

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70806 of 2018

(Arising out of Order-in-Appeal No.106-ST/APPL/KNP/ADG-NACIN/2017-18 dated 27.03.2018 passed by Additional Director General, NACIN (ZTI), Kanpur)

M/s J. P. Constructions,

(33, Lahar Grid Road, Jhansi-284003 U.P.)

.....Appellant

VERSUS

**Commissioner of Customs, Central Excise &
Service Tax, Kanpur**

(117/7, Sarvodaya Nagar, Kanpur)

....Respondent

APPEARANCE:

Shri Nishant Mishra, Advocate & Ms. Parinita Gupta, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70724/2024

DATE OF HEARING : 02.07.2024

DATE OF DECISION : 14.11.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.106-ST/APPL/KNP/ADG-NACIN/2017-18 dated 27.03.2018 passed by learned Commissioner Additional Director General NACIN (ZTI), Kanpur.

2. The facts of the case in brief are that the Appellant is a proprietorship firm, holding Service Tax Registration dated 26.12.2012 under the category of 'Management, Maintenance or Repair Services'. The Appellant had been solely rendering services of maintenance of Railways at various Railways sidings of the Food Corporation of India¹ under works contracts as execution of work required the transfer of materials. The Appellant had started working only w.e.f. 01.08.2011 and have

¹ FCI

been exclusively providing services in respect of only one customer namely FCI a wholly owned organization of the Government of India and solely relating to the maintenance of Railways as per the scope of services stipulated in the Technical Specification of the Agreement. The work *inter alia* involved through Packing of track, Picking up slag, Lubrication and oiling of fish plates and bolts, Creep adjustment by pulling back rails, Overhauling of track, O.H. of points and crossing, O.H. of level crossing and Repairs of cess and Cleaning of side drains and Catch water drains. The Appellant had rendered services under Works Contract as evident from the copy of agreement provided to the Department which clearly provided for payment of VAT by the Appellant on items used by them in execution of the work. Show cause notice² dated 29.11.2014 was issued proposing as under:-

(i) An amount of Rs.36,17,688/- (Rs. Thirty Six Lakhs Seventeen Thousand Six Hundred and Eighty eight only) charged and received from their customer as taxable amount during the F.Y. 2011-12 and F.Y. 2012-13 in lieu of providing the taxable services falling under the category of "Management, Maintenance or Repair Service" should not be treated as the value of taxable services provided by them and accordingly why Service Tax short paid by them amounting to Rs.3,58,598/- (inclusive of Service Tax, Education Cess and Higher & Secondary Education Cess) should not be demanded and recovered from them under the provisions of Section 73(1) of the Act read with Section 68 of the Act *ibid* and Rule 6 of the Service Tax Rules, 1994 and the amount of Rs.2,20,097/- already deposited by them vide challans dated 24.04.2014 and dated 30.09.2014 should not be appropriated against the said demand of service tax.

(ii) Interest at the appropriate rate for the relevant period till the payment of the Service Tax should not be

² SCN

demanded and recovered from them under the provisions of Section 75 of the Act.

(iii) Penalty should not be imposed upon them under Section 76 of the Act for failure to pay Service Tax in accordance with the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994.

(iv) Penalty should not be imposed upon them under Section 77 of the Act for contravention of various provisions of Section 70 of the Act and Rule 6 of the Service Tax Rules, 1994; and

(v) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994.

3. The SCN culminated into Order-in-Original dated 30.08.2016 and the following order was passed:-

"ORDER

1. *I confirm and determine the amount (Gross) of Rs.36,17,688/-(Rupees Thirty Six Lakhs Seventeen Thousand Six Hundred Eighty Eight only) as value of taxable services charged and received by the party from their customers in lieu of providing taxable services under the category of "Management, Maintenance or Repair Service" during the period 2011-12 & 2012-13 and confirmed the demand of Service Tax amounting to Rs.3,58,598/-(inclusive of Cesses) (Rupees Three Lakhs Fifty Eight Thousand Five Hundred and Ninety eight only) under Section 73(2) of the Finance Act, 1994 read with Section 68 of the Act *ibid* and Rule 6 of the Service Tax Rules, 1994 and I appropriate the amount of Rs.2,20,097/- already deposited by the party as service tax during current proceedings.*
2. *I order to recover interest at the appropriate rate for the relevant period for delayed payment of the service tax under the provisions of Section 75 of the Act *ibid*.*
3. *I impose penalty of Rs.10,000/-(Rupees Ten Thousand only) upon the party under Section 77 of the said Act for*

contravention of various provisions of Section 67 & 68 of the Act ibid and Rule 6 of the Service Tax Rules, 1994.

4. *I impose penalty of Rs.3,58,598/- under Section 78 of the Finance Act 1994 for suppressing the value of taxable services provided by them and contravening the provisions of Finance Act, 1994 with intent to evade payment of Service Tax.*
5. *I impose penalty /late fee of Rs.1,00,000/- for ST-3 returns under Section 70 of the Finance Act, 1994 with Rule 7C of the Service Tax Rules, 1994 for failure to furnish prescribed ST-3 returns for the F.Y. 2011-12 & 2012-13."*

4. Being aggrieved the Appellant filed appeal before the first Appellate Authority and vide Order-in-Appeal the following order was passed:-

"6. I have carefully gone through the case records, grounds of appeal and submission of the Appellant during personal hearing. I find that in the instant appeal, main issue for deliberation is admissibility of exemption from service tax on the service of maintenance of private railway side under Food Corporation of India under the provisions of notification No.24/2009-S.T. dated 27.07.2009. The said notification as amended vide Notification No.54/2010-ST dated 21.12.2010 exempts the taxable service, provided to any person by any other person in relation to management, maintenance or repair of roads, bridges, tunnels dams, airports, railways and transport terminals, from the whole of the service tax leviable thereon under section 66 of the Finance Act.

To examine the taxability or otherwise in respect of maintenance service of private railway side under Food Corporation of India, I refer to definition of "railways" as defined in Section 2(31) of the Railways Act, 1989, reproduced hereunder:-

"railway means a railway, or any portion of a railway, for the public carriage of passengers or goods,..."

From the above definition it is apparent that "railways" means a railway for public carriage of passengers or goods i.e. for use by public for passenger transportation or goods transportation. From perusal of records placed before me, I find that in the instant case maintenance work has been done in respect of private railway tracks inside the depots of Food Corporation of India which is their property. Thus it is obvious to construed that these railways tracks are meant for use by Food Corporation of India and not for public use. In support of their contention that exemption is also available to private railways, appellant have relied upon the case law of AFCONS Infrastructure Ltd. Vs. Commissioner of C. Ex., Mumbai-II, 2015(38)STR 194 (Tri.-Mumbai) wherein exemption from service tax under Commercial and Industrial construction services was allowed in respect of Construction work of stations of Delhi Metro Railway Project constructed for Delhi Metro Corporation. I find that Delhi Metro provides services of public transportation, therefore, it is 'railways in terms of definition under the Railways Act, 1989 and hence eligible for exemption under service tax. However above case law is not applicable in the instant case as railway tracks are for private use by Food Corporation of India and hence, are not railways' for public carriage of passenger or goods Therefore, exemption under notification No.24/2009-S.T. dated 27.07.2009 as amended, is not available in the instant case and adjudicating authority has rightly confirmed the demand alongwith interest.

However, I find that the demand of service tax was raised on the basis of Form 26AS, therefore, I have reason to believe the details of transaction are entered in specified record. Therefore, I reduce the penalty under Section 78 to

50% of the tax amount i.e. Rs.1,79,299/- only. I do not interfere with the quantum of penalty of Rs.10,000/- imposed under Section 77, however, in respect of penalty of Rs.1,00,000/- under section 70 for non filing of ST-3 returns. I find that penalty under section 70 was not proposed in the show cause notice hence, cannot be invoked in the O-I-O. Penalty under section 77 for contravention of provisions of section 70 was proposed which has been imposed."

5. Being aggrieved the Appellant has filed the present appeal before the Tribunal.
6. Heard both the sides and perused the appeal records.
7. The only issue for our consideration in this appeal is admissibility of exemption from service tax on the services of maintenance provided to Railway site under FCI. Vide the impugned order, the first Appellate Authority held that since the activities of the Appellant are provided for use of FCI and hence are not Railways for public carriage of passenger or goods. Therefore, the exemption under Notification No.24/2009-ST dated 27.07.2009 as amended is not available to the Appellant. Section 65(105) (zzzza) of the Finance Act, 1994 is reproduced below:-

"Section 65(105)(zzzza) of the Finance Act, 1994

"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, *excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

Explanation. — For the purposes of this sub-clause, "works contract" means a contract wherein, —

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

8. We find that the issue is no more *res integra* and has been decided by the Tribunal in the case of KVR Rail Infra Projects Pvt. Ltd. vs. Commissioner of Central Tax, Secunderabad reported as 2019 (27) G.S.T.L. 549 (Tri.-Hyd.) relevant paragraphs are reproduced as under:-

"11. From the above definition, it can be seen that the execution of works in respect of roads, Airports, Railways, Transport Terminals, bridges, tunnels, dams and ports are excluded from the purview of levy of the said category of service. The department relies upon the definition of Railways contained in Section 2(31) of the Railways Act 1989. It has to be mentioned that the definition of the services in Section 65(25b) or Section 65(105)(zzzza) does not make any differentiation between a Government railway or a non-Government railway. These sections merely uses the word 'railways'. The Railways Act defines government railway under section 2(20). Government railway 'means a railway owned by the Central Government'. Section 2(25) of the Act defines a 'non-governmental railway'. It means a railway other than a

Government railway. The definition of Commercial or Industrial Construction Service and Works Contract Service contained in Section 65(25b) or Section 65(105)(zzzza) does not state that only these airports, railways, bridges, tunnels owned by government are excluded. The private Railway siding/track so constructed has to be connected to the Railways to facilitate the transport of goods. These railway sidings also then are under the supervision and control of Railways. In the procedures for liberalization of Siding Rules dated 31-3-2005 issued by Ministry of Railways, para 4.5 mentions about cost of Railway staff. It is stated therein that in all private sidings other than Engine on Load only, barring the cost of one commercial staff per shift, Railways will bear the cost of all other Railway staff. The cost of all staff at Engine on Load (EOL) sidings will be borne by the Railways. Detailed instructions are issued for the construction, maintenance, supervision and use of these railway sidings.

12. The issue whether the construction activities of railway sidings/tracks for non-governmental railway or private railway is subject to service tax has been analysed by the Tribunal in the case of Afcons Infrastructure Limited (supra). In paras 5.1 to 5.4, the Tribunal observed as under :

"5.1. The definition of Commercial and Industrial Construction Service as provided in Section 65(25b) excludes such activities relating to roads, ports, railways, dams, bridges, tunnels, etc. There is no distinction between a monorail or metro rail or any other kind of rail and, therefore, the term railways used therein has to be given its widest meaning to include all types of railways and all types of railway lines. Therefore, the distinction sought to be made by the adjudicating authority is not sustainable in law.

5.2. Secondly, we do not find any basis for the conclusion drawn by the learned adjudicating authority by referring to some decision of the Government while examining the scope of the term 'railways' in the context of certain tax exemptions. There is no evidence before us to show that the Government examined the matter and came to such a conclusion nor is there any circular or notification issued by the Government in this regard. In the

absence of any such decision which is in the public domain, we are unable to accept the contention raised by the Revenue in this regard and reject the same totally. In other words, the law has to be interpreted as it stood, as held by the Hon'ble Apex Court in the case of Doypack Systems Pvt. Ltd. [1988 (36) E.L.T. 201 (S.C.)] wherein it has been held that the notings in the government files are not relevant for interpretation of the statutes and the statute has to be interpreted by the wordings explicitly used therein and if there is no ambiguity in the language used therein, there is no need to refer to the notings in the government file. On that ground also, the observation of the adjudicating authority has no bearing to the facts on hand and has to be rejected.

5.3. The learned adjudicating authority has relied on the definition of Section 65D(O) in the context of transportation of passengers by various modes such as monorail, tramways, metro rails, etc. This definition came into force only w.e.f. 1-7-2012 but the demands in the impugned order pertain to the period prior to 1-7-2012 and therefore this definition has no bearing whatsoever and no application for interpreting the law as it stood at the relevant time.

5.4 The Hon'ble High Court of Delhi in the DMRCs case (supra) has held that Delhi Metro Rail is Government Railway as defined in the Indian Railway Act. If that be so, the question of levy of service tax under "Commercial or Industrial Construction Service" would not arise at all as such constructions in respect of Railways stands excluded from the scope of the levy.

Similar issue was discussed by the Tribunal in the case of SMS Infrastructure Limited (supra) which reads as under :

"Learned Authorised Representative places reliance on the decision of this Tribunal in AB Projects Pvt. Ltd. v. Commissioner of Central Excise, Nagpur, [2010 (19) S.T.R. 886 (Tri-Mumbai)] to contend that any activity of construction that is able to generate revenue will not be exempt from levy of service tax. We take note of the specific exclusion of railway work from the definition (supra). Revenue contends that the exemption is accorded to railways that are

used as public carriage of passengers and goods which the projects undertaken by the appellant are not. Appellant relies upon the decision of the Tribunal in Afcons Infrastructure Ltd. v. Commissioner of Central Excise Mumbai-II [[2015 \(38\) S.T.R. 194](#) (Tri. - Mumbai)] and Delhi Metro Rail Corporation Limited v. Municipal Corporation of Delhi and Others [2008 (103) DRI 369] to drive home the point that coverage under Railways Act, 1989 is sufficient to consider any such infrastructure as railways. We notice that the Railway Act, 1989 provides for railways with public investment and private investment and both function under the same statute. Such railways established in the private sector have a statutorily acknowledged Administrator. Consequently, we too hold that railway sidings built by the appellant fall within the exclusionary portion of Section 65(25a) and are outside the ambit of taxation.

For the above reasons, we confirm the liability to tax on the labour portion of work executed by the appellant and which has been duly discharged by them. The demands under the other heads are set aside. Penalties are also set aside."

13. In the case of International Metro Civil Contractors, the Tribunal has observed that the works of civil engineering contraction, mechanical and electrical installation, tunnel ventilation and station air-conditioning etc. had been in relation to the construction of Delhi Metro Rail Corporation, was not liable to tax. The relevant para is reproduced as under :

"Seeing from another angle that the services provided by the appellant is the construction of rapid rail corridor which stands excluded otherwise from the tax ambit even of the works contract service. Though it is the case of the Department that the exemption is for railways and the metro corridor do not classify to be called as railways for it being a commercial concern. But this ground has already been adjudicated by Hon'ble Apex Court in the case Jagjeet Cotton Textile Mills v. Chief Commercial Superintendent, 1998 (5) S.C.C. (126) wherein the Hon'ble Apex Court has held that Delhi Metro Rail is a Government railway as defined in Indian Railway

Act. Since Railway also is meant to run on commercial basis, DMRC cannot be distinguished from being called as railways merely on the ground that it involves a commercial angle. This decision has been followed by Hon'ble Delhi High Court as well in the case of DMRC itself titled as DMRC v. Municipal Corporation of Delhi, 2008 (103) DRJ 369. Hon'ble High Court of Karnataka in the case of DMRC v. Ministry of Finance, 2013 (6) T.M.I. 78 has also held that work contract services in respect of railways are excluded under Clause 1 of 65(105)(zzzza) of the Act i.e. such contracts will fall outside the definition of taxable service and consequently no tax shall be leviable under Section 66 of the Act on the value of such services. This Tribunal in the case of M/s. IRCON International Ltd. v. C.S.T. Delhi, 2017 (4) T.M.I. 1086 (Tri. - Del.) [IRCON is one of the company constituting the joint venture i.e. the appellant] has held a composite work contracts irrespective include the category of service of erection, commissioning and installation irrespective that the said service is taxable since 1-7-2003 but since the services rendered is classified as works contract and the work contract in respect of railways is excluded from the tax liability as per the statutory definition itself, no question of levy of any service tax on such contract arises. It was also clarified that it is a well settled legal position that metro work is nothing but railways work."

14. In the above decisions, the Tribunal has held that Section 65(25b) or Section 65(105)(zzzza) of the Finance Act, 1994 does not use the word 'railways' for public carriage or that the railways should be government railways. The definition uses the words "railways" only. Therefore, the execution cannot be restricted to the government railways which are used for public transport of passengers or goods. The Ld. AR has relied upon the decision in the case of M/s. Mukesh Kalway v. CCE Bhopal (supra). In the said case, cleaning services provided to Railways was held to be taxable. In last sentence in para 8 of the said decision, the Tribunal has specifically mentioned that Commercial or Industrial Construction Service provided to railways is specifically excluded.

15. From the discussions made above as well as following the decisions, we are of the considered opinion that the

demand of service tax under Commercial or Industrial Construction Service or Works Contract Service for the period from October 2004 to June 2007 and August 2007 to October 2009 respectively for construction of railway sidings/tracks cannot sustain and require to be set aside which we hereby do so."

9. We find that the facts of the present case are squarely covered by the above mentioned decision of the Tribunal and we do not find it appropriate to take a different view. The demand of service tax is set aside and penalty imposed under Section 78 is also set aside. The appeal filed by the Appellant is partly allowed in the above terms.

(Order pronounced in open court on – **14th November, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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