CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. ST/624/2009

(Arising out of Order-in-Appeal No. 12/2009 (H-II) S. Tax dated 31.03.2009 passed by Commissioner of Customs, Excise & Service Tax (Appeals-II), Hyderabad)

IVRCL Infrastructure & Projects Ltd., …..Appellant(s)

Vs.

Commissioner of Central Excise, Customs & Service Tax, Hyderabad - II …..Respondent(s)

Appearance
Shri Joseph K. Antony, Advocate for the Appellant.
Shri Arun Kumar, Deputy Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 03/05/2018
Date of Decision: 03/05/2018

FINAL ORDER No. A/30544/2018

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Appeal No. 12/2009 (H-II) S. Tax dated 31.03.2009.

2. The relevant facts that arise for consideration are during the period 01.06.2006 to 31.12.2007, appellant had executed a contract for Fabrication and Laying of cross country pipelines for SPM in Kochi Refinery Limited. For execution of such contract they entered into an agreement with Kochi Refineries Limited, who was to supply material required for such pipeline free of cost. Appellant discharged the service tax liability under the category of Commercial or Industrial Construction Services on the consideration received by them not in including the cost of material supplied free by Kochi Refineries Limited. Investigation was conducted by the officers of DGCEI, and they concluded the cost of free supply of material by Kochi Refineries Limited also needs included in the value for discharge of service tax liability during the relevant period. Appellant defended the show cause notice. The Adjudicating Authority did not agree with the contentions raised by the appellant and confirmed the demands raised on the ground that cost of free supply of material needs to be included for arriving at the gross consideration, the claim of the benefit of Notification No. 04/2004-ST dated 31.03.2004 is also not available to appellant. Aggrieved by such an order, an appeal was preferred to the First Appellate Authority concurred with the views to the Adjudicating Authority and rejected the appeals filed by the appellant.

3. In this appeal, Learned Counsel submits that the issue of none inclusion of cost of free supply of material is settled by the Larger Bench of the Tribunal in the case of *Bhayana Builders (P) Ltd.,* [2013 (32) STR 49] and which has been upheld by the Hon'ble Apex Court as reported at [2018 (10) G.S.T.L. 118]. It is also his submission that benefit of Notification No. 04/2004 is available to them as for the period from 01.06.2007, Kochi Refineries Ltd., were co-developers of the SEZ.

4. Learned Departmental Representative reiterates the findings of the Adjudicating Authority and submits that for the period June, 2006 to December, 2007 the issue of eligibility to avail of benefit of Notification was not contested before the First Appellate Authority.

5. On careful consideration of submissions made both sides, we find that for the period from 01.06.2006 to 31.12.2007, the consideration have been worked out by the Lower Authorities for confirming the tax demand holding that cost of free supply of material needs to be included, is now settled in the favour of the appellant. Apex Court in the case of *Bhayana Builders (P) Ltd.,* (supra) has upheld the judgment and order of the Larger Bench of Tribunal holding that cost of free supply of the materials cannot be included for arriving at the gross value for calculation of service tax liability. The

issue is no more res integra, accordingly, the demands raised on appellant for non inclusion of cost of free supply of materials stands held in their favour and the impugned order to that extent is set aside.

6. As regards the demand of service tax liability from June, 2006 to December, 2007 on the ground that they are eligible for the benefit of Notification No. 04/2004-ST, we find that appellant has not contested the same before the First Appellate Authority as well as before this Tribunal (as pointed out by the Learned Departmental Representative). Since the appellant has not contested non extension of benefit of Notification No. 04/2004-ST, we hold that the demand on this amount is liable to be upheld subject to the re-quantification of the service tax liability is held herein above.

7. The appeal stands disposed of as indicated herein above.

(Order dictated & pronounced in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….