IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. ST/617/2010

(Arising out of Order-in-Appeal No.111/2010 dated 29.6.2010 passed by the Commissioner of Central Excise (Appeals), Trichy)

S. Arul — Appellant

Vs.

CCE, Trichy — Respondent

Appearance

Shri Akhil Suresh, Advocate for the Appellant
Shri S. Govindarajan, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **26.04.2018**

Final Order No. **41413 / 2018**

Per Bench

Brief facts are that the appellant is engaged in providing taxable service under the category of Commercial or Industrial Construction Service to M/s. Shree Ambika Sugars Ltd. It was noticed that the appellant did not discharge service tax under the said category and show cause notice was issued proposing to demand service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalties. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, ld. counsel Shri Akhil Suresh submitted that the appellant had discharged the service tax liability on the service charges received from the service recipient after availing exemption under Notification No. 15/2004-ST dated 10.9.2004. However, they have not included the value of goods and materials supplied free by the appellant. The department has confirmed the demand only on the portion of the free supplies made to the appellant. He adverted to Section 67 of the Finance Act and submitted that the gross amount charged does not include the value of goods and materials supplied free to the service provider. The said issue has been decided by the Hon'ble Supreme Court in the case of Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd. vide Civil Appeal Nos. 1335 to 1358 of 2015 dated 19.2.2018.

3. The ld. AR Shri S. Govindarajan reiterated the findings in the impugned order.

4. Heard both sides.

5. The issue that arises for consideration is whether the value of goods and materials supplied free to the appellant is

to be included in the gross amount charged to arrive at total taxable value. The said issue has been considered in the case of Bhayana Builders (P) Ltd. (supra) wherein the Apex Court has observed in paragraphs 13 and 14 that the gross amount charges does not include value of free goods and materials supplied. It is also to be noted that in the case of Bhayana Builders (supra), the Hon'ble Supreme Court has considered the decision passed by it in Larsen & Toubro Ltd. reported in (2016) 1 SCC 170. The relevant paragraph is reproduced as under:-

> *"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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> *xxxxx xxxxx xxxxx xxxxx*
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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."*

6. Following the same, we are of the view that the demand cannot sustain and requires to be set aside which we hereby do. The appeal is allowed with consequential relief, if any.

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

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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