

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 87980 of 2018

(Arising out of Order-in-Original No. ME/COMM/VR/84-88/2017-18 dated 31.03.2018 passed by Commissioner of GST & CX., Mumbai East Commissionerate)

**M/s. Vantage International
Management Company**

....Appellant

G 120, Kanakia Zillion Cst Road Junction,
Bkc Annexe, Kurla West,
Mumbai -400070.

VERSUS

Commissioner of CGST, Mumbai East

.....Respondent

9th Floor, Lotus Infor Centre,
J.B. Marg, Near Parel Station,
Mumbai-400012

Appearance:

Shri Prasad Paranjape along with Shri Sanjeev Nair, Advocates for the
Appellant

Shri Suresh Merugu, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85359/2021

Date of Hearing: 13.10.2020

Date of Decision: 12.02.2021

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that during the disputed period, the appellant herein was engaged in providing mining services to M/s. Oil & Natural Gas Corporation Limited (ONGC) for performing drilling operations on Oil Wells in the East and West Coasts of India. For providing such service, the appellant chartered its vessel, namely Ultra Deepwater Drilling Unit "Platinum Explorer (Hull No. 3601)", owned by it on time – charter basis to ONGC. Such service provided by the appellant is confirming to the definition of taxable service under the category of "Mining of Mineral, Oil or Gas Service", defined under Section 65 (105) (zzzy) of the

Finance Act, 1994. For providing such taxable service and other category of services, the appellant got itself registered with the Service Tax Department. In this case, the appellant had entered into an agreement dated 29.04.2009 with M/s. ONGC for carrying out the drilling operations. The agreement *inter alia*, provided that there will be an average consumption of diesel @ 50 KL/per day, which will be provided by M/s. ONGC at their cost. During the course of audit conducted under EA-2000, the department observed that ONGC had provided diesel to the appellant during the disputed period and opined that the cost of such fuel should form part of gross amount under Section 67 *ibid* for payment of service tax on such value. Since, the appellant did not discharge service tax liability on the value of diesel supplied by ONGC, the department initiated show cause proceedings against the appellant, which culminated into the adjudication order dated 31.03.2018 (for short, referred to as 'the impugned order'), wherein the learned Commissioner of Service Tax has confirmed service tax demand amounting to Rs.53,12,37,269/- along with interest and also imposed penalties under Section 76, 77 and 78 *ibid*. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Shri Prasad Paranjape, the learned Advocate appearing for the appellant submitted that for the period prior to 14.05.2015, the term 'consideration' finding place in the valuation provisions under Section 67 *ibid* meant only the amount, which was payable for the provision of the taxable service. Thus, he submitted that since M/s. ONGC was not required to made payment towards the cost of fuel to the appellant, its value cannot be added to the taxable value for the purpose of computation of service tax liability thereon. He further submitted that even the amended provisions to Section 67 *ibid* w.e.f.14.05.2015 would not be applicable to the case of appellant inasmuch as it had never charged the cost of fuel to the service receiver M/s ONGC for providing the taxable service. The learned Advocate has relied upon the judgment of Hon'ble Supreme Court in the case of Commissioner of Service Tax vs. Bhayana Builders (P) Ltd. – 2018 (10) G.S.T.L. 118 (S.C.) and Union of India vs. Intercontinental Consultants & Technocrats Pvt. Ltd. – 2018 (10) G.S.T.L. 401 (S.C.), to state that value of

free supplies made under the contractual arrangement by the service receiver to the service provider cannot be added to the value of taxable service provided by the service provider.

3. On the other hand, Shri Suresh Merugu, the learned AR for Revenue reiterated the findings recorded in the impugned order and supported confirmation of the adjudged demands in the impugned order.

4. Heard both sides and examined the case records.

5. The issue involved in this case for consideration by the Tribunal is, whether the appellant has taken the correct legal stand in not including the cost of free supply diesel made by M/s ONGC in the value of taxable service for running the drilling vessel.

6. On perusal of the agreement dated 29.04.2009, we find that the recipient of service M/s ONGC was required to supply the fuel (diesel) for running of the drilling equipments; that it was not required to make payment of fuel to the appellant and that the same was in fact, supplied free of cost to accomplish the assigned task. This factual aspect has also been accepted by the department in the show cause notice as well in the impugned order.

7. The period of dispute involved in this case is from December 2010 to December 2015. The provisions of valuation of taxable services for charging service tax are contained in Section 67 *ibid*. The said statutory provision has defined the term 'consideration', to include any amount that is payable for the taxable services provided or to be provided for provision of taxable service. Section 67 *ibid* was amended by the Finance Act, 2015 (20 of 2015), w.e.f. 14.05.2015. The effect of amendment was that sub-clauses (ii) and (iii) were inserted in clause (a) in the definition of consideration contained in the explanation part appended to Section 67 *ibid*. The amended provisions include *inter alia*, any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, subject to the

fulfilment of the prescribed conditions. In the present case, it is an admitted fact on record that the appellant had never charged any cost of fuel to M/s. ONGC over and above the amount claimed by it for providing the taxable service. Since, M/s. ONGC was not required to make payment of fuel to the appellant, its value cannot be added to the taxable value both under the un-amended and amended provisions of Section 67 *ibid*. Further, the appellant herein had received the entire consideration for provision of service in monetary terms. Hence, it cannot be said that it was not properly able to determine the value of taxable service, in order to attract the provisions of Rule 3 (b) of the Service Tax (Determination of Value) Rules, 2006. Similarly, the provisions of Rule 5 *ibid* also would not attract in this case inasmuch as no cost of fuel was charged or billed by the appellant to the recipient of service.

8. We find that the issue arising out of the present dispute is no more *res integra*, in view of the judgement of Hon'ble Supreme Court in the case of M/s. Bhayana Builders (P) Ltd.(supra), relied upon by the learned Advocate for the appellant. The relevant paragraphs in the said judgement are extracted herein below:

11. *As already pointed out in the beginning, all these assesseees are covered by Section 65(25b) of the Act as they are rendering 'construction or industrial construction service', which is a taxable service as per the provisions of Section 65(105)(zzq) of the Act. The entire dispute relates to the valuation that has to be arrived at in respect of taxable services rendered by the assesseees. More precisely, the issue is as to whether the value of goods/materials supplied or provided free of cost by a service recipient and used for providing the taxable service of construction or industrial complex, is to be included in computation of gross amount charged by the service provider, for valuation of taxable service. For valuation of taxable service, provision is made in Section 67 of the Act which enumerates that it would be 'the gross amount charged by the service provider for such service provided or to be provided by him'. Whether the value of materials/goods supplied free of cost by the service recipient to the service provider/assessee is to be included to arrive at the 'gross amount', or not is the poser. On this aspect, there is no difference in amended Section 67 from unamended Section 67 of the Act and the parties were at ad idem to this extent.*

12. *On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients :*

a. Service tax is payable on the gross amount charged :- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

b. The amount charged should be for "for such service provided" : Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"

13. *A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the*

goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

9. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Commissioner of Service Tax. Therefore, by setting aside the same, the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on 12.02.2021)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)