

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

SERVICE TAX APPEAL No.42037 of 2018

(Arising out of Order-in-Appeal No.313/2018 (CTA-I) dated 22.06.2018 passed by Commissioner of GST & Central Excise (Appeals-I), Chennai]

M/s.Cooper Elevators India Pvt. Ltd.

Appellant

(formerly known as Kannan Lifts Pvt. Ltd.)
3/533, BHEL Nagar, Mahanandapuram
Kundrathur Road, Porur
Chennai 600 116.

VERSUS

Commissioner of GST & Central Excise,

Respondent

Chennai South Commissionerate,
MHU Complex, No.692, Anna Salai,
Nandanam
Chennai 600 035.

WITH

SERVICE TAX APPEAL No.41580 of 2019

(Arising out of Order-in-Appeal No.207/2019 (CTA-II) dated 29.06.2019 passed by Commissioner of Central Tax (Appeals-II): CGST & Central Excise, Chennai]

M/s.Cooper Elevators India Pvt. Ltd.

Appellant

(formerly known as Kannan Lifts Pvt. Ltd.)
3/533, BHEL Nagar, Mahanandapuram
Kundrathur Road, Porur
Chennai 600 116.

VERSUS

Commissioner of GST & Central Excise,

Respondent

Chennai South Commissionerate,
MHU Complex, No.692, Anna Salai,
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Chennai 600 035.

APPEARANCE :

Shri V. Ravindran, Advocate
For the Appellant

Ms. Sridevi Taritla, ADC (AR)
For the Respondent

**CORAM: HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER(TECHNICAL)**

**DATE OF HEARING : 03.02.2022
DATE OF PRONOUNCEMENT:07.02.2022**

FINAL ORDER No. 40058-40059 / 2022

Order PER: SULEKHA BEEVI C.S

The issue involved in both these appeals being the same, they are heard together and disposed of by this common order.

2. Brief facts of the case are that the appellants are engaged in the business of supply, erection, commissioning and maintenance and repairs of lifts, elevators. They hold Central Excise registration under the category of "Erection and Commissioning Services" and "Maintenance and Repair Services". During the course of audit, it was noticed that the appellant received orders for the provision of lift / elevators at the customers' site as per their requirement and an agreement / contract for supply, installation, testing and commissioning of the lift was entered into between the appellant and their customers. The agreements specified type of lift and its specifications including warranty and maintenance conditions and also enumerated the items / work in the nature of providing shafts, pits essential for the execution of the contract which was required by the customers.

2. As per the agreement, the prices per unit for the provision of the lift is quoted under two heads (i) the price for design, supply, installation and commissioning of the lift, which is inclusive of the Value Added Tax

(VAT) (ii) the prices for installation and commissioning of the lift which is inclusive of the service tax.

3. The invoice for the value of the first component as above was raised with the description "Supply of Passenger lift material" on which the appellant discharged VAT. Invoice value for the second component was raised with the description "Erection, Commissioning and Installation charges" on which appellant paid service tax.

4. It appeared to the department that the contract entered into by the appellant for providing lift was composite in nature which involved both supply of material and rendering of services. In terms of CBEC instructions in Letter [F.No.B1/16/2007-TRU) dated 22.5.2007, the contracts which are treated as works contract for the purpose of levy of VAT / sales tax shall also be treated as works contract for the purpose of levy of service tax. The audit also found that the appellant had filed VAT returns declaring their activity as 'Works Contracts Service'. In their letter dated 04.05.2015, the appellant stated that they had discharged VAT on 85% of the contract value and paid service tax on 15% as per the provisions of Rule 8 (5) (d) of Tamil Nadu VAT Rules, 2007 taking the sale value of goods involved therein notionally at 85% of the contract value and remaining 15% as the value of labour involved for payment of service tax.

5. The department entertained a view that value adopted by the appellant for payment of VAT was not the actual value of the goods supplied while providing lift / escalators and that it was only a notional value. The service being in the nature of a work contract service for

original works, service tax is liable to be paid on 40% of the contract value. Show cause notice was issued for different periods proposing to demand short paid service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed equal penalty which was upheld by Commissioner (Appeals). Aggrieved by such orders, the appellant is now before the Tribunal.

2. Ld. Counsel Shri V. Ravindran appeared and argued for the appellant. He submitted that the period involved is from October 2010 to March 2015 and April 2015 to June 2017. The appellant had supplied, installed, tested and commissioned the lifts / elevators at customers' premises. The appellants had discharged the VAT as per Rule 8 (5) (d) of the Tamil Nadu VAT Rules, 2007 thereby paid VAT on 85% of the contract value. The appellant had discharged service tax on the balance 15% under the category of 'Erection, Commissioning and Installation Services'. The department now proposes to demand on the contract value which has already been subjected to levy of VAT. He submitted that it is settled position of law that VAT and Service Tax cannot be simultaneously levied and that they are mutually exclusive. The very same issue as to works contracts service in the nature of supply, erection and commissioning of lifts/ elevators was considered by the Tribunal in the case of *M/s. John's Lifts Pvt. Vs CST Chennai* -2017 (9) TMI 32 CESTAT CHENNAI. The Tribunal after considering the facts held that when the assessee has discharged VAT on the contract value that has been notional, arrived in terms of Rule 8 of Tamil Nadu Valued Added Tax Rules, 2007, the very

same amount cannot be subjected to levy of service tax. The relevant part of the decision is as under :

“9. In the judgment of Kone Elevator India Pvt. Ltd. (supra), the Hon’ble Supreme Court has held that the service of manufacture, supply and installation of escalators/lifts is works contract service. In the case of Larsen & Toubro (supra), the Hon’ble Apex Court as held that works contract prior to 1.6.2007 are not subject to levy of service tax. Following the principles laid down in the two judgments, we hold that the demand prior to 1.6.2007 is unsustainable and therefore requires to be set aside which we hereby do.

10. As per the Table given above, a small portion of the demand pertains to 1.6.2007 to 31.7.2007. It is not disputed that the appellant have discharged service tax on 15% of the value of the contract and also that they have paid VAT/Sales Tax on 85% of the value of the contract. Thus, the entire contract has been subjected to VAT/Service Tax. It is the contention of the department that appellants ought to discharge service tax on 33% of the gross amount charged being the liability under the service tax law. Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006 as reproduced above, shows that the value adopted for the purpose of payment of VAT shall be taken as the value of transfer of proper in goods involved in the section of works contract for determining eth value of works contract service. Since the appellant has paid service tax on 15% of the contract value and has discharged VAT on the remaining portion, we are of the view that any differential service tax demand beyond that already discharged for the period 1.6.2007 to 31.7.2007 is unsustainable and requires to be set aside, which we hereby do. Similarly, the demand of CENVAT credit to the tune of Rs.2,51,202/- also is seen to have been utilized by the appellant for payment of service tax prior to March 2007, during which period works contract service was held not to be liable to service tax. In the event, we do not find any grounds for sustaining the demand of Rs.2,51,202/- and the same is set aside. The demands for differential tax liability / recovery of credit having been set aside, the penalties imposed will also not sustain.

11. In the result, the impugned order is modified to the extent of setting aside the demand of service tax for the period prior to 1.6.2007 and also set aside the differential duty demand for the period 1.6.2007 to 31.7.2007 beyond that is discharged by them on 15% of value of contract. The penalties are also set aside. The appeal is partly allowed in the above terms.”

3. Ld. Counsel submitted that the Hon’ble Apex Court in the case of *Safety Retreading Company Pvt. Ltd. Vs CCE Salem* 2017 (1) TMI 1110 – SUPREME COURT = 2017 (48) STR 97 (SC) held that value of the

materials / goods cannot be considered for payment of levy of service tax in the execution of a works contract.

4. Ld. Counsel further submitted that in the case of *Ocean Interior Limited Vs CGST & Central Excise, Chennai* – 2019 (11) TMI 124 – CESTAT CHENNAI, the Tribunal held as follows :

“7.3 The appellant has arrived at the value of service portion of Works Contract Service as per Rule 2A (i) whereas the Department has proceeded to arrive at the value as per Rule 2A (ii) for the period after 01.07.2012 and under the Composition Scheme for the period prior to 01.07.2012. Rule 2A (ii) would apply only if the value is not determined under clause (i). The appellant in the present case has arrived at the value and also paid VAT as per the VAT Law. The value of transfer of property in goods has to be arrived at on the basis of purchase price of various goods, apportionment of overheads and profit margin. The appellant, being an assessee under the VAT Law, has to abide by the state law for payment of VAT. Thus, he can only arrive at the value of goods used in the Works Contract by applying the VAT Law after deducting the value arrived for payment of VAT; the remaining portion has been subjected to payment of Service Tax. When VAT has already been paid on the value of goods, the same cannot be subjected to levy of Service Tax again.

8.1 The Hon’ble Apex Court in the case of *M/s. Safety Retreading Co. (P) Ltd. Vs. Commissioner of C.Ex., Salem* reported in 2017 (48) S.T.R. 97 (S.C.) has held that the assessee is liable to pay Service Tax only on the service component, which under the State Act was quantified at 30%. It was held that the assessee is not liable to pay Service Tax on the total amount for retreading including the value of materials/goods that have been used and sold in execution of the contract.

8.2 The Tribunal in the case of *M/s. Singh Sales and Services Vs. Commr. of Cus., C.Ex. & S.T., Allahabad* reported in 2017 (52) S.T.R. 38 (Tri. – Allahabad) has held that value of goods/spare parts supplied and used for providing service are not includible in the taxable value.

8.3 In *M/s. Sobha Developers Ltd. Vs. Commissioner of C.Ex. & S.Tax, Bangalore* reported in 2010 (19) S.T.R. 75 (Tri. – Bang.) it was held that the material value sought to be included on the ground that goods are consumed in provision of service and not sold, cannot sustain.”

5. Ld. A.R Ms. Sridevi Taritla appeared for Revenue and reiterated the findings in the impugned orders.

6. From the facts of the case and submissions of the parties narrated above it can be seen that the composite activity of design, supply, erection, testing, commissioning of lift / elevators fall under the category of WCS both under VAT law and Finance Act, 1994. The appellant has to design, and supply the materials involved in providing the lift / elevator. Since the activity is composite in nature involving both supply of materials and rendering of service, including labour of construction of pit etc., the Tamil Nadu VAT Act provides for arriving at a notional value for payment of VAT. The appellants have paid VAT on 85% of the contract value as per the category of invoices issued for supply of material as stated in para 2 above. The department is of the view that this is only notional and not the actual value of materials supplied. The SCN proposes to levy service tax on 40% of the entire contract value. This means levying service tax on the amounts on which the appellant has paid VAT. The appellants have also filed VAT returns periodically complying with the mandate in the State Act. It is settled position that VAT and service tax are mutually exclusive and cannot be simultaneously levied.

7. The Tribunal in the case of *Johnson's Lift* (supra) had occasion to consider similar issue on identical set of facts. We find that the said decision is squarely applicable for which reason the demand cannot sustain.

8. After appreciating the facts and principles laid down in the above decisions, we are of the considered opinion that the demand of service tax cannot sustain. Impugned orders are set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in court on 07.02.2022)

**(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)
MEMBER (TECHNICAL)**

