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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 70778 of 2013

(Arising out of Order-in-Original No. COMMR/B-I/ST-42/2012 dated 29.03.2013 (issued on 08.04.2013) passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. Utkal Engineering Works **: Appellant**
Danagadi, Jajpur Road,
District: Jajpur, Orissa – 755 026

VERSUS

Commissioner of Central Excise, Customs & Service Tax **: Respondent**
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007

APPEARANCE:

Smt. Shreya Mundhra, Advocate for the Appellant

Shri S.S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75899 / 2024

DATE OF HEARING / DECISION: 07.05.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the impugned Order-in-Original No. COMMR/B-I/ST-42/2012 dated 29.03.2013 (issued on 08.04.2013) passed by the Commissioner of Central Excise, Bhubaneswar-I Commissionerate. In the impugned order, the Ld. Commissioner has confirmed the demand of service tax of Rs.80,93,242/- along with interest and imposed equal amount of tax as penalty. He also ordered appropriation of Rs.13,05,890/- already paid by the appellant.

2. The demand of service tax confirmed under various categories of services is summarized below:

Sl. No.	Particulars	Service Tax amount (approx.)
i.	Treating the processing and manufacturing activity as a taxable service under the category of manpower supply	Rs. 53.54 lakhs
ii.	Not treating the gross receipt under (i) as cum-tax amount	Rs. 10.77 lakhs
iii.	Disallowing rectification of accounting mistake	Rs. 10.65 lakhs
iv.	Levy of service tax on the services rendered by the Appellant as a sub-contractor and other miscellaneous issues	Rs. 5.97 lakhs
Total		**Rs. 80.93 lakhs**

3. The brief facts of the case are that the Appellant is engaged in the businesses such as 'management, maintenance or repair service' and 'commercial or industrial construction'. The Appellant also undertakes processing of raw material and manufacture of finished excisable goods which are cleared on payment of excise duty. The audit of the Appellant for the Financial Year 2004-05 to the Financial Year 2008-09 was conducted in February 2010.

3.1. Subsequently, in March 2011, investigation proceedings were initiated against the Appellant and on completion of the investigation, a Show Cause Notice dated 20.10.2011 was issued to the Appellant by invoking extended period of limitation and alleging undervaluation of the taxable services and consequent short payment of Service tax.

3.2. The Notice was adjudicated by the Ld. Commissioner vide the impugned Order dated 08.04.2013, wherein he has confirmed the demands raised in the Notice along with interest and penalty. Aggrieved against the impugned order, the appellant has filed this appeal.

4. Regarding the demand of service tax of Rs. 53.54 lakhs, by treating the processing and manufacturing activity as a taxable service under the category of manpower supply, the appellant submits that, the services provided by them to M/s. Jindal Stainless Limited are not classifiable as manpower recruitment and supply service; a perusal of the job orders along with the Flow Chart would demonstrate that nowhere in the agreement it has been mentioned that the contract is meant for supply of manpower. It is submitted that in a manpower supply contract, the supplied manpower would be working under the direct control and supervision of M/s. Jindal Stainless Limited; in the present contracts, it has been specifically mentioned that the appellant has to perform the operation of the plant and machineries for processing of raw materials and manufacture of the resultant excisable product i.e. Ferro Chrome and Ferro Manganese; the predominant purpose as per the Work Orders/contracts is to process the raw materials involving different activities at multiple stages. It is thus submitted by the appellant that the labour force deployed by the Appellant worked under the direct control and supervision of the Appellant and not otherwise and it was the responsibility of the Appellant under the contract to operate the plant and machineries for manufacture finished product out of the raw materials belonging to M/s. Jindal Stainless

Limited; further, the consideration paid to the Appellant was on tonnage basis and not otherwise .

4.1. The appellant further submits that alternatively, the activity performed by them can be categorized as 'business auxiliary service' for the processing / manufacturing activity carried out by M/s. Jindal Stainless Limited, which is outside the purview of Service tax in terms of Notification No. 8/2005-ST dated 01.03.2005.

4.1.1 Thus, the appellant submits that the activity performed by them does not qualify as "manpower recruitment or supply agency service" and hence the demand of service tax confirmed on this count is not sustainable.

4.2. Regarding the demand of Rs. 10.77 lakhs, the appellant submits that this demand has arisen due to non-consideration of the gross amount received as inclusive of tax. The appellant submits that when the activities of processing of raw material and manufacture of finished excisable goods are itself outside the levy of Service tax, the question of levy and collection of Service tax on those activities does not arise; accordingly, the demand of service tax confirmed without extending cum-tax benefit would also not survive.

4.4. Regarding the demand of service tax of Rs. 10.65 lakhs, the appellant submits that this demand has arisen due to disallowance of rectification of accounting mistake. The Appellant submits that the figure of Rs. 4,82,78,070/- considered by the Departmental authorities is incorrect inasmuch as certain receipts were considered twice by the auditors - M/s. Parida Mohanty & Associates; the said figure was examined by M/s. Srikanta & Associates, Chartered Accountants with reference to TDS certificates in Form 26AS, which revealed that the actual amounts received was Rs. 3,93,23,706/-; that, however, the *bona fide* mistake of human error in accounting figures has not been considered by the ld. adjudicating authority. The appellant also submits that the subsequent certificate of the Chartered Accountant has not been considered and the demand of service tax has been confirmed by taking into account the wrong figures. Accordingly, they submit that the demand of Rs.10.65 lakhs confirmed in the impugned order is liable to be set aside.

4.5. Regarding the demand of service tax of Rs. 5.97 lakhs, on the services rendered by the Appellant as a sub-contractor and other miscellaneous issues, they submit that the Board vide Circular No. 96/7/2007-ST dated 23-8-2007 clarified that the services provided by sub-contractors are liable to service tax even if the main contractor discharge service tax on the gross value. However, it is submitted that the above circular being oppressive in nature for the sub-contractor, would only have prospective effect, as decided by the Hon'ble Supreme Court in the case of *Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur [2007 (208) E.L.T. 321 (S.C.)].* Accordingly, they contended that the sub-contractor is also liable to pay service tax while rendering service to the main contractor, but only with effect from 23.08.2007. Reliance in this regard is placed on the decision of Tribunal Kolkata in the case of *DTM Construction India Ltd. v. Commissioner [2024 (16) Centax 371 (Tri.-Cal.)].* Accordingly, they contended that the demand confirmed on this count in the impugned order for the period prior to 23.08.2007 is liable to be set aside.

5. The Ld. Authorized Representative for the respondent reiterated the findings in the impugned order.

6. Heard both sides and perused the appeal documents.

7. We observe that out of the total demand of Rs.80.93 lakhs confirmed in the impugned order, Rs. 53.54 lakhs pertained to demand of service tax under the category of 'manpower recruitment or supply agency service'. The appellant submitted that they have undertaken the activity of 'processing and manufacturing' for the client viz. M/s. Jindal Stainless Steel Ltd., but the Department has considered these activities as a taxable service under the category of manpower supply service and confirmed the demand of service tax.

7.1. In order to ascertain the nature of activity performed by the appellant, we have perused the Work Order dated 28.07.2007 received by the Appellant from M/s. Jindal Stainless Steel Ltd. The subject of the Work Order reads as "*Contract of Service for Raw Material Feeding to Briquietting Plant*". The 'Scope of Work' assigned to the appellant as per the Work Order (page 89 of the appeal memorandum) is furnished below: -

> ***"SCOPE OF WORK***
>
> ***The contractor is responsible for the following works***

1. Shifting and feeding of chrome ore in the hoppers provided near chrome ore storage yard. by Volvo or pay loader.

2. filling and maintaining position all the bins in Daybin-2

4. The contractor shall take all safety measures during operation of the plant and all equipments should be cleaned on day to day basis.

5. The contractor shall ensure that the man power engaged by him are adequately experienced enough to operate and verify the conditions all the equipments of the above plant.

6. The contractor shall ensure total house keeping of the plant to the satisfaction of JSL Engineers.

7. The contractor shall engage his people for collecting of samples of chrome ore, from different points and taking those to laboratory for testing.

8. The contractor shall ensure that the tools taken from mechanical store is returned at the end of the work.

9. The contractor shall ensure that the plant will not stop in any shift for absence of his people.

10. The contractor shall be responsible for three shift operation of the plant.

11. The contractor shall ensure that the people deployed by him will operate the plant from DCS and local which ever is required.

12. The contractor shall inform the stock position of chrome ore in sufficient advance to JSL Engineers.

13. All parameters of operation are to be maintained by the peoples engaged by the contractor.

14. The contractor shall ensure that all equipments are working properly.

15. All safety appliances will be supplied by the contractor

16 Any break down occurs, the same should be informed immediately to concern JSL person.

17. Any shut down requires, the same will be taken after discussion with JSL Engineers

18. It is the responsible of contractor to see people are reliving on man to man basis at the end of the shift.

19. Any other job related to operation of chrome ore feeding circuit directed by JSL Executive is in the scope of the contractor."

7.2. From the Scope of Work reproduced above, we observe that the appellant has to perform the operation of the plant and machineries for processing of raw materials and manufacture of the resultant excisable product i.e. Ferro Chrome and Ferro Manganese. The labour force deployed by the Appellant worked under the direct control and supervision of the Appellant and not under M/s Jindal Steel Limited (JSL). It is very clear that the responsibility of the Appellant under the contract is to operate the plant and machineries for manufacture finished product out of the raw materials belonging to M/s. Jindal Stainless Limited. Thus, we find that the activity performed by the appellant does not qualify as "manpower recruitment or supply agency service".

7.3. Under this contract, we observe that the appellant has been paid @ Rs.5.50 per MT. Thus, we observe that the consideration paid to the Appellant was on tonnage basis and not on the basis of manpower deployed**.**

7.4. In view of the Terms of the contract and the Scope of Work assigned to the appellant in the Work Order, we hold that the activity undertaken by the appellant is not "manpower recruitment or supply agency service". We observe that the activity performed by the appellant can be categorized as business auxiliary service for the processing / manufacturing of goods for M/s. Jindal Stainless Limited, which is outside the purview of Service tax in terms of Notification No. 8/2005-ST dated 01.03.2005. Accordingly, we hold that the demand of service tax confirmed in the impugned order under the category of "manpower recruitment or supply agency service" is not sustainable and hence, we set aside the same.

8. We observe that the demand of Rs. 10.77 lakhs has arisen due to non-consideration of the gross amount received as inclusive of tax. Since the activities undertaken by the appellant have been held to be not liable for service tax, the question of levy and collection of Service tax on the gross amount as inclusive of service tax does not arise. Accordingly, the demand of service tax confirmed without extending cum-tax benefit also would not survive. Hence, we set aside the demand of Rs.10.77 Lakhs confirmed in the impugned order on this count.

9. Regarding the demand of service tax of Rs. 10.65 lakhs, we observe that this demand has arisen due to disallowance of rectification of

accounting mistake. The Appellant submits that the figure of Rs. 4,82,78,070/- considered by the Departmental authorities is incorrect in as much as certain receipts were considered twice by the auditors - M/s. Parida Mohanty & Associates. The said figure was examined by M/s. Srikanta & Associates, Chartered Accountants with reference to TDS certificates in Form 26AS which revealed that the actual amounts received was Rs. 3,93,23,706/-.

9.1. We find that at paragraph 4.6 of the impugned order, the ld. adjudicating authority has discussed the issue and given his findings, which is reproduced below: -

> *"4.6. In the above respect, I observe that the disputed income figure of Rs.4,82,78,070/- for the year 2009-10 was taken as gross receipts by the SCN only from the Balance Sheet and P&L A/c. of the noticee for the said year prepared by Parida Mohanty & Associates. The figures were certified by Sri Ajay Kumar Nayak, Chattered Accountant of the above firm. In the SCN, vide para 7.1, while quantifying the service tax liability of the noticee, the income figures for the rest of the period i.e. F.Y.2006-07, 2007-08 & 2008-09 were also taken from the P&L A/c. prepared by Parida Mohanty & Associates. I observe that the noticee has not disputed to the income figures of F.Y.2006-07, 2007-08 & 2008-09 whereas it has disputed the figures of 2009-10. The impugned P&L A/cs. have been prepared by the Chattered Accountants on the*

> *basis of the documents submitted by the noticee and accordingly, the receipt of Rs. 4,82,78,070/- during 2009-10 has been calculated and reflected in the P&L by Parida Mohanty & Associates. Similarly, the figure of Rs.3,93,23,706/- has been certified as income for 2009-10 by Srikanta & Associates basing on whatever information on transaction disclosed by the noticee before them through Bank Statements & TDS Certificates. The certificate from Srikanta & Associates does not certify non-concealment of any transaction information by the noticee. Secondly, Srikanta & Associates have not specifically clarified with evidence as to on what account the differential amount Rs.89,54,364/- was incorrectly shown in the P&L prepared by Parida Mohanty & Associates. Due to the above reasons I do not find the pleading & evidence of the noticee towards reduction of the gross receipt figure from Rs.4,82,78,070/- to Rs.3,93,23,706/- in 09-10, to be logical or tenable and accordingly I reject the same."*

9.2. From the above findings of the ld. adjudicating authority, we observe that M/s. Srikanta & Associates have not specifically clarified with evidence as to on what account the differential amount of Rs.89,54,364/- was incorrectly shown in the P&L account prepared by M/s. Parida Mohanty & Associates. We observe that the appellant need to clarify this point and for this purpose, the issue is remanded back to the adjudicating authority. The appellant should submit all the documentary evidence available with them within a period of one month from the date of receipt of this Order. Thereafter, the adjudicating authority shall decide the issue within a period of three months, after giving opportunity to the appellant to clarify the issue.

10. Regarding the demand of service tax of Rs. 5.97 lakhs, on the services rendered by the Appellant as a sub-contractor and other miscellaneous issues, we observe that Board vide Circular No. 96/7/2007-ST dated 23.08.2007 clarified that for the services provided, sub-contractors are liable to pay service tax even if the main contractor discharges service tax on the gross value. However, we observe that the said Circular, being oppressive in nature for the sub-contractor, could only have prospective effect. This view has been held by the Hon'ble Supreme Court in the case of ***Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur [2007 (208) E.L.T. 321 (S.C.)].*** The same view has been taken by this Tribunal also in the case of ***DTM Construction India Ltd. v. Commissioner [2024 (16) Centax 371 (Tri.-Cal.)].***

10.1. In view of the above, we hold that the appellant, as a sub-contractor, is liable to pay service tax only with effect from 23.08.2007. Accordingly, the demand confirmed in the impugned Order on this count is restricted to the period after 23.08.2007 and the demand, if any, for the period prior to 23.08.2007, is set aside.

10.2. We also observe that the appellant has rendered the services of erection, commissioning and installation and claimed abatement of 67% as provided under Notification No. 01/2006-ST dated 01.03.2006, but the appellant has not furnished any break up figures towards this service rendered. Also, no evidence has been submitted regarding supply of materials for claiming the abatement as provided under Notification No. 01/2006-ST. Therefore, for the purpose of quantification of duty liability as a sub-contractor and under erection, commissioning and installation, the matter is remanded back to the adjudicating authority.

11. Regarding the penalty imposed on the appellant, since we have already set aside the demands of service tax of Rs.53.54 lakhs and Rs.10.77 lakhs, demanding interest or penalty on these amounts does not arise.

11.1. Regarding the demand of service tax of Rs.10.65 lakhs, we observe that the demand pertains to accounting error. There is no suppression of fact with intention to evade payment of tax established on this count. Accordingly, we hold that no penalty imposable on the appellant on this amount and accordingly, we set aside the penalty imposed in this regard on the appellant in the impugned order.

11.2. Regarding the demand of Rs.5.97 lakhs, we have set aside the demand for the period prior to 23.08.2007. Hence, we hold that no penalty is imposable with respect to the demand, if any, for the period after 23.08.2007, as the issue involved is interpretational in nature and no *mens rea* with intention to evade payment of tax has been established.

12. In view of the above discussions, we pass the following order:

(i) The demand of service tax of Rs.53.54 lakhs confirmed in the impugned order under the category of "manpower recruitment or supply agency service" is set aside.

(ii) The demand of service tax of Rs. 10.77 lakhs confirmed without extending cum-tax benefit is set aside.

(iii) Regarding the demand of service tax of Rs. 10.65 lakhs, the issue is remanded back to the adjudicating authority. The appellant should submit all the documentary evidence available with them within a period of one month from the date of receipt of this Order. Thereafter, the adjudicating authority shall decide the issue within a period of three months, after giving opportunity to the appellant to clarify the issue.

(iv) The demand of service tax of Rs. 5.97 lakhs confirmed in the impugned order is restricted for the period after 23.08.2007 and the demand, if any, for the period prior to 23.08.2007, is set aside. However, for the purpose of quantification of duty liability as a sub-contractor and under erection, commissioning and installation, the matter is remanded back to the adjudicating authority.

(v) The penalty imposed on the appellant in the impugned order is set aside.

13. The appeal filed by the appellant is disposed on the above terms, with consequential relief, if any, as per law.

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

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd