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

Division Bench – Court No. - I

Service Tax Appeal No.3003 of 2011

(Arising out of Order-in-Original No.32/2011(RS) dated 05.08.2011 passed by Commissioner of Central Excise & Customs, Visakhapatnam-II.)

M/s. Ramky Infrastructure Limited
(E Bonangi P.O. Near Tirupathi Fuels, Parawada Road, Parawada, Visakhapatnam-531021.)

...Appellant

VERSUS

Commissioner of Central Tax, Visakhapatnam-II

.....Respondent

(Central Excise Building, Port Area, Visakhapatnam-530035.)

APPEARANCE

Shri B.Venugopal, Advocate for the Appellant (s)
Shri S.Hanuma Prasad, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO: A/30069/2022

DATE OF HEARING : 9 March 2022
DATE OF DECISION : 7 July 2022 .

P.K.CHOUDHARY :

The present appeal arises from Order-in-Original No. 32/2022 (RS) dated 05.08.2011 passed by the Ld. Adjudicating authority against the Show Cause Notice (SCN) dated 19.04.2010 by which a demand of Rs.22,11,73,069/- has been confirmed against the proposed demand of Rs.23,44,76.547/- under the service categories of "Commercial or Industrial Construction", "Erection, Commissioning and Installation Services" and "Site Formation Services" along with imposition of equivalent penalties for the period from April 2005 to March 2009.

2. The brief facts of the case are that the works executed under work orders issued by M/s Ramky Pharma City (India) Ltd. to the Appellant, for development of Jawaharlal Nehru Pharma City was originally awarded to them vide Letter of Intent No. APIIC/CE-1/Pharma City/18/2002 dated 18.11.2003 (Pg 149 - 151 of the Appeal Paper book). The said LOI was for 'Development of Pharma City on Commercial Format'. In terms of the said LOI, the project work shall be executed only by an incorporated Special Purpose Company. Accordingly, the special purpose company viz., M/s Ramky Pharma City (India) Ltd., was incorporated and a Concession Agreement for the Development of Pharma City on Build, Own and Operate (BOO) [Pg. 79-174 of Appeal Paper book] basis was executed between the APIIC (Andhra Pradesh Industrial Infrastructure Corporation Ltd) and the special purpose company (RPCIL). RPCIL has executed various work orders, from time to time, on the Appellant for execution of construction work relating to the development of Pharma City, which are detailed in SCN at para 4 [Pg. 250 of Appeal Paper book]. Copies of the said work orders are placed at Pg 175-201 of Appeal Paper book.

3. Basis the above work orders, it was determined by the Department that the Appellant has short paid service tax under the service categories of "Commercial or Industrial construction", "Erection, Commissioning and Installation services" and "Site Formation Services" and hence the present appeal before the Tribunal.

4. The Appellant submits that the confirmation of demand under categories of "Commercial or Industrial Construction", "Erection, Commissioning and Installation" services for the period prior to 01.06.2007 cannot survive as the contract awarded to the Appellant was a turnkey contract and hence the same cannot be vivisected to tax the same under categories of Commercial or Industrial construction, Erection Commissioning and Installation services as was

held by the Hon'ble Supreme Court in the case of CST vs L&T Ltd. 2015(39)STR 913 (SC). For the period after 01.06.2007, the Appellant states that the demand has been raised under the categories of Commercial or Industrial construction, Erection Commissioning and Installation services which cannot be sustained as the indivisible works contract services can be subjected to service tax levy only under the category of works contract services and thus the demand would fail. The Ld. Advocate for the Appellant relied upon the following judgments in support of his submissions :-

Real Value Promoters Pvt Ltd. Vs. Commissioner of GST and Central Excise, Chennai [2018-TIOL-2867-CESTAT-MAD]

M/s. Ashwini Apartments Vs. Commissioner of GST & Central Excise, Chennai South [2018 (10) TMI 404 CESTAT, CHENNAI]

M/s. Vijaisuriya Constructions P. Ltd. Vs. Commissioner of GST & Central Excise, Coimbatore [2018 (10) TMI 402-CESTAT, CHENNAI]

M/s. Sai Teja Constructions Vs. Commissioner of Service Tax, Hyderabad [2019 (7) TMI 575-CESTAT HYDERABAD]

M/s. SS Constructions Vs. C>C.E. & S.T., Chandigarh-II [2021 (12) TMI 429 CESTAT CHANDIGARH]

5. As regards the demand on Site Formation Services, the Appellant submits that the work order under dispute for the said services is also a composite turkey contract and hence the same would also merit classification under the works contract services introduced w.e.f. 01.06.2007 and not under site formation services w.e.f. 16.06.2005.

6. The Appellant also contends that the demand is time barred as the same was an interpretational issue and hence the demand along with penalties cannot be sustained at all.

7. The Ld. Authorized Representative for the department on the other hand reiterated the findings of the Order-in-Original and also relied upon the following judgments for the demand under site formation services:

R.balarami Reddy Vs CST, Hyderabad 2019(22)GSTL 255(Tri0Hyd)

Alok Guha Vs CST, Raipur 2018 (18) GSTL 434 (Tri- Delhi)

8. Heard both sides and perused the appeal records.

9. We find that the issue to be decided in the given case is whether the work orders issued for the various works are indivisible to form a works contract or are individual services as demanded in the SCN and confirmed by the Ld. Adjudicating authority. We find that the Ld. Adjudicating authority has dealt with the work orders in dispute and has come to a conclusion that the services rendered by the Appellant for construction of social infrastructure, Commercial and Services Hubs, Water Distribution system including water treatment/water reservoir and overhead tanks, marine outfall pipeline, common effluent treatment, boundary wall, construction of conduit (earth excavating, concrete construction, providing and laying of pipes) to drain out storm water are classifiable under commercial or industrial construction services.

10. On perusal of the work orders as above, it is seen that the said work orders are for complete work and cannot be vivisected to form separate work under each head. Further, since the Supreme Court has laid down the law in the case of L&T judgment *supra,* we would like to refer to the relevant observations in the judgement in this regard:

> ***"16.*** *At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is*

no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.), as follows :-

> *"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-*
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> > *"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."*
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> *For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements*

Ltd. v. Union of India [(2005) 4 SCC 214], SCC at p. 228, para 23 :-

> *"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)"*

17. *We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows :-*

> *"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)*

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20. *We also find that the assessees' argument that there is no charge to tax of works contracts in the Finance Act, 1994 is correct in view of what has been stated above.*

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24. *A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."*

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43. *We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."*

Thus, in the instant case, as regards the demand confirmed under the categories of Commercial or Industrial construction, Erection Commissioning and Installation services both prior to 01.06.2007 and post 01.06.2007, we are of the view that the same cannot be sustained and hence the demand to the extent of Rs. 19,71,44,488/- and Rs. 2,11,55,639/- under categories of Commercial or Industrial construction, Erection Commissioning and Installation services respectively is set aside.

11. As regards the demand on Site Formation Services for Rs.28,73,942/-, we find that the work order therein relates to land development, electrical distribution system, street lighting, Commercial hub, UGSR, OHT, WTP, Waster Conveyance system and CETP works at Vizag site. We find that the above scope of work cannot be classified under site formation services as site formation services is defined as below:

(97a) "site formation and clearance, excavation and earthmoving and demolition" includes, —

(i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(ii) soil stabilization; or

(iii) horizontal drilling for the passage of cables or drain pipes; or

(iv) land reclamation work; or

(v) contaminated top soil stripping work; or

(vi) demolition and wrecking of building, structure or road,

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;]

In the case at hand, the services are not aligned to the above definition but includes set up of various other units such as WTP, CETP etc which is a composite works contract and hence the same would also merit classification under the service of works contract. Thus, the demand under site formation services cannot survive.

Since we have already decided the issue on merits, our opinion on the point of limitation is not expressed.

Thus, the Appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 07.07.2022)

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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