IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING: 09/10/2018.
DATE OF DECISION :08/04/2019.

Service Tax Appeal No. 814 of 2010

[Arising out of the Order-in-Original No. 13/JM/10 dated 10/03/2010 passed by The Commissioner (Adjudication), Service Tax, New Delhi.]

M/s Punj Lloyd Limited Appellant

Versus

CST, New Delhi Respondent

Appearance

S/Shri Sujit Ghosh, Shashank, Aryadeep Roy and Shekhar, Advocates – for the appellant.

Shri Amresh Jain, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 50511/2019 Dated : 08/04/2019

Per. C.L. Mahar :-

Briefly stated facts are that the appellant were appointed as a contractor for preservation and maintenance of the properties of Dhabol Power Company (herein after referred as the "DPC") under orders of a Court Receiver appointed by the High Court, Mumbai as the DPC had stopped its activities of power production. After the initial period of contract from April, 2002 to September, 2002 the Court Receiver vide order dated 07/10/2002 extended the period from October, 2002 to March, 2003 on almost the same terms and conditions. Further the contract was renewed/ granted from time-to-time to extend the contract period. The total period of contract is from April, 2002 to December, 2005. As per description the contract, it contained of 'Preservation and Maintenance' of the properties of DPC covered the power plant phase I & II, LNG Terminal, Jetty, Naphtha, Single Point Mooring, housing complex etc. The contract initially used to be for a period of six months and the appellant used to issue monthly R.A. bills on pro-rata basis for the total amount to be received by them as shown in the contract. On each of such R.A bills, the description of the activity/service was mentioned as "Asset maintenance & preservation of power plant, LNG Terminal, Jetty, single point Mooring System including additional maintenance & preservation" and against that, the total amount charged was mentioned. The R.A. bills do not have any bifurcation of the amount billed; it only shows the total amount charged. The bills do not have any separate details showing details of goods and material and value thereof which were consumed/used during the course of providing services of Preservation and maintenance. The investigations were conducted against the appellants by the officers of Anti-evasion Squad-I of Pune II Commissionerate considering that the said activity of the appellant described as 'Preservation and Maintenance' of the properties of DPC covered the power plant phase I & II, LNG Terminal, Jetty, Naphtha, Single Point Mooring, housing complex etc. amounted to a taxable service of “maintenance or repair” covered in terms of Section 65(64) of the Finance Act, 1994 read with Section 65 (105) (zzg) of the Finance Act, 1994 and the appellants were liable to service tax with effect from 01/07/2003 to December 2005. The appellant deposited a sum of Rs. Rs. 4,80,12,417/- vide various challans dated 31/12/2004 to 16/12/2005 towards their service tax liability alongwith interest amount of Rs. 31,98,846. A show cause notice dated 23/11/2006 was issued to the appellant on the ground that the total taxable amount charged and received during the period July, 2003 to December, 2005 works out to Rs.72,68,97,135/- and liability of Service tax as applicable during the relevant period works out to Rs.6,40,33,042/- and Education Cess of Rs.6,94,395/-. The appellant has deposited an amount of Rs. 4,80,12,417/- against their service tax liability. Regarding the differential amount between service tax amount of Rs. 6,40,33,042/- demanded in the impugned show cause notice and the amount of Rs. 4,80,12,417/- it was claimed that the differential amount which was a deduction claimed by the appellant from the total taxable amount of Rs. 72,68,97,135/- on account of raw materials and other consumables used in the providing of service was not admissible as the appellant had not shown it separately in the invoices which was required in terms of CBEC Circular No. 59/8/2003 dated 20/06/2003. That to avail the benefit of abatement appellant are not entitled for the benefit under Notification 12/2003-ST dated 20/06/2003 of value of raw materials/goods used in providing the impugned service, the provisions of the CBEC Circular dated 20/06/2003 were required to be followed. In reply to the show cause notice, the appellant claimed that the impugned activity of appellant sought to be taxed to service tax was not under service tax net before 16/06/2005 as services of maintenance and repair as provided by the Appellant was for the **immovable properties** of DPC namely power plant, LNG Terminal, Naptha, jetty, housing complex and single point morning. System whereas Section 65(64) of the Finance Act as it existed during the relevant period has provision to tax only such services when provided in respect of maintenance or servicing of any **goods or equipment**. It has been contended that the immovable properties not being "goods or equipment" were not covered under the taxable service as defined under Section 65(64) of the Finance Act, 1994 prior to 16/06/2005 when this section was amended to include in its scope the maintenance or repair service of immovable properties also. The appellant further claimed that deductions on account of raw materials/goods consumed were admissible to them as they had provided sufficient proof in the form of returns submitted by them to the VAT/ Sales Tax authorities about the VAT/ sales Tax paid by them on these raw materials/goods used in providing the service. That notification 12/2003-ST dated 20/06/2003 did not contain any requirement of sowing the same separately in the invoices. The appellant further claimed that the show cause notice was barred by limitation as they had paid the service tax from December 2004 onwards whereas show cause notice was issued to them 23/11/2016. The adjudicating authority vide the impugned order i.e. Order-in-Original no. 13/JM/2010 dated 10/03/2010 confirmed the whole demand of Rs. 6,47,27,437/- (including Cess) alongwith interest under

Section 75 of the Finance Act, 1994. An amount of Rs. 6,47,27,437/- and Rs 1,000/- has been imposed as penalty under Section 78 and Section 77 of the Act respectively. He further appropriated the amount of Rs. 4,80,12,417/- and interest amount of Rs. 31,98,846/- already paid towards the tax liability of the appellant. The appellant are in appeal before us against the impugned order dated 10/03/2010 on merits as well as on the limitation aspect. The learned Counsel appearing on behalf of the appellant has assailed the impugned order on the ground that before 16/06/2005 their activity of maintenance and repair was not taxable in as much as the same was provided with respect to the immovable property whereas the service tax under Section 65(64) prior to 16/06/2005 was levied on maintenance of repair of "goods and equipment" and he vehemently claimed that their service of 'Preservation and Maintenance' of the properties of DPC covered the power plant phase I & II, LNG Terminal, Jetty, Naphtha, Single Point Mooring, housing complex etc.' was only with respect to immovable property and not with respect to "goods and equipment". He further claimed that even though they had discharged tax of Rs. 4,80,12,417/- for their liability prior to 16/06/2005 during the course of investigation bonafidely believing that their service was liable to tax, but there was no estopple to claim this benefit subsequently as decided by the Hon'ble Supreme Court in the case of **Share Medical Care vs. Union of India (2007 (209) E.L.T. 321 (S.C.)**] wherein it was held that if an applicant does not claim benefit under a particular notification/provision at the initial stage he is not debarred, prohibited or estopped from claiming such benefit at a later stage. He argued that the learned Commissioner has mechanically held that the service provided was in respect of "goods and equipment" and liable to tax with effect from 01/07/2003 without any discussion to support his finding on this aspect. The learned Counsel brought our attention to the relevant taxable provisions as existing before 16/06/2005 and after 16/06/2005 also detailed in the show cause notice which are reproduced below :-

> As per the then Section 65 (64) of the Act ibid prior lo 16.6.2005, the definition of `*maintenance or repair service'* *means "any service provided by:*
>
> *(i) any person under a maintenance contract or an agreement; or*
>
> *(ii) a manufacturer or any person authorized by him,*
>
> *in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle"*
>
> As per the new Section 65 (64) of the Act ibid w.e.f. 16/6/2005, the definition of `*maintenance or repair service'* *means "any service provided by-*
>
> *(i) any person under a contract or an agreement; or*
>
> *(ii) a manufacturer or any person authorized by him, in relation to:*
>
> *a. maintenance or repair' including reconditioning or restoration or servicing of any goods or equipment, excluding motor vehicle; or*

b. maintenance or management of immovable property"

As per Section 65 (105) (zzg) of the Act ibid, taxable service under the category *'maintenance or repair services' means any services provided or to be provided "to a customer, by any person in relation to maintenance or repair."*

2. The learned Counsel has placed reliance upon the decision in the case of **CCE, Ahmedabad vs. GE-Noova Pigone [2012 (27) STR 380 Tri-Ahd]** wherein a similar issue canvassing maintenance of gas turbine was involved. The Hon'ble Tribunal held that, every equipment needs to be examined in order to determine whether they are movable or immovable property. The Tribunal relying on the submissions made by the respondent held that gas turbines being affixed to earth and forming part of a power plant becomes an immovable property. Further, reliance was placed on the case of **Saikala Power Private Limited vs. Additional DGFT, New Delhi [2016 (344) E.L.T. 170 (Kar)]** wherein it was categorically held that hydel power plant which is installed and commissioned is an immovable property by nature which is fastened to the earth. He further argued that on the basis of aforesaid rulings, it can reasonably be construed that mere terminology like 'equipments', used in the Contract shall not be the determinative factor for deciding the nature of a property and it is imperative that a proper examination of facts need to be conducted. In the instant case, a perusal of the contract, the show cause notice, the reply and the order-in-original leads to the inevitable conclusion that the properties of DPC were nothing but immovable in nature. He vehemently argued

that adjudicating authority has given a non-speaking, vague and cryptic order without providing any reasonable basis to justify the properties of DPC as goods or equipment. He further stated that prior to 16/06/2005, maintenance or repair service provided to immovable properties was not leviable to service tax. Therefore, the Appellant cannot be saddled with a service tax liability till l6/06/2005. Reliance in this regard has been placed on the ruling of this Tribunal in the case of **Industrial Engineering Systems vs. Comm. Of Central Excise, Vizag [2016 (46) S.T.R. 755 (Tri-Bang)]** wherein it has been held that service tax cannot be levied in cases where services had been provided to immovable properties prior to 16/06/2005 holding that Lifts/Elevators in Naval Buildings were immovable property which was not liable to tax prior to 16/06/2005. He further argued that post 16/06/2005 liability towards service tax should be appropriated from the already deposited amount of Rs. 4,80,12,417/-.

3. With respect to the deductions claimed on parts and raw materials consumed in providing the impugned services, the learned Counsel argued that Appellant is entitled to deduct the cost of parts or materials consumed during the providing of maintenance and repair service under Section 67 of the Finance Act as also under Notification No 12/2003-ST dated 20/06/2003. He argued that in typical maintenance contracts, separate sale of materials are not envisaged and it is during the course of such service that the sale gets effectuated. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Xerox Modicorp Ltd. vs. State of Karnataka {2005 (7) S.C.C. 380**] . He cited the

> "*7. Even though at first blush the submissions of Mr. Ganesh may appear attractive. on a proper consideration, we think that Mr. Iyer was right when he submitted that the agreements are not just service contracts but also maintenance contracts. Mr. Iyer is right that the machines belong to the customer after they are sold to them. If after sale some part was to be replaced or some component supplied there would be sale as understood in law. Under the agreements, apart from the service element for which no tax is sought to be levied there is the element of supplying parts and components like toners/developers etc. Mr. Iyer is right in submitting that merely because price is not being separately charged for this, this does not detract from the position that the supply is for a price. Such supply has all the elements of sale as understood in law.*

4. He further submitted that the Appellant has paid VAT/sales Tax on the materials consumed towards the project of DPC, periodical Vat returns have been filed on the goods and materials consumed which is duly reflected in the VAT returns. The appellant has also adduced a Chartered Accountant Certificate certifying the utilization of goods and materials for the maintenance and preservation of the power plant of DPC. He further relied on the case law in **Safety Retreading Co (P) Ltd. vs. Commissioner of C. Ex. Salem [2017 (48) S.T.R. 97 (S.C.)]** and **Wipro GE Medical Systems vs. Commissioner of**

Service Tax [2009 (14) S.T.R. 43 (Tri.-Bang.)] to claim that the cost of raw materials was to be deducted to arrive at the taxable value.

5. He submitted that the appellant had produced proper documentary evidences in the form of invoices and Chartered Accountants Certificate, however the learned Commissioner had chose to deny the benefit of reducing the taxable value to the extent of value of goods, only on the ground that there was no proper bifurcation of supply of goods compound in the invoices. In this regard, it has been submitted that there is no requirement under law to bifurcate the sale of materials. Producing just and proper documents is enough to take the benefit provided to them by law. He also argued that both Vat and Service Tax cannot be charged on the same transaction. As the appellant had already discharged VAT on the materials consumed in providing the contracted service, the same were not liable to be included in the taxable value under Service Tax.

6. He also argued that extended period is not invocable in the facts of the present case as the appellant paid service tax from 31/12/2004 itself after being intimated by the Department pursuant to the investigation. it is submitted that the Appellant was under genuine belief that its activity is not taxable and in such circumstances invoking extended time period for demanding service tax under Section 73 of Finance Act, 1994 is not justified. For the similar reasons it was argued that penalty under section 78 of the Finance Act cannot be imposed. He also argued that since they have not recovered the amount of

service tax from the customer, the amount charged in the bills may be taken as cum-tax value and service tax may be calculated accordingly.

7. The learned AR from the Revenue argued that the Oder-in-Original passed by the adjudicating authority was legal and proper was maintenable. He also relied upon the case law in **Chandan Electrical vs. Commr. of C. Ex. & ST Ludhiana [2017 (48) S.T.R. 152 (Tri.-Chan.)** where it was held that exemption w.e.f. 16/06/2005 from Service Tax under section 98(1) of the Finance Act, 1994 was not available to maintenance and repair of tube-well, street lights and fountains owned by Municipal Council as these were not building parts in common parlance of non-commercial Government Buildings.

8. We have carefully examined the arguments of the learned Counsel of the appellant and the learned AR. Before proceeding to decide the issue at hand, we first discuss the findings of the Commissioner with respect to two main issues (i) whether the impugned maintenance and services are with respect to immovable property or with respect to "goods and equipment" (ii) whether the value of raw materials/ parts consumed in providing the impugned services are deductible from the taxable value. The Commissioner's findings in para 19 of the Order-in-Original are reproduced below:-

> *"19. The assessee has admitted that the services of Preservation and Maintenance provided to DPC are taxable and agreed to pay the service tax liability along with the interest w.e.f. 1.7.03 for the services rendered / provided to DPC, after claiming deduction on account of value of goods and material consumed / used, treating*

them as a sale to the client while providing the services. I find that the assessee in ST-3 returns have not declared the services provided to DPC in the application for service tax registration under the category of repair and maintenance and thus the service tax is not applicable to DPC. However, they agreed that the services of asset preservation and maintenance works is nothing but maintenance and repairs, which are taxable services under service tax w.e.f. 01/07/2003. Moreover, payments have been made only when the inquiry was initiated by the Department.

I do not agree with the contention of the assessee that they had quantified the amount on the basis of the invoices issued for the purchased items. The assessee submitted the copies of the invoices and the certificate issued by the Chartered Accountant that these goods were purchased by the assessee and utilized by them for the repair and maintenance services rendered to DPC. I find that the certificate issued by the chartered accountant tally with the figures shown in the SCN at para 6.1 that the assessee supplied the said material as per invoices. Later on assessee issued the Revised Invoices which are not co-related with the certificate issued by the chartered accountant. Moreover, in the Revised Invoices the assessee has not mentioned the item/material sold/utilized to DPC and also not mentioned about the VAT/Sales Tax in the said Revised invoices. The contention of the assessee that their services have been provided in relation to immovable properties only which have been made taxable w.e.f.

16/062005 only, is not maintainable. Perusal of the Asset Maintenance and Preservation Agreement reveals that the assessee has provided the services of maintenance of preservation of power plants and LNG Terminal which are goods and equipment, and was taxable w.e.f. 01/07/2003."

9. We find that both the issues have been decided in a non-speaking and very cryptic manner. No justifiable arguments have been given to decide the taxability on both the issues. It has been summarily held that the assessee has provided the services of maintenance of preservation of power plants, LNG Terminal which are goods and equipment without any discussion or examination whether the maintenance or repair services have been provided with respect to the immovable property or with respect to the "goods and equipment". Whereas we apparently find that the impugned services to Power Plant/ LNG terminal are with respect to immovable property but we refrain to pass any order in this respect as the party had initially voluntarily deposited the service tax amount after owning their liability towards this service and even raised revised taxable invoices to their customers. Hence, the issue may be examined in totality and a well reasoned order be passed after providing opportunity to the appellants to justify their claim that the said services were in respect of immovable property or not. Even on the issue of acceptance of invoices/Chartered Accountants Certificate whereas it has been accepted that such invoices/ CA certificate tallies with the quantification in the show cause notice but the claim has been merely rejected on the

basis that in the revised invoices the assessee has not mentioned the item/material sold/utilized to DPC and also not mentioned about the VAT/Sales Tax in the said Revised invoices (which were not a part/ relied upon documents of the show cause notice). This was no ground to dismiss the claim of the appellant and in the case of any apparent mis-match the appellant should have been provided opportunity to clarify the mis-match or provide the revised details of value of consumed raw material/ parts. We find that this value was required to be abated under the provisions of Notification 12/2003-ST dated 20/06/2003 when documentary proof specifically indicating the value of the said sold goods and materials used in the course of providing contractual service were produced. This abatement would have been available even if the same was not separately shown in the invoices if the verifiable documentary proof was otherwise produced as we find that there was no such condition as to show the value of same separately in the invoices, as per the relevant notification.

10. In view of above, we remand the matter back to the Original Adjudicating Authority with the above observations and with the directions that the case may be decided afresh after affording a reasonable opportunity to the appellant to produce all the documents in support of their arguments and decide the matter in the light of our observation in the preceding paras. The issues with respect to applicability of extended period, imposition of penalty under different provisions of Finance Act, 1994 are also be decided by considering the appellants contentions. We also direct the appellant to immediately

approach the Adjudicating Authority after receipt of this order and get the matter adjudicated at earliest.

(Order pronounced in the open court on 08/04/2019.)

(C.L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)