

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

COURT NO. 4

Appeal No. Service Tax / 50198 / 2016

[Arising out of the Order-in-Original No. 36/S.Tax./D-I/2015 dated 04.11.2015 passed by Principal Commissioner of Central Excise, New Delhi].

M/s. Simplex Infrastructures Limited
82-83, Vaikunth Building
Nehru Place, Kalkaji, New Delhi 110019.

Appellant

Versus

**Principal Commissioner of Central
Excise**
Delhi I, CR Building, I P Estate,
M G Marg, New Delhi 110002.

Respondent

Present for the Appellant :Ms Kanupriya Bhargava, Advocate
Present for the Respondent: Shri Sanjay Jain, AR

CORAM:

Hon'ble Mr. C L Mahar, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Date of Hearing / Decision: 19.12.2018

FINAL ORDER No. 53601 /2018

Per C L Mahar:

The brief facts of the matter are that the appellant are registered with the Service Tax department for providing taxable services falling under the category of "Commercial or Industrial Construction Service" and "Construction of Residential Complex Services as well as "Consulting Engineering service" etc. Working on an intelligence, the Department has initiated certain investigations against the appellant whereunder the Department felt that appellant had not paid the due service tax and evaded

the payment of service tax on gross amount received by them. The service provided by the appellant under the category of Commercial or industrial construction services and construction of complex services also involved element of certain free supplies and value of such free supplies was not added to the gross value of service. The Department, therefore, had entertained a view that the appellant had wrongly availed the benefit of Exemption Notification No. 1/2006-ST dated 01.03.2006 by claiming abatement of 67% from the gross amount charged by them from the service recipient because the appellant has not included the value of free material supplied by the service recipient for completion of work order provided to the appellant under the category of construction of commercial or industrial construction services. The appellant has admitted that during the period from April, 2010 to March, 2011 they have executed certain work contracts where certain raw materials / construction material has been supplied by the service recipient and the value of same has not been included by them in the gross value while claiming the abatement of 67% as per the provisions of Notification No. 1/2006-ST dated 1.3.2006.

2. A show cause notice No. 367/Div II/2012 dated 30.3.2012 came to be issued demanding the service tax of Rs.61,81,455/-. The provisions of demanding interest as per section 75 of the Finance Act, 1994 as well as penal provisions under section 76 and 77 were also invoked. The matter got adjudicated vide order in original No. 36/S.Tax/D-I/ 2015 dated 4.11.2015 whereunder all the charges as invoked in the show cause notice have been confirmed by the learned Commissioner. The appellant are before us against the above mentioned impugned order in original.

3. The learned advocate appearing on behalf of the appellant has submitted that it is an admitted fact that the value of free

supplied materials have not been included in the gross amount charged by the service provider before claiming the abatement of notification No. 1/2006 dated 01.03.2006. The learned advocate has further submitted that this issue is no longer res integra as in the case of ***CST vs. Bhayana Builders (P) Ltd. reported in [2018 (10) GSTL 118 (SC)]***. It has been held that the value of goods and material supplied free by the service recipient is not to be included in the gross amount charged as per the provisions of section 67 of the Finance Act, 1994.

3. We have also heard learned Departmental Representative who has agreed with the submissions made by learned advocate.

4. Having heard both the sides and on perusal of the record of the appeal, we feel that the matter is no more res integra as the issue has already been decided by Hon'ble Supreme Court in the case of ***CST vs. Bhayana Builders (P) Ltd.*** (supra). The relevant extract of the Hon'ble Supreme Court's decision is reproduced below:

“13. A plain meaning of the expression ‘the gross amount charged by the service provider for such service provided or to be provided by him’ would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the ‘gross amount’ simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words ‘for such service provided or to be provided’ by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby

that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14. We may note at this stage that Explanation (c) to sub-section (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation hereinbelow in order to understand the contention :

“gross amount charges” includes payment by (c) cheque, credit card, deduction from account and *any form of payment* by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called ‘suspense account’ or *by any other name*, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]”

[emphasis supplied]

15. It was argued that payment received in ‘any form’ and ‘any amount credited or debited, as the case may be...’ is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the ‘gross amount charges’ inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words ‘in any form of payment’ are by means of issue of credit notes or debit notes and book adjustment.

With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider."

5. Since the facts in the present matter are similar to the case decided by the Apex Court, we feel that order in original is devoid of any merit and we set aside the same.

6. Accordingly, the appeal is allowed.

(operative part of the order pronounced in the open Court)

(C. L. Mahar)
Member(Technical)

(Rachna Gupta)
Member(Judicial)

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