CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70370 of 2017

(Arising out of Order-in-Original No.13/Commissioner/ST/Noida/2016-17 dated 23.01.2017 passed by Commissioner of Service Tax, Noida)

M/s Interarch Building Products Pvt. Ltd., ...Appellant
(Plot No.B-30, Sector-57, Noida-201301)

VERSUS

Commissioner of Service Tax, Noida ....Respondent
(C/56/42, Sector-62, Noida)

APPEARANCE:

Shri Shailesh P. Sheth, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70496/2024

DATE OF HEARING : 09 April, 2024
DATE OF DECISION : 02 August, 2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Original No.13/Commissioner/ST/Noida/2016-17 dated 23.01.2017 passed by the Commissioner of Service Tax, Noida, confirming the demand of service tax under Section 73(2) of the Finance Act, 1994[1] along with interest thereon under Section 75 of the Act, and imposing the penalties on the Appellant under Sections 77 and 78 of the Act given the findings recorded therein.

2. The Commissioner has confirmed the demand for Service Tax under reverse charge in terms of Section 66A of the Act read with Rule 2(1)(d) of the Service Tax Rules, 1994[2] under the taxable category viz. Design Services on the remittances made

---

[1] The Act
[2] The Rules

by the Appellant to certain foreign entities during F.Y. 2008-09 and 2009-10 in respect of Design charges paid by the Appellant.

3. Briefly stated, the facts of the case are that the Appellant was engaged in the manufacture/ fabrication of the prefabricated/ pre-engineered steel structures and their parts and the installation and commissioning thereof. The Appellant was engaged as a sub-contractor in the execution of the Delhi International Airport Project[3] (Terminal T-3), i.e. DIAL Project of M/s. Delhi International Airport Ltd., wherein M/s. Larsen & Toubro Ltd[4]. was engaged as the main contractor. M/s. L & T had entered into two separate Agreements dated 06.03.2008 and 02.04.2008 with the Appellant, engaging the Appellant as 'sub-contractor' for the supply of 'T-03 Roof Sheeting and associated works' and 'T-03-02.2 Piers Structural Steel Works' as per the specifications respectively. The sub-contracts entered into with the Appellant also involved the erection, installation and other associated works at the site.

4. The Appellant, in turn, placed a Purchase Order dated 30.04.2008 on M/s. Corus Building Systems Pvt. Ltd[5]., Singapore for the supply of Kalzip Roofing System material required for the said DIAL Project (The name of M/s. Corus Building Systems Pvt. Ltd. was subsequently changed to "Kalzip Asia Pvt. Ltd.). The purchase order awarded to M/s. Corus envisaged the scope of the Order as follows:-

(a) Supply of Aluminium Kalzip straight sheets as per the specifications.

(b) Supply of Aluminium flashing non-clad alloy, PVD F-2 Coat paint system as per the requirements.

(c) Supply of Kalzip Bespoke Accessories

(d) Design, Drawings, Detailing, Calculations, Test Certificates, and Submittals for roofing system

(e) Providing technical support, supply of roll formers and technicians at site and roll forming charges.

---

[3] DIAL Project
[4] M/s L & T
[5] M/s Corus

In pursuance of the Works Order placed on it, M/s. Corus supplied the material from time to time. M/s Corus also supplied, electronically, the Designs, Drawings, Calculations, Testing Certificates, and Submittals in terms of the above purchase order dated 30.04.2008, against which the Appellant made the remittances during F.Y. 2008-09 and 2009-10.

5. However, pursuant to the objections raised by the Audit, a Show Cause Notice[6] dated 22.04.2017 was issued by the Commissioner Customs, Central Excise and Service Tax, Noida, to the Appellant, asking them to show cause as to why:-

(i) the amount of Service Tax, including cesses, of Rs.1,42,48,828/- should not be demanded and recovered from them under the proviso to Section 73 of the Act;

(ii) interest should not be charged from them under Section 75 of the Act;

(iii) penalty under Section 77 of the Act should not be imposed upon them for contravention of provisions of Sections 66A & 70 of the Act;

(iv) penalty under Section 76 of the Act should not be imposed upon them for non-payment of service tax and contravention of the provisions of Section 68 of the Act read with Rule 6 of Service Tax Rules, 1994; and

(v) penalty under Section 78 of the Act should not be imposed upon them for the non-payment of service tax by reason of willful suppression of facts and contravention of the provisions of Section 68 of the Act read with Rule 6 of the Rules on the grounds stated therein.

6. The SCN raised the demand of service tax under reverse charge on the design charges paid by the Appellant to the said foreign entities, in terms of the provisions of Section 66A of the Act, on the grounds stated therein. Consequent upon the adjudication proceedings held on the SCN, the Commissioner passed the Order-in-Original dated 23.01.2017, confirming the demand of service tax of Rs.1,42,48,828/- raised against the Appellant under Section 73(2) of the Act, along with the interest

---

[6] SCN

thereon under Section 75 of the Act, and imposing a penalty of Rs.10,000/- under Section 77 and Rs.1,42,48,828/- under Section 78 on the Appellant in view of the findings recorded therein. Hence the present appeal before the Tribunal.

7. The learned Advocate made the following submissions:-

7.1 The impugned order is unsustainable in law in as much as the SCN itself was vague, non-specific and invalid. As is evident from the perusal of paragraphs 5 and 9 of the SCN, the design charges paid by the Appellant were considered liable to be taxed under reverse charge simultaneously under two taxable categories, viz. Design Services and Commercial and Industrial Construction services. He submitted that, assuming the liability on design charges paid by the Appellant under reverse charge, the Department was obliged in law to explicitly specify the taxable category under which the alleged services stated to have been availed from the foreign entities were classifiable and taxable and the basis or grounds in support thereof. It was not permissible in law for the Department to adopt the 'If I fail here, I may succeed there' approach regarding the classification and the consequential demand based on it. He submitted as the SCN itself was *ex-facie* bad-in-law, the impugned order, confirming the demand on the design charges under reverse charge under the taxable category viz. Design Services is rendered illegal and unsustainable in law. The learned Advocate relied on the following judgments in support of his submissions:-

1. Shubham Electricals vs. CCE 2015 (40) S.T.R. 1034 (Tri-Delhi). [Affirmed in 2016 (42) S.T.R. J312 (Del.)].
2. Balaji Contractor vs. CCE 2017 (52) S.T.R. 259 (Tri-Del).

7.2 The demand of service tax confirmed under the taxable category viz. Design services is illegal and without the authority of law as the Appellant had not availed or procured any service, much less a 'taxable service' from M/s. Corus during the relevant period to attract the service tax liability under reverse charge. He submitted that the purchase order dated 30.04.2008 awarded to M/s. Corus was an indivisible contract involving supply of goods and services concerning the execution of the DIAL project. The learned Advocate submitted that the consideration for the contract was determined on a lump-sum basis, though it was paid on stage-wise or milestone basis, and even separately for the supply of the goods and services involved therein. The provision of design, detailing, drawings, submittals, testing, deputation of technical personnel for roll forming at site, etc. was an integral and inseparable part of the contract and could not be artificially segregated from such indivisible contract and subject to service tax as a provision of service. He submitted that the parties to the contract never intended for the provision of any service involved in the contract on an independent, stand-alone basis. He further submitted that the principles of law on this issue stands settled in the case of Daelim Industrial Co. Ltd. vs. CCE – 2003 (155) E.L.T. 457 (Tri.-Del.) and maintained by the Hon'ble Supreme Court in 2004 (170) E.L.T. A 181 (S.C.). He also submitted that the reliance placed by the Commissioner on the judgement of the Tribunal in the case of Alstom Projects (India) Ltd. vs. CST – 2011 (23) S.T.R. 489 (Tri.-Del.) was misplaced as in this case, the main issue for consideration before the Tribunal was whether the services of 'Consulting Engineer's Services" and 'Erection, Installation or Commissioning Service" provided as a works contract or part of works contract could be charged to service tax during the period prior to 01.06.2007 or not. While the Tribunal upheld the levy of service tax on such contracts during the period prior to 01.06.2007, the judgement stood impliedly overruled in view of the judgement of the Hon'ble Supreme Court in the case of Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.). He further submitted that though in Alstom's case, the Tribunal departed from the view taken in Daelim's case (supra), in view of the affirmation of the judgement of the Tribunal in Daelim's case by the Hon'ble Supreme Court in 2004 (170) E.L.T. A 181 (S.C.), the judgement in Alstom's case, holding that a service component in a composite contract of sale of goods and service could be subjected to levy of service tax stood overruled.

7.3 The learned Advocate further submitted that even if it is assumed, for the sake of argument, that the supply of designs, drawings, detailings, calculations, testing certificates, and submittals by M/s Corus involved a service, and that also, a taxable service, the same was not classifiable and taxable under the taxable category, viz., Design Services as defined vide Section 65 (36b) read with Section 65 (105) (zzzzd) of the Act, rendering the impugned order illegal and without the authority of law. Referring to the definition of 'Design Services' given in Section 65 (36b), the learned Advocate submitted that the definition covered the service/activity in relation to designing of the specified products/intangibles, viz. furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three-dimensional models; that the definition was exhaustive and not illustrative. He vehemently argued that the Kalzip Aluminium Roofing Sheets supplied by M/s. Corus were structural components and were neither the consumer products nor industrial products. The sheets and other items were tailor-made as per the specifications, and meant for the specific use i.e. to be installed in Terminal-3 of Delhi International Airport Project. The supply of design, drawing, detailing, submittals, etc. by M/s. Corus, therefore cannot be classified under the taxable category viz. Design Services and subjected to the levy of service tax thereunder.

7.4 The learned Advocate further submitted that in any event, the demand confirmed by the impugned order is entirely barred by limitation and unsustainable in law. He submitted that the Appellant was under a *bona fide* belief that as the contract dated 30.04.2008 placed on M/s. Corus was an indivisible contract, and it was not procuring nor had any intention to procure any service, much less, design service, separately, the liability to pay service tax under reverse charge in respect of the remittances made as design charges to M/s. Corus did not arise. He further submitted that the Appellant also believed in good faith that as the construction of airport was outside the levy of service tax absolving M/s. L & T of any service tax liability as a main contractor, they were also not liable for the payment of service tax as a 'sub-contractor'. This belief was widely held by the service providers engaged as 'sub-contractors' in the execution of the projects for the construction of airports, ports, etc. The legal position was only later clarified by the CBEC by Circular dated 21.10.2011. The ld. Advocate further submitted that the issue involved related to the statutory interpretation and, therefore, the allegation of willful suppression of facts with an intent to evade payment of service tax and the findings of the Commissioner upholding the same are unjustified and not maintainable in law. It is pertinent to note here that the Department itself was uncertain about the classification of the so-called design service, as is evident from the fact that in the SCN, the said service was considered classifiable and taxable under two taxable categories, namely viz. Design Service and Commercial and Industrial Construction Service simultaneously. He also argued that the Appellant had also recorded all the transactions in its books of accounts, and there was no attempt by the Appellant to hide or camouflage any transaction with M/s Corus. The demand was raised on the basis of the information recorded in the books of accounts and which was provided by the Appellant itself. He lastly submitted that there was an inordinate and unexplained delay in the issue of the notice though all the material facts were within the knowledge of the Department as early as 2010 through EA-2000 audit. The learned Advocate also submitted that the allegation of suppression of facts with an intent to evade payment of service tax made by the SCN and the findings of the Commissioner upholding the same are devoid of any substance or merit, unsubstantiated, invalid and untenable in law. Consequently, the invocation of the extended period of limitation available under the proviso to Section 73(1) of the Act is illegal, unjustified and without the authority of law. The demand of service tax for the period F.Y. 2009-09 to 2009-10 raised by SCN dated 22.04.2014 and confirmed by the impugned order is, therefore, entirely barred by limitation and unsustainable in law. He relied upon the various judgements in support of these submissions. The learned Advocate, accordingly, prayed that the impugned order be set aside and the appeal be allowed.

8. The ld. Authorized Representative appearing for the Department reiterated the findings in the impugned order and supported the order. The ld. Authorized Representative also submitted that the contract dated 30.04.2008 specifically provided for the supply of Design and detailing services for Roofing system.

9. Heard both the sides and perused the appeal records and the synopsis and compilation of case laws & other documents filed by the learned Counsel for the Appellant.

10. We find that the Appellant was engaged as a sub-contractor by M/s. L & T i.e. the main contractor for the supply of 'T-03 Roof sheeting and associated works' and 'T-03-02.2 Pieces structural works' as per the specifications in the execution of the Delhi International Airport Project (Terminal T-3) Project of M/s. Delhi International Airport Ltd. The Appellant, in turn, placed a Purchase Order dated 30.04.2008 on M/s. Corus for the supply of Kalzip Roofing System. The scope of the Purchase Order is outlined in the preceding paragraphs. We find that the contract with M/s. Corus was an indivisible contract involving, not only the supply of the goods, i.e. the Kalzip Roofing Sheets and related items, but also supply of services and labour like Design, Drawings, Detailing Calculations, Test Certificates, Submittals, providing technical support, supply of roll formers and technicians at site and roll forming.

11. On careful perusal of the contract placed by the Appellant with M/s. Corus, we find that it involved the supply/provision of various services described above, which were integral and inseparable parts of the contract. We also find that the contract did not involve nor envisage the provision of 'Design and drawing services' independently and on a standalone basis. Even

the submission of Design and Drawings involved in the contract was integrally connected with other services to be provided by M/s. Corus in terms of the Contract as is evident from clause 9 titled 'Design' of the Contract, which is reproduced below:-

> *'9.* *<u>Design</u>*
>
> i) *Corus will prepare Kalzip layout drawings, shop drawings & details and interface details for submission to Interarch. Substructure drawings to be prepared by Interarch. Corus to provide all necessary Technical Help and support required for the job of no extra cost, including calculations, test certificates and submittals'*.

We, thus, find that there was no provision or supply of any independent services of Design and Drawings by M/s. Corus to the Appellant in terms of the contract. The separate consideration in the form of foreign remittances paid by the Appellant to M/s. Corus was not only for any independent supply or provision of any Design or Drawings services. Moreover, the consideration so paid was also for the provision of a gamut of services as described above, including design and drawings, and which were an integral part of the entire contract, incapable of being segregated or vivisected. The Revenue has also not brought any evidence on record nor has been able to establish before us that the design and Drawings covered within the scope of the Contract constituted an independent aim of the contractual arrangement between the contracting parties, and that the entire consideration described as 'Design Charges' paid by the Appellant was only for the provision/supply of Design and drawings.

12. We, therefore, find that the attempt of the Revenue to artificially vivisect the supply of Design and Drawings from the above indivisible contract cannot be sustained, and the demand of service tax raised and confirmed on this basis cannot be upheld.

13. We have also considered the submissions made by the learned Advocate for the Appellant that the impugned order was

vitiated in law as the SCN dated 22.04.2014 was vague, non-specific and invalid in as much as it simultaneously alleged the disputed services under two taxable categories viz,. Design Services and Commercial and Industrial Construction Services, which was not permissible in law. We find substantial force in the submissions of the learned Advocate. We find that para 5 of the SCN read as follows:-

> *"5. It is a matter of fact that the impugned input service is used in the construction of project of DIAL and* ***thus it appears that the impugned input service falls under the category of designing service and party is liable to pay tax thereupon being the service taxable****."*
>
> ***[Emphasis provided]***

However, after considering the said services as classifiable and taxable under the taxable category viz. Design Services, the SCN, in the same breath, at para 9 thereof states and concludes as follows:-

> *"9. And whereas, from above it appears that the party has received Roofing systems material from M/s. Corus Building Systems Pvt. Ltd. and used it by the party to complete the DIAL project and finally construction done at DIAL by the party. So, the services provided by M/s. Interarch Building Product Pvt. Ltd. as sub-contractor not treated as independently provided for completion of the main contract as the party used the Roofing Systems material for project of pre-fabricated steel building of M/s. DIAL because the Roofing systems material received by the party and used by the party themselves to complete the project of DIAL,* ***so, the exemption from payment of service tax not appears to be available to the party and the design charges paid by the party are liable to be taxed under reverse charge in commercial & industrial construction service."***

[Emphasis provided]

The above contradictory conclusions were drawn by the Department based on the statutory definitions of 'Design

Services' and 'Commercial and Industrial Construction Service' and the CBEC's Circular No.147/16/2011-Service Tax (F. No. 137/57/2011-Service Tax) dated 21.10.2011.

14. We find that the SCN was per se bad in law and invalid as it failed to establish the classification of the said services under any specified taxable category. We find that the demand in the present case related to the period F.Y. 2008-09 to March, 2010 and that is, for the period prior to the introduction of the 'Negative List based levy of Service Tax' regime introduced in July 01, 2012. During the relevant period, the service tax regime was governed by the 'Positive List based levy of Service Tax' and only that service could be brought within the scope of the levy which was covered by any of the sub-clauses of Section 65 (105) of the Act that defined the term 'taxable service'. We, therefore, find that the onus was on the Department to conclusively establish the classification of the services under dispute relating to Design and Drawings under a specified taxable category, even if its taxability was presumed. The Department, however, failed to discharge this burden cast upon it in the present case. We find that the SCN was vague, non-specific and void *ab initio* as it simultaneously alleged the classification and taxability of the said service under two specified table categories viz. Design Service and Commercial and Industrial Construction Service which was not permissible in law.

15.1 In C.C.Ex. vs. Brindavan Beverages- 2007 (213) E.L.T. 487 (S.C.), the Supreme Court made the following pertinent observations:-

> *"The show cause notice is the foundation on which the department has to build up its case. If the allegation in the show cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible, that is sufficient to hold that the notice was not given proper opportunity to meet the allegations indicated in the show cause notice."*

15.2 In Shubham Electricals vs. C.CEx. – 2015 (40) S.T.R. 1034 (Tri.-Del.), the Tribunal observed and held as follows:-

> ***"10.*** *It is a axiomatic that a best judgment assessment under Section 72 could only be for ascertaining the quantum of the tax liability, in a context where the actual extent of liability cannot be determined with mathematical precision on account of non-availability of relevant documents or financial records. There cannot be a best judgment assessment regarding the specific taxable service provided. There can be no best judgment, for instance as to whether the tax liability is for income tax, sales tax, excise duty, customs duty, Service Tax or professional tax.* ***A conclusion as to the taxable event and the liability to tax under the appropriate fiscal legislation authorizing the levy and collection of such tax is a matter for determination with precision and clarity and not by a process of guess-work or speculation.***
>
> ***11. Neither the show cause notice dated 21-10-2011 nor the impugned adjudication order dated 18-1-2013 record any assertion/conclusion whatsoever as to which particular or specific taxable service the appellant had provided. In the absence of an allegation of having provided a specific taxable service in the show cause notice and in view of the failure in the adjudication order as well, neither the show cause notice nor the consequent adjudication order could be sustained."***

[Emphasis provided]

The judgement of the Tribunal was affirmed by the Hon'ble Delhi High Court as reported in 2016 (42) S.T.R. J312 (Del.). We note that in this case, the SCN alleged rendering of the taxable services which were considered as classifiable either under 'Management, Maintenance or Repair Service' or 'Erection, Installation and Commissioning Service' and other construction linked services as defined under the Finance Act, 1994.

15.3 In Balaji Contractor vs. C.C.Ex – 2017 (52) S.T.R. 259 (Tri-Del), the Tribunal observed as follows:-

> ***7.*** *We have heard both the sides and perused the appeal records. Admittedly, the show cause notices issued to the appellant sought to demand/recover Service Tax under the taxable category under Cargo Handling Services. The proposal was made after due examination of the scope of services rendered by the appellant. The same was confirmed by the original authority. On appeal, the first appellate authority examined the same scope of services, reclassified it under new categories of manpower supply and Goods Transportation Agency services.* ***We note that the tax entry of each type of service has got legal implications with reference to tax liability, classification, quantification, exemption, abatement, etc. It is for this reason, the assessee should be put to notice about the correct classification under which the demand was sought to be made, so that defence can be made to reply for such allegation. Admittedly, in the case involved in the present proceeding, no such proposal to demand Service Tax in GTA services or manpower supply service has been made by the department. As such, the impugned order which travelled beyond the scope of show cause notice is not sustainable on this legal ground alone. We rely on the decision of Hon'ble Karnataka High Court in the case of Mahakoshal Beverages Pvt. Ltd. (supra)."***
>
> ***[Emphasis supplied]***

16. We find that the ratio of the principle laid down in the above judgements squarely apply in the present case. As observed by us, the SCN issued to the Appellant was vague and non-specific as it alleged the said services classifiable under the two taxable categories. Therefore, applying the principle laid down in the above judgments, the notice has to be held as void

ab initio, rendering the impugned order without the authority of law. We hold accordingly.

17. We have also carefully considered the alternate submission of the learned Advocate for the Appellant that in any event, the disputed service could not be classified under 'Design Service' and therefore, the impugned order confirming the demand under this taxable category was unsustainable in law. We find substantial force in the submission of the learned Advocate. The definitions of 'Design Services' and 'taxable service' related thereto given in Section 65 (36b) and Section 65 (105) (zzzzd) of the Act read as follows:-

> ***"S.65(36b)*** *– "Design services" includes services provided in relation to designing of furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three dimensional models."*
>
> *"**S.65(105) (zzzzd)** – "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to design services, but does not include service provided by –*
>
> *(i) an interior decorator referred to in sub-clause(q); and*
>
> *(ii) a fashion designer in relation to fashion designing referred to in sub-clause(zv); and the term "service provider" shall be construed accordingly.* "

18. We find that the 'Design Services' as defined, covered the services of designing provided in relation to the specified goods/intangibles, viz. furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three dimensional products. The products, viz. Kalzip Aluminium Roofing Sheets and other related items were structural material, meant for a specific use for a specific project. We find that these products were neither consumer goods nor industrial products nor could be considered

so. We, therefore, find that the services under dispute were outside the scope of the 'Design Services' as defined in Section 65 (36b) of the Act and demand of service tax confirmed under this taxable category is unjustified and unsustainable in law. We also find that the Commissioner justified the classification of the services under 'Design Services' by observing as follows at para 6.3 of the Order:-

> *"6.3 .. … However, I find that the party made a desperate attempt to debar classification of designing/drawing in relation to such fabrication and supply of Kalzip Aluminium roofing sheets and other specified items from the inclusive list of services defined under the definition of "design services" but they could not submit their explanation on the production of three dimensional models as detailed in the said definition. As I understand that for executing such a huge project like the DIAL one has to prepare a walk through or similar type of three dimensional model so as to make correct type of roofing sheet in the CKD condition for ease of transportation and assembly at site. Thus, the design of the project detailed in a three dimensional model and further preparation of drawings is very much found covered in the definition of Design Service under Section 65 (105)(zzzd) of the Finance Act 1944 and I find no justification in the defense reply that the Design service includes only intangible goods and not the immovable property."*

19. We find that the observations of the Commissioner are incoherent, self-serving, based on his personal understanding but otherwise unsubstantiated. The observations and findings are also beyond the scope of the SCN dated 22.04.2014 in as much as no such basis was laid down in the notice for alleging the classification of the services under 'Design Services'. We, therefore, hold that the impugned order passed by the Commissioner holding the services under dispute under the taxable category viz. Design Services and confirming the

demand of service tax under reverse charge thereunder cannot be sustained in law and we hold accordingly.

20. As we have decided the issue on merit itself as discussed above, we do not consider it necessary to deal with other submissions including on limitation made by the learned Advocate for the Appellant.

21. In view of the above discussion, the impugned order cannot be sustained and is, accordingly, set aside. Thus, the appeal of the Appellant is allowed with consequential relief, as per the law.

(Order pronounced in open court on – **02nd August, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS