CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86275 OF 2018

[Arising out of Order-in-Original No: 13-14/cost-nm/Commr/SKV/2017-18 dated 21st November 2017 passed by the Commissioner of Central Tax & Central Excise, Navi Mumbai.]

Global SantaFe Drilling Company
2nd Floor, Boulevard Road, Hiranandani Business Park
Powai, Mumbai - 400076 … ***Appellant***

versus

Commissioner of CGST & Central Excise
Navi Mumbai
16th Floor, Satra Plaza, Sector 19D, Palm Beach Road
Vashi, Navi Mumbai - 400705 ***…Respondent***

APPEARANCE:

Shri Abhishek Deodhar, Advocate for the appellant

Shri Nitin Ranjan, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86274 /2022

DATE OF HEARING: 27/07/2022
DATE OF DECISION: 27/07/2022

PER: C J MATHEW

The cavil of M/s Global SantaFe Drilling Company in this appeal is the mis-application of section 67 of Finance Act, 1994 in relation to a contract entered into by them with M/s Oil and Natural Gas Corporation Limited (ONGC Ltd) on 24th July 2013 for undertaking ‘offshore drilling’ by deploying rig ‘GSF Explorer’ and, specifically for 2013-14 and 2014-15, with consequent confirmation of tax of ₹ 12,59,94,642/- attendant upon by penalties under section 76 and section 77 of Finance Act, 1994.

2. According to Learned Counsel for appellant, the issue, which stands settled by a decision of the Larger Bench of the Tribunal in *Bhayana Builders (P) Ltd and Others v. Commissioner of Service Tax, Delhi [2013 (9) TMI 294 – CESTAT NEW DELHI (LB)],* has been erroneously not extended to them merely on the ground of appeal of Revenue pending before the Hon’ble Supreme Court.

3. Factually, the recipient of the service, by contractual obligation, had provided 34.5 kilolitres of diesel for the actual operation with cost of any excess thereof to be deducted by M/s ONGC from the amount payable to the provider; the dispute is, thus, limited to the taxability of monetized value of 34.5 kilolitres of diesel consumed for each day of operation.

4. We have heard Learned Authorised Representative who took us through the impugned order and urged acceptance of the justification therein.

5. Section 67 of Finance Act, 1994 does not envisage monetization of ‘free supplies’ provided by the recipient of service in fulfillment of contractual obligation; the cost of ‘free material’ used for rendering of service is not an earning of the provider of the service as charged by him for rendering of such service which consideration is. The issue had been agitated on several occasions in the past and had attained finality by the decision of the Tribunal in *re Bhayana Builders (P) Ltd and Others.* Notwithstanding the said decision holding the field, and certainly at the time of confirmation of the demand in the impugned order, the adjudicating authority, and cavalierly too, relegated it to the backburner with the improper justification of unwillingness of Revenue to accept the same; neither was there any stay of the decisions set in motion by the Hon’ble Supreme Court pending disposal of appeal before it. The adjudicating authority would have done well to remind itself of being part and parcel of an appellate hierarchy obligating compliance with judicial discipline; the law does not remain tentative, or unsettled, merely because an aggrieved person has chosen to appeal against a decision.

6. In any case, the Hon’ble Supreme Court has, since, dismissed the appeal of Revenue in *Commissioner of Service Tax v. Bhayana Builders (P) Ltd [2018 (2) TMI 1325 – SUPREME COURT]* which has been taken note of by the Tribunal in *Vantage International Management Company v. Commissioner of CGST, Mumbai East*

[2021 (2) TMI 564 –CESTAT MUMBAI] thus

'8. We find that the issue arising out of the present dispute is no more res integra, in view of the judgment 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 judgment are extracted hereinbelow :

11. As already pointed out in the beginning, all these assessees 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 assessees. 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'.

7. Nothing further remains to be decided in this dispute and, consequently, the impugned order is set aside to allow the appeal.

(Operative Part of the Order pronounced in the open court on 27th July 2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*