

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Service Tax Appeal No.70247 of 2013

(Arising out of Order-in-Original No.69/S.Tax/Commr./2012 dated 23.11.2012 passed by Commissioner of Central Excise & Service Tax, Jamshedpur)

M/s Gillander Arbuthnot & Co. Ltd.

MICCO,D.S.Pandey House,Block No.4,Shastri Nagar, Kadma,Jamshedpur-831005

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur

143, New Baradwari, Sakchi, Jamshedpur-831001

Respondent

Appearance:

Shri Arvind Behati, Chartered Accountant for the Appellant

Shri A.Roy, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75436/2022

DATE OF E-HEARING : 14.06.2022

DATE OF PRONOUNCEMENT : **04 AUGUST 2022**

Per P.K.Choudhary :

Service Tax Appeal No.70247/2013 is directed against Order-in-Original dated 23 November 2012 passed by the Commissioner of Central Excise and Service Tax, Jamshedpur, confirming a Service Tax demand of Rs.1,12,56,351/- along with interest and penalties on the Appellant.

2. Briefly stated, the undisputed facts of the case are that the Appellant was awarded separate work orders for "sale/supply of goods" and provision of "Erection, Commissioning and Installation Services" thereof by M/s. Tata Steel Limited ('TSL') during the period from 2006 to 2011. The goods supplied under the supply work orders were procured by the Appellant from different manufacturers and consigned directly to the 'TSL' site at Jamshedpur, with applicable VAT/CST. The Appellant had also discharged the applicable service tax

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on the provision of "Erection, Commissioning and Installation Services" based on the monetary consideration agreed in the respective service work orders. Pursuant to an audit of records, proceedings were initiated against the Appellant by a Show-cause Notice dated 23rd April 2012 ('SCN') alleging short payment of service tax under the taxable category "Erection, Commissioning and Installation Services" on the purported ground of non-inclusion of the value of goods/material supplied under the supply work orders in valuing the said taxable service. The case of the Revenue as forthcoming from the SCN is that the separate work order for supply of goods and services have to be construed as a single EPC contract for the purposes of discharge of service tax and that there has been an artificial splitting in the value of goods and services so as to inflate the value of goods and suppress the value of services. Consequently, the SCN demanded differential service tax from the Appellant by clubbing the value of goods with the value of services and also denied the benefit of any deduction for the sale of goods under Notification No.12/2003-ST dated 20 June 2003 in the hands of the Appellant on the purported ground that the recipient i.e. 'TSL' had availed the benefit of Cenvat credit on the goods supplied. The Ld. Commissioner has confirmed the entire demand proposed in the SCN vide the Order-in-Original dated 23rd November 2012 along with interest and also imposed penalties under Section 77 and 78 of the Finance Act, which forms the subject matter of challenge in these proceedings.

3. The Ld.Chartered Accountant appearing for the Appellant has assailed the order dated 23rd November 2012 on the following alternative grounds:

A. The work order for "supply/sale of goods" and provision of "Erection, Commissioning and Installation Services" respectively, are separate and distinct contracts. The levy of tax on sale of goods is within the exclusive domain of the State legislature whereas tax on services comes within the ambit of the Parliament. It is settled by the decision of the Hon'ble Supreme Court that levy of VAT/Service Tax are mutually exclusive [Imagic Creative – 2008 (9) STR 337 (para

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28]] and that the value of goods cannot be included in the value of services or vice versa [Bharat Sanchar Nigam Ltd. - 2006 (2) STR 161. Therefore, higher/lower profit margin arising from a contract for sale of goods cannot per se be a ground for rejecting the valuation of services, which has to be ascertained strictly in terms of Section 67 of the Finance Act. Since "Erection, Commissioning and Installation Services" were supplied for a monetary consideration, the gross amount charged for such service alone can be a subject of tax under Section 67(1)(i) of the Finance Act. Moreover, the attempt of the Ld. Commissioner to proceed under Section 67(1)(ii) of the Finance Act by treating the goods supplied by the Appellant to 'TSL' under the Supply work order and received back from 'TSL' for the Erection, Commissioning & Installation Work as an alleged non-monetary consideration, is contrary to the decision of the Hon'ble Supreme Court in the case of M/s. Bhayana Builders reported in 2018 (10) GSTL 118.

B. Even assuming that separate work orders for supply of goods and services are to be construed as an indivisible EPC contract, it is now settled by the decision of the Hon'ble Supreme Court in the L&T case reported in 2015 (39) STR 913 that EPC Contract could only be taxed under the taxable category "Works Contract Services" introduced with effect from 1 June 2007 and that the pre-existing category "Erection, Commissioning and Installation Services" could only cover service contracts simplicitor. Taxation of EPC contract under the works contract services has been specifically rejected by the adjudicating authority creating an apparent contradiction vis-à-vis the charge in the SCN. Therefore, the demand cannot sustain on the point of incorrect classification alone. Reference in this regard is invited to the following decisions:

- (i) URC Construction (P) Ltd. Vs. CCE, Salem - 2017 (50) STR 147 (Para 8 to 11)
- (ii) Ajit India Pvt. Ltd. Vs. Commissioner of ST, Mumbai-II - 2018 (19) GSTL 659 (Para 4.2 to 4.4).

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C. The Ld. Commissioner has generalized the observation regarding extraneous profit margin on supply of goods by comparing the manufacturer's invoice vis-à-vis the corresponding invoice of the Appellant in one stray instance as opposed to calculating the profit margin on supply of goods at the work order level. The sample manufacturer invoice vis-à-vis the corresponding invoice of the Appellant in at least four different supplies would demonstrate that the Appellant has also incurred losses. In any event, the value of the goods as agreed with 'TSL' in terms of the supply work order had to be allowed as deduction and could not be taxed as a service be it under "Erection, Commissioning and Installation Services" or "Works Contract Services".

D. The interpretation placed by the Ld. Commissioner so as to deny the benefit of Notification No.12/2003 dated 20th June 2003 on the purported ground that TSL could not have availed credit of the material supplied is ex facie contrary to sub-Clause (b) of the proviso.

E. The demand is barred by limitation inasmuch as the Appellant was not statutorily obliged to disclose the value of goods sold in the service tax returns. Therefore, this cannot be said to be a case of suppression of facts so as to justify the invocation of the extended period.

4. The Ld. D.R. appearing on behalf of the Revenue, supports and reiterates the findings of the Ld. Commissioner in the impugned Order-in-Original dated 23rd November 2012.

5. Heard both side and carefully perused the appeal records.

6. We find that the issue involved in this case relates to alleged undervaluation of the taxable category, "Erection, Commissioning and Installation Services" on the purported ground of non-inclusion of the value of goods and material sold by the Appellant under the supply work order in valuing the said taxable services. At the outset, there is considerable merit in the contention of the Appellant that composite contracts involving supply of both goods and services could not have been taxed under the category, "Erection, Commissioning and

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Installation Services” in view of the law laid down by the Hon’ble Supreme Court in the L&T case (supra) as under,

'24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of properly in goods transferred in the execution of a works contract.'

Therefore, the taxable category “Erection, Commissioning and Installation Services” could only cover pure service contracts within its fold. We observe that the Ld. Commissioner on one hand treats the separate work orders for sale/supply of goods and provision of “Erection, Commissioning and Installation Services” as an indivisible EPC yet at the same time rejected the taxability thereof under the category, “Works Contract Services” which is clearly unsustainable in light of the L&T case(supra). The ratio of the decisions of the Tribunal

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in Ajit India and URC Construction (supra) also supports the case of the Appellant on this point.

7. The issue can be looked at from another angle, as well. The composite contracts in this case were divided into supply obligation and service obligation between the parties inter se for a pre-agreed monetary consideration. Since the work order for "Erection, Commissioning and Installation Services" was for consideration in money, the gross amount charged for such services alone could be subjected to service tax under Section 67(1)(i) of the Finance Act. The valuation framework as contained in Section 67 of the Finance Act does not seek to include within its ambit, any amount charged for sale/supply of goods and we are in complete agreement with the Appellant that higher or lower profit margin with respect to sale of goods cannot be a ground for questioning the value of a taxable service. It is well settled that levy of tax on sale/supply of goods and provision of services are mutually exclusive and it is not in our domain to assess whether VAT/CST was correctly discharged or otherwise. Suffice it to say that the value of goods cannot be subjected to service tax and neither can the value of services be charged to VAT, by following the decisions of the Hon'ble Supreme Court in the Imagic case and BSNL case (supra).

8. Further-more, we find that the reason adduced by the Ld. Commissioner for denying deduction with respect to sale of goods to the Appellant under Notification No. 12/2003 is also unsustainable when the Appellant has undisputedly not availed any credit of excise duty on the goods sold to 'TSL'. The proviso to Notification No. 12/2003 only restricts the availment of credit in the hands of the service provider as evident from Clause (b) thereof and therefore, as to whether 'TSL' was entitled to avail Cenvat credit of excise duty on the said goods is an altogether separate question having no bearing on the instant proceedings.

9. Hence the impugned Order-in-Original is set aside and the appeal is allowed with consequential relief, if any. Having allowed the

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appeal on merits, we refrain from making any observation on the aspect of limitation.

(Pronounced in the open Court on **04.08.2022**)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

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