CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Appeal No. C/3194/2011

(Arising out of Order-in-Appeal No.40/2011 (V) CH dt.29.09.2011 passed by CCCE & ST (Appeals), Visakhapatnam)

M/s Bharat Aluminium Company Ltd
P.O.Balco Nagar, Dist Korba, Chattisgarh,
India – 495 684 **......Appellant**

VERSUS

Commissioner of Customs & Service Tax – Visakhapatnam - CUS
4th floor, Customs House, Port Area,
Visakhapatnam, AP – 530 035 **......Respondent**

Appearance
Present for the Appellant: Ms Sindhu, Advocate
Present for the Respondent: Shri N. Bhanu Kiran, Authorized Representative.

Coram:
HON'BLE MS. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30482/2019

Date of Hearing: 23.04.2019
Date of Decision: 23.04.2019

[Order per: P. VENKATA SUBBA RAO.]

1. This appeal is filed against Order-in-Appeal No. 40/2011 (V) CH dated 29.09.2011.

2. Heard both sides and perused the records.

3. The appellant herein has imported machinery under EPCG scheme from their supplier in France. The contract which they have entered into with their supplier includes an amount of EUR 460,000 towards supervision of erection, commissioning and performance guarantee tests of the equipment and machinery. This amount was paid by the assessee to their overseas supplier. While assessing the bill of entry, the lower authority has added

50% of this amount i.e., EUR 230,000 to the assessable value taking roughly half of the erection and commissioning supervision charges as having been rendered prior to import and rest having been rendered post import. Aggrieved by the decision of the lower authority, assessee preferred an appeal before the first appellate authority who vide the impugned order held that the lower authority was wrong in arbitrarily adding 50% of the supervision charges to the assessable value and held that it is for the assessee to show what percentage of the supervision charges are for services rendered in India after importation and to that extent they are not liable to the Customs Duty. He ordered refund of the duty paid by the appellant in excess of the duty payable on the supervision charges paid for supervision overseas. Aggrieved by this order of the first appellate authority, the present appeal is filed by the appellant.

4. Learned counsel for the appellant submits that confusion arose regarding the term "offshore" used in the contract. It is presumed by the department that the services were rendered outside India prior to import and therefore they were included as part of the assessable value. As it was not clear to the lower authority as to what part of the supervision charges were for services rendered in India, he added 50% of the total charges while the first appellate authority has held that assessee has to prove what percentage of these charges are meant for services rendered post importation India and held that they are entitled to refund to that extent.

5. Learned counsel for the appellant draws the attention of the bench to article 3 of their contract which gives the details of the amounts which they had to pay to their supplier. Sl.No.19 of this Schedule deals with supervision of erection and commissioning charges amounting to EUR 460,000. Article 3.1 above this table reads as follows:

> *"3.1 As a consideration for the scope of work enumerated under Article 2 above, the supplier shall be entitled to the payment of the Contract Price which shall be **EUR 9,806,000 (say Euro nine million, eight hundred six thousand only)**. The above price includes supply of plant and equipment on CIF Vizag / Gangavaram / Kolkata seaport or CIP Kolkata airport basis (INCOTERMS 2000) and the charges for supervision of Erection, Commissioning and Performance Guarantee Tests in India.*

Sl. No.	*Item Description*	***EUR***
	Supply : Equipment & Spares	
1	*Supply of equipment including commissioning and mandatory spares. [FOB Value]*	*8,791,000*
2	*Ocean freight (for imported only)*	*305,000*

3	*Transit Insurance*	*Incl. Above*
4	*Cost of mandatory spares (2 years O&M spares)*	*250,000*
5	*Subtotal (1+2+3+4)*	*9,346,000*
6	*Excise Duty & CVD incl. Ed. Cess extra as actual*	*NA*
7	*Sales Tax extra at actual*	*NA*
8	*Inland Transportation*	*NA*
9	***Subtotal (5+6+7+8) CIF Indian Sea Port / CIP Indian airport***	***9,346,000***
10	*Custom Duty extra at actual*	*by Owner*
11	*Port Clearance excl. Customs Duty (Estimated)*	*NA*
12	*Entry Tax on Supply Contract*	*NA*
13	***Total Offshore Supply Contract Price for 4 FTP (9+10+11+12)***	***9,346,000***
	Civil & Structural Work	
14	*Civil Work*	*NA*
15	*Structural Work*	*NA*
16	***Total Civil & Structural Price (14+15)***	
	Services	
17	*Unloading, Storage, Handling, Installation, Testing, Commissioning & PAT etc.*	*NA*
18	*Training*	*Incl. In 19*
19	*Supervision of erection and commissioning*	*460,000*
20	*Service Tax incl. Ed. Cess Extra*	*by Owner*
21	*Storage Cum Erection Insurance and Contractor All Risk Insurance*	*NA*
22	***Offshore Services Contract Price (17+18+19+20+21)***	***4,60,000***
		EUR
23	***Total Contract Price***	***9,806,000***

6. She would submit that the charges for supervision of erection, commissioning and performance guarantee tests in the table are clearly for the activities carried out in India as per Para 3.1. There is no indication whatsoever in the contract that any part of this EUR 460,000 is meant for any supervision activities conducted overseas. She would submit that the term “offshore” used in the contract appears to have created some confusion because India is offshore from the point of view of the supplier while France is offshore from the point of view of the importer. The contract refers to offshore from the point of view of the supplier as is evident from the expression “in India” used in Para 3.1. Therefore, the entire amount of supervision of erection and commissioning are meant for services rendered by their supplier in India.

7. Learned departmental representative reiterates the findings of the first appellate authority and submits that the term used is “for offshore services” and therefore the services cannot be said to have been rendered in India. As there is ambiguity, the first appellate authority has correctly held that the appellant is entitled to refund to the extent they can prove that the charges were for services rendered in India.

8. We have considered the arguments on both sides and perused the records. It is not in dispute that the charges for supervision of erection, commissioning and performance guarantee tests need not be included in the assessable value to the extent they represent post importation charges and to the extent they represent any charges for services rendered prior to importation, they are includable. Perusal of Article 3.1 of the contract shows that the entire amount of EUR 460,000 paid by the assessee to their supplier is towards supervision of erection, commissioning and performance guarantee tests in India. Therefore, the entire amount is for services rendered in India. Even otherwise, the supervision of erection, commissioning and performance guarantee tests cannot be done in the country of origin because a commissioned plant cannot be imported. Commissioning takes place after the import. We, therefore, find there is no scope for interpreting these charges as meant for any services rendered in the country of origin.

9. We, therefore, find that the appellant has case in their favour and the entire charges for supervision of erection, commissioning and performance guarantee tests in India is not includable in the assessable value. Consequently, the impugned order needs to be set aside and we do so.

10. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Dictated and pronounced in open court)

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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