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

ST/00171/2009

[Arising out of Order-in-Appeal No.130/2008, dated 17.12.2008 passed by the Commissioner of Central Excise (Appeals), Madurai]

COMMISSIONER OF CENTRAL EXCISE, MADURAI — APPELLANT

Versus

M/s. SCIENTIFIC METAL ENGINEERS (P) LTD. — RESPONDENT

Appearance:

For the Appellant — Shri A. Cletus, ADC (AR)
For the Respondent — Shri S. Viswanathan, Adv.

CORAM:

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

Date of hearing/decision **17-07-2017**

FINAL ORDER NO. 41239/2017

Per Bench:

The fact of the matter is that the respondents were providing 'design and engineering drawing' as required by their customers and to set up 'Cathodic Protection System' to long distance pipelines to protect them against corrosion. It appeared that the work entrusted and executed involved complete supply of required materials and carrying out the installation of materials, testing and commissioning. For these services provided by them, respondents were getting installation charges in addition to cost of materials supplied. Department took the view that the activity is liable to service tax under the category of "Erection, Commissioning and Installation Services" [ECIS]. Accordingly, proceedings were initiated, *inter alia,* proposing demand of service tax liability under "ECIS" for the period 01.07.2003 to 31.03.2006 along with interest liability thereon to imposition of penalties under various provisions.

2. The original authority vide Order dated 31.03.2008 confirmed these proposals including imposition of equal penalty equal to the tax liability demanded under section 78 of the Finance Act, 1994 as also penalties under section 76 and 77 *ibid*. In appeal, Commissioner (Appeals) vide impugned Order dated 17.12.2008 set aside the Order-in-Original and allowed the appeal of the respondent. The lower appellate authority took the view that 'installation' means " to put in place a pre-existing machinery or plant", which was not the case in respect of the respondents, therefore, the demand of service tax was not sustainable.

3. Aggrieved, department has filed an appeal before this forum. On 17.07.2017, when the matter came up for hearing, Shri A. Cletus, ADC (AR) on behalf of the department, reiterated the grounds of appeal. He further submits that all the items required for the purpose of existing 'Corrosion Protection System' would be covered under the term "equipments". Since commissioning or installation of all equipment are covered under "ECIS" from 01.07.2003, the Commissioner has erred in deciding the matter in favour of the respondents.

4. On the other hand, the learned Advocate Shri S. Viswanathan submits that for the period of dispute is from 01.07.2003 to 31.03.2006, and in view of the law laid down by the Apex Court in the case of *Commissioner of Central Excise & Customs, Kerala Vs Larsen & Toubro Ltd.* reported in *2015 (39) S.T.R.913 (S.C.)*, this activity

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performed by them being in the nature of Works Contract will not become taxable till 01.07.2006. In response, learned authorized representative submits that the judgment rendered by Hon'ble Apex Court was only in respect of indivisible contract and for Works Contract simplicitor, which is not the case here since the deetails of labour charges involved are available.

5. Heard both sides. From the facts narrated in the Order dated 31.03.2008 of the original authority itself, it clearly emerges that even the department has considered the activity carried out by the respondents as being in the nature of "Works Contract". Para 5 of the said order, which is reproduced below will exemplify this finding:-

> "Vide letter Reference SME/CEX/2005-2006/841, dated 23.03.2006, the assessee furnished copies of **contract** with various agencies, copies of bills and details of payment received from the said agencies. As they did not produce any evidence for receipt of amount from the various agencies, the **work contract receipt** as pointed out by the Audit were taken into account for consideration of demand the evidence produced by the assessee towards the cost of supply of materials to audit were also taken into consideration for arriving at the taxable value." [**emphasis supplied**]

6. In any case, vide the *Larsen & Toubro Ltd.* judgment cited supra, the Hon'ble Apex Court has clarified that such services which are in the nature of Works Contract carried out, as is the case here, cannot be exigible to tax till such service was brought under the tax net with effect from 01.07.2006. The relevant provisions of the Supreme Court's judgment are reproduced below:-

> "**24.** A close look at the Finance Act, 1994 would show that the five 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*". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross

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amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second *Gannon Dunkerley* case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second *Gannon Dunkerley* case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated :-

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract.

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> **29.** It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament."

7. Viewed in this light, no merit is found in the appeal filed by the Revenue, for which, the same is required to be dismissed, which we hereby do.

(Dictated and pronounced in open court)

(MADHU MOHAN DAMODHAR)
TECHNICAL MEMBER

(SULEKHA BEEVI C.S)
JUDICIAL MEMBER

ksr
19-07-2017

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