CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 89460 of 2014

[Arising out of Order-in-Original No: 15/ST/2014/C dated 7th July 2014 passed by the Commissioner of Central Excise & Customs, Nagpur.]

RK Structure Pvt Ltd
Old Model Mills Campus, Old Umer Road,
Ganeshpath, Nagpur - 440002 …***Appellant***

versus

Commissioner of Excise Customs & Central Excise
Telangkhedi Road, Civil Lines, Nagpur – 440001 ***…Respondent***

APPEARANCE:

Shri SP Mathew, Advocate for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87572 / 2019

DATE OF HEARING: 27/08/2019
DATE OF DECISION: 27/08/2019

PER: C J MATHEW

As the proposition of Revenue, embedded in the impugned order, appears to be very interesting, it would be appropriate for us to commence with a narration of the circumstances leading to the initiation of proceedings against M/s RK Structure Pvt Ltd.

2. M/s National Textile Corporation (North Maharashtra) Ltd, desirous of selling their land and building at Model Mill, Nagpur along with the old and used machinery lying therein, floated tender in which the appellant happened to be the highest bidder. The appellant incorporated M/s Goldbrick Infrastructure Pvt Ltd with themselves as the main promoter for the development and construction of the said property and, on 20th July 2007, entered into a memorandum of understanding (MoU) this new 'special purpose vehicle (SPV)' for assembling, including by demolition of the structures, and disposing, scrap and other material lying on the premises after the finalisation of the tender as *quid pro quo* for the cost incurred by the appellant then for procurement of the property. Once the bid of the appellant was approved, the land was allotted on 22nd February 2008, and on their express advice, the vendor executed the sale deed in favour of the 'special purpose vehicle (SPV)' on 18th July 2008. From June 2008, the appellant commenced the removal of the machinery and structures after demolishing the buildings to facilitate this. The sale of resultant scrap yielded revenue of ₹ 4,88,64,094 to the appellant.

3. The demolition and removal, in pursuance of the terms of

'memorandum of understanding (MoU)', between 2008-09 and 2011-12 by the appellant was alleged to be liable to tax for rendering of 'site formation and clearance, excavation and earthmoving and demolition service' as enumerated in section 65(105)(zzza) of Finance Act, 1994 and defined in section 65(97a) of Finance Act, 1994 to include 'demolition and wrecking of building' among other activities. The tax liability was computed as ₹ 52,28,129, in accordance with section 73(2) of Finance Act, 1994 for accommodating the tax within the consideration when it is not charged separately from the recipient, in the proposal for recovery under Finance Act, 1994.

4. Commissioner of Central Excise & Customs Nagpur confirmed the demand under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, besides imposing penalty of like amount under section 78 of Finance Act, 1994. In addition, on the tax liable till 10th May 2008, the adjudicating authority also invoked the penal provision in section 76 of Finance Act, 1994.

5. Learned Counsel for the appellant contends that no service had been rendered to M/s Goldbrick Infrastructure Pvt Ltd and that the MoU had been entered into to facilitate demolition only for removal of their own property from the premises that was now in possession of another entity. It was also contended that no consideration had been

received from the developer of the purchased property and that the scrap generated in the process of removal was compensation for the costs borne by the appellant for participation in the tender process.

6. We have heard Learned Authorised Representative who argued that the complicated web of transactions does not conceal the actual performance of service assigned to the appellant by M/s Goldbrick Infrastructure Pvt Ltd intended for enabling them to commence the new project. According to him, the stream of activities, which included demolition, were all specifically covered within the elaboration of section 65(97a) of Finance Act, 1994. He further submits that the sale proceeds of scrap generated in the removal process was the agreed-upon consideration for site clearance and formation. Summing up his arguments, he urged us to uphold the order of the adjudicating authority.

7. The appellant had commenced the generation and removal of scrap in June 2008 after the possession was handed over to M/s Goldbrick Infrastructure Pvt Ltd by the vendor in February 2008 and in pursuance of 'memorandum of understanding (MoU)' dated 20th July 2007, well before the tender process was completed, between themselves and M/s Goldbrick Infrastructure Pvt Ltd. It is now well settled law that, for a service to be taxable prior to 1st July 2012, conformity with the enumerations in section 65 (105) of Finance Act,

1994, comprising description of activity, identified recipient and consideration for such service, is unavoidable.

8. The tax, as proposed in the show cause notice, was allegedly liable for service provided or to be provided

> *'(zzza) to any person, by any person, in relation to site formation and clearance, excavation it earthmoving and demolition and such other similar activities'*

within the enumeration of section 65 (105) of Finance Act, 1994. That the appellant did demolish structures and dismantled machinery which were then removed from the premises is not disputed. Therefore, all that remains to be decided upon by us is the denial of the existence of recipient of service and of consideration having been received from such recipient.

9. From our comprehension of the tendering process, it would appear that the appellant, although successful in being accepted as the highest bidder, assigned its rights thereto over the land to M/s Goldbrick Infrastructure Pvt Ltd who were obliged to pay the purchase price to M/s National Textile Corporation (North Maharashtra) Ltd. This is one level of transaction in which the appellant is neither buyer nor seller but mere participant in a tender process.

10. At another level, the appellant, whose participation in the tender

process entitled them to the entirety of land, buildings and structures thereon as well as any other goods therein, retained possession over everything but the land which was assigned to M/s Goldbrick Infrastructure Pvt Ltd and without any apparent investment except the costs involved in participating in the tender process. As the assignee of land, to be paid for by them, M/s Goldbrick Infrastructure Pvt Ltd was not, by any stretch, owner of anything other than the land. The appellant appears to be correct in claiming that they had merely removed their property from the premises of M/s Goldbrick Infrastructure Pvt Ltd. Though, such removal effectively permitted the latter to have access to the property, it does not appear to have been provided to them.

11. The assigning of land to M/s Goldbrick Infrastructure Pvt Ltd was contingent upon the vendor being paid the value bid by the appellant in which there seemed to be no further role for the appellant. M/s Goldbrick Pvt Ltd did not have to bear the cost of tendering met by the appellant but, owing to the circumstances of the interlinked transactions, that was merely considered to be payment made by the appellant to the vendor for rights over the structures and machinery on the land. Acknowledgement of that as a separate transaction in which M/s Goldbrick Infrastructure Pvt Ltd had no participation was not difficult as they appeared to have interest only on the land. Consequently, the acknowledgement of the appellant having paid the

cost of participation does not, of itself, lead to the conclusion that this was a payment effected to the appellant.

12. It would, therefore, appear that the conformity of demolition and removal with the description of the taxable service along with the fortuitous possession of all the structures and machinery on the property by participation, and bearing of cost, in the tender process has prompted the confirmation of the tax liability by the adjudicating authority without ascertaining the existence of an agreement, oral or otherwise, for rendering of any service that is exclusively to benefit M/s Goldbrick Infrastructure Pvt Ltd by the appellant.

13. The computation of value of taxable service as the sale value of scrap, adjusted for tax under Finance Act, 1994, appears to be erroneous inasmuch as that was consideration for a transaction not contemplated in Finance Act, 1994. It has been recorded in the impugned order that cost of participation in the tender which benefited M/s Goldbrick Infrastructure Pvt Ltd was consideration for the removal of structures, machinery and buildings on the property. If at all, there was consideration only this could have been it and not the sale value. There is nothing on record to establish that the costs incurred approximated the sale value. Consequently, the receipt from sales is consideration for the sales and not for service. The existence of consideration for service is not on record.

14. In view of there being neither recipient of a service nor any consideration for a service, the impugned order lacks authority of law and a set aside. The appeal is allowed.

(Pronounced in the open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*