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

ST/33/2011

(Arising out of Order-in-Original No. 314/2010 (C) dated 14.10.2010 passed by the Commissioner of Central Excise & Service Tax, LTU, Chennai).

M/s. Areva T & D India Ltd. : Appellant

Vs.

CCE & ST, LTU, Chennai : Respondent

Appearance

Shri Joseph Prabhakar, Advocate,
for the appellant

Shri A. Cletus, ADC (AR)
for the Respondent.

CORAM:

Hon'ble Shri V. Padmanabhan, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: **29.05.2018**
Date of Pronouncement: 01.06.2018

FINAL ORDER No. **41709/2018**

Per V. Padmanabhan,

The present appeal challenges the order-in-original No. 314/2010 dated 14.10.10. The appellant is a manufacturer of transformers and other electrical switchgear which are supplied to various Electricity Boards and other entities engaged in transmission and distribution of electricity. The DGCEI carried out investigation against the appellant in connection with the allegation that they were not paying service tax, but were claiming ineligible abatement under Notification No. 1/2006-ST dated 01.03.2006. After conclusion of investigation SCN dated 20.10.2009 was issued to the appellant. After completion of the process of adjudication, the impugned order was passed confirming the demand of service tax amounting to Rs.4,69,31,742/- along with interest. Penalties were also levied under Section 76 of the Finance Act, 1994. Challenging the above impugned order, the present appeal has been filed.

2. In this connection we have heard the Ld. Counsel, Shri Joseph Prabhakar for the appellant and the Ld. DR, Shri A.Cletus, ADC, for the Revenue.

3. The brief facts of the case are that:-

a. The appellant has entered into various contracts with power generation/transmission agencies. Most of the contracts are split up as follows by the contract awarding agencies:-

   i) Supply contract which includes supply of various items such as transformers,

   ii) Erection, Commissioning and Installation contract,

   iii) Balance of plan contract which mostly involve civil works using cement, steel etc.

b. Some of the contracts involve a combination of erection, commissioning and civil works but invariably the split up of the two parts are available in the contract.

c. In respect of supply works, the appellant has already discharged VAT/Sales tax and there is no dispute. In regard to erection and commissioning contracts, the appellant has discharged the service tax liability on the full value of such contracts without availing any abatement. However, in respect of the work involving civil construction, the appellant availed abatement as available under the Notification No. 1/2006 and paid service tax on 33% of the contract value. Revenue has sought to disallow the abatement under the said Notification No. 1/2006, by taking the view that the gross amounts of such contracts do not include the entire cost of plant, equipment and spares and material used in the project. Revenue has taken the above view by considering the service rendered under the category of 65 (105) (zzd) ie., erection and commissioning as declared by them in the ST-3 returns.

d. In respect of a few contracts, the appellant has paid the service tax under the category of works contract service, by availing the concessional rate of duty which is available under the Works Contract (Composition Scheme), the same is also denied by the Revenue. The benefit has been denied since the appellant has failed to exercise the option in respect of works contract prior to payment of service tax in respect of the said work contracts.

4. The arguments of the Ld. Counsel for the appellant are summarized as under:-

i) The entire work awarded to the appellant was spilt into three different contracts by the awarder of the contract. There is no dispute with reference to the supply contract (on which VAT paid) and erection and commissioning contract(since service tax paid on full value without availing abatement). The Revenue has denied the abatement under Notification No. 1/2006 by considering the service rendered by the appellant under 65 (105) (zzd) but the work carried out was in the nature of commercial and industrial service falling under (zzq). The contract involved supply of materials in the form of cement, steel etc., and will be entitled to the benefit of such abatement in respect of Sl.No.7 of the Notification ibid. In respect of those contracts for which service tax has been paid under Works Contract (Composition Scheme), he argued that such benefit cannot be denied only for the reason that the option has not been exercised in respect of works contract prior to payment of service tax in respect of the said works contract.

5. The Ld. DR justified the impugned order. His submissions are summarized as under:-

a. During the courses of investigation the investigating agency has repeatedly issued summons to the appellant for submitting various contracts executed so as to correctly assess the nature of the service rendered and to decide its classification. But the appellant failed to submit the copies of the contracts executed during the course of the investigation. Accordingly, a SCN was issued to demand service tax under erection and commissioning by adopting such classification on the basis of ST-3 returns.

b. In the present case, even though separate contracts have been entered into for supply portion, erection portion and civil works portion, entire contract is a turnkey project/composite contract involving design, engineering, supply, erection, commissioning and installation for sub-station. He argued that the benefit of Notification No. 1/2006 (sl. No. 5) for erection and commissioning cannot be extended to the appellant since they have not included the value of plant and machinery supplied in the value of contract for payment of service tax and hence he justified denial of abatement.

c. In respect of works contract services, he drew our attention to the works contract composition scheme for payment of service tax and argued that the benefit under the scheme has the condition precedent that the provider of taxable service shall exercise the option for payment of service tax under the scheme in respect of the works contract prior to the payment of service tax in respect of the said works contract. Finally he submitted that the impugned order may be upheld.

6. Heard both sides and carefully perused the records.

7.1 In respect of supply contracts and the erection and commissioning contracts, practically there are no disputes. In the former no service tax is payable and in the latter, tax stands paid at full rate without abatement. The dispute centres around the contracts for civil works which admittedly involve the materials viz., cement and steel. The adjudicating authority has gone by the classification as declared by the appellant in their ST-3 returns under 65 (105) (zzd) which covers the erection, commissioning or installation service. He has observed that all the three types of contracts taken together form a turnkey project and has proceeded to deny abatement on the civil works portion by observing that the tax payer cannot pay full rate on one portion and avail abatement on the other portion. But, it is seen that the Revenue has made no attempt to combine the three contracts into one mega turnkey project. No attempt has been made to assess such a composite contract as a single works contract. Hence we are of the view that the supply contract, erection contract as well as civil works contract are required to be assessed independently since the same have been executed separately by the two parties.

7.2 Considering the civil works contract, the adjudicating authority has blindly gone by the classification declared in the ST-3 returns under 65 (105) (zzd). The execution of civil works no doubt involves supply of materials in the form of steel, cement etc. Consequently, such contracts merit classification under 65 (105) (zzq) under commercial or industrial construction service which also enjoys abatement in terms of Sl.No. 7 of the Notification No. 1/2006-ST. We are of the view that the appellant will be entitled to the benefit of abatement under Sl.No. 7 of the Notification ibid. The adjudicating authority was in error by blindly sticking on the classification under 65 (105) (zzd) as declared by the appellant in their ST-3 returns.

7.3 Now we turn to the claim of appellant for the benefit of concessional rate of duty under Works Contract (Composition Scheme). The appellant has paid service tax availing the above benefit in respect of some of the contracts. Since the civil construction contract definitely involves supply of materials such as cement and steel, such contracts are rightly classifiable under the works contract service. But the adjudicating authority has denied the benefit of composition scheme for the reason that the appellant has failed to exercise the option for payment of service tax under the scheme prior to the payment of service tax under the respective works contract. Even though such a stand adopted cannot be faulted , we are of the view that appellant will be entitled to assessment under Works contract service for such contracts and entitled to payment of service tax only on the value of service portion. The adjudicating authority is directed to extend such a benefit subject to appellant producing satisfactory documentary proof evidencing the value of service.

8. In view of above discussions, we pass the following order:-

i) Order denying abatement under Notification No. 1/2006-ST dated 01.03.2006 is set aside and abatement allowed.

ii) Regarding assessment under Works Contract service, matter remanded to the adjudicating authority.

(Order pronounced in the open Court on 01.06.2018)

(P. DINESHA)
MEMBER (JUDICIAL)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

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