CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 4

SERVICE TAX APPEAL NO. 50961 OF 2018

[Arising out of the Order-in-Original No. 03-05-PK-GST-DE-2017-18 dated 18/12/2017 passed by the Commissioner Central Goods and Service Tax, Delhi East]

COMMISSIONER OF CENTRAL TAX GOODS AND SERVICE TAX, DELHI EAST — **Appellant**
Central Goods and Service Tax, Delhi East
CR Building, I P Estate, New Delhi-110002

Vs.

M/S SANJAY ELECTRICALS — **Respondent**
A-2, Acharya Niketan, Mayur Vihar,
Phase-I, New Delhi-110091

WITH

SERVICE TAX APPEAL NO. 50967 OF 2018

[Arising out of the Order-in-Original No. 03-05-PK-GST-DE-2017-18 dated 18/12/2017 passed by the Commissioner Central Goods and Service Tax, Delhi East]

M/S SANJAY ELECTRICALS — **APPELLANT**
A-2, Acharya Niketan, Mayur Vihar
Phase-I, New Delhi-110091

VS.

COMMISSIONER OF SERVICE TAX, COMMISSIONERATE, AND GST, DELHI EAST — **RESPONDENT**
Central Goods and Service Tax, Delhi East
CR Building, I P Estate, New Delhi

WITH

SERVICE TAX APPEAL NO. 51320 OF 2018

[Arising out of the Order-in-Original No. 03-05-PK-GST-DE-2017-18 dated 18/12/2017 passed by the Commissioner Central Goods and Service Tax, Delhi East]

M/S SANJAY ELECTRICALS — **APPELLANT**
A-2, Acharya Niketan, Mayur Vihar
Phase-I

New Delhi-110091

VS.

COMMISSIONER OF SERVICE TAX, COMMISSIONERATE, AND GST, DELHI EAST **RESPONDENT**
Central Goods and Service Tax, Delhi East
CR Building, I P Estate, New Delhi

WITH

SERVICE TAX APPEAL NO. 51321 OF 2018

[Arising out of the Order-in-Original No. 03-05-PK-GST-DE-2017-18 dated 18/12/2017 passed by the Commissioner Central Goods and Service Tax, Delhi East]

M/S SANJAY ELECTRICALS **APPELLANT**
A-2, Acharya Niketan, Mayur Vihar, Phase-I
New Delhi-110091

VS.

COMMISSIONER OF SERVICE TAX, COMMISSIONERATE, GST, DELHI EAST **RESPONDENT**
CR Building, I P Estate, New Delhi

Appearance

Shri A K Batra, Chartered Accountant for the appellant

Shri Rajeev Kapoor, Authorised Representative for the department

CORAM:
HON'BLE DR. RACHNA GUPTA,MEMBER (JUDICIAL)
HON'BLE MR P. V. SUBBA RAO,MEMBER (TECHNICAL)

FINAL ORDER NOS. 50105-50108 /2024

Date of hearing : 22/09/2023
Date of Decision : 18/01/2024

P. V. SUBBA RAO:

These four appeals have been filed by the Revenue and M/s. Sanjay Electricals[1] to assail the Order-in-Original dated

1 Assessee

18.12.2017[2] passed by the Principal Commissioner deciding the proposals in three Show Cause notices[3] dated 20.2.2015 (covering the period 1.7.2012 to 31.3.2013), dated 20.4.2015 (covering the period 2013-14) and dated 21.3.2016 (covering the period 2014-15). He confirmed demand of service tax of Rs. 48,03,775 along with interest and imposed penalty under section 76, he dropped the remaining demand of Rs. 7,18,11,366 proposed in the three SCNs by giving abatement of 90% of the value of the contracts towards material relying on CBIC's circular dated 25.5.2010.

2. **Service Tax Appeal 50961/2018** is filed by the Revenue asserting that the Principal Commissioner committed an error in allowing 90% abatement towards the cost of the materials in the Works contracts towards material because as per the explanation (3) to Rule 9 of the Uttar Pradesh VAT Rules, 2008, the assessee is required to pay VAT only on 80% of the composite value of works contracts towards materials and 20% abatement is allowed towards the value of the services.

3. **Service Tax Appeals numbered 50967/2018 51320/2018** and **51321/2018** are filed by the assessee assailing the confirmation of the demands as, according to it, no service tax was payable at all since the services were rendered to the Public Works Department[4] of the Government and to the New

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2 Impugned order
3 SCN
4 PWD

Okhla Industrial Development Authority[5] and hence were fully exempted during the relevant period as per entry 12 of Notification No. 25/2012-ST dated 20.6.2012. According to the assessee, all three Show Cause Notices were also not sustainable for the reason that the demands were made under Sections 65(105)(zzd) (Erection, Commissioning and Installation Service), 65(105)(zzg) (Management, Maintenance and Repair Service) and 65(105)(zzzza) (Works Contract Service) which were not in existence during the relevant period.

4. We have heard Shri A K Batra, learned Chartered Accountant for the assessee and Shri Rajeev Kapoor, learned authorised representative for the Revenue and perused the records. Three fundamental issues need to be examined before going into the other submissions by both sides:

a) Can the demands raised in the SCNs under the non-existent charging sections of Sections 65 (105) (zzd), (zzg) and (zzzza) be confirmed by the Commissioner under those sections?
b) During the relevant period, were the services rendered by the appellant exempted by notification no. 25/2012-ST dated 20.6.2012 (entry no. 12)?

c) If the answer to the above two questions is affirmative, was the Commissioner correct in allowing abatement of 90% of the total cost towards the material when the assessee was only

5 NOIDA

required to pay VAT on 80% of the cost under the UPVAT Rules?

Demand under the non-existent charging sections.

5. Both sides agree that the demands were for the period after 1.7.2012. It needs to be pointed out that Service Tax is levied under **Chapter V of the Finance Act, 1994**[6] and it was leviable on a few services only. The charging section was section 66 which levied tax on taxable services, i.e., services covered in one of the clauses of Section 65(105). This list was expanded from time to time. Thereafter, the law was amended with effect from 1.7.2012 and the charging section 66 and Section 65(105) along with all its clauses were repealed and a new charging section 66B was introduced and all services other than those mentioned in the negative list were made taxable. Further, some services were included under section 65E which were called 'Declared Services' on which tax was certainly leviable.

6. The undisputed factual position is that the demands were made under various clauses of section 65(105) which were not on the Statute Book at all during the relevant period. While all services (other than those in the negative list) were chargeable to service tax, under the provisions relevant to this period, those provisions were not invoked. According to the learned consultant to the assessee, all the demands made in the three SCNs and partly affirmed in the impugned order need to be set aside as the authority of law relied upon did not exist during the relevant period and the assessee was not put to notice under the law relevant to the period.

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6 Finance Act

7. According to the learned authorised representative for the Revenue, all services were chargeable to service tax during the relevant period and mere mentioning of an incorrect legal provision in the SCNs cannot render the demands does not vitiate them. Relying on **Pradyumn Steel Ltd.**[7] and **J K Steel Ltd.,** he submits that '*mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power".* However, learned authorised representative assails the Commissioner relying on exemption notification no. 12/2003-ST dated 30.6.2003 which has been rescinded by notification no. 34/2012-ST dated 20.6.2012.

8. We have considered the submissions on this issue. It is undisputed that the charging sections under which the appellant was put to notice did not exist during the relevant period although all services were chargeable to service tax (unless they are in negative list) during the relevant period. In **Pradyumna Steel,** the Supreme Court held as follows:

> Leave granted.
> **2.** An application for rectification was made by the Department to the Tribunal for rectification of its order dated 23-6-1987 deciding the appeal. In the main order, the only relevant part is contained in para 4 thereof, with which alone the other member of the Bench expressed his concurrence. In that part of the order, it was held that the provision mentioned in the show-cause notice being inapplicable, the show cause notice was invalid and the correct provision to show-cause could not be seen to support the validity of the notice. **The application for rectification made by the Department was on the ground that the mere mention of an incorrect provision of law in the show cause notice was not sufficient to invalidate the same and a decision was relied on in support of this proposition to**

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7 1996(82) ELT 441(SC)

> **make out the ground of an error apparent on the face of the order.** This application has been rejected by the Tribunal. Hence, this appeal by special leave.
> **3. It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law.**
> **4.** The impugned order of the Tribunal dated 21-12-1989 rejecting the Department's application is, therefore, set aside. This results in the Department's application for rectification being allowed, with the consequence that the main order dated 23-6-1987 passed by the Tribunal is also set aside. The Tribunal would now proceed to decide the appeal afresh on merits.
> **5.** The appeal is disposed of. No costs.

9. However, in these appeals, it is not a case of an erroneous mention of a wrong provision of law in the SCN. The charging sections under which the demand was raised in the SCN and also confirmed in the impugned order were not in existence during the relevant period. Correspondingly, the exemption notification dated 30.6.2003 relied upon by the learned commissioner also did not exist during the relevant period as pointed out by the learned authorised representative for the Revenue. The question is if the demand could have been made and sustained under some other provision and therefore, sustained as per the law laid down by the Supreme Court in **Pradyumna Steel.** We do not know because, the assessee was not put to notice on those provisions nor was the assessee able to defend itself on them. At this stage in this appeal, we cannot either examine or confirm a demand under a provision which was neither quoted in the SCN nor examined in the impugned order and uphold the demands confirmed by the Commissioner under entirely provisions.

10. It would have been a different case if the Commissioner had, noting that the SCNs were erroneous, given the appellant sufficient opportunity to defend under the relevant provisions, examined their submissions and confirmed the demand under the provisions relevant to the period. Therefore, this is not a case of mere wrong mention of a provision in the SCN but a confirmation of demand on charging sections which did not exist during the relevant period at all. It is also a case of ascertaining the demand considering exemption notification which also did not exist during the relevant period. Not only were the wrong provisions invoked in the SCN, but the demands were confirmed under them in the impugned order which shows complete non-application of mind. The provisions were not only wrong but were non-existent during the relevant period. We, therefore, answer this question in favour of the assessee and against the Revenue and hold that the demand confirmed in the non-existent legal provisions cannot be sustained.

Exemption under Notification no. 25/2012-ST dated 20.6.2012 (S.No. 12)

11. According to the learned consultant for the assessee, notification no. 25/2012-ST dated 20.6.2012 (S.No.12) exempted as the services which it provided were to PWD and NOIDA. This contention was not accepted by the Principal Commissioner as they were not of non-commercial nature and also for the reason that the assessee could not prove that the Government holds more than 90% participation in these two

organizations. Learned authorised representative supports the impugned order.

12. We have considered the submissions on this ground. The relevant portion of the text of the exemption notification is as follows:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (*i*) *vide* number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:—

…

12. **Services provided to the Government, a local authority or a governmental authority** by way of construction**,** erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of—

(*a*) **a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;**

(*b*) ….

(*c*) ….

(*d*) ……..

(*e*) **pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal;**

Definitions.
2. For the purpose of this notification, unless the context otherwise requires, -

(*s*) **"governmental authority" means an authority or a board or any other body :**

(*i*) set up by an Act of Parliament or a State Legislature; or

(*ii*) established by Government,

with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution;

13. It is undisputed that the services were rendered to the PWD and to NOIDA. PWD stands for Public Works Department which is a department of the State Government. Therefore, it is Government itself and not a Governmental authority. The

notification exempts not only services rendered to governmental authorities but also services rendered to the Governments and Local authorities. PWD, being the Government, the question of it having to fall under the definition of 'Governmental authority' does not arise. As far as NOIDA is concerned, it stands for New Okhla Industrial Development Authority which governs a part of the National Capital Territory of Delhi and is part of the State of Uttar Pradesh. It is created, as per the learned consultant, under the UP Industrial Area Development Act, 1976 (Section 3) like other similar authorities in the State. Section 6 of the Act explains the functions of these authorities as follows:

> **Section 6: Functions of the authority**
> (1) The object of the Authority shall be to secure the planned development of the industrial development area.
> (2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions :–
> (a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purpose of the Act;
> (b) to prepare a plan for the development of the industrial development area;
> (c) to demarcate and develop sites for industrial, commercial and residential purpose according to the plan;
> (d) to provide infrastructure for industrial, commercial and residential purposes; (e) to provide amenities;
> (f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;
> (g) to regulate the erection of buildings and setting up of industries: and
> (h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area.

14. The term 'local authority' is not defined in the notification and hence the commonsensical meaning of the term should be applied. A perusal of the functions of the NOIDA as per section 6 of the Act reproduced above makes it abundantly clear that it falls in the definition of 'local authority'. Therefore, neither the NOIDA nor the PWD need to fall under the definition of

'Government authority' because NOIDA is a 'local authority' while PWD is a part of the Government itself. The services of street lighting and other maintenance work carried out by the assessee to these two organizations, also cannot by any stretch of imagination, be called **predominantly meant for commerce or business.** We, therefore, answer this question also in favour of the assessee and against the Revenue.

15. Since we have held against the Revenue and in favour of the assessee on the first two questions, it is not necessary to answer the third question of extent of abatement under works contract service. It is also not necessary to go into any of other submissions.

16. The impugned order cannot be sustained and needs to be set aside. Revenue's appeal is rejected and the three appeals of the assessee are allowed and the impugned order is set aside with consequential relief to the assessee, if any.

(Pronounced in Court on **18.01.2024)**

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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