Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.3 of 2010

(Arising out of OIO-STC/14/COMMR/AHD/2009 dated 30/09/2009 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Doshion Limited **........Appellant**
Plot No. 24-26,
Phase-Ii, Gidc, Vatva, AHMEDABAD, GUJARAT

VERSUS

C.S.T.-Service Tax – Ahmedabad **.......Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

WITH

i. **Service Tax Appeal No. 389 of 2011(Doshion Ltd.)**
ii. **Service Tax Appeal No. 438 of 2011 (Dohion Ltd.)**
iii. **Service Tax Appeal No. 439 of 2011 (Doshion Ltd.)**

APPEARANCE:
None appeared for the Appellant
Shri. Dinesh Prithiani, Assistant Commissioner (AR) for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. P. ANJANI KUMAR

Final Order No. A/ 10417-10420 /2022

DATE OF HEARING: 17.11.2021
DATE OF DECISION: 05.05.2022

RAMESH NAIR

These appeals are filed against respective orders passed by the Commissioner of Service tax, Ahmedabad by the Appellant and Appeal No. ST/389/2011 filed by Revenue against Order-in-Original dated 08.04.2011. Being involved common issue, all the appeals are taken up together for disposal. The table below gives details of appeals.

Sl. No.	Appeal No.	OIO No. & date	SCN date	Period covered	Service tax demand & order to recover (in Rs.)
1	2	3	4	5	6
1.	Appeal ST/03/2010	STC/14/COMMR/AHD/2009 dtd. 30.09.2009	SCN dtd. 22.10.2008	2004-2005	94,66,715/-
2.	Appeal No. ST/389/2011 (Department)	STC/12/COMMR/AHD/2011 dtd. 08.04.2011	SCN dtd.22.01.2010	January 2006 to March 2009	1,82,21,781
3.	Appeal No ST/438/2011	STC/11/COMMR/AHD/2011 dtd. 08.04.2011	SCN dtd. 07.10.2010	April 2009 to March 2010	51,01,908
4.	Appeal No. ST/439/2011	STC/12/COMMR/AHD/2011 dtd. 08.04.2011	SCN dtd. 22.01.20210	January 2006 to March 2009	1,82,21,781/-

2. The fact of the case is that the appellant are engaged in the manufacture of water treatment plant and water treatment chemical. They also undertake various activities such as erection and installation of water treatment plants its repair etc., During the course of audit by the department, it was found that assessee had provided the taxable service 'Operation and Maintenance Service' to M/s Tamilnadu Water Supply and Drainage Board (TWAD), but no service tax was paid thereon. As per the agreement No. CER/SR/MDU-25/2003-04 dated 27.02.2004 with Tamilnadu Water Supply and Drainage Board, the nature of work shown in the agreement was alleged to be Composite Maintenance Contract which also includes the cost of parts to be replaced. The nature of work shows that they were liable to Service tax under the category of repair and maintenance as defined under Section 65(64) of the Finance Act 1994. As detailed above,Show cause notices were issued proposing demand of service tax and proposing imposition of penalty on appellant. The adjudicating authority after considering the submissions made by the appellant by respective impugned orders confirmed the demands along with interest and also ordered for imposition of penalty. Hence Appellant are before this Tribunal. However, learned Commissioner in impugned order No. STC/12/COMMR/AHD/2011 dated 08.04.2011 allowed the benefit of cum-tax value. Therefore, revenue is in appeal against the impugned order to this scent only.

3. As per the appeal memo the appellant submitted that Prior to 16.06.2005 the definition under Section 65(64) of the Finance Act 1994, *"maintenance or repair" means any service provided by –*

(i) any person under a maintenance contract or agreement; or

(ii) a manufacturer or any person authorised by him, in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle;

Thereafter from 16.06.2005, the same was subtitled and the definition read as under.

"maintenance or repair" means any service provided by –

(i) any person under a maintenance contract or agreement; or

(ii) a manufacturer or any person authorised by him, in relation to-

(a) maintenance or repair or including reconditioning or restoration, or servicing of any goods or equipment, excluding motor vehicle; or

(b) Maintenance or management of immovable property;

The service related to maintenance or management of immovable property was introduced with effect from 16.06.2005 and therefore the demand prior to said period is without authority of law. They placed reliance on the decision in the case of Krishna Electrical Contractors Vs CCE, Trichy-2009(16) STR 57 (Tri. -Chennai) and Bharat Mechanical & Structural Works Vs. Commissioner of Central Excise, New Delhi 2009(16) STR 486 (Tri. Del)

3.1 Appellant submitted that there is no dispute about the fact that the water treatment plant was within the ownership of the Appellant for a period of 7 year till this contract was to be executed. Therefore, whatever repair and maintenance Service the plant required was with the intention of making the plant operational for themselves and not for rendering any service to any third party. In the case of **CMC (India) Operation & Maintenance Ltd. reported in 2007 (7)STR369 (T),** it was held that tax payer who entered into a contract to run and manage a power plant and provide electricity to the owner, the revenue vivisected the contract and contended that such service provider under the contact were liable to Service tax under different service categories. The Tribunal rejected the Revenue's plea and held that service taxable under repair and maintenance service were not the services which were provided by the tax payer. The Tribunal held that the main object of the contract was generation and supply of power and the other functions were incidental to this primary object and could not be separately taxed under Service tax. The ratio of said decision is directly applicable to the case of appellant.

3.2 It was further submitted that in the present matter, adjudicating authority has erred in not appreciating clause 48 of the Agreement which related to "Sales Tax", it is provided in the agreement that from every payment made to the Appellant, deduction at source towards tax shall be made at 2% for civil work contract and 4% for all the work contract as per Tamilnadu General Sales Tax (Fifth Amendment) Act (Act No. 15 of 1999) if it is applicable for supply of product water. The entire payments were received by the Appellants after deducting sale tax on the quantum of product water which is evident form the invoice raised by the appellant. Invoice was raised by the Appellant showing the result of the water purification containing TDS as the rates for payment were based on TDS content. The law in this regard is very clear that as has been categorically held by the courts of law that where there is sales of goods, sales tax is applicable and where the service is provided, service tax is payable. Both cannot go together. Therefore, same when the sales tax is payable as per clause 48 of the agreement, there is no provision made in the agreement by TWAD Board for Service tax. The Service tax which is an indirect tax just like sales tax, is required to be borne by TWAD Board if there would have been and liability on TWAD Board to pay Service tax. The appellant placed reliance on the decisions in the case of

- Cauvery Motors (p) Ltd. -2009 (16) STR 0355,
- Wipro GE Medical System Pvt. Ltd.-2009(14)STR43(T).

3.3 The appellant submitted that it is evident from the agreement that it was comprehensive contract. It is well settled legal position that comprehensive contract cannot be vivisected to find out the value of service tax contained therein. In this regard he relies on the decision of Tahel Ali Industries & Project Ltd reported in 2009 (14) STR 0245 (T) and in the case of M. Ramakrishna Reddy reported in 2009(13) STR 0661(T).

3.4 It is the appellant's submission that learned Commissioner has wrongly interpreted the ratio laid down by the Hon'ble Tribunal in the decision reported in **Precot Mills Ltd. – 2006(2) STR 495 (T).** The contention of the Appellant on the issue of service to self were that since the ownership of desalination plant was transferred by TWAD Board to the Appellant, where services were provided by the Appellants to the desalination plant were the services provided to the self. Hence the ratio of the Judgment in the case of Precot mills ltd *supra* erroneously differentiated by the Ld. Commissioner.

3.5 Appellant also contended that Learned Commissioner has wrongly erred in rejecting the submission of the appellant that the demand is hit by limitation as they were issued another show cause notice invoking the extended period on the same grounds. He wrongly distinguished the Judgment of the Hon'ble Supreme Court in the case of Nizam Sugar reported in **2006 (197) ELT 0465 (SC)** and various other cases relied by the appellant in their submissions. The finding of Ld. Commissioner on the said limitation issue also baseless and the demand of service tax dropped on the ground of the same being barred by limitation.

4. On other hand, Shri Dinesh Prithiani learned Assistant Commissioner (AR) opposed the contention of the Ld. Counsel and reiterated the findings of impugned orders. He submits that assessee has been awarded specific work under specified Agreement with M/s TWAD Board which had required maintenance and repair of the plant of M/s TWAD. The activities carried out by the assessee clearly fall under the category of "maintenance or repair service" as defined under Section 65(64) of the Finance Act 1994. As regard the contention of Appellant, Learned Authorized Representative placed reliance on the following decisions:

- CCE Raipur Vs BSBK Pvt. Ltd. – 2010-TIOL-646-CESTAT-DEL-LB
- Nagarjuna Construction Company Ltd. Vs. GOI- 2010-TIOL-403-HC-AP-ST
- Shapporji Pallonji Infrastructure Capital Co. Ltd. Vs. CST, Chennai – 2017-TIOL-2673-CESTAT-MAD

4.1 As regard the cum-tax-price benefit, he submits that the adjudicating authority has erred in extending the benefit of cum-tax-price in as much as there is no evidence on records to show that the invoice specifically say that gross amount charged includes Service tax. He placed reliance on the case of **M/s Shakti Motors reported in 2008(12)STR 710 (Tri. - Ahmd.)**

5. We have considered the submissions made by Learned AR and perused the records. We find that in the present matter the issues that emerge and which are to decided that whether the activity carried out by the Appellant is

taxable service under the "management, maintenance or repair service' as per department or the said activity is of conversion of portable water out of sea water and not attracting service tax.

5.1 We find that definition of "maintenance or repair" services under Section 65(64) of the Finance Act,1994 as amended from time to time needs to be considered for the period in question which falls into two categories, one prior to 2005 and the other one post2005. The same are reproducedbelow: -

> Definitions as per Section 65 of F.A., 1994:
>
> Post-2005
>
> "Management, Maintenance or repair" means any service provided by -
>
> (i) any person under a contract or an agreement; or
>
> (ii) a manufacturer or any person authorized by him, in relation to, -
>
> (a) maintenance or repair including reconditionning or restoration or servicing of any goods or equipment, excluding motor vehicle; or
>
> (b) maintenance or management of immovable property.
>
> ……………………………………………………………………………
>
> Definitions as per Section 65 of F.A., 1994 :
>
> prior to 15-6-2005
>
> "Maintenance or repair" means any service provided by -
>
> (i) any person under a maintenance contract or agreement; or
>
> (ii) a manufacturer or any person authorized by him,
>
> in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle.

It can be seen from the above reproduced definition that the requirement of statute prior to 2005 and even after the 2005 for taxability of the services rendered is very clear i.e. the maintenance or repairs has to be provided by any person under "contract" or "agreement". Undisputedly in the case in hand for the entire period, there was no specific maintenance contract entered by the appellant with M/s Tamil Nadu Water Supply and Drainage Board (TWAD Board).We have gone through the Contract/ agreement and find that the "Name of Work" as described in said agreement is as below:

"Rajuvenation, replacement of membranes with required re-engineering works including supply of all materials, maintenance of raw material (open sea water) drawl system, pretreatment and post treatment by providing demineralization lower or by any other process, including maintenance of Transformers and accessories etc., complete and to supply a quantity of 3800m3/day potable water of specified standers, on Kilo Liter rate basis every day at the inlet of TWAD Board Product Water tank of plant site at Narippaiyar in Ramnathapuram District T.N. for a period of 7 years including Reject water disposed into sea"

Further in the said contract as regard the consideration it described as under:

"Now hereby agreed that in consideration of price levelised Tariff @Rs. 57.94 / kilo Liter (Rupees Fifty-Seven and Paisa Ninety-Four per Kilo Liter) offered by the contractor and accepted by the Board in B.P. Ms No. 156/CMW/ dated 13.12.2003.

The IV Programme Schedule provide as under

(a) The ownership of assets for which investment is made by the contractor towards rehabilitation and replacement work will remain with the contractor till the expiry of agreement period of 7 years. In the unlikely event of fore closure of work, contractor will be compensated to the extent of repayment value of the investment made as on date of force closure of works. However, the bidder should not remove any of the material/component/equipments/from the plant site.

The V. Payments and Recoveries provide that

42.1 <u>Charges Payable</u>

(i) The charges payable by TWAD Board to the Company for supply of Potable water shall be in the nature of

a. the Water Capacity Charges;
b. the water variable charges; and
c. the Energy charges

(ii) The water Capacity charges means ------------------ -- ---------------------------------

(iv) The water Variable charges would be calculated as the product of price of portable water and volume of portable water registered by the meter at the inlet to product water tank with necessary adjustment during the period under consideration.

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42.2 Billing and Payment :

42.2.1 Invoice :

At the end of each calendar month, by the ----------------- --, the company shall prepare and submit to TWAD Board an invoice in duplicate, stating with supporting calculation.

A. In----to the water capacity charges---

i. Availability capacity for the facility for the month.

ii. -- ---

From the above we find that the Appellant is being paid an amount of Rs. 57.94 Per Kilo Liter water and the agreement reveals that the same is for supply of a quantity of 3800 m3 per day portable water of specified standard, on kilo Liter rate basis every day at the inlet of TWAD Board Product water tank of plant site for a period of seven years.As per the clause 42.1 the charges payable by M/s TWAD to Appellant for supply of potable water shall be in nature of water capacity charges, water variable charges and energy charges and invoices is prepared for supply of potable water with the same understanding. However, the sentence used in the above agreement " *"Rejuvenation, replacement of membranes with required re-engineering works including supply of all materials, maintenance of raw material (open sea water) drawl system, pretreatment and post treatment* *by providing demineralization lower or by any other process, including maintenance ------------,* can be held to be incidental. Further after going into all the conditions of the said agreement, it clearly reveals that contract is for supply of potable water every day at the inlet of TWAD Board Product water tank of plant site. The said contract/ agreement is not a "maintenance contract". Accordingly, the demand raised on the appellant on this count is unsustainable.

5.2 We also find that the Hon'ble Supreme Court dismissed the appeal filed by Commissioner of Central Excise, Pondicherry against the CESTAT Final Order Nos. 614-615/2007, dated 21-5-2007 as reported in 2007 (7) S.T.R. 369 (Tri.-Chennai) *[CMS (I) Operations & Maintenance Co. Pvt. Ltd.* v. *Commissioner]*. While dismissing the appeal, the Supreme Court passed the following order:

> "*Delay condoned.*
>
> *Heard learned counsels for the parties and perused the relevant material.*
>
> *We do not find any legal and valid ground for interference. The civil appeal(s) is/are dismissed."*
>
> *The Appellate Tribunal in its impugned order had held that the activity of maintaining and operating power plant on contract basis was not leviable to Service Tax under category of Management Consultant service under Section 65(65) of the Finance Act, 1994 as the appellant being a contractor did not provide any advice for improvement of organization and contract provided for rewards and penalties which was indicative that no advisory services provided.*
>
> *It was further held that the said activity also could not be taxed under Consulting Engineer's service under Section 65(31) ibid since no consultancy provided to the owner or others during running of the plant. On the basis of suggestions for better running of the plant given during its erection, it could not be said that the appellant had provided Consulting Engineer's services.*
>
> *It was also held that the appellant contractor could not be held liable for payment of Service Tax under category of Clearing and Forwarding Agent's service under Section 65(25) ibid solely on the ground of his co-ordination with transport agent for supplying fuel to run the power plant since such activity is incidental function to the primary function of the power generation.*
>
> *It was also held that the activity of maintenance and operation of power plant on contract basis also could not be taxed under Business*

Auxiliary Service under Section 65(19) ibid since electricity is manufactured excisable goods and excluded from definition of BAS.
It was also held that the maintenance of electricity generation plant on contract basis was not taxable under Management, Maintenance or Repair service under Section 65(64) ibid since goods and equipments were maintained/repaired by suppliers thereof under warranty or maintenance contract and services rendered by the appellant amounted to self-service.
It was also held that the contract for maintenance and operation of power plant cannot be vivisected as Works Contract as such contract is for supply and generation of power and not for rendering any services.

The Ratio of aforesaid judgment is also applicable in present matter.

5.3 Without prejudice the above, we also find that the entire plant was handed over by TWAD Board to Appellant for operation and completing the contract to TWAD Board in rendering such activities, even if the Appellant undertakes the maintenance or repair services which in our view are for self and the services of management, maintenance or repair are not attracted as the same is not provided to any client/customer.Our above said view is fortified by the ratio of decision of the Tribunal in the case of SHAPOORJI PALLONJI INFRASTRUCTURE CAPITAL CO. LTD. vs. C.S.T., CHENNAI2017 (5) G.S.T.L. 65 (Tri. - Chennai) wherein the was held that

"The activity carried out in the power plant is not solely management of power plant, but operation of the same. The word 'operation' is not used in the definition of 'Maintenance and repair' services which is relied by department as amended with effect from 16-6-2005. The said word is seen used in the definition of Business Support Services ('Operational assistance'). Thus, it is very much clear that management of immovable property does not include operation activities. In addition, it cannot be said that the appellants are doing management service for the reason that the management service is done by appellants to themselves and not to any other person. The appellants are operating the power plant to generate electricity on behalf of the owner for supplying the same to TNEB."

In the matter of *CMS (I) Operations and Maintenance Co. Pvt. Ltd.* [2007 (7) S.T.R. 369], we reproduce the order:

"As regards Repair or Maintenance Services, the argument of the appellants that they maintained only the plant and the taxable service of maintenance or repair of goods/equipment covered by the Act were done by the suppliers of the equipment under

warranty of Annual Maintenance Contract (AMC) is reasonable and merits acceptance. If the appellants undertook these activities, they had rendered the service to themselves and not to another person. Therefore, no liability is incurred by the appellants on this account."

5.4 In the light of the discussions and also following the ratio laid down by the Tribunal in the cases referred supra, we have no hesitation in holding that the demand of service tax is not sustainable.

5.5 As regard Revenue's appeal, we find that the said appeal is solely on the issue ofthe benefit of cum-tax value extended by the Adjudicating authority to Appellant. Since we have decided the matter in favour of Appellant on merit itself, revenue appeal is not sustainable.

5.6 Since the entire demand has been set aside, consequently penalties and demand of interest are also not sustainable.

6. As per our above observations and findings, the impugned order is modified to the above extent. The parties' appeals are allowed with consequential reliefs, if any and Revenue's appeal is dismissed.

(Pronounced in the open court on 05.05.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Geeta