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

Application No.ST/Misc/CT/41133/2017
Appeal No.ST/644/2012

[Arising out of Order-in-Appeal No.111/2012 (MST) dt. 25.09.2012 passed by Commissioner of Central Excise (Appeals), Chennai]

Operational Energy Group India Private Ltd. Appellant

Versus

Commissioner of GST & Central Excise,
Chennai South Commissionerate
Chennai Respondent

Appearance :

Shri J. Shankarraman, 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 : 09.01.2019

FINAL ORDER No. 40104 / 2019

Per Madhu Mohan Damodhar

The brief facts of the case are that appellants are registered with the department for rendering for Consulting Engineer Service (CES) and Maintenance or Repair Service (MMRS). During the course of audit, it was noticed that appellants had entered into an agreement with various clients like

M/s.Thermax India Ltd., Tidel Park, JCT, Tamil Nadu Petroleum Ltd. etc for operation and maintenance of power plants. In terms of the agreements with their clients, appellants were responsible inter alia, for monitoring plant equipment performance, operation planning, coordinating with the State Electricity Board, breakdown maintenance and repairs of all transformers, switchgears, breakages, motor control centres, etc. that may be used in the operation of the power plant in an effective and timely manner. The aforesaid activities are performed by appellants with their group of experienced and office and management personnel. In consideration of rendering the above, appellant collected maintenance charge and operation charges from their clients. Department was of the view that charges collected on operation of the plants as mentioned above, have got nexus with the Management, Maintenance or Repair of Power Plants and above charges are liable to service tax w.e.f. 16.06.2005 under MMRS under the category of Management, Maintenance of Immovable Property. Accordingly, a show cause notice dt. 24.03.2008 was issued to appellants inter alia, proposing service tax demand of Rs.33,50,510/- along with interest as also imposition of penalty under Section 76 of the Finance Act, 1994. In adjudication, adjudicating authority vide an order dt. 30.07.2008 confirmed the proposed demand of service tax with interest and imposed penalty under Section 76 ibid. On appeal, Commissioner (Appeals) vide impugned order dt. 25.09.2012 modified the order of original authority to the extent of upholding the demand with interest for the normal period and set aside the penalty imposed under Section 76 ibid by invoking Section 80 ibid. Aggrieved by the order of lower appellate authority, appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellants, Ld. Advocate Shri J. Shankarraman submits that the very same issue has been dealt by this very Bench of the Tribunal in the case of *Shapporji Pallonji Infrastructure Capital Co. Ltd. Vs CST Chennai* in favour of appellant. He prays that following the ratio of the decision of CESTAT Chennai appeal may be allowed.

3. On the other hand, Ld. A.R supports the impugned order.

4. After hearing both sides, we find that Ld. Advocate is correct in his assertion. The issue as to whether activity of production of electricity in power plant would amount to management of immovable property or otherwise, has been analyzed and discussed by this Bench in the case of *Shapoorji Pallonji Infrastructure* (supra) and held in favour of assessee. The relevant portion of the order is reproduced below :

> **"10.1** The learned counsel for the appellant has countered this allegation stating that the activity would not fall under 'management of immovable property'. That it will get covered under the definition of Business Auxiliary Service; the dominant activity carried out in the power plant being generation of electricity and maintenance of the power plant being only an incidental one. That generation of electricity amounts to 'manufacture' of goods within the meaning of Section 2(f) of the Central Excise Act, 1944. That electricity is mentioned under Chapter Heading 27.16 of the First Schedule to the Central Excise Tariff Act, 1985, with effect from 1-3-2005 and electricity being an excisable product, though with nil rate of duty. We have to say that this argument of the appellant is not without substance. The major activity in the power plant is production of electricity which is an excisable product. Further, activity of production of electricity cannot be equated with management of immovable property. In a situation where the property is entrusted for management, the dominant intention would be to manage the property to raise

profits whereas in the present case, it is for generation of electricity. The contention of the department may be applicable to a situation where the management is handed over to a management company for the sole purpose of management of the immovable property. In the present case, the sole purpose is not management of immovable property. Further, the management, if any, of the power plant is done by the appellants and is only incidental to the activity of generation of electricity. The activity carried out in the power plant is not solely management of power plant, but operation of the same. The word 'operation' is not used in the definition of 'Maintenance and repair' services which is relied by department as amended with effect from 16-6-2005. The said word is seen used in the definition of Business Support Services ('Operational assistance'). Thus it is very much clear that management of immovable property does not include operation activities. In addition, it cannot be said that the appellants are doing management service for the reason that the management service is done by appellants to themselves and not to any other person. The appellants are operating the power plant to generate electricity on behalf of the owner for supplying the same to TNEB.

10.2 In arriving at this conclusion, we also draw sustenance from the decisions of this Tribunal as follows:-

(a) *CMS (I) Operations & Maintenance Co. P. Ltd.* v. *Commissioner of Central Excise, Pondicherry* - 2007 (7) S.T.R. 369 (Tri. - Chennai). Paragraphs 30 and 31 are reproduced as follows :-

"30. In the impugned order the Commissioner had rendered a finding that the facility was run by entering into contracts with different organizations such as CMS who had contracted to undertake the operation and maintenance of the facility. He found that though CMS was operating the facility for generating electricity, the entire activity was carried on by CMS on behalf of ST-CMS. The Commissioner also observed : "the agreement also provides for incentive payments/liquidated damages/environmental fines......" This does not happen when any agency provides service to another. A service provider is not responsible to achieve any performance target referring to which it becomes entitled to any reward or incurs penalties. Such provisions in the O&M contract fortify our finding that the appellants were not rendering any advisory services and were engaged in activities which could be measured such as generation of power in the instant case.

We have seen that in generating power, the 31. appellant did not render any advice to improve the functioning of the working system of another organization. They ruin the facility and organized the required materials through the owner and services of their own staff. These activities did not constitute services to any other person/organisation. These impugned functions were incidental to their main activity of producing power. The O&M contract is a works contract and it is bad in law to vivisect it and tax certain activities covered by the contract. A reading of the whole contract makes it plain that the same was intended to ensure generation and supply of power as per PPA and not for rendering any service to the owner."

(b)*Rolls Royce Indus. Power (I) Ltd.* v. *Commissioner of Central Excise, Vishakhapatnam* - 2006 (3) S.T.R. 292 (Tri.)

"6. We have perused the records and considered the submissions made by both sides. The issue raised is the true meaning and scope of operation and maintenance agreement dated 14-3-1995. The appellant had taken over the plant and was operating & maintaining it in terms of the agreement. A perusal of the agreement makes it clear that it is a contract between owner and an operator. The terms of the contract vest complete freedom and responsibility on the appellant, without any interference by the owner. The owner's right is restricted to entry and access, to be satisfied that the operation is carried out according to standards. He also receives reports about the relevant aspects of operation, status and output. The payment for operation and maintenance are determined under the various clauses of the contract. In addition to the lump sum payment, it also provides for bonus and penalty. The terms of the contract do not envisage or involve providing any consulting or engineering help to the owner. The operator is fully autonomous and responsible for the performance of operation and maintenance. Whatever engineering issues are involved, it is for the operator to find solutions for, and attend to in the course of operation and maintenance. He is not required to render any advice or to take any orders from the owner. He cannot pass on the responsibility for operating the plant in any manner to the owner. Thus, there are no two parties, one giving advise and the other accepting it. Service tax is attracted only in a case involving rendering of service, in this case, engineering consultancy. That situation does not take place in the present case. Therefore, we are of the opinion that the duty demand raised is not sustainable. The learned SDR's contention about the 46th Amendment and the Apex Court's decision in *Builders Association of India and Others* (supra) have no application in the present case since such a deemed definition does not exist in the case of job work as has taken place in regard to project contracts in sales tax. In these facts and circumstances, the appeal is allowed after setting aside the impugned order."

(c) *CLP Power Pvt. Ltd*. v. *Commissioner of Service Tax, Bombay* - Final Order Nos. A/90709 to 90712/2016/STB/CLP. The relevant portion is extracted below:-

"…… In the present case, admittedly, there are two agreements into existence, one is clearly for operation of power plant and second is for maintenance on which appellant discharged the service tax. The agreement of operation of plant is neither involved any management of either plant or maintenance or repair. Entire plant was taken over by the appellant for operation. Therefore, the same does not fall under Management, Maintenance or Repair Service. As per our above discussion as well as settled legal position on the identical issue as per the above judgments, we are of the view that the impugned order is not sustainable, therefore, the same is set aside."

Following the ratio laid down by this Bench in the aforesaid decision, the impugned order to the contrary then cannot sustain and will require to be set aside, which we hereby do. The appeal is allowed with consequential relief, if any, as per law. MA filed by Revenue for change of cause title consequent to the introduction of GST and the resultant change in the jurisdiction, is allowed.

(Operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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