

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 52383 of 2019 [DB]

[Arising out of Order in Appeal No. 497 (CRM) ST/JDR/2019 dated 22.05.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur]

**The Commissioner
Central Excise & Central GST, Udaipur** ...Appellant

Versus

M/s. Navdeep TradersRespondent
Gayatri Nagar, Civil Lines, Bundi (Raj.)

APPEARANCE:

Mr. Rajeev Kumar, Authorized Representative for the Appellant-Department
Mr.A.R. Madhav Rao & Shri Mukunda Rao, Advocate for the Respondent-Assessee

CORAM :

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS.HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: **20.02.2023**
Date of Decision: **28.04.2023**

FINAL ORDER No. 50575/2023

DR.RACHNA GUPTA

The present appeal has been filed by the department pursuant to review order No.32 dated 25.09.2019 to challenge the order in Appeal No.497 dated 22.05.2019.

2. The respondent - assessee herein are engaged in providing blasting services for extraction of sand stone etc. by using explosive material procured by them under license from LE-3 issued under Explosive Rules, 2008 by transporting the same to the place of their customers. The Department received an intelligence that the respondent - assessee were neither registered under service tax regime nor were paying the service

tax despite the fact that the nature of service being rendered by them is not covered under the negative list introduced w.e.f. 01.07.2012. Even the excavation and removal of overburden by way of blasting of explosives for preparation of agricultural land and digging of well have also been made taxable. Department noticed that the respondent - assessee was not discharging the tax liability, rather was found evading the payment of service tax.

3. Department also observed that the assessee was having an explosive license for procuring explosive from the seller, storing the same and for subsequently using these explosive, through mine's blasters, at the site of customer, for excavation of sand stone. It was found that explosive material was issued from respondent's magazines under Form RE-13 (pass for use of explosives) as per the requirement/consumption for blasting at customer's site. On being enquired, the partners of the respondent-assessee were examined, who stated that they issued bills to the customers charging for the explosive material and blasting services separately and they pay the applicable Value Added Tax (VAT) on the explosive material. The partners simultaneously admitted that they cannot sell the explosives in the open market. Hence, they do not have any transaction of direct sale except issuing the explosives to the mine's blasters.

4. Based on these facts and on the statutory provisions, the activities of excavation, Site clearance/ demolition etc. were alleged to be taxable. The Show Cause Notice dated 26.04.2018 was served upon the respondent - assessee proposing the demand of tax of Rs.70,98,005/- for a period from June, 2012 to

July, 2017. This proposal was initially confirmed by the Original Adjudicating Authority vide the Order No.27/2018-19 dated 25.10.2018. The appeal thereof has been allowed vide Order in Appeal No.497/2019 dated 22.05.2019. It is thereafter that vide Review Order No.32/2019 dated 25.09.2019 Order-in-Appeal is directed to be challenged.

5. We have heard Shri Rajeev Kapoor, Id. Authorised Representative for the Appellant – Revenue and Shri A.R. Madhav Rao and Shri Mukunda Rao, Id. Counsels for the Respondent-assessee.

6. Ld. D.R. has mentioned on behalf of appellant-department that the services provided in relation to mining of minerals, oil and gas qualify to be called as "service" within the meaning of section 65B (44) as was inserted vide Finance Act, 2012 w.e.f. 01.07.2012. All services were made taxable if not covered under negative list or do not fall under any of the exemption notifications. It is mentioned that Commissioner (Appeals) has wrongly held the impugned services of blasting the site as the 'works contract' services while setting aside the demand as was confirmed by the original adjudicating authority. The decision in the case of **M/s. Krishna Engineering works vs. Commissioner of Central Excise, Vadodara reported as 2019 (22) GSTL 409** has been relied upon to emphasis that consumption of goods by service provider during the provision of service does not convert service into works contract because

extending scope of work contract to include consumables would amount to including all services within the purview of work contract. Hence, the respondent in the present case was providing the taxable blasting services, consumption of explosive while providing such service cannot convert the nature of the said service to being a works contract.

7. Ld. D.R. further impressed upon that, irrespective the respondent - assessee was paying VAT on the explosive while it being sold to the customers, but the payment of VAT, if wrongly made, is not the proof of sale. Any service cannot be called as works contract service just because service provider has paid VAT on goods consumed during provision of service. Ld. D.R. has relied upon the decision in the case of **Idea Mobile Communication Ltd. vs. CCS Cochin reported as 2011 (23) STR 433 (S.C.)**.

8. Ld. D.R. also relied upon the decision in the case of **M/s. Shikhavat Explosives vs. State of Rajasthan reported in 2004 (137) STC 326 (Raj.)** as was decided on 21.01.2003 wherein it was held that when a job of blasting is undertaken, the use of explosives in such job can neither be termed as sale within the meaning of Rajasthan Sales Tax Act nor it could be subjected to be levy of tax. It is submitted that Commissioner (Appeal) has wrongly held the services to be classifiable under works contract. The order of Commissioner (Appeals) while dropping the demand

is therefore, prayed to be set aside and appeal is prayed to be allowed.

9. While rebutting these submissions, Id. Counsel for the respondent assessee mentioned that the respondents have been paying VAT under Rajasthan VAT Act on the value of explosives used in the process. The said fact has nowhere been disputed. The Department is thus, trying to undo the assessment made by the Rajasthan VAT Authorities by forming a wrong understanding that while using the explosives, there is no deemed sale as is laid down under Article 366 (29A) (b), when read with the corresponding provisions in Rajasthan VAT Act. It is further impressed upon that irrespective the explosives were fully consumed while providing the blasting services but are such goods which become attached or embedded to the earth. Hence, shall definitely be covered under the expression "in some other form" of the aforesaid article and as such are deemed as goods and the transfer by the respondent - assessee of such goods to the consumption site is recognized as deemed sale. Decisions of Hon'ble Apex Court in the case of **Kone Elevator India Private Ltd. vs. State of Tamil Nadu reported in 2014 (304) ELT 161 (S.C.)** (Constitution Bench) and in **Larsen and Toubro Ltd. vs. State of Karnataka reported 2014 (303) ELT 3 (S.C.)** (affirmed by Constitution Bench) is relied upon.

10. It is further mentioned that Notification No.12/2003-ST provides for abatement of value, of material on which VAT is paid

from the total value charged to the customers to arrive at the assessable value. Section 66E (h) talks about “declared services” covering the service portion in execution of works contract. Hence once it is works contract, the value of service portion only shall be assessable to tax and not the value of materials used in executing the said work contracts. The same is also clear from the provisions of Service Tax (Determination of Value) Rules, 2006 wherein for the purposes of Section 66 E (h), with regard to works contract, it is provided that the value of the service portion of a works contract would be the contract value less the value of property in goods transferred in execution of works contract. Explanation clause (c) thereof clearly provides that where VAT has been paid on the value of goods transferred, in the execution of works contract, then value adopted for payment of VAT shall be the value of goods transferred and only the balance would be regarded as the value of service on which tax is payable. With these submissions, it is mentioned that the demand in question was wrongly confirmed by the Original Adjudicating Authority and has rightly been dropped by Id. Commissioner (Appeals).

11. In addition Id. Counsel submitted that since the assessee-respondent has been paying VAT on all bills in question, that too, at a higher rate of 14.5% as compared to service tax rates applicable during the period of demand, the intent to evade duty on part of the assessee has wrongly been alleged. Hence the extended period for issuing the Show Cause Notice has wrongly been invoked. The demand has rightly been dropped even on the

grounds of limitation. Impressing upon no infirmity in the order of Commissioner (Appeals), the appeal filed by the department is prayed to be dismissed.

12. Having heard the rival contentions, perusing the record and after going through the relevant case law relied upon by the parties, we hereby observe and hold as follows:-

The original adjudicating authority has confirmed the proposal of the Show Cause Notice dated 26.04.2018 by holding that the activity of the respondent is blasting services against consideration, hence are taxable in terms of provisions of section 65 B (44) of Finance Act, 1994. The very basis of those findings is the respondent's own admission that they are not selling the explosives to their customers while blasting at the customers' site. Also for the reason that the explosives issued for blasting was fully consumed while providing the blasting services. However, Commissioner (Appeals) has dropped the demand holding that the activity of the respondent is a works contract service though chargeable to tax under section 65B (44) of Finance Act, 1994 but the value for the material as has already been assessed for the purposes of VAT cannot be considered as the value for assessing service tax liability. Thus, the moot controversy which appears to be adjudicated is:

"whether the activity of the respondent is a works contract service and thus the value of the blasting material/explosives is to be excluded from the amount

received by the assessee for blasting at customer's site for excavation of sand stone."

13. We observe that similar issue has been dealt by the Hon'ble Apex Court, the 3 Judge Bench in the case of **Larsen and Toubro** (supra) wherein the 46th Amendment of 1982 has been appreciated to have widened the concept of sale or purchase of goods that would be eligible to tax by introducing the fiction of a deemed sale to the transactions covered specifically by sub-clauses (a) to (f) to sub-article 29A of the said Article. Hon'ble Court held that the expression "goods (whether as goods or in some other form)" appearing in sub-clause (b) of 366 (29A) of the Constitution has the effect of enlarging the term "goods" by bringing within its fold goods in all different forms. The relevant para of the judgment reads as follows:-

"56. It is important to ascertain the meaning of sub-clause (b) of clause (29A) of Article 366 of the Constitution. As the very title of Article 366 shows, it is the definition clause. It starts by saying that in the Constitution unless the context otherwise requires the expressions defined in that article shall have the meanings respectively assigned to them in the article. The definition of expression "tax on sale or purchase of the goods" is contained in clause (29A). If the first part of clause (29A) is read with sub-clause (b) along with latter part of this clause, it reads like this : "tax on the sale or purchaser of the goods" includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. The definition of "goods" in clause (12) is inclusive. It includes all materials, commodities and articles. The expression, "goods" has a broader meaning than merchandise. Chattels or movables are goods within the meaning of clause (12). Sub-clause (b) refers to transfer of property in goods (whether as goods or in some

other form) involved in the execution of a works contract. The expression "in some other form" in the bracket is of utmost significance as by this expression the ordinary understanding of the term "goods" has been enlarged by bringing within its fold goods in a form other than goods. Goods in some other form would thus mean goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. In other words, goods which have by incorporation become part of immovable property are deemed as goods. The definition of "tax on the sale or purchase of goods" includes a tax on the transfer or property in the goods as goods or which have lost its form as goods and have acquired some other form involved in the execution of a works contract."

14. Hon'ble Court in the case of **Kone Elevator** (supra) has held as follows:-

"Prior to insertion of clause (29A) in Article 366 by Constitution (Forty-sixth Amendment) Act, 1982, whether a contract was for sale of goods was dependent on dominant intention as reflected from terms and conditions of contract and many other aspects. There was no straitjacket formula for determination of nature of contract and it depended on facts and circumstances of each case. State Legislatures did not have legislative competence to charge sales tax under Entry 48 List II of Seventh Schedule of Constitution on indivisible contract of sale of goods which had component of labour and service, and assessing officer could not dissect indivisible contract to distinguish sale of goods constituent and labour and service component. However, after insertion of clause (29A) ibid, Apex Court has interpreted contract involving transfer of property and element of service as works contract."

It is indivisible contract but by legal fiction is divided into two parts, one for sale of goods, and other for supply of labour and services. "Dominant nature test" or "degree of intention test" or "overwhelming component test" for treating contract as works contract is not applicable. "Works contract" in Article 366(29A) of Constitution of India takes in its sweep all genre of works contract, and is not to be narrowly construed to cover one species of contract to provide for labour and service alone. Once characteristics of works contract are met, any additional obligation in contract would not change nature of contract. Incidental part as regards labour and service pales into insignificance for determining nature of contract."

15. It was clarified that though insignificant services rendered for supply of goods will not render a contract for supply of goods to be called as works contract. However, adopting **Larsen and Toubro (supra)** we have no reason to differ from the findings that term 'works contract' cannot be confined to a contract to provide labour and services alone and any contract which is undertaken to bring into existence some element of works involving supply of goods would be sufficient to hold the said as "works contract". The Apex Court in the case of **Larsen & Toubro (supra)** has held that in performance of contract for construction of building, goods like cement, concrete, steel, bricks etc. are intended to be incorporated in structure and even though they lost their identity as goods. Hence it is liable to tax under Article 366 (29A) (b) of Constitution as was introduced vide 46th Amendment of 1982 Act.

16. We observe that the very basis of 46th Amendment was the decision of Hon'ble Supreme Court in **Gannon Dunkerley's reported in AIR 1958, SC, 560 & (1983) 1 SCC 364** wherein the Constitution Bench had laid down "dominant intention test" to find out as to whether a particular contract involved transfer of property in goods. The Court was of the opinion that if the dominant intention of a contract was not to transfer the property in goods, but it was Works Contract, or for that matter, a contract in the nature of rendering of services, even if a part of it related to the transfer of goods, that would be immaterial and no sales tax on the said part could be levied, going by the principle of

dominant intention behind such a contract, which was in the nature of Works Contract in the contract relating to construction of buildings. Thus, the Court also held that such a contract was indivisible.

17. However, the Supreme Court in the case of **Builders Association of India vs. Union of India reported in 1989 (2) SCC 645** has held that it is now open to the States to divide the works contract into two separate contracts by a legal fiction : (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is, what was the dominant intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is not empowered by the amended law to impose sales tax on such incidental materials used in such contracts."

18. Though the "dominant intension test" was reiterated by the Apex Court in the case of **Railbow Colour Lab vs. State of Madhya Pradesh reported as 2001 (134) ELT 332 (S.C.)**.

However with a subsequent decision in the case of **ACC Ltd. vs. Commissioner reported as 2001 (128) ELT 21 (S.C.)**, the issue again cropped out for discussion and decision before the Three Judge Bench that after 46th Amendment, State is empowered to levy sales tax on the material used even in those contracts where "the dominant intention of the contract is the rendering of a service, which will amount to a Works Contract". The conclusion of **ACC Ltd. (supra)** has been reiterated by the Apex Court in the case of **Bharat Sanchar Nigam Ltd. vs. Union of India reported in 2006 (2) STR 161 (S.C.)**. It was held as follows:-

"We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of Clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the 46th Amendment would apply"

19. Thereafter came the decision of Hon'ble Apex Court in the case of **M/s. Larsen & Toubro (supra)**. The Court after extensive and elaborate discussion once again specifically negated the argument predicated on "dominant intention test" in the following words:-

"64. Whether contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to

levy sales tax on the materials used in such contract if it otherwise has elements of works contract. The view taken by a two-Judge Bench of this Court in Rainbow Colour Lab. (supra) that the division of the contract after Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes place as an incident of contract of service is no longer good law, Rainbow Colour Lab. (supra) has been expressly overruled by a three-Judge Bench in Associated Cement.

65. *Although, in Bharat Sanchar, the Court was concerned with sub-clause (d) of Clause 29A of Article 366 but while dealing with the question as to whether the nature of transaction by which mobile phone connections are enjoyed is a sale or service or both, the three-Judge Bench did consider the scope of definition in Clause 29A of Article 366. With reference to sub-clause (b) it said : "sub-clause (b) covers cases relating to works contract. This was the particular fact situation which the Court was faced with in Gannon Dunkerley-I and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley-I was directly overcome". It then went on to say that all the sub-clauses of Article 366(29A) serve to bring transactions where essential ingredients of a 'sale' as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase or sale for the purposes of levy of sales tax."*

20. In the light of 46th amendment, any service in the nature of works which involves utilization of goods is classifiable only as works contract service and that the transfer of goods in such contract has to be considered as the deemed sale.

21. Reverting to the facts of the present case, we observe that undisputedly, the assessee – respondent was purchasing explosives from the authorized seller under a license for being used for the blasting purposes at customer's site. Though the assessee was not selling the explosive to the mine blaster and

was issuing the same for execution of mining works but there is no simultaneous denial to the fact that the assessee was issuing bills to the customer in which they were charging for the explosive material and blasting service separately and that the assessee was paying applicable VAT on the explosive material. From the entire above discussion dominant intention test to ascertain the factum of sale no more holds a good law. These facts and the above discussion are sufficient for us to have no reason to differ from the following finding of Commissioner (Appeal) in the order under challenge:-

"I find that the department has classified blasting services under "site formation & clearance, excavation & earth moving" is also not correct, instead, it was correctly classifiable under "works contract services" chargeable to tax under section 65(B) (44) of FA, 1994. The services are to be classified under works contract & to be valued in terms of service tax (determination of value) Rules, 2006 as amended time to time. The valuation is to be done under Rule 2 A (i) of the above said Rules, 2006. I find that VAT was never been paid in advertently but was paid knowingly well that it was payable. It was paid considering the definition of "works contract" as defined under section 2 (44) of RVAT Act, 2003 read with rule 22 of RVAT Rules, 2006."

In Nutshell a conjoint reading of the provision of Rajasthan VAT Act, 2003, RVAT Rules, 2006, the decision of Honourable Apex Court & of Gujarat AAR, the services rendered by the appellant are correctly classifiable under works contract services, VAT was correctly paid & since the value of services during any FY was less than threshold exemption limit hence was exempted under notification No.33/2012-ST dated 20.06.2012. Hence, appellant was not required to pay any tax, therefore, was neither required to get himself registered or was not required to file return in form ST-3. Therefore, demand of

tax, with interest & imposition of penalties & demand for late fees are liable to be set aside."

22. Consequent to the entire above discussion, we do not find any infirmity with the Order of Commissioner (Appeals), same is hereby upheld. Appeal of the Department stands dismissed.

[Pronounced in the open Court on 28.04.2023]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Anita