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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75882 of 2015
(On behalf of Appellant)

(Arising out of Order-in-Original No.05-06/ST/Adjn/2015 dated 03.06.2015 passed by Commissioner of Central Excise & Service Tax, Patna)

M/s TRF Limited
11, Station Road, Burma Mines, Jamshedpur-831007

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna
C.R.Building (Annexe), Bir Chand Patel Path, Patna-800001

Respondent

WITH

Service Tax Appeal No.75883 of 2015
(On behalf of Appellant)

(Arising out of Order-in-Original No.05-06/ST/Adjn/2015 dated 03.06.2015 passed by Commissioner of Central Excise & Service Tax, Patna)

Mr.Sudhir L. Deoras, C/o - M/s TRF Limited
11, Station Road, Burma Mines, Jamshedpur-831007

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna
C.R.Building (Annexe), Bir Chand Patel Path, Patna-800001

Respondent

AND

Service Tax Appeal No.75951 of 2015
(On behalf of Appellant)

(Arising out of Order-in-Original No.05-06/ST/Adjn/2015 dated 03.06.2015 passed by Commissioner of Central Excise & Service Tax, Patna)

Mr.Nandan Kumar Sarkar, C/o - M/s TRF Limited
11, Station Road, Burma Mines, Jamshedpur-831007

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna
C.R.Building (Annexe), Bir Chand Patel Path, Patna-800001

Respondent

APPERANCE :
Shri Prasad Paranjape, Ms.Dhruvi, both Advocates and Shri Vivek Singh, Asstt. Manager (F & A) for the Appellant
Shri P.K.Ghosh, Authorized Representative for the Respondent

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

FINAL ORDER NO.75328-75330/2024

DATE OF HEARING : 21 .02.2024
DATE OF DECISION : 21 .02.2024

Per Ashok Jindal :

The appellants are in appeals against the impugned order, wherein the demand of service tax has been confirmed against the main appellant along with interest and penalties have been imposed on all the appellants.

2. The facts of the case are that the main appellant is a manufacturer of machinery and machinery parts and also undertaking works contracts for large projects involving service and sale of goods as works contracts.

2.1 The Aravali Power Corporation Private Limited (APCPL) and Damodar Valley Corporation (DVC) invited global tenders for erection, construction, installation of Coal Handling Plants at various locations. The appellant participated in the International Competitive Bidding and was awarded two contracts each by APCPL and DVC and one for sale of plant and equipment and one for services in the nature of works contract for civil works, structural works, installation etc..

2.2 Under the sale contract, the property in the goods were transferred to APCPL and DVC at the time of handing over the goods to the transporters and thereafter, those goods were handed over to the appellant free of cost by APCPL and DVC for providing services with respect to those goods, which also included transfer of property in certain other goods used by the appellant while rendering services under Contract II qualifying this contract as a "works contract".

2.3 As per the terms of agreement, the appellant was required to execute two separate contracts, i.e. Contract I & Contract II.

2.4 The execution of two separate Contracts for sale of goods and provisions of services along with supply of goods, was the condition put forth by the service recipient APCPL and DVC as mentioned in the Instruction to Bidders and in General Conditions in the Contract and not the choice exercised by the appellant.

2.5 Since the Contract II involved provisions of services along with supply of goods, the appellant considered these contracts as works contract and opted to pay the service tax on Contract II under Rule 3 of Works Contract (Composition Scheme for payment of service tax) Rules, 2007 as "Composition Scheme". Accordingly, the appellant paid the service tax on the gross value of the consideration under Contract II at the time of composition rate of tax prescribed under the Composition Scheme.

2.6 These contracts with APCPL and DVC were executed on 19.02.2008 and 04.12.2008 and the works started commencing prior to 07.07.2009.

2.7 Against these two Contracts, two show-cause notices were issued to the appellants demanding service tax from the appellant alleging that even if the appellant has entered into two separate contracts for sale of goods/supply and works contract services, the value of goods sold under Contract I would be required to be included in the gross amount charged under Contract II for the purposes of payment of service tax under the Composition Scheme. The notices also invoke extended period of limitation.

2.8 The matter was adjudicated and the demand of service tax was confirmed on gross value of Contract I & Contract II i.e. sale of goods/supply and works contract services and demanded the service tax thereon along with interest and penalties on all the three appellants were imposed.

2.9 Aggrieved from the said order, the appellants are before us.

3. The ld.Counsel appearing on behalf of the appellants, submits that Section 65(105)(zzzza) of the Finanace Act, 1994 defines works contract taxable service as any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

3.1 He further submitted that in the impugned order, Contract II is a works contract only. On the premise that no evidence of sales tax paid is produced or that sales tax is not shown on the invoice is not based on the correct position in law. Non-mention of tax amount in the invoice was due to the contract terms specifying that all tax liabilities shall be borne by the appellant. In any case, disclosing of tax amount on the invoice does not decide whether the transaction is sale or not. In any case, this basis adopted in the impugned order was beyond the allegations in the impugned show cause notices.

3.2 He further submitted that the appellant has opted to pay service tax under Rule 3(1) of the Composition Scheme which stipulates that notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to 2%, 4% or 4.8% on the gross amount charged for the works contract. It is provided by way of an explanation that for the purposes of this sub-rule, gross amount charged for the works contract shall *inter alia* be the sum, including the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise.

3.3 He submitted that The Revenue is seeking to invoke the explanation to hold that the appellant ought to have included value of goods sold under the Contract I which is a sale-simplicitor contract which is not a works contract as per the statutory definition of the term works contract.

3.4 He further submitted that such a proposition is not correct in law because first of all, the sale-simplicitor contract i.e. Contract I is not a works contract and second, the appellant sells goods under Contract I, property in which gets transferred to the buyers as soon as the goods are handed over to the transporter. Till this time i.e. the time when sale gets complete, there is no element of service involved. The goods so sold are thereafter handed over to the appellant in trust and for execution of services under Contract II. Therefore, the explanation will get triggered only when the contract is a works contract which in the present case it is not. To attract explanation, another cumulative test of the appellant supplying the goods under works contract for a consideration or otherwise needs to be satisfied. The explanation is not applicable when the goods are sold but it applies when they are merely supplied i.e. the case of a works contract.

3.5 He further submitted that the impugned order relying on gross fall breach clause is not of any significance in the present case as the contract has to be first a works contract under the Act to be leviable to tax under this clause irrespective of whether it can be treated as a composite or not for any other purpose or under any other statute.

3.6 He further submitted that without prejudice to the above, under Rule 3(1) of the Composition Scheme, amended with effect from 07.07.2009, a proviso to the explanation to the said Rule was inserted which clearly specified that the inclusion of value of goods supplied under any other Contract, for the purpose of payment of service tax under the Composition Scheme, would not be applicable in case of those Works Contract where execution has commenced prior to 07.07.2009 or any payment has been made prior to 07.07.2009.

3.7 It is his submission that in this case, the execution of work under Contract I & II has commenced prior to 07.07.2009 and invoices were raised or payments were received. Therefore, in terms of Rule 3(1) of the Composition Scheme vide Notification No.150/1/2012-ST dated 08.02.2012, the value of Contract I cannot be included for determination of gross value for payment of service tax under the Composition Scheme. To support, he relies on the following decisions :

a) Essar Projects (I) Ltd vs CCE – 2014 (33) STR 696 (T)

b) Tata Projects Ltd vs CST – 2019 (2) TMI 1037 – CESTAT Hyd

c) CCE vs Kalpataru Power Transmission – 2021 (48) GSTL 354 (T)

Therefore, he prayed that the impugned order is to be set aside and the appeals be allowed.

4. On the other hand, the ld.A.R. for the Revenue supported the impugned order and submits that the appellant has entered into two separate contracts to avoid the payment of service tax on gross value of services provided and supplied by them, therefore, the value of goods sold under Contract I is to be added to the value of goods sold under Contract II for payment of service tax liability under the Composition Scheme.

5. Heard both sides and considered the submissions.

6. We find that the facts are not in dispute. The agreements were entered by the appellant and the service recipient prior to 07.07.2009 i.e. 19.02.2008 and 04.12.2008 and it is not in dispute that the appellant started execution of works prior to 07.07.2009 and raised invoices and also received payments thereof. In that circumstances, the CBEC Circular No.150/1/2012-ST dated 08.02.2012 is relevant to decide the present issue. For better appreciation of law, the said Circular is extracted below :

> *"Meaning of expression 'gross amount' as per Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 — Regarding*
>
> *Circular No. 150/1/2012-S.T., dated 8-2-2012*
>
> *F.No. 354/236/2010-TRU*

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, as it stood prior to 7th day of July 2009 - Regarding.

Reference has been received from a field formation seeking clarification as to whether 'gross amount', for the purpose of payment of service tax under the Works Contract Composition Scheme, included the value of free of cost supplies, for the period prior to 7-7-2009.

2. The issue has been examined. The meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, is qualified by the Explanation inserted in the said Rule with effect from 7-7-2009. Since the Explanation inserted in Rule 3(1) with effect from 7-7-2009 is clarificatory and prospective in nature, inclusion of value of free-of-cost supplies of goods and services in or in relation to the execution of Works Contract [mentioned in the Explanation to Rule 3(1)(a)(i) and (ii)] in the 'gross amount' for the purpose of payment of service tax on works contract under the composition scheme, is a legal requirement, only with effect from 7-7-2009 when the Explanation became a part of Rule 3(1).

3. The explanation appended to Rule 3(1) with effect from 7-7-2009, categorically says in the proviso that "…nothing contained in this Explanation shall apply to a works contract where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009." Where execution of works contract has commenced prior to 7-7-2009 or where any payment (except payment through credit or debit) has been made towards a works *contract prior to 7-7-2009, then in those cases 'gross amount' for the purpose of payment of service tax does not include the value of free of cost supplies.*

4. The above clarification may be communicated to the field formations and service tax assessees through Trade Notice/Public Notice. Hindi version to follow."

As per the said Circular, the explanation has been appended to Rule 3 (1) of the Composition Scheme, which clearly shows that the contract entered prior to 07.07.2009, the value of cost of free supply will not be includible to determine the gross amount for the purposes of payment of service tax.

7. The same view has been taken by this Tribunal in the case of Essar Projects (India) Limited (supra), wherein this Tribunal has observed as under :

*"**9.1** It is clear from the above Circular issued by C.B.E. & C. that where execution of works contract has commenced prior to 7-7-2009, in those cases gross amount, for the purpose of payment of Service Tax, will not include the free of cost supply by the service recipient. In this regard, appellant has argued that as per clause 15.4 of the Supply Contract, reproduced below, full rights/title/ownership in respect of each item of the Balance of Plant stand transferred to the owner on delivery by the supplier at the site :-*

"15.4 - The full right, title, ownership and interest and all risks (except for those specifically retained by the Supplier in accordance with the terms of this Contract) in each item of the Balance of Plant shall be transferred to the Owner upon Delivery by the Supplier of that item of the Balance of Plant at the Site and upon endorsement of the documents required under Article 15.1."

9.2 *In view of the above clause of the supply contract, the findings of the adjudicating authority that ownership of the Balance of Plant and items stands transferred only at the time of completion of work, is not correct. In the case of imported equipments as well as the Balance of Plant equipment, the ownership/title lies with the service recipient when the same are received at site. Accordingly, it has to be held that after receipt of balance equipment, the title/ownership of the same is transferred to the service recipient. Accordingly, adjudicating authority cannot go beyond the C.B.E. & C. Circular No. 150/1/2012-S.T., dated 8-2-2012 wherein it has been clarified that for the works contract executed before 7-7-2009, free of cost supplies are not required to be added to the gross amount, for the purpose of payment of Service Tax. There is no evidence on record to convey that both, the supply contract and the construction contract were artificially bifurcated after introduction of explanation to Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.*

10. *The Hon'ble Supreme Court in the case of UOI v. Mahindra and Mahindra Limited [1995 (76) E.L.T. 481 (S.C.)] in Para 5 has held as follows :-*

"5. The main thrust of the arguments of the learned Solicitor General before us was that the price for the sale of CKD packs by the foreign collaborator to the respondents is not the true price. In other words, the price fixed or mentioned in the invoices was not the sole consideration for the sale of CKD packs, for the various reasons stated by the Assistant Collector in his order. According to the learned Solicitor General, the price mentioned in the invoices was (or should have been) determined by taking into consideration the lumpsum of 15 million French Francs (nearly three crores of Rupees) paid by the respondents to the foreign collaborator under the agreement. It is on this basis Section 14(1)(a) was excluded and resort to Section 14(1)(b) of the

Customs Act was sought to be justified by the revenue. In appreciating the above plea we have to bear in mind certain basic principles. The bargain between the respondents and the foreign collaborator is evidenced by written agreements, (dated 6-11-1979 & 6-3-1980). There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs. It is, no doubt, open to the revenue to allege and prove that the apparent is not the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million French Francs. The short question is whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price and so Section 14(1)(b) of the Act was properly invoked."

11. *In view of the law laid down by the Hon'ble Supreme Court, a contract has to be interpreted in a manner from the apparent tenor of the agreement and apparently it has to be accepted as the real state of affairs.*

12. *The judgment of ITAT relied upon by the Revenue is not applicability to the facts of this case because the Income Tax law is applied in altogether in a different sphere of taxation whereas, the Service Tax liability and determined of value under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, constitute an altogether a different area of operation. Based on the above observations, it is concluded that both the contracts dated 24-8-2007 for Supply of equipments and Construction of works has to be treated as distinct and separate contracts and* *value of supply contract cannot be added to the value of the construction contract for the purpose of Service Tax liability.*

13. *In view of the above, appeal filed by the appellant is allowed and cross-objection filed by the Revenue is rejected."*

8. Further, in the case of Tata Projects Limited (supra), this Tribunal has again examined this issue and observed as under :

"7. We have considered the arguments on both sides and perused the records. There is no dispute on the facts of the case that the appellant had entered into three agreements with M/s APPDCL as per the LOI issued by them, of which two are supply contracts and one is a contract for services which also included supply of some material. He also had an umbrella agreement combining these three agreements. It is not also in dispute that in addition to the supply, the appellant had discharged VAT/CST as the case may be in respect of the supply contracts. The only question remains to be answered is whether the value of this onshore and offshore supplies by the appellants need to be included in the value of services rendered by them under the works contract scheme. It is not in dispute that the material in question was supplied by the appellant with respect to this particular contract and after the supply was completed, the goods which were supplied were given by APPDCL back to appellant for execution of the contract. A plain reading of CBEC circular D.O.F. No. 334/13/2009-TRU, dated 06.07.2009 explains that such values became includible in the value of the works contract as per the amendment made vide notification NO. 23/2009-ST, dt. 07.07.2009. By inserting an explanation, it was also clarified by CBEC themselves that the inclusion of the values would not apply to such contracts where either the execution of works contract has already started or any payment (whether in part or in full) has been made on or before 07.07.2009. In this particular case, the payments in respect of all the three contracts were made prior to 07.07.2009. Needless to

say that there is no separate payment under the umbrella contract because it was only a combination of the other three contracts. This issue was agitated by the appellant before the adjudicating authority who, however, did not agree with this contention on the following words:

" 7.1. The issue required to be decided in these proceedings is whether the contracts dated 12.08.2009 with service recipients, commenced before and payments received before 7.7.2009 can be considered as separate contracts or as one contract. It has been argued by the appellant that both the contracts are independent and cannot be considered as one for the purpose of determining taxable value of the service provided. It was further argued that even if two contracts are treated as one, still appellant's case will not be covered under the Explanation added with effect from 7.7.2009 in Rule 3(1) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. In view of the findings above and nature of EPC works contract service and the existence of only one contract No. for all the supply and the service contracts, the scope of supply/work being the same i.e. "basic and detailed design, engineering, procurement, manufacture, assembly, pre assembly, inspection, tests at contractors and/or his sub vendors' works, shock painting, packing, transportation to site, freight and insurance of balance of plant systems and equipment package for 2 x 800 W thermal power plant"; that the assessee is responsible for installation of the whole facility under the EPC contract by using the Off-shore supply and On-shore supply procured by the assessee themselves, and therefore, the contracts have to be considered as one. In this regard, it is observed that both, supply contract and service contract have no separate defects liability clauses and the total price of the Contract, price variation being for the total price of the contract, and the Liquidated Damages applicable for the entire and complete Design, Engineering, Procurement, manufacture supply, erection, testing,

commissioning, initial operation, reliability operation and performance guarantee tests on EPC basis for Balance of Plant (BOP) systems and equipment for 2 x 800 MW supercritical coal fired Thermal Power Plant, the contracts have to be considered as one."

8. In other words, the adjudicating authority held that the three contracts in question are essentially part of the same contract and they were signed on 12.08.2009, hence the explanation w.e.f. 07.07.2009 to Rule 3 of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 is not relevant. On a plain reading of the contracts in question, we do not find it so. There are indeed three different contracts and for which three different payments were to be made and were made. The umbrella agreement only combines all these three agreements so as to give a complete perspective of the scope of the contract. In fact, there is no payment whatsoever under the umbrella agreement. Further, the advances in respect of the three contracts were received prior to 07.07.2009 and hence the amended provisions do not apply. In view of the above, we find that the value of the material supplied under off-shore and on-shore contracts cannot be included in the value of the works contract service as the advance payment in respect of all the three contracts are received prior to 07.07.2009.

9. We also find that this case is identical to the case of ESSAR Projects (India) Limited (supra) in which a similar view has been taken. In view of the above, we find that the demand of service tax and interest and imposition of penalties in the impugned order are not sustainable and the impugned order is liable to be set aside and we do so.

10. The appeal is allowed and the impugned order is set aside."

9. As it is evident that all the contracts were entered by the appellants with the service recipient prior to 07.07.2009 and the invoice

has been issued and the payment was also received. In that circumstances, in terms of CBEC Circular No.150/1/2012-ST dated 08.02.2012, the value of supply of goods contract, which were executed by the appellant and the same were given to the appellants for execution of Contract II, were the contract value, in that circumstances, the value of goods in Contract I cannot be included for determination of gross value for payment of service tax. Therefore, the appellant is correctly discharged their service tax liability on gross value of works contract i.e. Contract II.

10. In view of the above observations, we set aside the impugned demand. Consequently, we waive the penalties imposed on all the appellants.

11. In the result, we set aside the impugned order and allow the appeals 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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