IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
Court : DB- B1

Appeals No. ST/398/2012 & ST/609/2012

(Arising out of Order-in-Appeal No. 72/2012 dated 27.03.2012 and Order-in-Appeal No. 133/2012 dated 18.07.2012 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Coimbatore).

M/s. G. Ramamoorthi Constructions (I) Pvt. Ltd. : Appellant

Vs.

CCE & ST, Coimbatore : Respondent

Appearance

Ms. S. Sridevi, Advocate
for the Appellant

Shri B. Balamurugan, AC (AR)
for the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing/Decision: **03.01.2019**

FINAL ORDER Nos. **40010-40011/2019**

Per Madhu Mohan Damodhar

The facts of the case are that the appellants were providing service under the category of "Construction of Residential Complex Service", "Commercial or Industrial Construction Service" and "Works Contract Service"". The materials required for such construction service were being supplied free of cost by the clients. The department, however, took the view that as per the explanation appended to

Notification No. 1/2006-ST dated 01.03.2006, the gross amount charged shall include the value of the goods and the materials supplied or provided or used by the provider of the construction service for providing taxable service. Hence, show cause notices were issued to the appellants proposing demand of service tax in respect of the value of the materials supplied free of cost. The original authority upheld the proposal made in the SCNs and also imposed penalties under various provisions of law. The period of dispute involved June, 2005 to March, 2008 and April, 2009 to March, 2010. The Commissioner (Appeals) vide impugned orders 72/2012 dated 27.03.2012 and No. 133/2012 dated 18.07.2012 upheld the orders of the adjudicating authority. Aggrieved appellants have filed the present appeals viz., ST/398/2012 & ST/609/2012.

2. Today when the matter came up for hearing, on behalf of the appellants, Ld. Advocate Ms.. S. Sridevi submits that the matter under dispute has been finally laid to rest by the Hon'ble Supreme Court judgment in. *CST Vs. Bhayana Builders (P) Ltd* – 2018 (10) GSTL 118 (S.C.), where the Apex Court has held that the goods/materials supplied free of cost by the service recipient and used for providing taxable service of construction of Commercial or Industrial Construction is not to be included "gross amount charged" for the purpose of arriving tax liability.

3. On the other hand, Ld. AR, Shri B. Balamurugan, AC, supports the impugned orders.

4. On going through the facts of the case, we find that the Ld. Advocate is correct in her assertion that the issue under dispute has been finally laid to rest by the Hon'ble Supreme

Court judgment in Bhayana Builders (P) Ltd. The relevant portions of the said judgment are reproduced for ready reference:-

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

20. It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of

> Section 65 of Chapter V of the Act under which such notifications were issued.
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> **21.** For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue."

3. Following the ratio laid down by the Hon'ble Apex Court as above, we are of the considered opinion that the impugned orders cannot be sustainable and requires to be set aside, which we hereby do.. Appeals are therefore allowed with consequential benefits, if any, as per law.

(Order dictated and pronounced in the open Court)

(P.DINESHA)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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