tribunal as also of the Hon'ble High Court which are required to be followed. We accordingly, by following the said declaration of law by the Tribunal as also by the Hon'ble Supreme Court and by the Hon'ble High Court of Allahabad, uphold the impugned order. Accordingly appeals of Revenue are dismissed. Cross objection also get disposed of.

(Pronounced in the open court on 12.06.2024*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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