CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 168 of 2010

(Arising out of Order-in-Original No. 43/2009/ST dated 30.11.2009 passed by the Commissioner of Central Excise & Customs, Cochin Commissionerate)

M/s. AB Tek Constructions
Punnam Mansion,
29/49, Janatha Road,Vyttila,
Cochin – 682 019. **...........Appellant**

VERSUS

Commissioner of Service Tax
Cochin
C.R. Building, I.S Press Road
Ernakulam – 682 018. **.......Respondent**

Appearance:

Mr. Rishab J., Advocate for the Appellant
Mr. Neeraj Kumar, AR for the Respondent

Coram:
Hon'ble P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

<u>Final Order No. 20939 / 2024</u>

Date of Hearing: 01.04.2024
Date of Decision: 30.09.2024

Per: P.A. Augustian

The issue in the present appeal is whether the appellant is liable to pay service tax for the activity carried out by them considering the activity as ‘Works Contract’. The relevant period is from 10.09.2004 to 30.09.2007 and 16.06.2005 to 30.09.2007.

2. The brief facts are Appellant is a partnership firm and entered into agreement for construction by using both material and labour.

Considering the activity carried out by the appellant as falling under the category of service tax, appellant had obtained registration in 2007 and also paid considerable amounts by availing the benefit of abatement of 67% provided by Notification No. 18/2005-ST dated 07.06.2005 and 15/2004-ST dated 10.09.2004 and paid service tax on 33% of gross value and also filed ST-3 returns. However, alleging that the appellant is liable to pay service tax for the entire amount, show-cause notice was issued and also alleging suppression of facts considering the service as Commercial Construction or Residential Constructions. Appellant disputed the same and as per the impugned order, adjudication authority confirmed the demand. Aggrieved by the said order, present appeal is filed.

3. When the matter came up for hearing, learned counsel draws our attention to the decision of the Hon'ble Supreme Court in the matter of ***Commissioner of C.Ex. & Cus., Kerala Vs. Larsen & Toubro Ltd. reported in 2015 (39) S.T.R. 913 (SC)*** and submits that the issue is squarely covered by the above decision, wherein it is held as under:

> ***"24.*** *A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation*

contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

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43. *We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."*

4. Since the period covered in the impugned order is post introduction of the 'Works Contract Service', the learned counsel also drew our attention to work order and the evidence regarding payment of VAT. Learned counsel also relied on the judgment of the Hon'ble Supreme Court in the matter of ***Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd. reported in 2018 (10) G.S.T.L. 118 (SC),*** wherein it is held as under:

"12. *On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients:*

a. Service tax is payable on the gross amount charged :- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

b. The amount charged should be for "for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service *and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"*

13. *A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be* *determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.*

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19. *Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170* = 2015 (39) S.T.R. 913 *(S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under :*

"23. A close look at the Finance Act, 1994 would show that the fixed taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines 'taxable service' as 'any service provided".

Further, while referring to exemption notifications, it observed:

"42. ...Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added."

5. Similarly, in the matter of ***Sobha Developers Ltd. Vs. Commr. of C. Ex. & Service Tax, Bangalore reported in 2010 (19) S.T.R. 75 (Tri.-Bang.),*** it is held as under:

5.1 *The impugned order seeks to deny the benefit of this notification availed by the appellant during the material period and orders recovery of exemption availed for the failure of the assessee to fulfill the conditions of the notification. We find that the requirement to qualify for the exemption is that materials are sold in the course of provision of service and the service provider maintains a record of the same. There is no dispute that the appellants are registered with the Karnataka VAT department for payment of VAT under the category of works contract for the impugned activities and that it paid VAT on 70% of the value of the works contract as per the provisions of KVAT Act. As clarified by the Deputy Secretary, Ministry of Finance, CBEC, exemption in respect of materials consumed/sold by the service provider to the service recipient providing taxable service is available if the service provider maintains records showing the materials consumed/sold while providing the taxable service. Interpreting the provisions of this notification, this Tribunal held that the notification did not require that the inputs used should be mentioned in the invoices/bills issued to the customers. The Tribunal held that* *exemption was admissible on the value of the goods consumed. Value of such goods consumed in the provision of service could not be included in the taxable value for levy of service tax. This was the ratio of the decision in Shilpa Colour Lab. Case (supra). The impugned order seeks to recover service tax on a portion of the contract amount relating to materials consumed/sold in the course of provision of construction service. As rightly pointed out by the appellant, Clause 29-A of Article 366 of the Constitution provides that tax on the sale or purchase of goods includes, inter alia, a tax on the transfer of property in goods whether as goods or in some other form involved in the execution of a works contract which reads as follows :-*

"(29A) 'Tax on the sale or purchase of goods includes'-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of the property in goods (whether as goods or in some other form) involved in the execution of a works contract;...

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

6. Learned Authorised Representative (AR) for the Revenue fairly admits that the issue is squarely covered.

7. Considering the activity carried out by the appellant is prior to introduction of the 'Works Contract Service" and considering the facts and circumstances, the issue is squarely covered by the judgment of the Hon’ble Supreme Court in the matter of **Larsen & Toubro Ltd.** (supra), hence the appeal is allowed.

(Order was pronounced in open court on 30.09.2024)

(P.A Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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