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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.241 of 2011
(On behalf of Appellant)

(Arising out of Order-in-Original No.Commr/BBSR I/ST-06/2011 dated 23.03.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar I)

M/s Siddhartha Engineering Limited
Plot No.1015, Nayapalli, NH-5, In front of Hotel Presidency, Bhubaneswar-751012

Appellant

VERSUS

Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar I
C.R.Building, Rajaswa Vihar, Bhubaneswar-751007

Respondent

APPERANCE :

Shri C.R.Das,Advocate for the Appellant
Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO…76302/2023

DATE OF HEARING : 26 .07.2023
DATE OF DECISION : 26 .07.2023

Per Ashok Jindal :

The appellant is in appeal against the impugned order where the demand has been confirmed under the category of erection, commissioning and installation services and commercial and industrial construction services.

2. The facts of the case are that the appellant entered into an agreement with M/s Karnataka Power Transmission Corporation Limited (KPTCL) for a turnkey project. As per the order, the work involved (i) supply of materials/equipments portion, (ii) Civil Works and (iii) Erection of materials and equipments. The agreement itself has been

vivisected into three parts according to its nature of work. The appellant discharged the liabilities of service tax on erection work at full rate as because on erection part, no supply of goods is involved. That the civil works consisting of yard lighting, foundation of cable trenches, site surfacing, transformer foundation and associated rail track, road work, culvert across the approach roads, gate work, fencing work, control room building, water supply system, oil drainage system etc. amongst others. For carrying out such civil works, materials and labours are supplied by the appellant as per the BOQ contained in civil work. For discharging service tax liabilities on the said work, the appellant availed abatement under Notification No.15/2004-ST dated 10.09.2004 and Notification No.01/2006-ST dated 01.03.2006 and paid the service tax. With regard to supply of materials, the appellant did not pay the service tax as it is suffered VAT.

2.1 The audit was conducted on 28.11.2007 for the period from 2003-04 to 2006 to 2007 and subsequently for the period from 2007-08 to 2008-09 on 18.09.2009. Thereafter, on 19.02.2010, a show-cause notice was issued to the appellant to demand service tax on the gross value of the contract along with interest and to impose penalty.

2.2 The matter was adjudicated. The demand of service tax along with interest was confirmed and penalty was also imposed.

2.3 Against the said order, the appellant is before us.

3. The ld.Counsel for the appellant, submits that the Revenue has demanded the service tax on the gross value of contract whereas the appellant has vivisected the said contract into three parts, namely, (i) supply of materials/equipments portion, (ii) Civil Works and (iii) Erection of materials and equipments. The appellant, therefore, by

vivisecting, did not pay the service tax for full amount of civil works and the appellant availed the benefit of the Notifications cited in Para 2 above and paid the service tax and for remaining parts, they have paid the service tax on full value of service of erection part. He, therefore, submits that the Revenue is seeking demand of service tax from the appellant under the category of Commercial and Industrial Construction Services/Erection, Commissioning and Installation Services on the gross value of the contract, if gross value is taken into consideration, in that circumstances, the merit classification of the works of activity undertaken by the appellant, is "Works Contract Service". Admittedly, the show-cause notice does not propose to demand of service tax under "Works Contract Service". Therefore, in the light of the decision of the Hon'ble Apex Court in the case of Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Toubro Limited reported in 2015 (39) STR 913 (SC), the appellant is not liable to pay service tax.

3.1 In alternative, he submits that for the services rendered to M/s KPTCL, the same is exempted from service tax in terms of Notification No.11/2010-ST dated 27.02.2010.

3.2 To support his contention, he relied on the decision of this Tribunal in the case of M.P.Power Transmission Company Limited Vs. Commissioner of Customs & Central Excise, Bhopal reported in 2011 (24) STR 67 (Tri.-Del.). He, therefore, prayed that the impugned order be set aside.

4. On the other hand, the ld.A.R. for the Revenue, supported the impugned order.

5. Heard both the parties and considered the submissions.

6. We find that in this case, the facts are not in dispute that they have entered into a Turnkey Project with KPTCL and vivisected the said contract into three parts, namely, (i) supply of materials/equipments portion, (ii) Civil Works and (iii) Erection of materials and equipments.

7. The appellant is paying service tax on election parts of full amount and on civil parts, after availing the abatement under Notification No.15/2004-ST dated 10.09.2004 and Notification No.01/2006-ST dated 01.03.2006. But the Revenue wants service tax from the appellant on whole of the value on the contract of Turnkey project. Therefore, it is alleged that the appellant has short paid the service tax to the Department. This contract involves supply of raw materials along with services. For the said activity, the merits classification of the service as "Works Contract Service" as held by the Hon'ble Supreme Court in the case of Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Toubro Limited reported in 2015 (39) STR 913 (SC), wherein it has been held as under :

> *"**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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41. *We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts."*

Therefore, we hold that the merits classification of the activity undertaken by the appellant is "Works Contract Service" and no demand has been raised in the show-cause notice under "Works Contract Service".

8. In that circumstances, we hold that the entire show-cause notice is not sustainable.

9. Further, we find that in respect of activity undertaken by the appellant for transmission and distribution of electricity, the same is exempted by Notification No.11/10-ST dated 27.02.2010 and in the case of M/s M.P.Power Transmission Company Limited (supra), this Tribunal has dealt this issue, wherein it has been held as under :

> *"**9.** We find that Notification No. 11/10-S.T., dated 27th February, 2010 exempts services relating to transmission and distribution of electricity provided by a person (service provider) to any other person (service receiver) from 27-2-2010. Further for the past period upto 26-2-10, Ministry has issued Notification No. 45/2010 dated 20-7-10 exempts such service invoking provision under Section 11C of the Central Excise Act read with Section 83 of the Finance Act, 1994. Hence, the impugned orders, demanding service tax on transmission and distribution of electricity are not sustainable. Accordingly, the impugned orders are set aside."*

10. In view of this, we hold that the activity undertaken by the appellant is exempted from service and no service tax is payable.

11. In view of the above discussion, we hold that the demand proposed in the show-cause notice are not sustainable. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-

(K.Anpazhakan)
Member (Technical)

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