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

Appeal No.	Appellant	Respondent	Order-in-Appeal No.
ST/143/2009	Genting Lanco (India) Pvt Ltd	CCT, Guntur - GST	OIO: 10/2008-ST, dt.17.12.2008
ST/817/2009			OIO: 18/2009-ST(Commr.), dt.16/17.07.2009
ST/3224/2012			OIO: 74/2012-ST, dt.29.08.2012
ST/25749/2013			OIO: 114/2012-ST, dt.31.12.2012
ST/23688/2014			OIO: GUN-EXCUS-000-COM-060, dt.09.09.2014
ST/30407/2016			OIO: GUN-EXCUS-000-COM-019-15-16, dt.24.03.2016
ST/487/2010	CCT, Guntur GST	Genting Lanco (India) Pvt Ltd	OIA: 28/2009,dt.19.12.2009

Appearance

Shri K. Parameswaran, Advocate for the Assessee.
Shri Arun Kumar, Dy. Commissioner/AR for the Revenue.

Coram:

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

Date of Hearing: 10.09.2018
Date of Decision: 10.09.2018

FINAL ORDER No. A/31226-31232/2018

[Order per: M.V. Ravindran]

1. All these appeals are directed against the Orders-in-Original No.10/2008-ST dt.17.12.2008, 18/2009-ST dt.16/17.07.2009, 74/2012-ST dt.29.08.2012, 114/2012-ST dt.31.12.2012, GUN-EXCUS-000-COM-060 dt.09.09.2014, GUN-EXCUS-000-COM-019-15-16 dt.24.03.2016. Appeal No.ST/487/2010 is filed by the Revenue against the Order-in-Appeal No. 28/2009 dt.19.12.2009. Since all the appeals raise a common question of law, they are being disposed of by a common order.

2. The relevant facts that arise for consideration in the appeals filed by the assessee/appellant are during the period in question, 16.06.2005 to March, 2014 appellant was issued various show cause notices for the demand of service tax liability under the category of "management, maintenance and repair services", on the ground that appellant had been operating and generating electricity for M/s Lanco Kondapalli Power Plant Ltd. It is the case of the appellant before the lower authorities that the contract entered by appellant is for operation and maintenance of power plant of M/s Lanco Kondapalli Power Plant Ltd and had two portions to it. One is maintenance and another is operation. It is the submission that the demand of service tax liability is on the amount/consideration received by the appellant from the said M/s Lanco Kondapalli Power Plant Ltd towards operation of the power plant. The adjudicating authority has confirmed the demands so raised along with interest. In the revenue's appeal, the first appellate authority has set aside the demands on the ground that generation of power by the appellant is amounting to producing a non-excisable product during the period in question.

3. Learned counsel for the appellant after taking the Bench through the said operation and maintenance agreement and also the findings in the Order-in-Original, submits that the demand is only in respect of the operation portion. It is his submission that the operation portion and the amounts received for such operation included the various aspects of maintenance of the power plant, guaranteeing 24x7 power to M/s Lanco Kondapalli Power Plant Ltd and they have paid the service tax on the amounts received towards maintenance and repairs of the said power plant but contested that operation and maintenance of the plant cannot be classified under "management, maintenance and repair services" at the

most gets covered under "business auxiliary services". He would submit that identical issue has been decided by this Bench in the case of GVK Power and Infrastructure Ltd. He would take us through the entire case law and the factual position in those cases. He would submit that the said decision of the Bench is reported at 2018-TIOL-788-CESTAT-Hyderabad. As regards one of the appeals, ST/30407/2016, it is in respect of the interest demanded on the out-of-pocket expenses claimed by the appellant and he submits that the law is now settled by the judgment of the Intercontinental Consultants and Technocrats Pvt Ltd and has been upheld by the Apex Court which is reported at 2018-10-GSTL-401.

4. Learned departmental representative reiterates the findings of the lower authorities. It is his submission that operation of a power plant includes various other aspects which are correctly classifiable under heading "management, maintenance and repair services" as appellant is undertaking the maintenance of the power plant, taking shut down for repairing the machineries which would definitely amount to services rendered under "management, maintenance and repair services". He would submit that the lower authorities were correct in coming to such conclusion.

5. On careful consideration of the submissions made, we find that the issue as correctly pointed out by the learned counsel is that whether the amounts received as consideration by the appellant for operating power plant on behalf of his client would be liable for the discharge of service tax under the heading "management, maintenance and repair services".

6. The facts are not in dispute. Appellant has entered into an agreement with M/s Lanco Kondapalli Power Plant Ltd for operation and maintenance of the power plant, vide which it was guaranteed 24x7 power, subject to

periodical maintenance and was paid consideration as per the agreement. As per the annexure to agreement, it is noticed that appellant is getting separate consideration for operation of the power plant and for maintenance and repair of the power plant. Appellant discharges the tax liability on the portion received as maintenance and repair services but has claimed that no tax is payable on operating part of the contract.

7. We do find that the issue is no more *res integra*. The Tribunal in the case of GVK power and infrastructure Ltd (Supra) (wherein one of us, M.V.Ravindran was also a member) and has settled the issue as recorded in Paras 7 to 11 of the order, which we reproduce.

> *"7. Heard both sides at length and perused records. On perusal records we find that the issue, as correctly pointed out by both sides is regarding the taxability of the amount received as consideration by the appellant.*
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> *8. On perusal of contracts which were produced by the Ld. Counsel in the appeal memorandum, we find that the contract is for operation and maintenance of the power plant to produce electricity and transmit it to the power grid. Appellants are challenging orders on two grounds i.e. production of electricity is manufacture of goods and that contracts cannot be vivisected and amounts are not received for maintenance and repair but for running of power plant effectively.*
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> *9. On perusal of contract, we find that it indicates the amounts which are received by the appellant as consideration, are for running of the power plant and not only for maintenance and repair charges. The agreement is for operation of power plant for 24 x 7 in pursuance of such agreement, appellant prepares a detailed plan as to how to conduct maintenance of the power plant, repairs of various machinery and submits the plan to the power plant owners, in order to, give them advance intimation of the planned shutdown of the power plant. We find that this maintenance under taken by the appellant is in order to keep the power plant in the working conditions; there is no interruption in power generation and transmission to the power grid. Similar issue came up before this Bench in the case CLP Power India Ltd., wherein the Bench after referring to various case laws and producing excerpts from them, concluded operation of power plant is not taxable under maintenance and repair services.*
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> *The bench considered the following case laws.*
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>> *a) CMS Operation and Maintenance Co. Pvt Ltd., Vs. CCE[2007(7) STR 369(T)] =* ***2007-TIOL-892-CESTAT-MAD***
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>> *b) Rolls Royce Industrial Power(I) Ltd., Vs. CCE[2006(3) STR 292(T)] =* ***2004-TIOL-529-CESTAT-DEL***
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>> *c) Basti Sugar Mills Co. Ltd Vs. CCE[2007(7) STR 431(T)] =* ***2007-TIOL-657-CESTAT-DEL***

d) Commissioner Vs. Basti Sugar Mill Co. Ltd[2012(25) STR J154(SC)]

e) Inox Air Products Ltd. Vs. CCE[2015 (38) STR 90(T)] = ***2014-TIOL-803-CESTAT-MUM***

f) CST-Mum-II Vs. Global S.S. Construction Pvt Ltd [2016-VIL-240-CST-MUM-ST = ***2016-TIOL-832-CESTAT-MUM***

g) CEST-Mum-II Vs. Polydrill Engineers Pvt Ltd [2016-VIL-263 CST-MUM-ST = ***2016-TIOL-927-CESTAT-MUM***

h) CST-Mum-II Vs. Evonik Energy Services [2016-VIL-265 CST-MUM-ST] = ***2016-TIOL-1073-CESTAT-MUM****.*

11. The issue involved in this case being similar/identical, we have no hesitation to hold that issue involved is decided in favour of the appellant."

8. Since the issue is now settled in favour of the appellant by the decision of this Bench, we do not find any reason to deviate from such a view already taken. Accordingly, we hold that the impugned order is unsustainable and liable to be set aside and we do so. The impugned orders are set aside and the appeals filed by the appellant/assessee are allowed with consequential relief, if any.

9. As regards the revenue's appeal against the order of first appellate authority, regarding the non-taxability of electricity being generated is a manufactured product, we find that the first appellate authority has relied upon the decision of the Tribunal in the case of NTPC Sail Power Company Pvt Ltd [2009-TIOL-1021-CES-KOL]. This particular decision was also cited before the Bench in the case of GVK Power and Infrastructure Ltd and the Bench in Para 12 has held that the ratio of the judgment of NTPC Sail Power Co. Pvt Ltd would also help the appellant GVK Power and Infrastructure Ltd as to that the generation of electricity being a manufactured product is being non-excisable, service tax liability does not arise under any services. We do not find any reason to deviate from such a view as already taken and recorded in GVK Power and Infrastructure Ltd. Accordingly, the revenue's appeal is rejected.

10. As regards appeal ST/30407/2016 of the appellant/assessee, an amount of Rs.22,999/- is demanded and confirmed as tax liability under the category of "management, maintenance and repair services". This amount of tax has been calculated on the amount received as consideration for the billing of the appellant for out-of-pocket expenses and the reimbursement thereof. We find that the issue is now settled by the Apex Court in the case of Union of India Vs Intercontinental Consultants and Technocrats Pvt Ltd (supra) wherein the Apex Court has upheld the judgment of Hon'ble High Court of Delhi that reimbursable expenses cannot be taxed under the Finance Act, 1994. In view of this, even this portion of the demand which is raised on the appellant/assessee also is unsustainable and we hold it so.

11. In view of the foregoing, the appeals filed by the assessee are allowed and the appeal filed by the revenue is rejected. Assessee/Appellant is eligible for all consequential relief arising out of this order.

(Operative part of this Order was pronounced in the Open Court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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