

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

DIVISION BENCH – COURT NO. 1

Service Tax APPEAL No. 1710 of 2011

(Arising out of **Order-in-Original** No. 04/2011-ST-Hyd-III-Adjn. Dated 30.03.2011 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-III)

KVR Rail Infra Projects Pvt. Ltd.

12-5-34-35/1, Vijaypuri,
South Lallaguda,
SECUNDERABAD – 500 017.

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APPELLANT*VERSUS***Commissioner of Central Tax,
SECUNDERABAD G.S.T.**

Secunderabad Commissionerate,
Kendriya Shulk Bhavan,
L.B.Stadium Road, Basheerbagh,
HYDERABAD – 500 004. Telangana

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RESPONDENT**Appearance**

Shri B. Venugopal, Advocate for the appellant

Shri A.V.L.N. Chary, Superintendent/AR for the Respondent.

Coram: Hon'ble Ms. Sulekha Beevi C.S., MEMBER (JUDICIAL)**Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)****FINAL ORDER No. A/30485/2019**

Date of Hearing: 23.04.2019

Date of Decision: 29.04.2019

[ORDER PER: Ms. Sulekha Beevi C.S.)

1. The facts of the case are that intelligence gathered revealed that the appellant is providing various taxable services in the nature of Consultancy

Services, Construction of railway sidings, Maintenance of Railway tracks, Site Formation services and Supervision of Site Formation & Loading of the materials to various private companies namely Grasim, ACC Ltd., Madras Cement Limited etc. They did not discharge the service tax on these services and also had not deposited to the Government the service tax collected by them. Show cause notice was issued proposing to demand the short paid service tax along with interest and also for imposing penalties. Demand was also made under section 73A for failure to deposit the amount collected as service tax by the appellants. After due process of law, the original authority confirmed the demand of service tax to the tune of Rs. 13,98,18,576/- along with interest and imposed penalties of Rs. 2,000/-, Rs. 18,000/- and Rs. 5,000/- under sections 70, 76 & 77 of the Finance Act, 1994 and equal penalty of Rs. 13,98,18,576/- under section 78 of the Finance Act, 1994. Further, the payment of Rs. 3,88,63,535/- being the amount collected as service tax by appellants and not deposited with the Government was also confirmed under section 73A of the Finance Act, 1994, along with interest. Aggrieved by such order, the appellants are now before the Tribunal.

2. On behalf of the appellants, Ld. Counsel Shri B. Venugopal appeared and argued the matter. He made oral and written submissions, which can be summarised as under:

(a) The demand with respect to various services and the period involved as tabulated by the Counsel for the appellant is as under:

Sl. No.	Description of service	Demand of Service Tax (Rs.)	Period involved
1	Commercial or Industrial Construction Service- Section 65(25b) of the Finance Act, 1994.	15,98,761	October 2004 to June 2007
2.	Works Contract Service – Section 65(105)(zzzza) of the Finance Act, 1994	12,15,21,865	August 2007 to October, 2009
3.	Consulting Engineer Service – Section 65 (31) of the Finance Act, 1994	1,19,74,519	October 2004 to September 2009

4.	Maintenance or Repair Services – Section 65(64) of the Finance Act, 1994	3,55,404	January 2005 to September 2009
5.	Site Formation and clearance service – Section 65(97a) of the Finance Act, 1994	38,51,355	August 2006 to July 2008
6.	Business Auxiliary Service – Section 65(19) of the Finance Act, 1994	5,16,672	April 2008 to February 2009
	Total	13,98,18,576	
7.	Demand of Service Tax collected and not paid under section 73A of the Finance Act, 1994	3,88,63,535	2004-05 to 2009-10 (Upto Sept. 2009)

(b) With regard to the demand under Commercial or Industrial Construction Service/Works Contract Service for construction of railway sidings/tracks, it is submitted by the Ld. Counsel that the said activities are excluded from levy of service tax as per the definition contained in Section 65(25b) of the Finance Act, 1994, which defines commercial or Industrial Construction Services as well as the definition of Works Contract Service contained in Section 65(105)(zzzza) of the Act *ibid*.

(c) The department is of the view that the exclusion is not available to the appellant since the railway sidings constructed by the appellant is for private companies and not for the Government. That the Department is relying upon the definition contained in the Railways Act to conclude that only if the Railway is used for carriage of passengers and goods for the public, the exemption from service tax would be available. He referred to the definition contained in the above sections and submitted that the said definitions does not say that exclusion is available only for the Government railways. Further, the issue whether the service tax is attracted for Commercial or Industrial Construction services carried out for railway sidings for non government railway was considered by the Tribunal in the case of *Afcons Infrastructure Limited Vs. Commissioner of Central Excise, Mumbai-II* as reported at [2015(38)S.T.R. 194 (Tri.-Mumbai)]. Similar view was taken in *SMS Infrastructure Limited* [2017(47)S.T.R 17 (Tri.-Mumbai) and *International Metro Civil Contractors* as reported in [2019(20)G.S.T.L. 66 (Tri.-Del.)]. He therefore argued that the

demand of service tax under the category of Commercial or Industrial Construction Service as well as Works Contract Service for construction of railway sidings/tracks for the period October 2004 to June 2007 as well as August 2007 to October 2009 cannot sustain. It is also argued by the Ld. Counsel that for the period prior to 01.06.2007 being composite contracts, the case of Larsen & Toubro Limited as reported in [2015(39)S.T.R 913 (SC)] would be applicable and that demand cannot sustain for this reason also.

- (d) With regard to Consulting Engineering Service, he submitted that the said services were provided in relation to the construction of railway siding. That the appellant was under the bonafide belief that Consulting Engineering Services provided in relation to the construction of railway siding is not taxable and accordingly service tax was not paid. However, due to the confusion, in some cases the appellant collected service tax to the extent of Rs. 92,45,529/- from their customers but had not remitted the same to the Government. Later, during the course of investigation, when the Officers pointed out the same, the appellant had paid Rs. 3,93,47,417/- towards the service tax liability. The non payment of service tax was only on account of confusion with regard to the payment of service tax on the services provided by them and it was not with intent of evading payment of service tax. He prayed that the penalties on this account may be set aside by invoking Section 80 of the Finance Act, 1994.
- (e) The appellants provided services relating to Management, Maintenance and Repairs which are also the activities carried out in relation to railway siding. The demand in this category is Rs. 3,55,404/- for the period from January 2005 to September 2009. The scope of work is a systematic maintenance of track and level crossing and other assets. The said service is in relation to construction of railway siding and therefore the appellant was under the bona fide belief that the same does not fall under the taxable service and hence had not discharged the service tax. Due to confusion, the appellant though collected the

service tax in some cases to the extent of Rs. 3,21,006/-, did not remit the same to the Government account. However, major portion of service tax along with interest was paid during the time of investigation. Taking into consideration that the amount has been paid, the penalties imposed on this account may be waived of.

- (f) With regard to the demand of Rs. 38,51,355/- made under Site Formation and Clearance Service, Ld. Counsel relied upon the Notification No. 17/2005-ST, dated 07.06.2005. He pointed out that the said work was carried out in the course of construction of railway sidings and by the above notification, such activities are excluded from payment of service tax. He relied upon the decision of the Tribunal in the case of *Commissioner of Central Excise, Raipur vs. Anand Construction* [2017(51)S.T.R. 435 (Tri.-Del.)].
- (g) The Department has raised a demand of Rs. 5,16,672/- under Business Auxiliary Services for the period April 2008 to February 2009. He submitted that the appellant had carried out supervision of earth work in formation of embankment for railway siding and for construction of tipper line etc. to private parties. The Department alleges that the said activities would fall under Business Auxiliary Services. He adverted to the definition of Business Auxiliary Service under Section 65(19) and agreed that the appellant has not provided any service on behalf of the client and therefore the allegation that the activity of supervision for site formation, earth work etc. would not fall under Business Auxiliary Services. The show cause notice does not specify under which limb of the definition the demand of service tax has been proposed. The adjudicating authority has classified the service of supervision carried out by the appellant as falling under the limb of 'Customer Care Service on behalf of the client'. At no stretch of imagination, the supervision service provided by the appellant can be termed as Customer Care on behalf of the client. The activity carried out by the appellant will not fall under the definition of Business Auxiliary Service and therefore the demand cannot sustain.

- (h) With regard to the demand in Sl.No. 7 of the above table, the Ld. Counsel submitted that the appellant had collected Rs. 3,88,63,535/- as service tax for various services, the details furnished by the Ld. Counsel as per the table are given below:

Description of Service		Service Tax collected (Rs.)
Consultancy Services	:	92,45,529
Repairs & Maintenance Services	:	3,21,006
Construction Services/WCS	:	2,62,44,891
Site Formation Services	:	3052,109
TOTAL		3,88,63,535

- The appellant had paid up the entire amount of service tax collected by them and the same has been appropriated towards service tax confirmed under the impugned order. Out of the above said amount, for the reason submitted above, the demand in respect of Construction/Works Contract services and Site formation services are not liable to Service Tax and therefore the service tax collected on these services can alone be confirmed under section 73A of the Act. The balance amount of Rs. 1,22,54,413/- (Rs. 3,93,47,417/- + Rs.22,03,996/-, less the service tax of Rs. 2,62,44,891/- collected towards Construction/Works Contract Services and Rs. 30,52,109/- collected towards Site Formation Services) should be appropriated towards the service tax liability of Consultancy Services (Rs. 1,19,74,519/-) and Maintenance & Repair Services (Rs.3,55,404/-). The admitted service tax liability thus works out to Rs. 1,23,29,923/- and the balance tax payable works out to Rs. 75,510/-.
- (i) He argued that the demand of interest under section 73B of the Finance Act, 1994 on the amounts demanded under Section 73A *ibid* cannot sustain inasmuch as the confirmation of demand of service tax in the instant case falls within the ambit of sub-section (2) of Section 73A and the provisions of Section 73B are applicable only to the demands confirmed under sub-section (1) of Section 73A as held in Final Order No. A/30061/2019, dated 16.01.2019 in the case of *Indu*

Eastern Province Projects Pvt. Ltd. He prayed that the appeal may be allowed.

3. The Ld. AR Shri A.V.L.N. Chary appeared on behalf of the Department. With regard to the first issue of demand of service tax under Commercial or Industrial Construction Service/Works Contract Service for construction of railway sidings/tracks, the Ld. AR submitted that the exemption of service tax provided in the section for construction of railway sidings is not available to the appellant since the railway sidings are constructed for private parties. He relied upon the definition of 'Railways' given in Section 2(31) of The Railways Act, 1989. The said definition states that 'Railway means a railway or any portion of a railway, for the public carriage of passengers or goods'. Thus, the exclusion is available only for railway sidings which are constructed for public carriage of passengers or goods. In the present case, the railway sidings constructed by the appellants are used for carriage of goods of private parties and therefore the exclusion/exemption of service tax is not available. He relied upon the decision of the Tribunal in the case of *Mukesh Kalway vs. Commissioner of Central Excise, Bhopal* [2017(3) TMI 615 – CESTAT New Delhi] to argue the point that in the said case cleaning service provided to railways was held to be taxable. Only when railways are used for public purpose, the activities of construction of railway sidings can be excluded from the purview of levy of service tax. The demand confirmed therefore is legal and proper.

4. With regard to the Consulting Engineering Service, he submitted that the said activities provided by the appellant are subject to levy of service tax and cannot be excluded merely for the reason that it is related to construction of railways. The exclusion contained in Commercial or Industrial Construction Service or Works Contract Service cannot be applied to the Consulting Engineering Services to claim the exemption from service tax.

5. The demand confirmed in Maintenance or Repair Service is not correct since the appellant has been carrying out the activity of maintenance or

repair services with regard to railway siding. They have further collected service tax and has not paid up such tax to the government.

6. The demand under Site Formation and Clearance Service has been discussed by the original authority in para 45 of the impugned order. The Site Formation does not exclude railway or transport terminal. Therefore, the demand is correct.

7. Ld. AR referred to the definition of 'Business Auxiliary Services' and submitted that the appellants were engaged in supervision of the Site Formation/Earth work for railway embankments for various companies such as Madras Cement Ltd., ACC Limited, Zuari Cement Limited etc. Sub clause (vii) of Clause (19) of Section 65 states that management or supervision services would fall within the definition of Business Auxiliary Service. Therefore, the supervision activity rightly falls under Business Auxiliary Service.

8. The arguments of the appellants with regard to the demand of interest on the amount of service tax collected and not paid to the Government are erroneous and cannot be accepted. He prayed that the impugned order may be sustained.

9. Heard both sides.

10. The first issue is with regard to the demand of service tax under Commercial or Industrial Construction Service and Works Contract Service for construction of railway sidings/tracks. The period involved under Commercial or Industrial Construction service is from October 2004 to June 2007. The said services are in the nature of composite contracts which involve both supply of material and rendition of services. Hence the decision of Hon'ble Apex Court in the case of Larsen & Toubro (supra) would apply and the demand cannot sustain. The demand under Works Contract Service has been raised for the period from August 2007 to October 2009 for the very same activity. The appellant has submitted that the said demand

cannot sustain for the reason that construction works related to railways is excluded by the definition. For better appreciation, the definition of Commercial or Industrial Construction Service contained in Section 65(25b) and Works Contract Service contained in Section 65(105)(zzzza) of Finance Act, 1994 is reproduced as under:

Section 65(25b) of the Finance Act, 1994

- (a) "Commercial or Industrial Construction"** means -
- (b)** (a) construction of a new building or a civil structure or a part thereof; or
 - (c)** (b) construction of pipeline or conduit; or
 - (d)** (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
 - (e)** (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is -
 - (f)** (i) used, or to be used, primarily for; or
 - (g)** (ii) occupied, or to be occupied, primarily with; or
 - (h)** (iii) engaged, or to be engaged, primarily in,
 - (i)** commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

Section 65(105)(zzzza) of the Finance Act, 1994

"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,—

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,—
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

- (c) construction of a new residential complex or a part thereof; or
- (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
- (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

11. From the above definition, it can be seen that the execution of works in respect of roads, Airports, Railways, Transport Terminals, bridges, tunnels, dams and ports are excluded from the purview of levy of the said category of service. The department relies upon the definition of Railways contained in Section 2(31) of the Railways Act 1989. It has to be mentioned that the definition of the services in Section 65(25b) or Section 65(105)(zzzza) does not make any differentiation between a Government railway or a non government railway. These sections merely uses the word 'railways'. The Railways Act defines government railway under section 2(20). Government railway 'means a railway owned by the Central Government'. Section 2(25) of the Act defines a 'non-governmental railway'. It means a railway other than a Government railway. The definition of Commercial or Industrial Construction Service and Works Contract Service contained in Section 65(25b) or Section 65(105)(zzzza) does not state that only these airports, railways, bridges, tunnels owned by government are excluded. The private Railway siding/track so constructed has to be connected to the Railways to facilitate the transport of goods. These railway sidings also then are under the supervision and control of Railways. In the procedures for liberalization of Siding Rules dated 31.03.2005 issued by Ministry of Railways, para 4.5 mentions about cost of Railway staff. It is stated therein that in all private sidings other than Engine on Load only, barring the cost of one commercial staff per shift, Railways will bear the cost of all other Railway staff. The cost of all staff at engine on Load (EOL) sidings will be borne by the Railways. Detailed instructions are issued for the construction, maintenance, supervision and use of these railway sidings.

12. The issue whether the construction activities of railway sidings/tracks for non governmental railway or private railway is subject to service tax has

been analysed by the Tribunal in the case of Afcons Infrastructure Limited (supra). In paras 5.1 to 5.4, the Tribunal observed as under:

“5.1. The definition of Commercial and Industrial Construction Service as provided in [Section 65\(25b\)](#) excludes such activities relating to roads, ports, railways, dams, bridges, tunnels, etc. There is no distinction between a monorail or metro rail or any other kind of rail and, therefore, the term railways used therein has to be given its widest meaning to include all types of railways and all types of railway lines. Therefore, the distinction sought to be made by the adjudicating authority is not sustainable in law.

5.2. Secondly, we do not find any basis for the conclusion drawn by the learned adjudicating authority by referring to some decision of the Government while examining the scope of the term ‘railways’ in the context of certain tax exemptions. There is no evidence before us to show that the Government examined the matter and came to such a conclusion nor is there any circular or notification issued by the Government in this regard. In the absence of any such decision which is in the public domain, we are unable to accept the contention raised by the Revenue in this regard and reject the same totally. In other words, the law has to be interpreted as it stood, as held by the honble apex Court in the case of Doypack Systems Pvt. Ltd. [1988 (036) ELT 0201 (SC)] wherein it has been held that the notings in the government files are not relevant for interpretation of the statutes and the statute has to be interpreted by the wordings explicitly used therein and if there is no ambiguity in the language used therein, there is no need to refer to the notings in the government file. On that ground also, the observation of the adjudicating authority has no bearing to the facts on hand and has to be rejected.

5.3. The learned adjudicating authority has relied on the definition of [Section 65D\(O\)](#) in the context of transportation of passengers by various modes such as monorail, tramways, metro rails, etc. This definition came into force only w.e.f. 01/07/2012 but the demands in the impugned order pertain to the period prior to 01/07/2012 and therefore this definition has no bearing whatsoever and no application for interpreting the law as it stood at the relevant time.

5.4 The honble High Court of Delhi in the DMRCs case (supra) has held that Delhi Metro Rail is Government Railway as defined in the [Indian Railway Act](#). If that be so, the question of levy of service tax under “Commercial or Industrial Construction Service” would not arise at all as such constructions in respect of Railways stands excluded from the scope of the levy.

Similar issue was discussed by the Tribunal in the case of SMS Infrastructure Limited (supra) which reads as under:

“ Learned Authorised Representative places reliance on the decision of this Tribunal in *AB Projects Pvt. Ltd. v. Commissioner of Central Excise, Nagpur* [[2010 \(19\) S.T.R. 886](#) (Tri-Mumbai)] to contend that any activity of construction that is able to generate revenue will not be exempt from

levy of service tax. We take note of the specific exclusion of railway work from the definition (supra). Revenue contends that the exemption is accorded to railways that are used as public carriage of passengers and goods which the projects undertaken by the appellant are not. Appellant relies upon the decision of the Tribunal in *Afcons Infrastructure Ltd. v. Commissioner of Central Excise Mumbai-II* [[2015 \(38\) S.T.R. 194](#) (Tri.-Mumbai)] and *Delhi Metro Rail Corporation Limited v. Municipal Corporation of Delhi and Others* [2008 (103) DRJ 369] to drive home the point that coverage under Railways Act, 1989 is sufficient to consider any such infrastructure as railways. We notice that the Railway Act, 1989 provides for railways with public investment and private investment and both function under the same statute. Such railways established in the private sector have a statutorily acknowledged Administrator. Consequently, we too hold that railway sidings built by the appellant fall within the exclusionary portion of Section 65(25a) and are outside the ambit of taxation.

For the above reasons, we confirm the liability to tax on the labour portion of work executed by the appellant and which has been duly discharged by them. The demands under the other heads are set aside. Penalties are also set aside."

13. In the case of International Metro Civil Contractors, the Tribunal has observed that the works of civil engineering contraction, mechanical and electrical installation, tunnel ventilation and station air conditioning etc. had been in relation to the construction of Delhi Metro Rail Corporation, was not liable to tax. The relevant para is reproduced as under:

"Seeing from another angle that the services provided by the appellant is the construction of rapid rail corridor which stands excluded otherwise from the tax ambit even of the works contract service. Though it is the case of the Department that the exemption is for railways and the metro corridor do not classify to be called as railways for it being a commercial concern. But this ground has already been adjudicated by Hon'ble Apex Court in the case *Jagjeet Cotton Textile Mills v. Chief Commercial Superintendent*, 1998 (5) S.C.C. (126) wherein the Hon'ble Apex Court has held that Delhi Metro Rail is a Government railway as defined in Indian Railway Act. Since Railway also is meant to run on commercial basis, DMRC cannot be distinguished from being called as railways merely on the ground that it involves a commercial angle. This decision has been followed by Hon'ble Delhi High Court as well in the case of *DMRC* itself titled as *DMRC v. Municipal Corporation of Delhi*, 2008 (103) DRJ 369. Hon'ble High Court Karnataka in the case of *DMRC v. Ministry of Finance*, 2013 (6) T.M.I. 78 has also held that work contract services in respect of railways are excluded under

Clause 1 of 65(105) zzzza of the Act i.e. such contracts will fall outside the definition of taxable service and consequently no tax shall be leviable under Section 66 of the Act on the value of such services. This Tribunal in the case of *M/s. IRCON International Ltd. v. C.S.T. Delhi*, 2017 (4) T.M.I. 1086 (Tri.-Del.) [IRCON is one of the company constituting the joint venture i.e. the appellant] has held a composite work contracts irrespective include the category of service of erection, commissioning and installation irrespective that the said service is taxable since 1-7-2003 but since the services rendered is classified as works contract and the work contract in respect of railways is excluded from the tax liability as per the statutory definition itself, no question of levy of any service tax on such contract arises. It was also clarified that it is a well settled legal position that metro work is nothing but railways work.”

14. In the above decisions, the Tribunal has held that Section 65(25b) or Section 65(105)(zzzza) of the Finance Act, 1994 does not use the word ‘railways’ for public carriage or that the railways should be government railways. The definition uses the words “railways” only. Therefore, the execution cannot be restricted to the government railways which are used for public transport of passengers or goods. The Ld. AR has relied upon the decision in the case of *M/s Mukesh Kalway vs. CCE Bhopal* (supra). In the said cases, cleaning services provided to Railways was held to be taxable. In last sentence in para 8 of the said decision, the Tribunal has specifically mentioned that Commercial or Industrial Construction Service provided to railways is specifically excluded.

15. From the discussions made above as well as following the decisions, we are of the considered opinion that the demand of service tax under Commercial or Industrial Construction Service or Works Contract Service for the period from October 2004 to June 2007 and August 2007 to October 2009 respectively for construction of railway sidings/tracks cannot sustain and require to be set aside which we hereby do so.

16. The arguments put forth by the appellant with regard to Consulting Engineer Service and Maintenance or Repair Service is that these services are in relation to construction of railway sidings and therefore the

appellants were under the impression that these services are not subject to levy of service tax. On perusal of the definition of Consulting Engineer Service and Maintenance or Repair Service, we do not find any exclusion for services rendered in respect of railways. The confirmation of demand under these two heads are therefore legal and proper. We uphold the demands under these two services.

17. The demand of Rs. 38,51,355/- is confirmed under Site Formation and Clearance Service for the period from August 2006 to July 2008. The appellant has relied upon the Notification No. 17/2005-ST, dated 07.06.2005. The relevant portion of the notification is as under:

“Notification: 17/2005-S.T., Dated 07 Jun-2005.

Site formation and clearance, excavation and demolition services etc. when provided in the course of construction of roads, airport, railways, transport terminals, bridges, tunnels, dams and ports – Service tax exemption.

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the site formation and clearance, excavation and earthmoving and demolition and such other similar activities, referred to in sub-clause (zzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, from the whole of service tax leviable thereon under section 66 of the said Finance Act.

2. This notification shall come into force on the 16th day of June, 2005.”

18. The said notification exempts Site Formation and clearance, excavation and demolition and such other similar activities carried out in the course of

construction of roads, Airports, Railways etc. from the levy of service tax. This notification has come into force on 16th June, 2005. The demand, therefore, for this activity cannot sustain and needs to be set aside which we hereby do so.

19. The appellant had received amounts for supervision activities carried out for various companies like Madras Cement Ltd., ACC Limited etc. A demand of Rs. 5,16,672/- has been confirmed under Business Auxiliary Service alleging that the charges received for supervision activities carried out by the appellant would fall under the definition of Business Auxiliary Services. For better appreciation, the definition of '**Business Auxiliary Services**' as it stood during the relevant period is as under:

"Business Auxiliary Service" means any service in relation to, -

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, **management or supervision.**"

20. The Ld. Counsel for the appellant is right in his assertion that the show cause notice does not specify under which clause of the definition of Business Auxiliary Service the service tax is proposed. The Commissioner has classified the service as 'Customer Care Service rendered on behalf of the client'. At no stretch of imagination the supervision services cannot be

said to be Customer Care services. The Ld. AR for department has submitted that the said activity would be covered under sub clause (vii) of the definition. Sub clause (vii) of the definition would apply only if the activity falls under sub clauses (i) to (vi). Since the service does not fall under sub clauses (i) to (vi), we have no hesitation to conclude that the supervision activities carried out by the appellant cannot be classified under Business Auxiliary Services and therefore the demand under this category does not sustain and needs to be set aside which we hereby do so.

21. The appellant collected Rs.3,88,63,535/- as service tax but had failed to deposit with the government. As per Section 73A, any amount collected towards service tax has to be deposited with the Government. The Ld. Counsel for the appellant has contended that all the amounts so collected have been deposited by them. He pleads to set aside the demand of interest under section 73B in respect of service tax collected for the services under Commercial or Industrial Construction Service and Works Contract Service as well as Site Formation Service. He pointed out that as per Section 73B, interest has to be paid on the amount collected in cases where tax is determined under sub section (4) of Section 73A. We have already held that no service tax is payable under Commercial or Industrial Construction Service, Works Contract Service and Site Formation Services. The amounts collected under the category of Commercial or Industrial Construction Service/Works Contract Service and Site Formation service would then fall under sub clause (2) of Section 73A which reads as under:

"Section 73A – sub clause (2)

"Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government."

22. Section 73B does not provide for demand of interest in case of any amount collected which is not required to be collected as service tax from

any other person as provided in sub clause (2) of Section 73B. The Tribunal in the case of *Indu Eastern Province Projects Pvt. Ltd. (supra)* had observed in para 13 of the said judgment that *"there does not appear to be a corresponding provision for collection of interest under section 73B where any amount has been collected as tax which is not required to be collected. In the absence of any statutory provision, the demand of interest cannot sustain."* Thus, the demand of interest in respect of the amounts collected under Commercial or Industrial Construction Service/Works Contract Service and Site Formation and Clearance Service cannot sustain and require to be set aside which we hereby do.

23. The next issue to be addressed is with regard to the penalties imposed. The demands under Consulting Engineer Service and Maintenance or Repair Services have been upheld by us. The appellant has submitted that they were under much confusion as to whether the services are subject to levy of service tax for the reason that these services were rendered in relation to their activities of construction of Railway sidings. They entertained a bonafide belief that the services are not taxable. Taking into consideration that the appellant has put forward the reasonable cause for failure to pay service tax, we are of the considered opinion that it is a fit case to invoke Section 80 of the Act *ibid* and the penalties imposed under these two categories are set aside.

24. The impugned order is, therefore, modified in the following manner:

- (a) The demand of service tax under Commercial or Industrial Construction Service, Works Contract Service, Site formation and Clearance Services and Business Auxiliary Services is set aside.
- (b) The demand of Service Tax under Consulting Engineering Services and Maintenance or Repair Services along with interest is upheld.

- (c) The penalties imposed in respect of these two services is set aside.
- (d) The demand of service tax collected and not paid under section 73A to the tune of Rs. 3,88,63,535/- is upheld. However, the demand of interest under section 73B raised in respect of Commercial or Industrial Construction Services/Works Contract Service and Site Formation Services is set aside.

25. The appeal is partly allowed in above terms, with consequential reliefs, if any.

(Order pronounced in the open court On 29.04.2019)

(Ms. SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)