CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 89735 of 2013

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-020-13-14 dated 11.09.2013 passed by the Commissioner of Central Excise, Pune- I)

M/s Thermax Engineering & Construction Co. Ltd. **.... Appellant**
Energy House, D-II Block,
Plot No- 38 & 39, MIDC, Pune – 411 019.

Versus

Commissioner ofCentral Excise & Service Tax, Pune **.... Respondent**
ICE House, 41-A, Sasson Road,
Pune – 411 001.

WITH

Service Tax Appeal No. 85962 of 2016

(Arising out of Order-in-Original No. PUN-EXCUS-001-PR. COM-005-15-16 dated 15.10.2015 passed by the Pr. Commissioner of Central Excise, Pune-I)

M/s Thermax Engineering & Construction Co. Ltd. **.... Appellant**
Energy House, D-II Block,
Plot No- 38 & 39, MIDC, Pune – 411 019.

Versus

Commissioner of Central Excise & Service Tax, Pune **.... Respondent**
ICE House, 41-A, Sasson Road,
Pune – 411 001.

Appearance:

Shri Vinay Jain, Advocate for the Appellant

Shri Piyush Barasu, 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/86206-86207/2023

Date of Hearing: 14.03.2023

Date of Decision: 14.03.2023

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellants herein are engaged, *inter-alia*, in providing the services under the category of Erection, Commission and Installation of Boilers. The work order issued by the service recipient has specified the scope of work of the appellant, which *inter alia* includes deployment of labour and supply of goods such as welding electrodes, nuts, bolts, gases etc., for carrying out the assigned work. The appellants claimed that the proportion of labour to material for carrying out the assessed task was in the ratio of 90:10. In respect of the labour element, the appellant had duly discharged the service tax liability which has not been disputed by the Department. Further, with regard to the material component, the appellant had paid Sales Tax/ Value Added Tax (VAT) into the State Government account, considering the same as sale of goods. With the above background of the issue, the appellant claimed that material components involved in the execution of the work contract shall not be exisable to service tax in terms of the Finance Act, 1994. However, the contention of the appellant was not considered favourably by the Department and accordingly, show cause proceedings were initiated against the appellant, seeking confirmation of the service tax demand. The matter arising out of the show cause notices were adjudicated upon by the Commissioner of Service Tax vide the impugned orders dated 11.09.2013 and 15.10.2015, wherein the learned Adjudicating Authority has confirmed the proposals made in the show cause notices. In support of confirmation of the adjudged demands on the appellants, the learned Adjudicating Authority has held that the materials namely, electrodes, nuts, bolts and gases were essentially required for use in provision of the erection service in the contract and hence, merely showing payment of VAT on those goods in the invoices will not absolve the appellants from the liability for payment of service tax. Further, he has also held that the appellants had contravened the provisions of Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 inasmuch as they had failed to arrive at the correct value for the purpose of charging of service tax. Feeling aggrieved with the impugned orders, the appellants have preferred these appeals before the Tribunal.

2. Learned Advocate appearing for the appellants, submitted that in respect of the supply of goods as per the work orders, the appellants had discharged the Sales Tax/ VAT liability and the assessment of such liability has also been accepted by the authorities in the respective State Governments. Thus, he submitted that the separate treatment cannot be provided by the Service Tax authorities in claiming that the material components should also be added to the labour component for the purpose of levy of service tax. He further submitted that the learned Adjudicating Authority has wrongly applied sub-rule (1) of Rule 5 *ibid* inasmuch as the said rule has been stuck down by the Hon'ble Delhi High Court in the case of *Intercontinental Consultants and Technologies Pvt. Ltd. Vs Union of India - 2012-TIOL-966-HC-DEL-ST*, which was subsequently upheld by the Hon'ble Supreme Court, reported in *2018 (10) GSTL 401 (SC).* With regard to the Larger Bench order of the Tribunal in case of *Aggarwal Colour Advance Photo System Vs Commissioner of Central Excise, Bhopal, reported in 2011 (23) STR 608 (Tri-LB)*, relied upon by the learned adjudicating authority, learned Advocate for the appellant submitted

that the said order has been overruled by the Hon'ble Madhya Pradesh High Court, reported in 2020-TIOL-928-HC-MP-ST. Accordingly, learned Advocate has pleaded for setting aside the impugned orders.

3. On the other hand, learned Authorized Representative appearing for the Revenue reiterated findings recorded in the impugned order and further submitted that since the disputed goods were not transferred physically to the recipient of service, the same cannot be termed as "Sale of Goods", and accordingly, the appellant are liable to pay service tax on the gross amount charged for execution of the assessed task. He further submitted that those disputed goods in question are much more essential for execution of the erection activities, without which the ultimate services cannot be provided by the appellant and thus, the value of those goods are required to be included in the gross value in terms of valuation provisions contained in Service Tax statute.

4. Heard both sides and examined the case records.

5. On perusal of the works order placed in file, we find that the scope of work defined therein relate to both sale of goods as well as rendition of service. It has further been spelt out that out of the entire contract value, 10% of the value was towards sale of material component for execution of the contract. Thus, the contract clearly envisaged that there were separate and distinct contract, one for rendition of service and other for supply of materials, the fact of which has also not been disputed by the Department. Since the supply component has suffered VAT / Sales Tax and the assessment

were not disputed by the statutory authority dealing with such subject, the same in our considered view, cannot be questioned or altered by the Service Tax authority, holding that supply of material should also be considered as a value of taxable service for the purpose of levy of Service Tax thereon. We find that the learned adjudicating authority has referred to the provisions of sub-rule (1) of Rule 5 *ibid* to conclude that the material components supplied for execution of the assigned task at the service recipient's end should be added to the taxable value. In this context, we find that the constitutional validity of Rule 5 *ibid* was challenged before the Hon'ble Delhi High Court in the case of *Intercontinental Consultants (supra)* and upon analysis of the statutory provisions and more specifically the valuation provisions contained under Section 67 of the Finance Act, 1994, the Hon'ble Court has stuck down the said rule, holding as *ultra vires*. The judgment of the Hon'ble Delhi High Court was also upheld by the Hon'ble Supreme Court. The relevant paragraph in the judgement of the Hon'ble Supreme Court is extracted herein as below:-

> ***24.*** *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

In view of the settled position of law, we are of the considered opinion that addition of the cost of material in the contract value for deployment of labour is not sustainable in law.

6. With regard to the consumables used for rendition of service, we find that the learned adjudicating authority has relied upon the Larger Bench decision of this Tribunal in the case of *Aggarwal Colour Advance Photo System (supra)*, to conclude that in absence of actual supply of goods, which were consumed during the course of execution of works contract, the value of such material cannot be excluded for the purpose of computation of the gross taxable value. We find that the order passed by the Larger Bench of this Tribunal in the case of *Aggarwal Colour Advance Photo System (supra)* is no more valid, having been set aside by the Hon'ble Madhya Pradesh High Court (supra). The relevant paragraphs in the said judgment are extracted below:

> *19. In view of the law laid down by the Apex Court in M/s Pro. Lab's case (supra), it can be safely held that photography service, which has both the elements of goods and services is covered under works contract. Thus, in a works contract which involves transfer of property, the provisions as contained in Article 366(29A) of the Constitution are attracted. Therefore, in the light of sub-clause (b) of Clause (29A) of Article 366 of the Constitution, in execution of a works contract when there is transfer of property even in some other form than in goods, the tax on such sale or purchase of goods is leviable. In this view of the matter, after the 46th Amendment, there is no question of dominant nature test applying in photography service and the works contract, which is covered by Clause (29A) of Article 366 of the Constitution where the element of goods can be separated, such contracts can be subjected to sales tax by the States under Entry 54 of List II of Schedule II. Once that is so, value of photographic paper and consumables cannot be included in the value of photography service for the purposes of imposition of service tax. Thus, in the light of the judgment of the Apex Court in M/s Pro Lab (supra), wherein it is held that part of processing and supplying of photographs, photo prints and negatives, which have "goods" component exigible to sales tax is constitutionally valid, it is held that value of photography service has to be determined in isolation of cost of goods such as photography paper, consumables and chemicals with which image is printed, negatives and other material which has "goods" component liable to sales tax. Accordingly, the substantial question of law No.1 is answered in favour of the assessee and against the Revenue.*
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> *20. Having answered the substantial question of law No.1 in favour of the assessee, the substantial question of law No.2, which already stands concluded while dealing with the question of law No.1, is also answered in favour of the assessee and it is held that the term 'sale' appearing in exemption Notification No.12/03-ST dated 20.06.2003 would also include "deemed sale" as defined by Article 366(29A)(b) of the Constitution.*

7. In view of the forgoing discussions and analysis, we do not find any merits in the impugned order, insofar as it has confirmed the

adjudged demands on the appellants. Therefore, by setting aside the impugned order, the appeals are allowed in favour of the appellants.

(Dictated and pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha