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

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Appearance :

Ms. P. Jayalakshmi, Advocate
For the Appellant

Shri A. Cletus, ADC (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 : 21.01.2019
Date of Pronouncement : 18.03.2019

FINAL ORDER No. 40500-40503 / 2019

Per Bench

All these appeals since relating to same issue and same appellant they are taken up for common disposal.

2. The common facts of the case are that pursuant to scrutiny of ST-3 returns filed by the appellants, it appeared that they had discharged service tax liability by availing benefit of Notification No.1/2006-ST dt. 1.3.2006 namely, after availing 67% abatement on the value of taxable services under the category of Erection, Installation or Commissioning services. It was noted by department that the machinery and equipment were supplied by service recipient. From perusal of purchase orders and agreements between the appellants and the service recipient Nortel Networks (India) Pvt. Ltd. (hereinafter referred to as Nortel), it appeared that in all invoices issued to customer, it has been declared by appellants as "service charge" only. The department was of the view that to avail the benefit of notification, the plant, machinery, equipment and other material should be supplied by the service provider and not for simple supply of any other material for providing service. Further, appellants availed input service tax credit against above services. Accordingly, show cause notices were issued to the appellant inter alia, denying the benefit of notification No.1/2006 and proposing to demand service tax along with interest for various periods and proposing imposition of penalties under various provisions of law. The details of SCN period involved, service tax demand, adjudication order, impugned order as furnished by Ld. Advocate are tabulated herein below :

S.No	Appeal No.	SCN No.	Period of Dispute	O-I-O	O-I-A	Amount Rs.
1.	ST/738 /2010	02/2008 dt. 03.04.2008	10/2006 to 03/2007	10/2008 dt. 16.09.2008	396-398/ 2010 dt. 30.8.10	14,06,997
2.	ST/739 /2010	V/ST/30/122/ 07-STU dt. 12.10.2007	06/2006, 07/2006 & 09/2006	5/2009 dt. 17.06.2009		2,88,356
3.	ST/740 /2010	V/ST/30/68/20 08-STU (SCN) dt. 06.10.2008	09/2007	14/2009 dt. 03.12.2009		19,199
4.	ST/463 /2011	03/2009-ST dt. 05.10.2009	May 2008 to July 2008	8/2010 (ST) dt. 21.07.2010	209/ 2011 dt. 29.04.11	7,40,014/-

Upon adjudication of SCNs as at Sl.No.1 to 3 as above, the adjudicating authority confirmed the demands as proposed in the notices and imposed penalties under Section 76, 77 of the Finance Act, 1994. In appeal, Commissioner (Appeals) vide a common order dt. 30.08.2010 (impugned order) upheld the orders of original authority. Hence Appeal Nos.ST/738 to 740/2010. So also, SCN as at Sl.No.4 was adjudicated which culminated in order dt. 29.04.2011 (impugned order) passed by Commissioner (Appeals). Hence Appeal ST/463/2011.

3. Today when the matter came up for hearing, on behalf of the appellants, Ms. P. Jayalakshmi made oral and written submissions which can be broadly summarized as under :

(i) The issue involved in the instant appeals is no more res-integra and is covered by the decision of the Hon'ble Supreme Court in the case of Commissioner Vs. Larsen & Toubro Ltd. 2015 (39) S.T.R. 913 (SC), where in it was held that works contract is not taxable prior to 01.06.2007. This decision has been followed by the order of this Hon'ble Tribunal in the case of URC

Construction (P) Ltd Vs. Commissioner of Central Excise, Salem 2017 (50) S.T.R. 147 (Tri. – Chennai).

(ii) The Appellants submits that they have not availed of the Cenvat credit on the input services of the Nortel contract which is in dispute. However, the appellants submits that they are eligible to avail input services credit in respect of other works for which full rate of tax has been paid without availing benefit of abatement under the said notification. In respect of the aforesaid contract, the works carried out are foundation works and electrical works falling under works contract involving both supply of construction and electrical materials. Since sales tax/VAT is already paid on the supplied goods, the contract is a composite contract.

(iii) The appellant further submits that in an ECI contract which is a works contract, there is an involvement of both material and services. The law facilitates the levy of tax through two methods in the first method it is open to an assessee to identify the service portion in a transaction and discharge applicable service tax. In the second method, the Government has issued Notification 1/2006 as per which an abatement of 67% is available and what is taxable is only 33% of the gross amount charged by the service provider from providing the taxable service. In the market with regards to the ECI contracts, there is a practice among clients as well as institutions to purchase their own manufactured materials certain materials on their own and provide the said materials to the contractor for the purpose of execution of the contract and the contractor is a bailee in respect of such materials.

(iv) The appellants submits that the explanation to the said Notification cannot result in a taxation of an item which is not contemplated in charging section and is beyond even the legislative competence of the Parliament. If materials supplied to the service provider has to be added to the contract value and then 67% abatement is to be calculated, it would amount to a service tax levy on 33% of the value of the materials supplied by the client, which is not within the scope of the contract of the contractor and would amount to levy of service tax on a material component as well as on an item which is not even received or enjoyed by the contractor.

(v) The appellants further submits that the constitutional bench of the Supreme Court in the case of Commissioner of Central Excise Vs Acer India (2004) 172 ELT 289 examined the definition of transaction value must be read in the text and context thereof and not dehors the same. The Supreme Court held that a machinery provision contained in section 4 and the explanation contained therein by way of definition of transaction value can neither override the charging provision nor by reason thereof a goods which is not excisable would become an excisable one only because one is fitted into the other unless the context otherwise requires.

(vi) The Appellants submits that no violation of any provision has been made by them thereby warranting the levy of penalty under the instant section. Thus, the imposition of penalty is not sustainable in law.

4.1 On the other hand, Ld. A.R Shri A. Cletus draws our attention to Annexure to SCN dt. 03.04.2008, wherein as per para-10, it has been narrated that the gross amount charged is only related to work charges / service charges, as evident from relevant purchase orders of the customer and net price as defined in General Agreement dated 25.02.2005 (page 7) and para 1 (a) of the agreement dated 25.02.2005.

4.2 As per the fees set out in the purchase order, Nortel was required to pay to appellant only the fees for performance of service and completion of the work.

4.3 Apart from that it has been provided in agreement that “all materials including without limitation equipment, documentation, software, tools etc. supplied by Nortel Networks or the Customer remains the property of Nortel Networks or the customer at all times.

4.4 Further, in all invoices issued to Nortel, it has been declared by the appellant that “service charges only” and also declared that “materials supplied by the party”.

4.5 Appellants in their letter dt. 21.09.2007 regarding scope of work, they themselves admitted that “major equipment” would be supplied by customer Nortel; that their scope of work would only be erection, installation and commissioning of towers including foundation works and electrical works.

4.6 Even if the appellants have used some material belonging to them for the services provided, the value of such material would be very small compared to the value of materials supplied by Nortel, hence just because the appellants have supplied small quantity of materials, the services provided by them cannot be treated as work contract.

4.7 It will therefore have to be treated only as a service simplicitor.

4.8 Any other view to the contract will be incorrect and coloured one.

5.1 Heard both sides and have gone through the facts of the matter.

5.2 On perusal of the Master Agreement between the appellant and Nortel, it is seen that the agreement is more in the nature of General / Master Agreement for provision of services by appellants to Nortel mainly in the nature of Erection, Commissioning and Installation services. The show cause notice has flagged para 4.6 of the agreement to allege that all materials are supplied by Nortel. On a closer reading of relevant para 4.6 (a) only lays down that all materials which **are supplied** by Nortel would remain the property of Nortel at all times. On the other hand, in para 8 (b) it is specifically indicated that a contractor will be responsible for providing at his own cost of all facilities, tools, equipment, components, raw materials, supplies, software and other items and resources reasonably necessary to perform the Services and complete the work and to perform its related maintenance and support obligations. Contractor will bear all costs associated with its performance hereunder. In no circumstance, will Nortel Networks be liable for such expenses or costs.

5.3 Further perusal of the purchase order and invoices indicates that the appellant's activities are not restricted only as a service provider simplicitor, for example a purchase order / invoice clearly indicate "supply and installation of power cables multi strand, Armoured copper UG, Tower implementation, shelter erection on site, supply and installation of earthing pits, supply and installation of aviation lamp for towers and so on. The SCN has also alluded to the appellant's letter dt. 21.09.2007 wherein the appellants have reported to have informed that "major equipment" would be supplied by the customer Nortel. While this may very well be so, there is no allegation by the department that entire equipment and material has been supplied in totality by Nortel. Even during the hearing, the Ld. Advocate has averred that appellants have in fact supplied the goods also, as part of the work contracted to them, and that sales tax / VAT has been paid on the supplied goods.

5.4 The question that will require to be addressed is whether for being considered as a composite works contract, the service provider is required to provide not only of the services required for execution of the contract but also all materials and equipments required for such execution. In our view, when there is supply of material involved by the service provider in execution of the product project / work contracted to him, the activity done on such service provider cannot be mere "service simplicitor" but will be a composite contract comprising of both materials and services. It really does not matter what percentage of the materials is being provided by such service provider at his cost.

5.5 Ld. Advocate has also submitted that they have not availed cenvat credit on input services of the Nortel contract which is in dispute but only in respect of input services in respect of other works for which full rate of tax has been paid without availing the benefit of the said notification. This being so, the very premise to the contrary in the SCN does not appear to be convincing.

5.6 However, necessary facts as to whether the appellants had actually supplied material also for the works executed by them is not forthcoming. More so because, the purchase order says "for services only". It is seen that appellants have rendered ECIS in nature of laying foundation for tower, installation of machinery equipments etc. Though tower, machinery, equipments are provided by Nortel, the contractor would have to use other materials for rendering ECIS. The facts in such line have to be verified. In such circumstances, we are of the considered opinion that the matter requires to be remanded to the adjudicating authority to relook into the question as to whether the works executed are service simplicitor or composite involving both supply of materials and provision of services. Needless to say, that if the works are in the nature of composite contract involving both materials and service, the demand of service tax cannot sustain for the period prior to 1.6.2007 as per the decision laid in *Larsen & Toubro Ltd.* (supra). For the period after 1.6.2007 also, the demand cannot sustain under ECIS, if the contracts are composite as decided by the Tribunal in the case of *Real Value Promoters Ltd*. – 2018-TIOL-2867-CESTAT-MAD.

6. From the foregoing, the impugned orders are set aside and remanded to adjudicating authority for de novo adjudication. The appeals are allowed by remand.

(Order pronounced in court on 18.03.2019)

(Madhu Mohan Damodhar)
Member (Technical)

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

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