CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 816 of 2011

[Arising out of Order-in-Appeal No. 263/2010 dated 10.12.2010 passed by the Commissioner of Central Excise (Appeals), Mangalore]

M/s Ahura Constructions
No. 56, 1st Floor, Annapoorna Complex,
2nd Cross, Kalidasa Road
V.V. Mohalla
Mysore – 570 002 **....Appellant**

VERSUS

Commissioner of Central Excise,
Customs and Service Tax, Mysore
S1-S2, Vinaya Marga
Siddhartha Nagar
Mysore – 570 011 **....Respondent**

WITH

Service Tax Appeal No. 817 of 2011

[Arising out of Order-in-Appeal No. 263/2010 dated 10.12.2010 passed by the Commissioner of Central Excise (Appeals), Mangalore]

M/s Ahura Constructions
No. 56, 1st Floor, Annapoorna
Complex
2nd Cross, Kalidasa Road
V.V. Mohalla
Mysore – 570 002 **....Appellant**

VERSUS

Commissioner of Central Excise,
Customs and Service Tax, Mysore
S1-S2, Vinaya Marga
Siddhartha Nagar
Mysore – 570 011 **....Respondent**

AND

Service Tax Appeal No. 3062 of 2012

[Arising out of Order-in-Appeal No. 358/2012 dated 08.08.2012 passed by the Commissioner of Central Excise (Appeals), Mangalore]

M/s Ahura Constructions
No. 56, 1st Floor, Annapoorna
Complex
2nd Cross, Kalidasa Road
V.V. Mohalla
Mysore – 570 002 **....Appellant**

VERSUS

Commissioner of Central Excise,
Customs and Service Tax, Mysore
S1-S2, Vinaya Marga
Siddhartha Nagar
Mysore – 570 011 **....Respondent**

Appearance:
Mr. N. Anand, Advocate, for the Appellant
Mr. Neeraj Kumar, Authorized Representative for the Respondent

Coram:

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

<u>Final Order Nos.: 21650 - 21652 /2024</u>

Date of Hearing:17.10.2024
Date of Decision: 17.10.2024

Per: Pullela Nageswara Rao

M/s. Ahura Constructions, the appellant is a proprietary concern engaged in construction activities and registered as a 'Works Contract dealer' under the provisions of Karnataka Value Added Tax Act, 2003. The appellant is also registered as a taxable service provider under the category of 'commercial or industrial construction' service and paying service tax.

2. The brief facts are the appellant has been discharging service tax on the activity of construction of commercial or industrial buildings by availing the benefit of abetment of 67% under Notification No. 16/2004-ST dated 10.06.2004 or 1/2006-ST dated 1.03.2006. Further, some of the customers of the appellant have supplied free materials for the

construction of the buildings and the appellant by using the free materials along with his own goods/material had rendered construction services. However, while discharging the service tax after claiming abatement of 67% as per the notifications mentioned above, the appellant has not included the value of 'free materials' supplied by the customers. The department issued periodical show cause notices alleging that the appellant is required to also include the value of 'free materials' supplied in the gross value of construction service and should have paid service tax on the abated value of free materials. Accordingly, the demand of service tax along with interest and penalties were proposed in the show cause notices. The proposals in the SCNs were confirmed by the adjudication authority and the amounts paid by the appellant 'under protest' were appropriated. Aggrieved by the order appeals were filed by the appellant, which were rejected by the Commissioner (Appeals). Aggrieved by the impugned order the appellant filed these appeals before this Tribunal. Since the issue involved in all the 3(three) appeals is common, all these appeals are being decided by this order.

3. The issue involved in the present appeals is whether goods supplied/materials supplied free of cost by the service recipient/customer used for providing construction service is includable in the value of taxable service as per Section 67 of the Finance Act, 1994 read with Notification Nos. 15/2004-ST or 1/2006-ST.

4. The appellant during the hearing has reiterated the contentions urged in the Memorandum of Appeal (s) and submits that the issue is no longer *res integra* and settled by the judgment of Hon'ble Supreme Court in the case of **Commissioner of Service Tax Vs. Bhayana**

Builders (P) Ltd. -2018 (10) GSTL 118 (SC), affirming the decision of Larger Bench of the Tribunal in the case of **Bhayana Builders (P) Ltd. Vs. CST-2013 (32) STR 49 (Tri-LB)**; therefore in the light of the above judgment of the Hon’ble Apex Court the impugned orders are untenable. The Learned Counsel further submits that the appellant has paid the differential service tax amounts under protest, which were appropriated in the adjudication orders by vacating the protest; since the matter stands settled by the judgment of the Hon'ble Apex Court such payments made under protest was liable to be refunded to the appellant. The appellant further submitted that as regards the other aspect whether service tax is payable in respect of composite construction activity involving both materials and labour prior to 01.06.2007 i.e., before introduction of 'works contract' service under Section 65(105)(zzzza) and whether execution of composite construction activity is classifiable under 'commercial or industrial construction' service under section 65(105)(zzq), the issue is settled in favour of appellant by the judgment of **Hon'ble Supreme Court in CC Vs. Larsen & Toubro - 2015 (39) STR 913 (SC).**

5. The Learned Authorised Representative (AR) for the Revenue reiterated the findings in the impugned orders.

6. Heard both sides and perused the records.

7. We find that the issue of including the value of free materials supplied to the appellant has been decided by the Hon'ble Apex Court in the case of **Bhayana Builders Ltd (Supra),** wherein it is held that:-

> *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 recipient for determination of the gross value.*

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16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary *significantly. Such a value has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.*

17. Faced with the aforesaid situation, the argument of the Learned Counsel for the Revenue was that in case the assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 1, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67%: 33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessees to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.

18. In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the

Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

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."

8. We find that the issue is squarely covered by the decision of the Hon'ble Apex Court in the case of **M/s.Bhayana Builders Ltd. (Supra)** and the value of free material supplied by some of the customers of the appellant is not includable in the value of the service, hence the impugned orders are unsustainable.

9. In view of the above discussion the appeals are allowed with consequential relief, if any in accordance with law.

(Operative portion of the order was pronounced
in open court on 17.10.2024)

(P. A. Augustain)
Member(Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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