CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/801/2012-DB

[Arising out of No. Order-in-Original No.208/2011 dated 30/12/2011 passed by the Commissioner of Service Tax, Bangalore.]

M/s. SHAPOORJI PALLONJI AND CO. LTD.
124, 7TH FLOOR, SURYA CHAMBERS, MURUGESH PALYA, OFF AIRPORT ROAD, BANGALORE 560 017 — Appellant(s)

Versus

The Commissioner of Central Excise
1ST TO 5TH FLOOR, TTMC BUILDING, Above BMTC BUS STAND, DOMLUR BANGALORE – 560 071. KARNATAKA — Respondent(s)

Appearance:

S/Shri Shailendra Sukhailendra and Abhishek Agarwal, CAs
PRINCIPAL OFFICE NO: PLOT NO.6A, SADARMANGALA INDUSTRIAL AREA, KADUGODI BANGALORE – 560 067. KARNATAKA — For the Appellant

Dr. J. Harish,
Dy. Commissioner (AR) — For the Respondent

Date of Hearing: 04/10/2018
Date of Decision: 17/12/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21911 /2018

Per : P. ANJANI KUMAR,

M/s. Shapoorji Pallonji and Company Ltd., the appellant, were engaged in providing Civil Construction Service classifiable

under “Works Contract” service and “Commercial or Industrial Construction” service. The appellants were providing service to various clients including M/s. Keppel Land, M/s. Keppel Purvankara and M/s. SAP Lab Café Expansion. On conduct of audit, the department contended that the appellants have not included the value of reinforcement steel and cement received free of cost from M/s. Keppel Land for the period April 2007 to August 2007 and from M/s. Keppel Purvankara during the period April 2007 to March 2010, in the taxable value of the service. It was also contended that the appellants have supplied ready mix concrete to their clients i.e., M/s. SAP Lab Café Expansion, SAP Lab Facade and that they have not included the cost of the same while arriving the taxable value. The department issued a show-cause notice 16.11.2010 seeking to demand service tax of Rs.1,85,67,985/- on the issue of cost free supply of reinforcement steel and cement and service tax of Rs.32,76,030/- on the ready mix concrete. The show-cause notice was confirmed by the Commissioner of Service Tax, Bangalore vide Order-in-Original No.208/2011 dated 27.12.2011. Commissioner has also imposed penalty under Sections 76, 77 and equal penalty of Rs.2,18,44,015/- under Section 78.

2. The learned counsel for the appellant submitted that they have taken up the construction of M/s. Keppel Purvankara for the clients and availed the benefit of service tax Notification No.1/2006-ST dated 1.3.2006; audit was conducted for the periods April 2006 August 2007 and September 2007 to March 2010. As regards the supply of ready-mix concrete to SAP Lab, the appellants accepted the audit point and have discharged the liability along with interest before issuance of show-cause notice. He submitted that learned Commissioner has confirmed the service tax on the includability of items supplied free of cost giving the following observations.

> *"Section 67 of the Finance Act provides that value of any taxable service shall be gross amount charged by the service provider for services provided or to be provided. This section was substituted by Finance Act 2006 w.e.f. 01.05.2006 to provide that in case where provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as with addition of service tax charged, is equivalent to the consideration.*
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> *In view of the amended provision, scope is wide enough to cover the material supplied by customer as well as service provider into taxable value for determination of service tax amount of demand, interest and penalty."*

2.1 The learned counsel contended that the issue of includability of the value of items supplied free of cost by the

customers is no longer *res integra* as the Hon'ble Apex Court has decided the issue in favour of the appellants in the case of ***Commissioner of Service Tax vs. Bhayana Builders Pvt. Ltd.: 2018 (10) GSTL 118 (SC)*** wherein it was upheld that the value of goods/materials supplied by the service receivers on FOC basis in relation to the construction shall not be added for the purpose of computation of the gross amount charged. In view of the above, no service tax is leviable on value of materials supplied by service recipient on FOC basis. When the service tax itself is not held to be liable, interest and penalty cannot be levied.

2.2 Coming to the equal penalty levied on the duty liability accepted by them in respect of RMC supplied by them to M/s. SAP Lab, he submitted that they have paid service tax along with interest well before the issuance of show-cause notice. There was no *mala fide* intention on the part of the appellant to evade the said tax and therefore, imposition of penalty was not warranted. Further, in terms of Section 80 of the Finance Act, as it existed during the relevant period, no penalty can be levied if the assessee proves that there was a reasonable cause for non-payment of service tax. Reasonable cause has been defined to be "reasonably said to be a cause which prevents a man of average

intelligence and ordinary prudence acting under normal circumstances, without negligence or inaction or want of bona fides" as held in ***Azadi Bachao Andolan vs. UOI: 2001 (116) Taxmann 249/252-ITR 47***. He submitted that no penalty be levied on this issue.

3. The learned AR has reiterated the findings of the OIO.

4. Heard both sides and perused the records of the case.

4.1 The appellant relied upon the case of ***Bhayana Builders*** (supra). We find that Hon'ble Supreme Court has held that both prior to and after amendment to Section 67 of the Finance Act, 1994, 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.*
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> *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"

It is pertinent to note that in the above judgment Hon'ble Supreme Court has held that the definition of gross amount charged given in Explanation (c) to Section 67 only provides for the modes of payments of 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. In fact, the Hon'ble Supreme Court has observed at para 18 as follows:

"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'.

4.2 In view of the above, we find that the value of the items supplied by the customers to the service provider on FOC basis is not includable in the taxable value of the service. In deference to the ratio of the judgment cited above, we find that the appellants are justified in not including the cost of reinforcement steel and cement supplied by their clients M/s. Keppel Land, M/s. Keppel Purvankara. Therefore, the confirmation of duty of Rs.1,85,67,985/- in this regard is liable to be set aside. When the demand itself does not survive, interest and penalty would consequentially go.

4.3 Coming to the issue of levy of equal penalty in respect of RMC cleared by the appellants to M/s. SAP Lab, the appellants have paid the service tax along with interest before the issuance

of show-cause notice. They have submitted that they have no *mala fide* intention to evade payment of duty and as such, penalty cannot be imposed. We find that except for the stating that they have no *mala fide* intention they have not produced any evidence to prove that they have no *mala fide* intention. The absence of mala fide intention would have been manifest if the appellants discharged the tax liability before the conduct of audit. We find that the appellants are big players in the field of construction. They cannot claim themselves to be at par with common man with average intelligence as claimed. Therefore, we find that they have not made any case to show the absence of mala fide intention. We find that they are liable to pay penalty equal to duty sought to be avoided/evaded. However, we find that learned Commissioner has given an option to pay 25% of the penalty if duty along with interest is paid within 30 days of receipt of the order. The appellants having paid service tax before the issuance of show-cause notice are well within their right to exercise the option given the learned Commissioner. Therefore, we restrict the penalty imposed on this count to 25% i.e. Rs.8,19,008/-.

5. In view of the above, the appeal is allowed with regard to the demand of service tax on the items supplied by the

customers of the appellants on FOC basis is set aside along with interest and penalty. As regards the issue of inclusion of value of RMC supplied by the customers to the appellants, we confirm the duty of Rs.32,76,030/- and restrict the penalty to Rs.8,19,008/-.

(Order was pronounced in Open Court on **17/12/2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

rv...