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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 78645 of 2018

(Arising out of Order-in-Original No. 07/Commr/CGST/Haldia/Adjn/18 dated 09.07.2018 passed by the Commissioner of C.G.S.T. and Central Excise, Haldia Commissionerate, 15/1, Strand Road, M.S. Building, Custom House, Kolkata – 700 001)

M/s.Novel Engineering & Technical Works Pvt. Ltd. : Appellant
Gateway Guest House, Santipur,
Mecheda, District: Purba Medinipur,
West Bengal – 721 137

VERSUS

Commissioner of C.G.S.T. and Central Excise : Respondent
Haldia Commissionerate,
15/1, Strand Road, M.S. Building, Custom House,
Kolkata – 700 001

AND

Service Tax Appeal No. 79226 of 2018

(Arising out of Order-in-Original No. 07/Commr/CGST/Haldia/Adjn/18 dated 09.07.2018 passed by the Commissioner of C.G.S.T. and Central Excise, Haldia Commissionerate, 15/1, Strand Road, M.S. Building, Custom House, Kolkata – 700 001)

Commissioner of C.G.S.T. and Central Excise : Appellant
Haldia Commissionerate,
15/1, Strand Road, M.S. Building, Custom House,
Kolkata – 700 001

VERSUS

M/s. Novel Engineering & Technical Works Pvt. Ltd. : Respondent
Gateway Guest House, Santipur,
Mecheda, District: Purba Medinipur,
West Bengal – 721 137

APPEARANCE:
Shri Aditya Dutta and Smt. Mitali Barpujari, both Advocates for the Assessee

Shri J. Chattopadhyay, Authorized Representative for the Revenue

CORAM:

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

FINAL ORDER NOs. 75901-75902 / 2024

DATE OF HEARING: 06.05.2024

DATE OF DECISION: 10.05.2024

Order :[PER SHRI K. ANPAZHAKAN]

M/s. Novel Engineering and Technical Works Pvt. Ltd (assessee/appellant) are engaged in rendering the services of Commercial and Industrial Construction Service. Works Contract Service, Site Preparation Service, Business Auxiliary Service etc. They provided service to M/s. West Bengal Power Development Corporation Ltd ('WBPDCL' in short) and to M/s. Haldia Energy Ltd. ('HEL' in short) for construction/renovation of railway lines, but not paid service tax. Accordingly, officers of the DGCEI initiated investigation against the assessee and as a result of the investigation issued a Show Cause Notice dated 18.09.2017 demanding service tax of Rs.5,67,98,134/- (including Cess) along with interest and penalty.

2. The Show Cause Notice made the following allegations:-

(i) The laying of railway lines/allied and incidental work done for HEL and WBPDCL are for private usage and hence not exempted under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012.

(ii) Other contracts awarded by HEL were for site formation, supply of manpower etc, no exemption under Notification No. 25/2012-ST dated 20.03.2012.

(iii) Value of free issue materials were not segregated year-wise hence should form part of taxable value.

3. The Notice was adjudicated by Ld. Commissioner vide impugned Order-in-Original dated 09.07.2018, wherein the Ld. Commissioner has confirmed the service tax of Rs.3,99,33,158/- along with interest

and imposed equal amount of tax as penalty. The Ld. adjudicating authority dropped the remaining demand of Rs.1,68,64,976/- made in the Notice. Aggrieved against the confirmation of demands, the assessee filed appeal before this Tribunal. Revenue also filed appeal against dropping of the demand of Rs.1,68,64,976/- in the impugned order. As both the appeals emanate from the same order, both are taken up together for decision by a common order.

4. Regarding confirmation of the demand of Rs. 3,99,33,158/-, the assessee submits that:

(a) Service tax of **Rs. 3,96,05,317/-** is related to Works Contract Services including sub-contracts in respect of 'Railways'; in respect of M/s. Haldia Energy Limited, the Railway works are related to Private party and in respect of M/s. WBPDCL, it is Government Railway. The said services are exempted from payment of service tax under Notification No. 25/2012-ST dated 20.06.2012. In support of their contention, they relied on the decision in the case of *Mahendra Kumar Anchalia v Commissioner of CGST&CX, Kolkata vide Final Order Nos.77170-77171/2023 dated 26.09.2023 in Service Tax Appeal No. 76030 of 2019 & anor. (CESTAT, Kolkata).*

(b) In respect of the remaining demand of Service Tax of **Rs. 3,27,841/-** confirmed in the impugned order, the assessee-appellant submits that the demand confirmed in this case is related to Work Order No. HEL:WO:1219 dated 16th May, 2015. The said work order is for 'Transportation and Dumping of Ash Silo to Specified Areas Inside the Plant'. The said activity is an essential part of the production process and the same is not a 'service activity'. In support of this contention, they relied on the decision in the case of *Marshall Corporation Ltd. v Commissioner of C.G.S.T. and C.Ex., Kolkata [Final Order No.75650/2023 dated 02.06.2023 in Service Tax Appeal No. 176 of 2010 – CESTAT, Kolkata].* It is further submitted that in respect of this work order, they collected service tax under the category of 'works contract service' after availing abatement @60%, amounting to Rs.1,78,980/- (including Cess) vide Bill dated 23.05.2015. The service tax collected has been deposited in the Government account and indicated in the return filed by them in the month of May 2015. However, later they realized that this activity was not liable to service tax. Accordingly, they submitted that the remaining demand confirmed on this count is not liable to be paid, as the service rendered are not liable to service tax.

4.1. Regarding the dropping of the demand, the assessee submits that out of the dropped demand of Rs.1,68,64,976/-, Rs. 1,32,99,117/- is related to addition of free issue materials in the assessable value for the purpose of demanding service tax; the ld. adjudicating authority dropped the demand by relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Service Tax vs Bhayana Builders Pvt. Ltd. reported in 2018 (10) GSTL 118 (SC),* wherein it has been held that the value of free supply materials are not includable in the gross value for the purpose of demanding service tax. They submit that the remaining demand of Rs. 35,65,859/- has been dropped as per Circular 123/5/2010-TRU dated 24th May,2010 as the service undertaken by them would fall under Works Contact Service, being ancillary to main Work Order; accordingly, the ld. adjudicating authority has held that the assessee is eligible for 60% abatement as provided under Rule 2A(ii) of Service Tax Determination of Value Rules) 2006.

4.2. In view of the above submissions, the assessee-appellant prayed for upholding the dropping of the demand by the ld. adjudicating authority.

5. The Ld. Authorized Representative for the Revenue submits that the laying of Railway lines/allied and incidental work done for HEL and WBPDCL does not qualify as 'Original Work' as defined in Explanation 1 to Rule 2A(ii) of the of (Service Tax Determination of Value Rules) 2006 and hence not exempted under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012. Accordingly, he supported the confirmation of the demand in the impugned order.

5.1. Regarding dropping of the demand by the Ld. Commissioner, the Ld. Departmental Representative submits that the activity undertaken by the assessee cannot be considered as 'Works Contract Service' and hence not eligible for 60% abatement as provided under Rule 2A(ii) of Service Tax Determination of Value Rules) 2006. Accordingly, the Ld. Authorized Representative for the Revenue prayed for setting aside the dropping of the demands in the impugned order.

6. Heard both sides and perused the appeal documents.

7. Regarding confirmation of the demand of Rs. 3,99,33,158/-, we observe that the confirmed Service tax of **Rs. 3,96,05,317/-** is related to Works Contract Services rendered by the appellant/assessee in respect of laying of 'Railways lines' to M/s. Haldia Energy Limited and M/s. WBPDCL. We observe that the service rendered in connection with laying of Railway lines are exempted from payment of service tax under Notification No. 25/2012-ST dated 20.06.2012. This view has been taken by this Tribunal in the case of *Mahendra Kumar Anchalia v Commissioner of CGST&CX, Kolkata [Final Order Nos.77170-77171/2023 dated 26.09.2023 in Service Tax Appeal No. 76030 of 2019 & anor. (CESTAT, Kolkata)].*

7.1. In this regard, the Ld. Authorized Representative for the Revenue contended that the benefit the exemption under Notification No. 25/2012 is applicable only for the 'Original Work' rendered to Railways. A perusal of the work orders shows that many of the works undertaken by the assessee are modification and renovation of existing Railway lines which cannot be considered as 'Original Works'. Accordingly, the Ld. Authorized Representative submitted that the assessee is not eligible for the benefit under the Notification No. 25/2012-ST dated 20.06.2012.

7.2. We have perused the Work Orders executed by the assessee. It reveals that some of the work executed are construction of new Railway lines and some are modification/ renovation of the existing Railway lines. The availability of the benefit of the Notification No. 25/2012-ST dated 20.06.2012 to new Railway lines laid for the Government is not in dispute.

In the case of *Mahendra Kumar Anchalia (supra)*, this Tribunal has held that the exemption provided under Notification No. 25/2012-ST dated 20.06.2012 is available to Railway lines laid at private companies also.

8. Thus, the issue to be decided further is whether the exemption provided under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012 is available to modification/renovation work undertaken for existing Railway lines.

8.1. The contention of the Revenue is that the modification and renovation of existing Railway lines cannot be considered as 'Original Works' and hence the services rendered are not eligible for the exemption provided under Notification No. 25/2012-ST dated 20.06.2012.

8.2. We have gone through benefit of exemption provided under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012, which provides as under:

> *"14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-*
>
> *(a) an airport, port or railways, including monorail or metro;*
> *(b) a single residential unit otherwise than as a part of a residential complex;*
> *(c) low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;*
> *(d) post-harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or*
> *(e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;"*

8.3. For the purpose of valuation, we have perused the definition of 'Original Work' as defined in Explanation 1 to Rule 2A(ii) of the of (Service Tax Determination of Value Rules) 2006. For the sake of ready reference, the said definition is reproduced below: -

> *"Original Work" means*
>
> *(i) all new constructions;*
>
> *(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;*
>
> *(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise.*

8.3.1. From the above definition, we observe that 'Original Work' not only includes laying of new Railway lines, but also include all types of alterations to abandoned or damaged structures. We have perused one of the work order No.RITES/RPO-KOL/WPDCL-STPS/Reno-P.Way/PKC-C/2014/1270 issued by RITES for renovation work, which reads as 'Renovation & modification of existing Railway Track inside & outside plant yard (excluding MGR Track) of Santaldih Thermal Power Station (STPS) of WBPDCL, Dist. Purulia, West Bengal". We observe that this work squarely falls within the ambit of part (ii) of the definition of 'Original Work' which covers "all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable". Accordingly, we hold that the work contract service rendered by the assessee-appellant relating to new railway lines as well as modification/renovation work of existing railway lines, both fall within the ambit of 'Original Work' and both are eligible for the benefit of exemption as provided under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012.

8.4. We observe that the demand of service tax in the impugned order pertains to four contracts, namely:-

(i) 735/17/12/2011(Railway) dated 17.12.2011.
(ii) 1336 dated 01.03.2013
(iii) Rites/RPO/KOL/WPDCL/STPS/Reno/P/Way/PKG/C/2014/496 dated 20.03.2015.
(iv) Rites/RPO/KOL/WPDCL/KTPS/PH-IV/Truck Linking/PKG1/2014/496 dated 30.01.2015.

All these four contracts are related construction of new Railway lines or renovation/modification of existing Railway Lines either for the Government or private companies. As discussed above, all these services fall within the ambit of 'Original Work" and eligible for the benefit of exemption as provided under Sl. No. 14 of Notification No. 25/2012-ST dated 20.06.2012.

8.5. Thus, we hold that the demand of Service tax of **Rs. 3,96,05,317/-** confirmed in the impugned order relating to Works Contract Services rendered by the assessee in respect of 'Railways' to M/s. Haldia Energy Limited and M/s. WBPDCL, is not sustainable and accordingly, we set aside the same.

9. Regarding the demand of Service Tax of Rs. 3,27,841/-, confirmed in the impugned order, we observe that this demand is related to Work Order No. HEL:WO:1219 dated 16th May, 2015. The said work order is for 'Transportation and Dumping of Ash Silo to Specified Areas Inside the Plant'. The said activity

is an essential part of the production process and the same is not a 'service activity' as held by this Tribunal in the case of *Marshall Corporation Ltd. v Commissioner of C.G.S.T. and C.Ex., Kolkata [Final Order No.75650/2023 dated 02.06.2023 in Service Tax Appeal No. 176 of 2010 – CESTAT, Kolkata]*. Thus, the demand on this count is not sustainable.

9.1. It is observed that in respect of the above said work order, the assessee has collected service tax amounting to Rs.1,78,980/- (including Cess) vide Bill dated 23.05.2015. However, the service tax collected by the assessee has been deposited in the Government account and indicated in the return filed by them in the month of May 2015. It is observed that the appellant/assessee has collected service tax under the category of 'works contract service' and availed 60% abatement. Later, they realized that their activity was not liable to service tax. In view of the decision of the Tribunal cited above, we hold that the activity of 'Transportation and Dumping of Ash Silo to Specified Areas Inside the Plant' is not liable to service tax. Thus, we hold that Service Tax of Rs. 3,27,841/-, confirmed in the impugned order is not sustainable and accordingly, we set aside the same.

10. Regarding the appeal filed by Revenue with regard to dropping of the demand, we observe that out of the dropped demand of Rs.1,68,64,976/-, Rs. 1,32,99,117/- is related to addition of free issue materials in the assessable value for the purpose of demanding service tax. We observe that the ld. adjudicating authority has dropped the demand by relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Service Tax vs*

Bhayana Builders Pvt. Ltd. reported in 2018 (10) G.S.T.L. 118 (SC), wherein it has been held that the value of free supply materials is not includable in the gross value for the purpose of demanding service tax. We agree with the findings of the ld. adjudicating authority on this count and accordingly, uphold the dropping of this demand in the impugned order.

10.1. Regarding dropping of the demand of Rs. 35,65,859/-, we observe that the ld. adjudicating authority has dropped this demand by relying on the Circular 123/5/2010-TRU dated 24th May, 2010. The issue is related to availability of abatement @60% for some of the works contract services rendered by the assessee. In the Notice, it has been alleged that these work orders are independent and not related to the Work Orders relating to laying of Railway lines. Accordingly, the Notice alleged that the abatement @60% is not available to these work contract services. However, during the course of hearing the assessee produced evidence to the effect that all these work orders are supplementary to earlier work orders. We have perused the evidence submitted by the assessee which clearly reveals that all these work orders are supplementary to earlier work orders. Accordingly, we hold that the ld. Adjudicating authority has rightly extended 60% abatement as provided under Rule 2A(ii) of Service Tax Determination of Value Rules) 2006. Thus, we uphold the dropping of the demand by the ld. adjudicating authority on this count.

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

(i) The demand of service tax of Rs. 3,99,33,158/- confirmed in the impugned order is set aside.

(ii) Dropping of the demand of Rs.1,68,64,976/- by the ld. adjudicating authority is upheld.

(iii) Accordingly, the appeal filed by the assessee is allowed and the appeal filed by the Department is rejected.

12. The appeals are disposed on the above terms.

(Order pronounced in the open court on **10.05.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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

Sdd