# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# <u>CHENNAI</u>

REGIONAL BENCH - COURT No. III

**Service Tax Appeal No.40083 of 2015**

(Arising out of Order-in-Appeal No.197/2014-ST dated 08.10.2014 passed by Commissioner of Customs & Central Excise (Appeals), No.1, Foulks's Compound, Annai Medu, Salem 636 001)

**M/s.SKD & Co.** **.... Appellant**
14, 2nd Street, Pulikalmedu,
(Now at 1/68, Hostel Stop),
Tirupur Road,
Kangeyam 638 701.

*VERSUS*

**The Commissioner of CGST & Central Excise** **... Respondent**
Salem Commissionerate
No.1, Foulk's Compound,
Annai Medu,
Salem 636 001.

**<u>APPEARANCE :</u>**

Shri S. Murugappan, Advocate, for the Appellant
Shri M. Selvakumar, Authorised Representative for the Respondent

**<u>CORAM</u> :**

**HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)**
**HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

**<u>FINAL ORDER No.40485/2024</u>**

DATE OF HEARING : 25.04.2024
DATE OF DECISION : 25.04.2024

**Per: Ms. Sulekha Beevi. C.S**

Brief facts are that the appellant provided services relating to cable laying for M/s.BSNL Erode SSA and Coimbatore SSA during the period 2008-09 to 2009-10. On verification of their ST-3 returns filed for these periods, it was noticed that the appellant had not discharged appropriate service tax on the amounts received for the services of cable laying provided to M/s.BSNL. The department was of the view that the said activity falls under 'Erection, Commissioning or Installation Service' as defined under Section 65 (39a) of the Finance Act, 1994. Show cause notice was issued proposing to demand the service tax under the said category of service along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand of service tax along with interest and imposed penalties. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. The Ld. Counsel Shri S. Murugappan appeared and argued for the appellant. It is submitted that the appellant is a Civil Contractor and undertook the activity of laying optic fibre cables for BSNL at Erode and Coimbatore regions. Appellant is registered with the service tax department under 'Manpower Recruitment Agency Service' from April 2008. The appellant was informed by M/s.BSNL that the activity of laying of cable is exempted from service tax. The appellant did not discharge the service tax on bonafide belief that the said activity is exempted from service tax.

2.1 The Ld. Counsel adverted to the Circular No.123/5/2010-TRU dt. 24.05.2010 issued by the Board. It is submitted that at para-3 in Sl.No.2 of the table, the activity of laying cable under and alongside roads is clarified to be not taxable under sub-section (105) of Section 65 of the Finance Act, 1994. The appellant had put forward this contention before the adjudicating authority as well as the Commissioner (Appeals). The plea of the appellant was not accepted holding that the Circular refers only to laying of electric cables and that it does not apply to telecommunication cables.

2.2 The Ld. Counsel submitted that the appellant, so as to ascertain the taxability of the services and clear the doubt, had enquired from M/s.BSNL, Trichur, as to whether service tax to be paid for the activity of laying of cables. M/s.BSNL, Trichur replied to appellant vide their letter dt. 25.01.2014 stating that the said activity is not subject to levy of service tax and that they had been intimated from the department alleging wrong availment of credit on the service tax paid for the activity of laying of cables. It is submitted by the learned counsel that the department itself has taken the view that the activity of laying of cables is not subject to levy of service tax. In the said letter, M/s.BSNL, Trichur had adverted to the clarification issued by the Board vide Circular No.123/5/2010-TRU dt. 24.5.2010.

2.3 Ld. Counsel referred to the Circular and submitted that the subject mentioned in Circular refers to applicability of service tax on laying of cables and similar activities. This itself would show that the clarification issued is not confined to levy of 'electric cables' only.

2.4 Ld. Counsel argued on the ground of limitation also. It is submitted that the department itself has taken the contrary view in different cases and the issue is therefore interpretational in nature. The entire demand is raised invoking the extended period alleging suppression of facts. There is no evidence to show that the appellant has suppressed facts with intent to evade payment of service tax. In fact, the figures for quantifying the demand has been taken from the records maintained by the appellant. The Ld.counsel relied upon the decision in the case of *CCE, Cus. & ST Guntur Vs Indian Oil Corporation Ltd.* – 2020 (40) GSTL 345 (Tri.- Hyd.) to support his argument that when the issue is interpretational in nature, extended period cannot be invoked. Ld. Counsel prayed that the appeal may be allowed.

3. Ld. A.R Shri M. Selvakumar appeared and argued for the department. The definition of 'Erection, Commissioning or Installation Service" as contained in Section 65 (39a) of the Finance Act, 1994 was adverted to by the Ld. A.R which reads as under :

***"any service provided by a commissioning and installation agency, in relation to, (I) erection, commissioning or installation of plant, "machinery, equipment or structures, whether pre-fabricated or otherwise" or (II) installation of - (a) electrical and electronic devices, including wirings or fittings thereof; or (b) plumbing, drain laying or other Installations for transport of fluids; or (c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or (d) thermal insulation, sound Insulation, fire proofing or water proofing; or (e) lift and escalator, fire escape staircases or travelators; or () such other similar services"***

3.1 It is pointed out by Ld. A.R that the activity rendered by the appellant is laying of optic fibre cables. The Board Circular which is referred to by the appellant would apply only to laying of electric cables. Para 11.14 to 11.16 of the OIO has been adverted to by the Ld. A.R to submit that the original authority has discussed in detail that the activity which is exempt as per the Board's circular is the activity of laying cable for electricity and not for telecommunications. In para-5, the Commissioner (Appeals) also discussed the same and has held that the services provided by the appellant for laying optic fibre cable is not exempted from service tax. The appellant had not paid the service tax and therefore the demand raised invoking extended period is legal and proper.

4. Heard both sides.

5. The issue that arises for consideration is whether the appellant is liable to discharge service tax for the activity of laying of optic fibre cables. The definition of "Erection, Commissioning or Installation Service" under Section 65 (39a) of the Finance Act, 1994 has already been reproduced above. The department is of the view that the said activity would fall under 'erection, commissioning or installation service' and therefore the appellant is liable to pay service tax. On the contrary, the learned counsel for appellant has relied upon Board's Circular No.123/5/2010. The relevant part of the Board's circular is reproduced as under :

**Circular No. 123/5/2010-TRU, dated 24-5-2010**

**F.No. 332/5/2010-TRU**

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Applicability of Service tax on laying of cables under or alongside roads and similar activities - Clarification regarding.

Disputes have arisen in some parts of the country regarding applicability of service tax on certain activities such as shifting of overhead cables to underground on account of renovation/widening of roads; laying of electrical cables under or alongside roads/railway tracks; between grids/sub-stations/transformers the distribution points of residential or commercial complexes and such activities as electrification of railways, installation of street-lights, traffic lights, flood-lights. This clarification takes into account the taxability of different activities taking into account the scope of all services (such as site formation/excavation/ earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance Act, 2010.

… …. …..

3. ***The taxable status of various activities, on which disputes have arisen***

Based on the foregoing, the following would be the tax status of some of the activities in respect which disputes have arisen,

| S. No. | Activity | Status |
|---|---|---|
| 1. | Shifting of overhead cables/ wires for any reasons such as widening/renovation of roads | Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994. |
| 2. | Laying of cables under or alongside roads | Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994 |
| 3. | Laying of electric cables between grids/sub-stations/ transformer stations en route | Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994. |
| 4. | Installation of transformer/ substations undertaken independently | Taxable service, namely Erection, commissioning or installation services [section 65(105)(zzd)]. |
| 5. | Laying of electric cables up to distribution point of residential or commercial localities/ complexes | Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994. |
| 6. | Laying of electric cables beyond the distribution point of residential or commercial localities/complexes. | Taxable service, namely commercial or industrial construction' or 'construction of complex' service [section 65(105)(zzq)/(zzzh)], as the case may be. |
| 7. | Installation of street lights, traffic lights flood lights, or other electrical and electronic appliances/devices or providing electric connections to them | Taxable service, namely Erection, commissioning or installation services [section 65(105)(zzd)]. |
| 8. | Railway electrification, electrification along the railway track | Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994. |

6. From the above, it can be seen that the department has issued clarification on disputes that have arisen with regard to works related to cables. In the table given, in para-3 at Sl.No.3, it is mentioned that the laying of electric cables is exempt from levy of service tax. Sl.No.2 states that 'laying of cables under or alongside roads' is exempted from levy of service tax. Sl.No.2 is not qualified with the word 'electric cable'. The word 'cable' is used in general sense and will apply to telecommunications cables also. We therefore are of the considered opinion that the clarification issued by the Board would apply and that the said activity is exempted from levy of service tax.

7. It is also to be noted that the appellant had written a letter to M/s.BSNL, Trichur, Kerala to ascertain the leviability of service tax on the activity carried out by them. M/s.BSNL had replied vide letter dt. 25.01.2014 informing that they had availed credit of the service tax paid by their contractor and the Department had intimated them to reverse the credit informing that the said service is exempted from levy of service tax and that they are not eligible to avail the credit. Relevant part of the letter in which the observation by the Central Excise Audit conducted at M/s.BSNL, Trichur is reproduced as under :

> "...The Central Excise Audit para is as follows:
>
> "As per Rule 3 of Cenvat Credit rules, 2004, Credit of Service tax leviable under Section 66, paid on any input service is available to the provider of taxable service. As per circular No. 123/5/2010-TRU dated 24-5-2010 of CBEC issued vide F No. 332/5/2010-TRU, Laying of cables under or alongside roads, shifting of overhead electric cables between grids/substations/transformers, laying of electric cable upto the distribution of point of residential complex are not a taxable service under any of the sub-sections 105 of section 65 of Finance Act, 1994. Further CBEC vide Circular No. 940/1/2011-Cx dated 14/1/2011 (2011 (263) EL.T. (T47) had clarified that in case the assessee pays any amount as Excise duty on exempted goods, the same cannot be allowed as CENVAT

> CREDIT to the downstream units, as the amount paid by the assesee cannot be termed as 'duty of excise'. The amount so collected by the assessee from the buyers will have to be deposited with the Central Government in terms of Section 11D of Central Excise Act, 1944. Moreover, the Cenvat Credit of such amount utilized by downstream units also needs to be recovered in terms of rule 14 of Cenvat Credit Rules, 2004. The legal position clarified vide the Said circular appears to be applicable in case of Service Tax paid on non taxable service. Hence service tax credit utilized on such amount is to be reversed with interest."

8. It is clear that the department themselves had a contrary view holding that the activity is not subject to levy of service tax. Further, the Tribunal in the case of *CCE Lucknow Vs Raj Electric Works* - 2017 (9) TMI 793 -CESTAT ALLAHABAD had held that the activity of laying of opting fibre cables for M/s.BSNL is not subject to levy of service tax. The Tribunal in the said case had followed the Board's circular and also other decisions which have categorically held that the activity is not subject to levy of service tax.

9. From the foregoing, we are of the view that the demand of service tax cannot sustain and requires to be set aside. The issue on merits is answered in favour of the appellant.

10. The Ld. Counsel has argued on the ground of limitation also. There is no suppression of facts brought out by the Department. The appellant has accounted the entire consideration received by them in their books. The demand has been raised on the figures obtained from the records maintained by the appellant. Further the issue is interpretational in nature as discussed above. In such circumstances, the demand raised invoking the extended period also cannot sustain. The show cause notice is time-barred. The appellant succeeds on limitation also.

11. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Order dictated and pronounced in open court)

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| sd/- | sd/- |
| **(VASA SESHAGIRI RAO)** | **(SULEKHA BEEVI. C.S)** |
| Member (Technical) | Member (Judicial) |

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