

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
REGIONAL BENCH – COURT NO.2**

Service Tax Appeal No. 281 of 2011

(Arising out of Order-in-Original No. 61/Commr./ST/KOL/2010-11 dated 30.03.2011 passed by the Commissioner of Central Excise, Kolkata-I)

Commissioner of Service Tax, Kolkata-I

(180, Shantipally, Rajdanga Main Road, 3rd Floor, Kolkata – 700 107)

...Appellant

VERSUS

M/s D.M.P. Nirman Private Limited

(58/63, Prince Anwar Shah Road, Kolkata – 700 045)

...Respondent

With

Service Tax Appeal No. 296 of 2011

(Arising out of Order-in-Original No. 61/Commr./ST/KOL/2010-11 dated 30.03.2011 passed by the Commissioner of Central Excise, Kolkata-I)

M/s D.M.P. Nirman Private Limited

(58/63, Prince Anwar Shah Road, Kolkata – 700 045)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata-I

(180, Shantipally, Rajdanga Main Road, 3rd Floor, Kolkata – 700 107)

...Respondent

APPEARANCE :

Shri A. Roy, Authorized Representative for the Appellant/Revenue
Shri Amitava Ghosh & Shri Sourav Chatterjee, both Advocates for the
Respondent/Assessee

CORAM:

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

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO...75930-75931/2023

Date of Hearing : 02.05.2023

Date of pronouncement :26.06.2023.

PER K. ANPAZHAKAN

The appellant is engaged in providing construction of complex service and commercial or industrial construction service. The Appellant entered into a contract dated 12.12.2007, with M/s Kolkata West International City(Herein after referred as KWIC) for construction of new residential complex and civil

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structures at the Kolkata West International City (phase I). As per the contract KWIC supplied materials such as cement, TMT bars etc free of cost to the Appellant. The Appellant has not added the cost of free supply materials received from M/s KWIC in the assessable value for the purpose of payment of service tax. Accordingly, as investigation was initiated by DGCEI and a Notice dated 15.02.2010 was issued to the Appellant demanding service tax of Rs.53,31,470/-along with interest and penalty. The said Notice was adjudicated by the Commissioner vide Order-in-Original dated 30.03.2011, wherein the demand of service tax was confirmed along with interest and penalty equal to the service tax was imposed under section 78 of the Finance Act, 1994. No penalty was imposed under Section 76 of the Finance Act, 1996. The Appellant has filed the present appeal against the confirmation of the demands in the impugned order. The department filed appeal against the non imposition of penalty under Section 76 of the Finance Act, 1994.

2. In their submissions, the Appellant stated that Notification No. 15/04-ST dt.10.9.04 as amended by 19/05-ST dt.7.6.05, 18/05-ST dt.7.6.05 and 1/06-ST dt.1.3.06 allows abatement of 67% from the gross amount received for the purpose of payment of service tax. Accordingly, the Appellant availed the abatement and paid service tax. The department's contention was that the Notification No.1/06-ST dt.1.3.06 provides for abatement from the gross amount charged which shall include the value of goods and materials supplied free of cost by the recipient of service. Since, the Appellant has not included the value of materials received free of cost from the service recipient, they are liable to pay the differential duty.

3. They submitted that they have paid the service tax on the bonafide belief that the value of the free supply materials were not includable in the assessable value for the purpose of payment of service tax. They stated that the department made a reference to a Circular No. DOE No.334/13/2009-TRU dt.6.7.09, issued by the Board wherein it has been clarified that the value of

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the free supply materials supplied by the recipient of the service shall be included with the gross amount charged by the provider of service. The appellant contended that the said Circular was issued only on 7.7.09 and therefore, the same cannot have the retrospective effect. They stated that the Ld. Commissioner did not consider the submissions of the appellant that the value of the free supply materials were not includable during the relevant period and also circulars/notifications cannot have retrospective effect in respect of the said issue. Accordingly, they contended that the order passed by the Ld. Commissioner cannot be maintainable in law.

4. In support of their contention that the materials supplied free of cost by the service recipient are not includable in the assessable value, they relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Service Tax and Ors Vs Bhayana Bulders (P) Ltd, reported in 2018 (010) GSTL 0118 S.C, wherein it has been held that value of goods/materials supplied free of cost by the recipient of service used for providing taxable service are not includable in the assessable value for the purpose of payment of service tax. Accordingly, they contended that the demands confirmed in the impugned order not sustainable.

5. The Ld A.R reiterated the findings of the adjudicating authority.

6. We observe that the Appellant has entered into a contract with M/s KWIC and as per the terms of the contract KWIC supplied materials such as cement, TMT bars etc. free of cost to the Appellant. The Appellant has not added the value of materials received free of cost from the service recipient M/s KWIC in the assessable value for the purpose of payment of service tax. Thus, the issue involved in the present appeals is that whether the cost of free supply materials received by the Appellant and used in providing construction of residential complex and civil structures, are includable in the assessable value or not.

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7. We find that the issue has been settled by the decision of the Hon'ble Supreme Court in the case of Commissioner of Service Tax and Ors Vs Bhayana Bulders (P) Ltd, reported in 2018 (010) GSTL 0118 S.C, wherein it has been held that value of goods/materials supplied free of cost by the recipient used for providing taxable service are not includable in the assessable value for the purpose of payment of service tax. The relevant portion of the order is reproduced below.

16. ",,,In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expend the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.

17. Faced with the aforesaid situation, the argument of the learned counsel for the Revenue was that in case the Assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 01,2005. It was argued that since

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building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the Assesses. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67% 33% and to provide a ready for formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that the entire construction project, roughly 67% comprising the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the Assessee to include the value of goods/material supplied free of cost by the service recipient as well as otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of notifications as a whole, to our mind, it is not a valid argument.

18. In the first instance, no material is produced before us to justify that aforesaid basis of formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the central Government in issuing these notifications and prescribing the service tax to be calculated the value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says '33% of the gross amount charged from any person by such commercial concern for providing the said taxable service. 'According to these notifications, service tax is to be calculated on which is 33% of the gross amount that is charged from the service recipient . Obviously, no amount is charged (and it could

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not

be)

By the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

19. Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. MANU/SC/0887/2015 : (2016) 1 SCC 170 this Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by Sub-clause (zzq) of Clause (105) read with Clause (25b) and Sub-clause (zzzh) of Clause (105) read with Clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105) (g), (zzd), (zzh) and (zzzh)] has held as under:

23. A close look at the Finance Act, 1994 would show that the fixed 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'.

42.....Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise.

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross

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amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added.

20. It is to be borne in mind that the notifications in questions are exemption notifications which have been issued Under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of Clause (105) of Section 65. Thus, exemption Under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by Sub-clause (zzq) of Clause (105) and Sub-clause (zzzh) of Clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.

21. For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue.

22. Insofar as Civil Appeal No. 3247 of 2015 is concerned, where the Assessee is Gurmethar Construction, it may additionally be noted (as pointed out by the learned Counsel for the Respondent) that the Assessee was a sole proprietorship concern of Mr. Narender Singh Atwal, who died on February 24, 2014. This is so stated in the counter affidavit filed by the Respondent on May 16, 2017 and this position has not been disputed by the Department. This appeal, in any case, has abated as well in view of the judgment of this Court in *Shabina Abraham and Ors. V. Collector of Central Excise & Customs* MANU/SC/081/2015 : (2015) 10 SCC 770.

23. As a result, all appeals stand dismissed.

8. We observe that the decision of Hon'ble Supreme Court cited above is squarely applicable in this case. Relying on the above said decision of the

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Hon'ble Supreme court, we hold that the demand of service tax along with interest and penalty confirmed in the impugned order are not sustainable. Since the demand of service tax is not sustainable, the demand of penalty under Section 76 does not arise. Accordingly, there is no merit in the department's appeal. Thus, we hold that the impugned order is liable to be set aside.

9. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant assessee i.e. Appeal No. ST/296/2011. The Appeal filed by the department is rejected i.e. Appeal No. ST/281/2011.

(Pronounced in the open Court on...23rd June, 2023...)

Sd/-

(P.K. Choudhary)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Pinaki