

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:07/04/2017

Service Tax Appeal No.50665/2014 (DB)

[Arising out of Order-in-Original No.COMMISSIONER/RPR/ST/101/2013 dated
30.09.2013 passed by the Commissioner of Excise & Customs, Raipur]

M/s.Bharat Aluminium Co. Ltd.

Appellant

Vs.

CCE, Raipur

Respondent

Appearance:

Rep. by Shri Somnath Shukla, Advocate for the appellant.

Rep. by Shri Ranjan Khanna, DR for the respondent.

Coram: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
 Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.57864/2017

Per B. Ravichandran:

The appellant is aggrieved by the order dated 30.09.2014 of the Commissioner of Central Excise, Raipur. The appellants are engaged in the manufacture of excisable goods like Aluminum metal, etc. They were also registered with the Service Tax Department. The dispute in the present case relates to the transaction between the appellant and a Chinese Institute – Chinese Engineering Institute (GAMI). In terms of the agreement with the GAMI, the appellant is to receive technology transfer and engineering services with reference to aluminum smelter and anode plant of the appellant. The contract consisted of supply of basic engineering design, engineering services and training for the plant of the appellant. The contract is sought to be put to service tax liability for three basic activities:-

- (a) Supply of engineering drawing and design for the plant upgradation of the appellant;
- (b) Training of the employees of the appellants by GAMI, in China;
- (c) Engg. technical service with reference to such upgradation of plant to be provided by GAMI in India.

2. Out of these components, the present dispute is only with reference to the supply of engineering design, drawing and documents given by GAMI and imported by the appellants. In the impugned order, the Original Authority held that though such engineering design and drawing was imported in physical form and processed through the customs as goods. The same is used in construction and commissioning of the plant of the appellant and hence, the value of such drawing and design should suffer tax as consultancy engg. service in terms of Section 65(31) of the Finance Act, 1994. A tax liability of Rs.54,30,038/- was confirmed against the appellant along with penalties under Section 76 and 77 of the Finance Act, 1994.

3. Ld. Consultant appearing for the appellants submitted that in respect of the training service provided by GAMI, the issue was settled in their favour by the Tribunal vide Order No.62211 dated 2.12.2011. Regarding technical engineering service provided by GAMI in India, the appellant had already discharged the service tax under the category of “Engineering Consultancy Service”. As such, the present appeal is with reference to the confirmed service tax liability on the value of the engineering drawing and design imported by the appellant from GAMI. Ld. Consultant submitted that these engineering design and drawing in the form of documents were imported by them in physical form and they have filed bills of

entry with the customs and after due assessment cleared the same. When the drawing and design documents were imported as goods and assessed accordingly by the Customs Authorities, there is no question of service tax liability on the same value. He relied on the certain decided cases in support of his submissions.

4. Ld. AR submitted that drawing and design are very much essential for execution of the service contract by GAMI, with reference to the appellant's plant. In the contract with the appellant, the role of GAMI has been explained. The engineering, drawing and design being very essential to the technical service of engineering consultancy provided by GAMI in India, the value should form part of the various considerations and accordingly, he supported the findings in the impugned order.

5. We have heard both the sides and perused the appeal records.

6. The appellants were subjected to service tax liability under the category of "Consultancy Engineering Service". Section 65(35) defines "Consultancy Engineer" means any professionally qualified engineer or an engineering firm who, either directly or indirectly renders any advice, consultancy or technical assistance in any manner to a client in one or more discipline of engineering". Section 65 (105) (g) explains the scope of taxable service "Consulting Engineering Service" is in relation to advice, consultancy or technical assistance in any manner in one or more discipline of engineering including the discipline of computer hardware engineering". Admittedly, in the present case, the appellant imported the engineering drawing and design in physical form and filed the bills of entry for clearance through customs as goods. The present service tax liability is on the very

same value of engineering design and drawing, which were put to assessment by customs. The Original Authority while examining this issue held as below”-

“5.9 The Noticee has also contended that the drawings, designs and related process for establishing aluminium producing commercial plant were provided to them by GAMI in paper form, which have been imported upon filing bills of entries and therefore, the designs and drawings so imported by them shall be construed as goods and not as a service. In this regard, it is well known that when any technology, drawings & designs, any technical information, etc. for setting up of any plant in India are imported into India, it has to be imported in the form of documents, which are no doubt become a goods being a physical form. After importation into India, it has to be passed through Customs procedure under the provisions of Customs Act, 1962 and the Customs duty is payable as per the Customs Tariff Act, 1975. But, at the same it cannot be ignored that the ‘technology and engineering’ of smelter and anode plant was the ‘consulting engineer service’, which was first imported into India in document form and then subsequently, the entire technology and technical information was executed on the site of the Noticee by the service provider GAMI by constructing, commissioning and making operational the smelter and anode plant. The primary important part is therefore covered under the provisions of Customs Act, 1962 and the succeeding part is covered under the Finance Act, 1994. The purposes of the aforesaid two Acts are different and action taken by the Department under Customs Act, 1962 do not restrict the Department from taking action under Finance Act, 1994, if legitimately warranted.”

7. We find that the above observation is not reflecting the factual position. The Original Authority held that primary importation part is covered by the

Customs Act and the succeeding part of the providing service by GAMI is covered by the Finance Act, 1994. Admittedly, we are dealing with the same value of engineering design and drawing. It is also relevant to note that the importation had been done by the appellants and not by GAMI, who provided Engineering Consultancy Service to the appellants in terms of the contract. Whatever fee is charged by GAMI for providing engineering consultancy in India has been subjected to service tax and there is no dispute on that ground. We find that the Original Authority admitted that the engineering drawing and designs are to be treated as goods and were processed through customs. We note that the Hon'ble Supreme Court in **Associated Cement Companies - 2001 (128) ELT 21 (SC)** held that drawing and designs are tangible movable articles and they are liable to be treated as goods under the provisions of Customs Act, 1962, irrespective of the what articles may be or may contain.

8. We note that in similar set of facts, the Tribunal in the case of **Mitsui & Co. Ltd. – 2012 (28) STR 491 (Tribunal-Kolkata)** has held that the supply of imported and indigenously procured drawing and designs, treating them as goods, cannot form part of tax liability under “Consultancy Engineer Service”. The Tribunal held as under:-

“7.7 The Id. Spl. Counsel argued that even if the designs and drawing charges are treated as goods and subjected Customs duty, the same also could be assessed to Service tax. In this connection, he has referred to the judgment of the Apex Court in the case of *Tamil Nadu Kalyana Mandapam Assn. v. Union of India* reported in 2004 (167) [E.L.T.](#) 3 (S.C.) = 2006 (3) [S.T.R.](#) 260 (S.C.) wherein it has been held that the Service tax

on mandap keeper and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods despite an element of sale involving of such cases. A plain reading of the said judgment, we find that the ratio of the same is not applicable to the facts of the present case as in the said case, their Lordships are confronted with the question whether the Service tax on mandap keeper and outdoor caterers is in pith and substance a tax on services and not a tax on sale of goods or at hire-purchase activities. Their Lordships have come to the conclusion that a tax on services rendered on mandap keeper and outdoor caterers is in pith and substance a tax on services and not a tax on sale of goods or on hire-purchase activities. The Id. Spl. Counsel also referred to the judgment of the Hon'ble Supreme Court in the case of *Idea Mobile Communication Ltd. v. Commr of C.Ex.& Cus., Cochin* - 2011 (23) [S.T.R.](#) 433 (S.C.). The issue in that was whether the value of SIM Card would form part of the taxable value for the purpose of levy of Service tax. It is held that SIM Cards are not sold as goods independently from the services provided. They are considered as part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material *i.e.* SIM Cards which on its own but without the service would hardly have any value at all. In the present case, we find that the appellant entered into four different contracts with M/s. TISCO for setting up of a Skin Pass Mill. This project included supply of equipments against two contracts which are not disputed by the Department, whereas the third contract related to supply of designs & drawings procured from Japan and also procured indigenously, had been disputed. The designs & drawings are prepared in Japan and sold to the appellant independently as is evident from the fact that the same are assessed as 'goods' under the

Customs Act. Similarly, the designs and drawings procured in India are assessable as goods under the Central Excise Act. Hence, the said ratio is not applicable to the facts of the present case.

7.8 In view of the above, and as observed in our earlier remand Order we are of the considered opinion that the designs and drawings which were imported and assessed as ‘goods’, cannot be subjected to Service tax, hence, no Service tax is chargeable on that part of the contract relating to Contract No. CRMP/CON/SPM/03 dated 16-7-1998 attributing towards the value of designs and drawings. We also agree with the Id. Advocate that the value of drawings and designs procured indigenously also stood on the same footing being assessable to Central Excise duty under Chapter 49 of the Central Excise Tariff Act, 1985 and accordingly be treated as ‘goods’, hence cannot be subjected to Service tax.”

9. In view of the above discussion and settled legal position, we find that the impugned order is not sustainable. Accordingly, the same is set aside. The appeal is allowed.

[Order dictated in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.

