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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.544 of 2011
(On behalf of Appellant)

(Arising out of Order-in-Appeal No.291/ST/Kol/2011 dated 13.09.2011 passed by Commissioner (Appeals) of Central Excise, Kolkata)

M/s Macmet India Limited
10B, O.C.Ganguly Sarani, Kolkata-700020

Appellant

VERSUS

Commissioner of Service Tax, Kolkata
180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :
Mr.Joydeb Bhattacharya, Advocate for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER NO.75271/2024

DATE OF HEARING : 19 .02.2024
DATE OF DECISION : 19 .02.2024

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the demand of service tax has been confirmed against the appellant under the category of "Erection, Commissioning and Installation Service".

2. The facts of the case are that the appellant was engaged in the activities of fabrication of structures, erection, commissioning and installation to the plant and machineries, equipment structures etc., which were included in the value of erection, commissioning and installation services w.e.f.01.05.2006. As the appellant was not paying service tax on their activities of fabrication of works, it was alleged that the appellant deliberately is not paying service tax, therefore, a show-cause notice dated 03.11.2009 was issued to the appellant to demand

service tax under the category of "Erection, Commissioning and Installation Service" for the period from May, 2006 to March, 2008.

3. The matter was adjudicated and demand was dropped against the appellant holding that the activity of fabrication of structures of raw materials at the project site does not come under the purview of Erection, Commissioning and Installation Service. It was held that it is the activity of manufacture and therefore, no service tax is payable. The said order was challenged by the Revenue before the ld.Commissioner (Appeals), who set aside the adjudication order. Against the said order, the appellant is before us.

4. The ld.Counsel for the appellant submits that the appellant has discharged the service tax on service portion of their activity, but had claimed the exemption from excise duty under Notification No.3/2005-CE dated 24.02.2005. Therefore, they have paid whole of the amount. It is submitted that the dispute is regarding levy of service tax on fabrication part of the contract . It is also submitted that initially, the adjudicating authority dropped the demand, whereas the Revenue filed an appeal against the said order before the ld.Commissioner (Appeals). It is submitted that even though the entire contract was treated as a service contract including the value of fabrication of structure, they are liable to pay service tax at the rate of 33% of the total value of the contract as they are entitled to abatement of 67% against the supply part of the materials and they have paid service tax more than that. Therefore, the impugned order is to be set aside.

5. On the other hand, the ld.A.R. for the Revenue, reiterated the findings of the impugned order.

6. Heard both sides and perused the records placed before us.

7. We find that it is not in dispute by the Revenue that the appellant has taken the activities of erection, commissioning and installation services along with materials. Therefore, the merits classification of the above services under "Works Contract Service" and no demand is raised against the appellant under "Works Contract Service". Therefore, following the decision of the Hon'ble Apex Court in the case of Larsen & Tourbro Limited reported in 2015 (39) STR 913 (S.C.), wherein the Hon'ble Apex Court has observed 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."*

8. We hold that the merits classification of the impugned service is under "Works Contract Service" , if it is presumed that the appellant is liable to pay service tax on "Works Contract Service", then the appellant is required to pay service tax on 33% on the value of contract executed by them and the appellant has paid the service tax more than that.

9. In that circumstances, no demand is sustainable against the appellant. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any.

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

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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