CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/525/2012-ST [DB]

[Arising out of Order-in-Original No.16/2011/ST/JPR-II dated 28.12.2011/24.01.2012 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Jaipur-II]

M/s.Teknomin Construction Ltd. …Appellant

Vs.

C.C.E. & S.T., Jaipur-II … Respondent

Present for the Appellant : Mr.B.L.Narasimhan, Advocate
Present for the Respondent: Ms. Neha Garg, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

Date of Hearing: 24.03.2017
Pronounced on :11.04.2017

FINAL ORDER NO. 52776/2017

PER: ASHOK K. ARYA

M/s.Teknomin Construction Ltd. is in appeal against Order-in-Original No.16/2011 dated 28.12.2011 where-under demands of service tax of Rs.66,25,146/- alongwith interest and equivalent penalty has been confirmed against the appellant.

2. The brief facts of the case are that the appellant entered into the contract dated 20.05.2005 with M/s.Hindustan Zinc Ltd for production, Drilling & Associates Work in Underground Sindesar Khurd Mine.

3. The Revenue has treated the activities undertaken by the appellant under the category of site formation service, and the impugned order in original confirmed the service tax demand of Rs.21,58,467/- under the category of site formation service.

3.1 For execution of the subject services the assessee – appellant received certain free supplies from M/s. Hindustan Zinc Ltd. who are the recipient of their services as per the contract. The Revenue in the impugned order has confirmed the demand of service tax on the value of free supplies which include electricity and other items; the demand of service tax confirmed for free supplies is to the tune of Rs.44,66,679/-.

3.2 The appellant is in appeal against confirmation of above demands of service tax.

4. With above background we have heard both the sides, represented by ld. Advocate Shri B.L. Narasimhan for the appellant and Dr. Neha Garg for the Revenue.

5. The main submissions of the appellant are that the subject services are not covered by site formation and clearance excavation and earth moving and demolition service as defined under Section 65 (97a) of Finance Act 1984. The appellant says that impugned order failed to examine the limited scope of definition of site formation service and when several activities are undertaken, ultimately leading to mining then the gamut of activities cannot be taxed under site formation service. In support of their case, the appellant relies on the following case laws:-

1. Sadbhav Engineering Ltd. vs. C.S.T., Ahmedabad – 2016 (43) STR 288 (Tri.-Ahmde.)
2. Associated Soapstone Distributing Co. P. Ltd. vs. C.C.E., Jaipur-II – 2014 (34) STR 865 (Tri. – Del.)
3. CCE, Hyderabad vs. Vijay Leasing Company -2011 (22) STR 553 (Tri.-Bang.)

6. In case of service tax demand on the free supplies, the ld. Advocate for the appellant interalia submits that free supplies made by the service receiver shall not be added to the value of the services. The appellant show that in terms of Section 67 of the Finace Act, 1994, it is only consideration paid which is taxable and not any material supplied for use during the course of rendition of service.

6.1. In support, the appellant relying on the following case laws:-

1. Bhayana Builders P. Ltd. vs. Commissioenr of Service Tax, Delhi- 2013 (32) STR 49 (Tri.-LB)
2. Karamjit Singh & Co. Ltd. vs. Commissioenr of C. Excise, Razipur – 2013 (32) STR 740 (Tri.-Del.)

7. Ld. D.R. reiterates the findings given in the impugned order.

9. After having carefully gone through the case records and submissions of both the sides, it appears that the activities of services under consideration are to be treated as an activity auxiliary to the mining, their contract being indivisible contract. Such services are not taxable under the category of site formation clearance service, but they would be covered under the category of mining service, which has become taxable w.e.f. 01.06.2007 only. CESTAT, Delhi in the case of *M/s.Aravali Construction Co. Pvt. Ltd. Teknomin Construction Ltd. vs. CCE, Jaipur-II* – 2017- TIOL-896-CESTAT-DEL has held that such services are not covered under the category of site formation and clearance, excavation and earth moving and demolition.

9.1. CESTAT in this regard quotes Tribunal's order in the case of *Aravali Construction Co. Pvt. Ltd. Vs. CCE, Jaipur-II* – 2016 TIOL-2488 – CESTAT- Del. CESTAT in this decision (F.O. No.

52560/2016 dated 26.07.2016 in Service Tax Appeal No. 309/2009 observed as under:-

> *"4. Heard both the sides and examined the appeal records. On the first issue regarding appellant's service tax liability prior to 01/6/07 under the category of site preparation we find on careful consideration of the terms of agreement with Hindustan Zinc Limited that these services are primarily w.r.t. mining of ore. The agreements are composite involving various connected work with main objective being raising of ore. Similar issue has been subject matter of decision earlier by the Tribunal in Arvind Kumar & Co. vs. CCE, Jaipur - II vide final order No. ST/737-738/2012 - CU (DB) dated 30/11/2012, in Associated Soapstone Distributing Co. Pvt. Ltd. vs. CCE, Jaipur - II reported in 2013 - VIL 08 - CESTAT - DEL. and in National Construction Company vs. CCE, Jaipur reported in 2014 - TIOL - 387 - CESTAT - DEL. Tribunal held that in such situation the activities of site formation and clearance are to be treated as an activity ancillary to mining and since the overall contract for mining the contract being indivisible the same should be treated as mining contract. It was also held that w.e.f. 01/6/2007 when the activity of the appellant has been accepted by the Department as mining service, for the period prior to 01/6/2007 the same activity cannot be classified under site formation service. We find that the impugned order cannot be sustained on this ground."*

9.2 Therefore, service tax demand of Rs.21,58,467/- under the category of site formation service cannot be sustained and is hereby dropped.

10. In the case of free supply made by M/s.Hindustan Zinc Ltd. to the appellant – assessee the issue is covered in favour of the appellant by the Larger Bench decision in the case of *Bhayana Builders P. Ltd.* (supra). CESTAT in the case of *Bhayana Builders P. Ltd.* (supra) has elaborated the scope of Section 77 of the Finance Act 1994. CESTAT in the said case interalia observed as under:-

"8. Scope of Section 67 of the Act :

(i) …….

(ii) ………

(iii) Though Revenue has contended that the value of "free supplies" to a construction service provider ought to be included in the value of taxable services for determination of the liability to tax under Section 67 of the Act in view of sub-clause (ii) of Section 67(1), we are not persuaded that this is the appropriate construction of the provision. Sub-clause (ii) applies where a taxable service is provided for a consideration which is not either wholly or partly, for money. Therefore the non-monetary consideration must still be a consideration accruing to the benefit of the service provider, from the service recipient and for the service provided.

(iv) ……….

(v) Clearly, Section 67 of the Act deals with valuation of taxable services and intends to define what constitutes the value received by the service provider as "consideration" from the service recipient for the service provided. Implicit in this legislative architecture is the concept that any consideration whether monetary or otherwise should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the later. "Free supplies", incorporated into construction (cement or steel for instance), even on an extravagant inference, would not constitute a non-monetary consideration remitted by the service recipient to the service provider for providing a service, particularly since no part of the goods and materials so supplied accrues to or is retained by the service provider. Wherever a monetary consideration is charged for providing the taxable service and no non-monetary consideration forms part of the agreement between the parties, it is clause (i) that applies and the value of the taxable service would in such case be the gross amount charged by the service provider and paid by the service recipient.

(vi) ……..

(vii) In the light of the clear Legislative text, the unambiguous provisions of Sections 66 and 67 of the Act and in the light of the judgment in Intercontinental Consultants and Technocrats Pvt. Ltd. (supra), the conclusion is compelling and inviolable that the value "free supplies" by a construction services recipient, for incorporation in the constructions would not constitute a non-monetary consideration to the service provider nor

form part of the gross amount charged for the services provided. Whether the legislature may enact that the value of "free supplies" should be included in the value of the service provided for levy of tax; and within its legislative competence, is an aspect that is speculative for the nonce and outside the purview of either the substantive appeals or the issue referred to us. In this view of the matter it is not necessary to consider the contention on behalf of the assessees that an interpretation that Section 67 of the Act enables or mandates inclusion of the value of goods and materials incorporated into construction services (whether provided by the service provider or as a free supplies by the service recipient) would render the legislative provision unconstitutional, since value of the goods incorporated being sale of goods would be liable to sales tax, an area within the legislative competence of State, the value of goods sold would thus be beyond the legislative competence of Parliament for levy of tax on such sale; consequently could not also constitute the value of taxable services. Ld. Counsel placed reliance on the judgment in M/s. Gannon Dunkerley and Co. and Others v. State of Rajasthan and Others - (1993) 1 SCC 364; and State of Andhra Pradesh and Others v. Larsen & Toubro Limited and Others - (2008) 9 SCC 191, to buttress this contention."

10.1 CESTAT in the said decision Finally concludes as follows:-

"16. *In conclusion we answer the reference as follows :*

> *(a) The value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider, would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act, 1994; and*
>
> *(b) Value of free supplies by service recipient do not comprise the gross amount charged under Notification No. 15/2004-S.T., including the Explanation thereto as introduced by Notification No. 4/2005-S.T."*

10.2. In view of the above observations of the CESTAT in the case of *Bhayana Builders P. Ltd* the demand of service tax of Rs.44,66,679/- confirmed on the free supplies, which includes the value of electricity and other items is not sustainable and is hereby dropped.

13. In the result, the appeal is allowed with consequential relief, if any.

[Pronounced in the open Court on 11.04.2017)

(ASHOK K. ARYA)	**(S.K. MOHANTY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Anita