

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 89255 of 2018

(Arising out of Order-in-Original No. 98-101/VR/COMMR/2018-19 dated 24.07.2018 passed by Commissioner of GST & Central Excise, Mumbai East)

**Dynamic Drilling & Services
Private Limited.**

.....Appellant

No. A, 8th Floor, Summit Business Bay,
Prakashwadi, Andheri Kurla Road,
Andheri East,
Mumbai- 400093.

VERSUS

**Commissioner of GST &
Central Excise, Mumbai East**

.....Respondent

9th Floor, Lotus Infocentre,
J.B.Marg, Near Parel Station,
Parel East, Mumbai-400012.

Appearance:

Shri Sachin Mishra, Advocate for the Appellant

Shri Nitin Ranjan, Authorized Representative for the Respondent

CORAM:

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

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85265/2023

Date of Hearing: 09.02.2023

Date of Decision: 09.02.2023

PER : M.M. PARTHIBAN

This appeal has been filed under Sub-section (1) of Section 86 of the Finance Act, 1994 (for short, 'the said Act'), by M/s. Dynamic Drilling & Services Private Limited (formerly known as M/s Deepwater Drilling & Services Pvt. Limited) having been aggrieved by the Order-in-Original No. 98-101/VR/COMMR/2018-19 dated 24/07/2018 (for short, referred to as 'the impugned order'), passed under Section 73 of the said Act by the Commissioner, GST &

Central Excise, Mumbai East Commissionerate, Mumbai as adjudicating authority.

2. For the sake of convenience, the appellant M/s. Dynamic Drilling & Services Private Limited (formerly known as M/s. Deepwater Drilling & Services Pvt. Ltd.), herein shall be referred to as the 'assessee' and the respondent Commissioner, GST & Central Excise, Mumbai East Commissionerate, Mumbai herein shall be referred as the "revenue".

3. The facts of the case is that the assessee is registered with the Service Tax Registration No.AADCD 2277JSD002 and is presently coming under the jurisdiction of Mumbai East CGST & CX Commissionerate (erstwhile Commissionerate of Service Tax-IV). During the disputed period the assessee was providing 'mining services' which are covered under the taxable services provided to any person, by any person in relation to "mining of Mineral, Oil or Gas", as defined under section 65 (105) (zzzy) of the Finance Act, 1994. The assessee is engaged in providing mining services to M/s Oil and Natural Gas Corporation Limited (ONGC) for performing drilling operations on oil base in the West coast of India. To illustrate, for providing such service, the appellant had put in to operation of a drilling vessel, namely 'Dynamic Vision (Hull No. B-334)' for a period of five years, as per agreement entered with M/s. ONGC on time charter basis. Such service provided by the appellant is conforming 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. Thus assessee is engaged in the time charter of Rigs to the client viz. M/s Oil and Natural Gas Co. Ltd (ONGC) and are discharging service tax liability under the category of "mining services".

4. It appears from the materials on record that during the course of EA – 2000 Audit of the records of the assessee, for the period from 2009-10 to 2012-2013, it was found by the department that while providing the mining services, the fuel/diesel required for the rigs have been supplied free of cost by the clients i.e., M/s ONGC and the cost of the said free supply of fuel was not included in the

taxable value for payment of service tax by the assessee. Therefore show cause notices were issued periodically by the department to the assessee seeking recovery of service tax under section 73 along with interest under section 75 and imposition of penalties under section 76, 77 and 78 of the Finance Act, 1994. In total there were four show cause notices have been issued on the above subject covering the period April 2010 to March 2013, April 2013 to March 2014, April 2014 to March 2015 and April 2015 to March 2016 for a total tax demand of Rs. 27,67,89,910/- (Rupees Twenty Seven Crore Sixty Seven Lakhs Eighty Nine Thousand Nine Hundred and Ten) alleged to have been not paid by assessee, on account of the value of free supplies of fuel/diesel, not being included in the taxable value.

5. The show cause notices referred to above was adjudicated by the Commissioner, GST and the Central Excise, Mumbai East Commissionerate vide single common Order-in-Original No.98-101/VR/COMMR/2018-19 dated 24/07/2018, who, in turn, confirmed the demand of service tax amount of Rs.27,67,89,910/- alleged to have been not paid by the assessee on account of mining services under Section 73(1) and 73(2) of the Finance Act, 1994 and imposing penalties under various sections of the said Act such as section 78 for Rs.10,76,76,126/-; Section 76 for Rs.1,69,11,379/-; and Section 77 for Rs.30,000/-.

6. The assessee, being aggrieved with the order passed by the Commissioner preferred the Service Tax Appeal No. 89255 of 2012 before the Tribunal.

7. The Tribunal allowed the appeal filed by the assessee by granting early hearing application seeking 'out of turn' disposal on the ground that the issue in dispute stands covered by the decision of the Tribunal in *M/s Vantage International Management Company v. Commissioner of GST, Mumbai East* [2021(2) TMI 564 CESTAT MUMBAI].

8. The assessee has in its memorandum of appeal has submitted the following grounds for consideration by this Tribunal:-

(i) in terms of the relevant statutory provisions of the Finance Act, 1994 and the Rules made thereunder, dealing with the valuation of taxable services, the provision of service as envisioned in the contract must be seen as the basis for charging service tax.

(ii) the adjudicating authority merely proceeded on the fact that, the appellants ought to have incurred the expenses borne by service recipient, these expenses should be in part of value of taxable supply by the appellants. Whereas the contract shows that these expenses are not part of value of taxable supply rendered by the appellants.

(iii) the case of the Department that the consideration in the present matter is not ascertainable is incorrect and therefore department cannot resort to Rule 3 of Service Tax (Determination of Value) Rules, 2006 read with Section 67(1)(ii) of the Finance Act, 1994.

(iv) citing the decision of the Apex Court in Commissioner of Service Tax vs. Bhayana Builders (P) Ltd. [2018-TIOL-66-SC-ST] and various rulings given by the Tribunal as detailed in subsequent paragraph 10, the Appellant stated that the free fuel supplied would not form part of the value of taxable service.

(v) the appellant claimed that the impugned order of the adjudicating authority has been passed on assumptions, by adopting the best judgement assessment, by inclusion of the value of the expenditure based on the data received from the service recipient as per Rule 5 of Service Tax (Determination of Value) Rules, 2006, which is not applicable in their case.

(vi) the appellant also claimed, that without prejudice to their submission that the fuel / diesel received as free of cost from ONGC is no consideration to them, they may be given the benefit of cum-tax duty benefit, citing the Larger Bench decision in the case of *Sri Chakra Tyres 1999 (108) E.L.T. 361*, affirmed by the Apex Court decision in its order dismissing the departmental appeal in 2002 (142) ELT A279

(SC) that when no tax is collected separately, the gross amount has to be adopted to quantify the tax liability treating it as value of taxable service plus service tax payable.

(vii) the appellant claimed that the extended period of limitation is not applicable in their present case and the demand of service tax beyond the normal period of limitation is not applicable; and hence they claimed that no penalties can be imposed on the appellant.

9. The revenue has reiterated the findings and the conclusions arrived by the adjudicating authority in support of the demand of service tax confirmed by the said adjudicating authority.

10. The appellant has further submitted that the present issue is no more *res integra* in view of the principle laid down in this case

- (i) *Bhayana Builders (P) Ltd. and Others – 2013-TIOL-1331-CESTAT-DEL-LB, CST vs. Bhayana Builders (P) Ltd.- 2018-TIOL-66-SC-ST.*
- (ii) *M/s. Vantage International Management Company Vs. CGST, 2021 (2) TMI 564 CESTAT Mumbai.*
- (iii) *M/s. Dynasty Oil & gas Pvt. Ltd. Vs. Commissioner of CGST Mumbai East Service Tax Appeal No. 89261 of 2018.*
- (iv) *Global SantaFe Drilling Company Vs. Commissioner of CGST & Central Excise, Final Order No. A/86274/2022 dated 27.07.2022.*
- (v) *M/s. Greatship (India) Ltd. Vs. CST, 2021 (9) TMI 1173-CESTAT MUMBAI.*
- (vi) *Heligo Charters Pvt. Ltd. Vs. Commr of Service Tax Mumbai-VI, 2020 (4) TMI 182-CESTAT Mumbai.*

Thus, the appellant pleaded that the issue is squarely covered in favour of the appellant in the above-mentioned judgements. Accordingly they requested that the same must be followed in the present case and that their appeal should be allowed by dropping the demand along with consequential penalty and interest, and

claimed that the demand of service tax by the Revenue is liable to be set aside.

11. We have heard the learned counsel for the appellant and the learned Authorised Representative of the Department for the revenue. Having gone through the materials on record, we notice that the facts of the case are that during the disputed period, the assessee was engaged in providing mining services to M/s. ONGC for performing drilling operations on oil wells, in terms of specific agreements entered into between them for charter hire of drilling unit. We find that such service provided by the appellant is conforming 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; and for providing such taxable service the appellant got itself registered with the Service Tax Department. We also find that in providing such service, as a part of the agreement, a detailed schedule of responsibilities for drilling equipment materials, supplies and services to be provided by whom, either by the appellant as 'contractor' or by M/s. ONGC as 'operator', and at whose cost, have been clearly laid down in the said agreement. The agreement *inter alia*, provided that 'diesel fuel for all equipment of the drilling unit and mud', will be provided by M/s. ONGC at their cost. During the course of audit conducted under EA-2000, the department observed that M/s. ONGC had provided diesel to the appellant for free of cost 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 M/s. ONGC, the department initiated show cause proceedings against the appellant, which culminated into the impugned order dated 24.07.2018, wherein the learned Commissioner of Service Tax has confirmed service tax demand amounting to Rs.27,67,89,910/- along with interest and also imposed penalties under Section 76, 77 and 78 *ibid*. Feeling aggrieved with the impugned order, the assessee has preferred this appeal before the Tribunal.

12. Shri Sachin Mishra, 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 make 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 in as much 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.) = 2018-TIOL-66-SC-ST* and *Union of India vs. Intercontinental Consultants & Technocrats Pvt. Ltd. – 2018 (10) G.S.T.L. 401 (S.C.) = 2018-TIOL-76-SC-ST*, 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.

13. On the other hand, Shri Nitin Ranjan, the learned Authorised Representative for Revenue reiterated the findings recorded in the impugned order and supported confirmation of the adjudged demands in the impugned order.

14. Heard both sides and examined the case records.

15. 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 unit / vessel.

16. On perusal of one of the agreement dated 21.09.2012, we find that the recipient of service M/s ONGC was required to supply the fuel (diesel) for running of the drilling equipments; that no payment for fuel is required to be made by the appellant to M/s. ONGC and that the same was in fact, supplied free of cost by M/s. ONGC to

accomplish the assigned task. Further, the assessee do not charge the service receiver for the fuel / diesel, and M/s. ONGC is also not making any payment to assessee on account of fuel / diesel. This factual aspect has also been accepted by the department in the show cause notice as well in the impugned order.

17. The period of dispute involved in this case is from April, 2010 to March, 2016. 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 subclauses (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, neither the appellant was required to make payment to M/s. ONGC for free supply of fuel / diesel, nor the appellant charged the service receiver M/s. ONGC, the cost of fuel / diesel 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 the Revenue 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.

18. 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 civil Appeal Nos. 1335 - 1358 of 2015 dated 19th February, 2018 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."

19. In view of the foregoing discussions, we have come to the conclusion that during the disputed period, no such manner has been prescribed in the legal provisions of service tax to include free goods supplied by service recipient in the value of taxable service for determination of gross value. Accordingly, we conclude that in this case, the cost of fuel / diesel, supplied free of cost by the service receiver M/s. ONGC to the service provider i.e., the assessee, is not a part of the gross amount charged for the taxable service, which is charged to the service receiver; and hence it is not includable in the value of taxable service.

20. In view of the above, we do not find any merits in the impugned order passed by the learned Commissioner, GST & Central Excise, Mumbai East Commissionerate, Mumbai. Therefore,

by setting aside the same, the appeal is allowed in favour of the appellant.

(Operative Part Dictated and pronounced in open court)

(M.M. PARTHIBAN)
Member (Technical)

(S. K. Mohanty)
Member(Judicial)

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