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

Appeal(s) Involved:

ST/422/2009-DB

[Arising out of Order-in-Original No. 10/2009 dated 19/02/2009 passed by Commissioner of Central Excise and Service Tax , COCHIN]

M/s Roman Tarmat Ltd
Tarmet Chambers,sector 24, Plot 19,nr.turbhe
Fly Over,sanpada, Navi Mumbai-400705

Appellant(s)

Versus

C.C.,C.E.& S.T-Cochin-cce
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018

Respondent(s)

<u>Appearance:</u>

MR. M.S. NAGARAJA, ADVOCATE
#1010, 1st floor
(Above Corp.Bank) 26th Main,4th T Block,
Jayanagar,
Bangalore
Karnataka
560041

For the Appellant

MR. MADHUPSHARAN, ASST. COMMISSIONER (AR)

For the Respondent

Date of Hearing: 23/09/2019
Date of Decision:25/09/2019

CORAM:

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

<u>Final Order No.20820/2019</u>

Per : P. ANJANI KUMAR

The appellant is engaged in the execution of Works Contract with

M/s Power Grid Corporation of India Ltd. for setting up of 400/220 KV Sub-Stations. Department issued a SCN dated 25.01.2008 to the appellant demanding Service Tax classifying the work undertaken by them under "Site Formation and Clearance, Excavation, Earthmoving and Demolition Service" falling under Section 65(zzza) of the Finance Act, 1994 for the period May 2006 to September 2007. The SCN was adjudicated vide Order dated 19.02.2009 wherein Service Tax of Rs.57,87,451/- was confirmed along with interest and penalties. Hence, this appeal.

2. Learned Counsel for the appellants submits that the agreement they have entered into with Power Grid Corporation was a composite contract and was a Works Contract. A perusal of the agreement dated 03.04.2006 and a Letter of Award dated 27.03.2006 along with Bill of Quantities reveal that the contract is of a value of Rs.4,72,49,360/- of which supply of Red Earth alone is worth Rs.4,31,92,603/- . The measure chunk of the contract was for filling the Earth with borrowed Earth. It is quite evident from the 10 invoices issued during the period from 23.05.2006 to 18.03.2007 and a summary placed on the records. He also submitted that the contract was treated by Rule 42 of Kerala VAT Rules, 2005 and applicable VAT was deducted and paid by Power Grid Corporation of India. Therefore, the contract requires to be treated as a Work Contract and as held by the Hon'ble Supreme Court in the case Larsen & Toubro, 2015 (39) STR 913 (SC). He further submits that Commissioner has confirmed the demand treating the value of the service in terms of Rule 5 of Service Tax (Determination of Value) Rules, 2006; in fact, Hon'ble Supreme Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd.,2018 (10)(GSTL) 401 SC has held that Rule 5 was ultra vires of the Constitution. It was only in 2015 that Section 67 of the Finance Act was amended and the value of the goods became includable in the value considered for payment of Service Tax. He also submitted that the demand is hit by limitation. The issue being a debatable one and has been settled by the Hon'ble Court only by 2015, the assessee has reasons to believe that his activity was not taxable. He also relied upon the following:

- *CBEC Circular F B1/16/2007 TRU dated 22.05.2007*
- *Hazaribagh Mining & Engineering P Ltd. Vs CCE, C & ST, 20174 (49) STR 289 s(T-Kol.)*

- *Sanjay Industrial Corporation Vs CCE, Mumbai, 2015 (3128) ELT 15 (SC).*
- *Kiran Ispat Udyog Vs CCE, Rajkot, 2015 (321) ELT 182 (SC).*
- *Jaiprakash Industries Ltd. Vs CCE, Chandigarh, 2002 (146) ELT 481 (SC).*
- *Larsen & Toubro Ltd. Vs CCE, Pune, 2007 (211) ELT 513 (SC).*

3. Learned AR for the Department reiterated the finding of OIO and submitted that the extended period has been rightly invoked as the appellant did not register himself and did not pay Service Tax.

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

5. Ongoing through the contract, we find that Article 2.0 stipulates as follows:

"Contract Documents: The contractor shall carryout and perform the completion of the subject work of Site levelling at Cochin 400/220 KV sub-station including the connected items of work and service strictly in accordance with the terms and conditions stipulated herein and the following documents attached herewith and hereafter referred to as contract documents:

a) Tender submitted by the contractor containing BOQ, Tender drawings, Special condition of contract, clarifications issued for the tender documents, POWERGRID GCC for Civil works, standard Technical specifications and Standard field quality plan.

b) Letter of Award No. SRTS-II/C&M/WC-307/LOA-324/2006/345/184Q dated 27.03.2006 along with bill of quantities issued by POWERGRID to the contractor, which had been unequivocally accepted by the contractor.

All the above contract documents shall form as integral part of this agreement."

5.1. Ongoing through the Letter of Award and Bill of Quantities, it is abundantly clear that substantial portion of the payment goes towards Earth work in filling with borrowed Earth. As the contract contemplates various items of works along with the cost of material involved. The appellants placed on record proof of payment of VAT on the subject contract under Kerala VAT which recognises the contract to be Works Contract. Therefore, in view of the Hon'ble Supreme Court's decision in L&T (Supra) the contract is to bee seen as a non-viviceptable contract and therefore, it is not chargeable to Service

Tax before 01.06.2007. The relevant portions of the order are extracted as below:

> "***11.*** *By the Finance Act, 2007, for the first time, Section 65(105)(zzzza) set out to tax the following :-*
>
> *"(zzzza) 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;"*
>
> ***12.*** *Section 67 of the Finance Act, 1994 was amended to read as follows :-*
>
> ***"Valuation of taxable services for charging Service tax.*** *-*
>
> *(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall, —*
>
> *(i) in a case where the provision of service is for a consideration in*

money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."

16. *At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.), as follows :-*

"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the

goods."

For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India [(2005) 4 SCC 214], SCC at p. 228, para 23 :-

"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)

17. *We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows :-*

"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)

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.*

25. *In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.*

26. *We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.*

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."*

We find that the appellant's case is squarely covered by the above judgment of Hon'ble Supreme Court

5.2. We find that as submitted by the Learned Counsel for the appellants the valuation made by the Commissioner in terms of Rule 5 is also incorrect. Hon'ble Supreme Court in the case of Intercontinental (supra) has held in Para 21,22,23,24,25,26,27,29 as follows:

> ***"21.*** *Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*
>
> ***22.*** *Section 66 of the Act is the charging Section which reads as under:*
>
> *"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."*
>
> ***23.*** *Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*
>
> ***24.*** *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of*

Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

25. *This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.*

26. *It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :*

"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

27. *The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.*

29. *In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax*

(Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under :

"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we *shall refer to few judgments containing this dicta, a little later."*

5.3. In view of the above, we find that the contract being indivisible, no Service Tax can be levied upon the appellants before 01.06.2007. The Learned AR submits that the impugned SCN also covers the period June 2007 to September 2007. However, Learned Counsel for the appellant submits that the SCN has mistakenly included the payments which were received after April 2007 though the service was rendered before April 2007. He submits that tax liability, if at all, is on the taxable event i.e. the date of provision of service. Therefore, their case is entirely covered by the decision of Hon'ble Supreme Court in the case of L&T (Supra). We are in agreement with the contention. We hold that just because the payments were received after March 2007, it cannot be said that the service was rendered when the amounts were realized. The Learned Counsel for the appellants further submitted that the appeal survives on limitation also as no *mens rea* could be attributed to the interpretation of statutory provisions. As we find that the appellant has a strong case on merits, we are not going into the issue of limitation.

6. In view of our discussion above, we allow the appeal with consequential relief, if any.

(Order was pronounced
in Open Court on **25/09/2019**)

S.S GARG
JUDICIAL MEMBER

P.ANJANI KUMAR
TECHNICAL MEMBER

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