IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 75958 of 2022

(Arising out of the Order-in-Appeal No. 145/JSR/2022 dated 14.09.2022 passed by Commissioner of CGST & Central Excise, Jamshedpur.)

M/s Ashok Kumar Pathak,
Kumara Para, AT/PO:- Noamundi, Dist. W. Singhbhum (Jharkhand),

...Appellant (s)

VERSUS

The Principal Commissioner, CGST & Central Excise, JSR,
143, New Barawari, Sakchi, Jamshedpur-831001.

. ...**Respondent(s)**

APPERANCE :
Mrs. Ritika Kurmy, Advocate for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77513/2023

DATE OF HEARING : 17.10.2023

DATE OF PRONOUNCEMENT: …21.11.2023

PER K. ANPAZHAKAN :

The instant Appeal is filed by the Appellant against the Order-in-Appeal dated 14-09-2022 passed by Ld. Commissioner (Appeals-I), Kolkata. By the impugned order, the Ld. Commissioner (Appeals) has confirmed composite service tax demand of Rs.29,45,657/- under (i) Management Maintenance or Repair Service, (ii) Erection, Commissioning or Installation Service, and (iii) Commercial or Industrial Construction Service. The Ld. Commissioner (Appeal) has confirmed entire service tax demand of Rs.29,45,657/- under the aforesaid three categories without any bifurcation and further alternatively held that the entire tax demand of Rs.29,45,657/- is leviable under "Management Maintenance or Repair Services". Aggrieved against the impugned order, the Appellant has filed this appeal.

2. Briefly stated facts of the case are that during the period under dispute i.e. 2006-07 to 2009-10 and 2010-11, the Appellant executed various contracts for their client M/s Tata Steels Ltd. against different work orders awarded by them for "Fabrication" & "Erection" "Cleaning" & "Up keep" and "Replacement" Work. Out of total 16 work orders, the Appellant collected service tax against 5 work orders and deposited the same with the Department. No service tax was collected on works executed against rest 11 work orders. This fact has been admitted in the O-I-O. The gross value of contracts and work orders executed during the material period is duly reflected in their regular books of accounts and Profit and Loss A/c for the respective periods.

3. A Show Cause Notice dated 21-10-2011 was issued to the Appellant alleging that they are engaged in providing services namely Commercial or Industrial construction service, Maintenance & Repair and Cleaning Service and demanded service tax of Rs.30,73,331/- (including E.Cess & HSE.Cess) on the taxable value of Rs.2,42,85,907/-. The Ld. Addl. Commissioner, confirmed service tax demand of Rs.29,45,657/- along with interest and penalty vide OIO dated 14.03.2013. The Ld. Commissioner (Appeal), vide Order-in-Appeal dated 02-11-2015, without going into merits rejected the appeal on the ground of limitation alone. On appeal, this Tribunal vide Order dated 09-12-2021 remanded the matter to the Ld.Commissioner (Appeals) for deciding the matter on merits without visiting the aspect of limitation. Pursuant to the direction of the Tribunal, the Ld. Commissioner (Appeals) passed the impugned Order-in-Appeal dated 14-09-2022. Aggrieved against the impugned order, the Appellant filed the present appeal on merits as well as on limitation.

4. In their grounds of appeal, the Appellant made the following submissions:

(i) The impugned order is not categorical about the classification of the service rendered by the Appellant. Under Para 10 of the impugned order, the activity of "Fabrication & Erection" and "Replacement" is classified under "Management, Maintenance or Repair Services", which is reproduced as under:

> *"10. On perusal of the appeal papers, I find that the services mentioned in the said purchase order/work order are indeed taxable services during the impugned period broadly classifiable in the category of "Management, Maintenance or Repair", "Erection, Commissioning or Installation" & "Commercial or Industrial Construction" as discussed in the preceding Para. However, the main services provided in the said purchase orders/work order are prima facie classified under the category of "Management, Maintenance or Repair" Services. Hence the Appellant is liable for payment of service tax under the category of "Management, Maintenance or Repair" Service. Held Accordingly"*

Under Para 12 of the impugned order, the activity of "Fabrication & Erection" and "Replacement" are classified under the category of Commercial or Industrial Constriction Services, Maintenance or Repair Service, Cleaning Services and Erection, Commissioning or Installation Services that too without bifurcation of tax/ taxable value under each category of Services. The relevant portion of the impugned order is reproduced below :-

> *"12. In view of the aforesaid, I find that the appellant has taken service tax registration for the services in the category "Construction Services in respect of Commercial or Industrial Building and Civil Structures", "Maintenance or Repair Services'', "Cleaning Services" and Erection, Commissioning and Installation" only and no other amendment in services has been included further. Hence, the Adjudicating authority is right in confirming the demands raised in the SCN that classified the nature of services provided by the appellant on the basis of their admission during recording of statement and purchase orders/work orders submitted by the appellant during the investigation process and the appellant is liable to pay the applicable Service tax on the amount received from M/s. Tata Steel Limited, Noamundi for the said services."*

(ii) In the impugned order, the Ld. Commissioner (Appeals) has attempted to justify the levy under the above stated categories on the ground that they are registered under the said three categories, hence, they are liable to pay service tax there under, which is illegal . In support of this contention, the Appellant relies on the decisions of the Tribunal in the case of *Jetlite (India) Ltd. Vs. CCE reported in 2011 (21) STR 119 (Tri. –Del.)*

(iii) The Appellant submits that the work of "Fabrication" and "Erection" and "Replacement" cannot be classified under "Management, Maintenance or Repair Services". The work of "Fabrication" amounts to "Manufacture" as held by the Larger Bench of the Tribunal in the case of *Mahindra & Mahindra Ltd., reported in [2005 (190) ELT 301 (Tri-L.B.)]* hence, it cannot be made taxable under Chapter V of the Finance Act, 1994.

(iv) The Appellant submits that neither the activity of "Fabrication or Erection" nor the activity of "Replacement" could be classified under Management, Maintenance or Repair Service going by strict letter of Section 65(64) read with Section 65(105) (zzq). In the case of Shrimati Tarulata Shyam Vs. CIT (1977) 3 SCC 305 the Hon'ble Supreme Court has held that in a taxing statute one has to look merely at what is normally said. There is no room for any intendment.

(v) The Ld. Commissioner (Appeal) confirmed service tax demand of Rs.29,45,657/- under the aforesaid three categories and further alternatively held in Para 10 of the impugned order that the entire tax demand of Rs.29,45,657/- is leviable under "Management, Maintenance or Repair Services"). The demand of service tax on alternate classification is illegal and arbitrary.

(vi) In the case of *Jai Shreee Shyam Borwell Co. Vs. CC reported in 2023-VIL-92-CESTAT-DEL,* the Tribunal following decision of the Division Bench of the Tribunal in the case of *M/s Shubham Electrical Vs. CST 2015-VIL-303-CSTAT-DEL-ST* as upheld by Hon'ble Delhi High Court reported in *2016(5) TMI 1055-Delhi High Court,* has held that resorting to alternate classification for confirmation of tax demand is not permissible and renders the proceeding vague and incoherent and accordingly set aside the impugned order and allowed the appeal.

(vii) The burden of proof that the service are taxable in the manner as claimed by the department is on the department. In this regard, the Appellant relies on the following decisions:

(i) *UOI Vs. Garware Nylons Ltd reported in 1996(87) E.L.T 12(S.C);*

(ii) *H.P.L. Chemical Ltd. Vs. CCE reported in 2006 (197) ELT 324 (SC).*

(viii) In the impugned order, the OIO and SCN, there is <u>no bifurcation</u> of tax demand under each category of service. Hence, the SCN, OIO and OIA are vague. *Dharambir Singh & Co. Vs. CCE, reported in 2018 (8) G.S.T.L. 440 (Tri-All.) .*

(ix) The confirmation of demand in the impugned Order under the category of "Erection Commissioning or Installment Service" is outside the scope of Show Cause Notice and hence not sustainable. In this regard the Appellant relies on the decision in the case of *CCE Vs. Shital International reported in (2011) 1 SCC 109*. It is their contention that Show Cause Notice is vague as there is no separate bifurcation under the three categories of service and how the value of services are taxable under the category of "Management, Maintenance or Repair Service", Commercial or Industrial Constriction Service and "Cleaning Service".

(x) The Order-In-Original dated 14-03-2013 is totally unreasoned as there is no finding on merit by the Ld. Addl. Commissioner as to how the purported service provided by the Appellant is taxable under the category of "Commercial or Industrial Construction Services", "Management, Maintenance or Repairs Services" and "Cleaning Services" as proposed in the Show Cause Notice. The Ld.Commissioner(Appeal) has attempted to supply reasons in OIO. It is well settled that disclosure of reasons by the appellate authority cannot be a substitute of the reasoning of the adjudicating authority. In support of this contention, the Appellant relied on *Oryx Fisheries Pvt. Ltd. Vs. UOI, [2011 (266) E.L.T 422 (S.C).*

(xi) The demand in the instant case relates to the period 2006-07 to 2010-11 whereas the Show Cause Notice was issued on 21-10-2011, therefore, demand up to 31-03-2010 is beyond normal period of limitation of one year.

5. The Ld. A.R. reiterated the findings in the impugned order.

6. Heard both sides and perused the appeal documents.

7. We observe that in the impugned order the Ld. Commissioner (Appeal) has confirmed service tax demand of Rs.29,45,657/- under "Management, Maintenance or Repair Service", "Erection Commissioning or Installation Service", "Commercial or Industrial Construction Service" without any bifurcation under each category of services and without stating which contract is taxable under which category of service. From the impugned order, we find that *the services mentioned in the said purchase order/work order has been held to be taxable broadly under the category of "Management, Maintenance or Repair", "Erection, Commissioning or Installation" & "Commercial or Industrial Construction" . However, the main services provided in the said purchase orders/work order are held as prima facie classifiable under the category of "Management, Maintenance or Repair" Services. Finally, it has been concluded that the Appellant is liable for payment of service tax under the category of "Management, Maintenance or Repair" Service. Thus, we observe that the finding in the impugned order is not very specific about the classification of the service rendered by the Appellant.* We also observe that the Show Cause Notice is very vague as there is no separate bifurcation under the three categories of service and there is no finding in the Order-in-Original as to how the value of services are taxable under the category of "Management, Maintenance or Repair Service", Commercial or Industrial Constriction Service and "Cleaning Service".

8. Regarding the nature of service rendered by the Appellant, we observe that all the work orders in the instant case were awarded by M/s Tata Steel Ltd, Nuamundi. The Appellant executed various contracts for M/s Tata Steels Ltd. against different work orders awarded by them for "Fabrication" & "Erection" "Cleaning" & "Up keep" and "Replacement" Works. The department demanded service tax for the

works undertaken by them under the category of "Management, Maintenance or Repair Service. The Appellant submits that the department is demanding tax only under the category of 'Management, maintenance or Repair Service' not any other category of service, hence, they are not liable to pay tax under any other category of service. They have under taken the works of panel replacement, steel fabrication and erection jobs. The contention of the Appellant is that the work of "Replacement" and "Repair" are different, distinct and separate. In support of their contention, they cited the case of *CIT Vs. Madras Cement Ltd reported in [2002] 295 ITR 243(Mad) (Page 5)* the Hon'ble Madras High Court, wherein it has been held that:

> *"Repair" implies the existence of a thing which has malfunctioned and can be set right by effecting repairs which may involve replacement of some parts, thereby making the thing as efficient as it was before or as close to it as possible. After repair the thing to which repair was carried out continues to be available for use. Replacement is different from repair. Replacement implies the removal or discarding of the thing that was in use, by a different or new thing capable of performing the same function with the same, lesser or greater efficiency…………"*

8.1. The Appellant submits that "Replacement" in respect of Plant(immovable property) of M/s Tata Steel Ltd., can not fall under Section 65(64)(b) which makes taxable only activities of maintenance or repair of movable or immovable properties and not replacement. Clause (c) of Section 65(64) deals with "goods" only and not immovable property(plant) of M/s Tata Steel Ltd. Section 65(64)(a) deals "management" and not "replacement".

8.2. We find merit in the submission of the Appellant. The work of "Fabrication" undertaken by the Appellant amounts to "Manufacture" as held by the Larger Bench of the Tribunal in the case of *Mahindra & Mahindra Ltd., reported in [2005 (190) ELT 301 (Tri-L.B.)]* and hence, it cannot be made taxable under Chapter V of the Finance Act, 1994. Accordingly, we observe that the 'Repalcement' works and fabrication of immovable property work undertaken by the Appellant would not fall under the category of ' "Management, Maintenance or Repair Service'.

We also find that *Circular No.B1/6/2005-TRU Dated 27-07-2005,* clarifies that "maintenance" is to keep a machine, building etc in a good condition by periodically checking and service or repairing, while "repair" is a one time activity, "maintenance" is a continuous process of which repairing may be incidental and ancillary. In this case, we observe that the Appellant has not undertaken any periodical maintenance. They have undertaken repair works as per work orders, as one time activity, which were not liable to service tax under the category of 'Management , maintenance or repair service' during the relevant period. Thus, we hold that the demand of service tax under this category is not sustainable.

8.3. We observe that the work of "Removal of Scrap & Residual Material from Processing Plant" is part of manufacturing process. The work of "Cleaning of Scrap & Residual material" is part of process of "manufacture" of M/s Tata Steel Ltd. In the impugned order, the demand on this account has been confirmed under 'Management, Maintenance or Repair' service. WE observe that the Appellant has paid service tax on the activities which did not amount to manufacture. For Example, the work of "Removal of silt from Drain & Tunnel Cleaning Work" , the work of "Cleaning, Upkeep and removal of Silt" are not related to manufacture process, accordingly, service tax has been collected and deposited by the Appellant and the subject matter is not in dispute in the instant case. Thus, we observe that out of total 16 work orders, the Appellant has rightly collected service tax against 5 work orders where service tax was liable to be paid and deposited the same with the Department. No service tax was collected on works executed against rest 11 work orders, as the same was not liable to service tax under the category of 'Management, Maintenance or repair Service' as demanded in the impugned order.

8.4. Accordingly, we hold that the activity undertaken by the Appellant cannot be classified under the category of ' Management, maintenance or Repair service' and hence the demand of service tax confirmed in the impugned order under the category of "Management, Maintenance or Repair Service, is not sustainable. Since the demand itself is not sustainable, the question of demanding interest and imposing penalty does not arise.

9. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on…21.11.2023…)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar