

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/60/2009

**(Arising out of Order-in-Original No. 10/Kol-VI/Commr./2008
dt. 17/11/2008 passed by Commissioner of Central Excise,
Kolkata-VI.)**

M/s. Visuvius India Ltd.

Appellant (s)

Vs.

CCE-Kol-VI

Respondent (s)

Appearance

Dr. Samir Chakraborty, Sr. Adv. & Shri Abhijit Biswas, Adv. for the
Appellant

Shri S. Mukhopadhyay, Suptd. (A. R.) for the Revenue

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing-06.12.2018

Date of Pronouncement:-26/02/2019

ORDER NO. FO/75216/2019

PER CORAM

The appeal is against the Order-in-Original No. 10/Kol-VI/Commr./2008 dated 17/11/2008. The impugned order was passed in the denovo proceedings, in compliance with the directions of the Tribunal in Excise Appeal No. 5220/2007 vide Order No. S-206/A-336/Kol/2008 dated 05/03/2008. The Lower Authority ordered payment of Central Excise Duty amounting to Rs.53,89,920/- along with interest and penalty of an equal amount under Section 11AC of the Act. Period of dispute is June 2000 to December 2000. The brief facts leading to the impugned order are summarized below:-

(i) The appellant is a manufacturer of refractory ceramic goods of various types, falling under Chapter 69 and 38 of the First Schedule to the Central Excise Tariff Act. They had manufacturing

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factories at Kolkata and Visakhapatnam, but the dispute relates to Kolkata factory. The goods manufactured are mostly sold to various Steel Plants and Cement Factories for use as lining material in their furnaces, ladles, converters e.t.c. The refractory materials are not only used for lining new furnaces, but also used for repair and replacement of such lining as part of routine maintenance. In addition to the supply of such materials, the appellant sometimes is also contracted to undertake the process of application of such materials in the furnaces. For such services, the appellant raises a separate Bill. There are also composite contracts involving both supply of goods as well as providing application services. In those cases where the services are rendered through separate contracts, the appellant claims to have paid Service Tax. In respect of certain composite contracts, involving supply of goods and providing application services, where no separate price for services is ascertainable, the appellant discharges Central Excise Duty on the entire contractual price. The dispute, however, is in respect of certain composite contracts in which separate amounts have been indicated for supply of goods as well as services. In such cases, the appellant discharges Excise Duty only on the component of value attributable to goods. Revenue was of the view that Excise Duty was required to be paid on the composite price of the contract. On these lines, Show Cause Notice dated 09/02/2005 was issued proposing to demand differential duty for the period June to December, 2000. The

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Adjudicating Authority upheld the demand of duty and the same is challenged in the present proceedings.

2. Heard Dr. Samir Chakaraborty, Ld. Advocate for the appellant along with Shri Abhijit Biswas, Advocate. Revenue is represented by Shri S. Mukhopadhyay, Ld. AR.

3. The learned Advocate explained the following points:-

(i) The appellants manufactured the goods as per the specific requirements of buyers. In certain cases, the goods to be manufactured are sold at ex-works price to the buyers. In cases where the customers intend to get services like application of the product in the nature of repairing, maintenance, installation, spraying, lining etc. at their site, separate order is placed on the appellants by the said party mentioning therein, among others, the price for rendering such services. The said services, known as Application Services, are optional to the customers and no customers are obliged to avail of the Application Services from the appellant.

(ii) The goods are used by the user industry as lining material in their blast furnaces, tundishes, converters etc. Due to inherent characteristics of the functioning of furnaces, such lining gets worn out and the said furnace, tundish, etc. need to be repaired as a part of routine maintenance. During the course of such maintenance or as the case may be, construction of new

furnace, the user industries procure the said goods. The job of initial lining or lining during repairing/maintenance processes is termed as application.

(iii) In most cases, the user industries themselves undertake the process of such application after purchasing the said goods. But some of the customers get the job done by the supplier of the goods based on various techno-commercial exigencies. The activity of supply involving sale of the said goods and the activities of rendering the application services are completely independent of each other and providing Application Services has got no nexus or bearing with the sale of the said goods. The Application Services are neither carried out by reason of sale nor in connection with the sale of the said goods. It is also not a pre-condition of sale of the said goods. They are independent of each other.

(iv) In cases of composite contracts, since prices of the goods to be sold and the Application Services to be rendered are also composite, no separate price for the Application Services under the goods are ascertainable. In such cases, the appellants take the entire contractual price as transaction value and pay duty of excise accordingly.

(v) In respect of Application Services rendered under a separate contract, the appellant is paying service tax on the

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value of the taxable service rendered in accordance with Finance Act, 1994.

(vi) He submitted that the Application Services, if carried by the appellant, is in the nature of post manufacturing activity and such post clearance activities cannot be included in the assessable value of the excisable goods for the purpose of levy of duty. In this connection, he also submitted that the Board's Circular No. 139/08/2000-CX-4 dated 03/01/2001 has directed that post manufacturing and post clearances activities cannot be included in determining the assessable value.

(vii) He submitted that an identical dispute in respect of the appellant's unit at Vishakhapatnam was decided by the Bangalore Bench of the Tribunal in favour of the assessee which has been reported as *Visuvius India Vs. Commissioner of Central Excise, Visakhapatnam* 2007 (217) E.L.T. 410 (Tribunal-Bangalore). He also relied on various other case laws to support his arguments including (i) *Commissioner of Central Excise Vs. Acer India Ltd.*, 2004 (172) ELT 289 (SC), (ii) *Commissioner of Central Excise Vs. Grasim Industries Ltd.*, 2018 (360) ELT 769 (SC), (iii) *Volvo India Ltd. Vs. Commissioner of Central Excise*, 2005 (182) ELT 471 (T).

4. Ld. AR justified the impugned order. He emphasized the findings of the Adjudicating Authority to the effect that the appellant received

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"Service Charges" on the basis of "Rupees per tone" which are nothing but part of the value of the goods supplied by the appellant which have been reserved by the buyers to be released after the supplied goods had been proved to be those ordered by them. He finally submitted that the value on which duty has been paid does not represent the true intrinsic value, since the total value has been split up into material value and service charges and the latter had been excluded from the assessable value for payment of duty.

5. We have heard both sides at length and perused the record.

6. The appellant is a manufacturer of various types of refractory materials. These materials are used in lining the inside of blast furnace, converters etc. In certain contracts, they have not only supplied the goods, but also carried out "Application Services" which involve the lining of the furnace with refractory materials. The dispute is only with reference to those contracts where the application services and the value of goods have been specified separately, even though the contract is composite. The Lower Authority has taken the view that the entire contract value is to be considered for payment of Excise Duty.

7. We find that an identical dispute with reference to the appellant's factory situated at Vishakhapatnam was decided by the Bangalore Bench of Tribunal in which the Tribunal held that the application charges collected separately in service contracts, not includable in the

assessable value. The facts are identical and the observations of the Tribunal are reproduced below:-

"6. We have gone through the records of the case carefully. Three Show Cause Notices had been issued to the appellants. In respect of the first Show Cause Notice, the appellants contended that the entire amount is barred by limitation of time and the invocation of longer period is not justified. On merits also it has been strongly contended that the charges for Application Services are not includible in the assessable value of the goods supplied to the customers. We feel that it would be better first to deal with the merit of the case. The allegation in the Show Cause Notices is that the appellant has collected charges for Application Services and did not include the said charges in the assessable value thereby evaded Central Excise duty. The appellants manufacture Refractory shapes which are used in furnaces. The products are excisable. The manufacturing process is complete in the factory of the appellants. It is not the case of the Department that the manufacturing process of the excisable goods is completed at the site of the customer. On going through the records, we find that in certain cases the appellants have supplied only the goods to the buyers. In other words, it is not obligatory on the part of the buyer to entrust the work of installation Application Services to the appellants. On those cases, there is absolutely no question of adding the application charges for the simple reason that such charges do not exist at all. In certain cases, apart from purchase of goods the buyers want the appellant to undertake repair/application/maintenance, etc. in their premises. For example, in certain furnaces they would have to replace the worn out refractory material with the new goods. In such cases, the appellants enter into a composite contract which indicates actually the total value of the goods as well as the services. In those cases, the appellants had already discharged the duty liability on the entire amount because it was not possible for them to vivisect the composite contract. Hence there is no dispute on these types of contracts.

7. However, there are cases in which the appellants have entered into separate contracts for the supply of goods and separate contract for service. Even in those cases, the appellants have contended that they had paid the service tax in respect of the service contract. They have also enclosed the details of service tax payment in their Paper Book. Revenue has

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alleged that the appellants had intentionally issued separate invoices from the Calcutta Office in order to evade duty. There is no evidence to this effect. In any case, in view of the Board's circular later during the years 2001 and 2002, there is no question of addition of application charges in the assessable value of the goods, because the manufacture of the goods is already completed in the factory. Moreover, assessment should be in the form in which the goods are removed and there is no legal sanction for adding the charges incurred in the customer's premises. When the appellant is receiving certain amount for the services rendered in the buyers factory in terms of the service contracts, it cannot be said that these charges are collected in relation to the sale of the goods. Appellants have cited various case laws which are very relevant. Therefore we hold that the application charges separately collected in terms of the service contracts are not includible in the assessable value. There is no evidence to show that the appellants has suppressed the facts with an intention to evade duty. In fact, in respect of composite contract, the appellants had paid duty on entire amount on contract which includes application charge also. This fact is not disputed. Therefore there is no justification for invoking the longer period. In such circumstances, the impugned order has no merit at all. We set aside the same and allow the appeal with consequential relief."

8. By following the above decision, we find no justification for payment of differential duty by including the application charges.

9. In view of the above discussion, impugned order is set aside and appeal is allowed.

(Order pronounced in the open court on 26/02/2019.)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja