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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

COURT : Division Bench III

Service Tax Appeal No. 40837 of 2013-DB

(Arising out of Order-in-Appeal No. 48/2013 dated 25.02.2013 passed by the Commissioner of Central Excise (Appeals), Salem).

M/s. Indiana Minerals **...Appellant**
Rukmani Ashram,
Hasthampatty, Salem-636 004.

Versus

Commissioner of Central Excise (Appeals) **...Respondent**
No.1, Foulks Compound, Anai Medu,
Salem-636 001.

APPEARANCE

Present For the Appellant : Shri V. Ravindran, Advocate

Present For the Respondent : Shri R. Rajaram, AC (A.R)

CORAM

Hon'ble MS. SULEKHA BEEVI C.S., MEMBER JUDICIAL
Hon'ble Shri VASA SESHAGIRI RAO, MEMBER TECHNICAL

Date of Hearing: **01.03.2023**
Date of Pronouncement: **07.03.2023**

FINAL ORDER No. 40131/2023

Order : Per Hon'ble Suleka Beevi C.S.

Brief facts are that the appellant had constructed 11 culverts at the premises of India Cements Limited and paid service tax for the work on 33 % of the value and claimed 67% abatement. On verification of the records, it was found that the service receiver had provided steel, cement and concrete pipes for the said work. The department was of the view that as the appellant

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has received free supply of materials, they are not eligible to claim abatement under Notification No. 1/2006-ST. Show Cause Notice dated 15.09.2011 was issued to the appellant. After due process of law, the original authority confirmed service tax of Rs.72,113/- along with interest and imposed penalty. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. Learned Counsel Shri V. Ravindran appeared and argued for the appellant. He submitted that the issue as to whether the value of the free supply of materials has to be included in the taxable value for payment of service tax has been settled by the decision of the Hon'ble Apex Court in the case of *Commissioner of Service Tax Etc. Vs. M/s. Bhayana Builders (P) Ltd. Etc.* reported in 2018 (10) GSTL 118 (SC). He prayed that the appeal may be allowed.

3. Learned AR Shri R. Rajaraman appeared for the department.

4. Heard both sides.

5. The issue to be decided is whether the appellant has to include the value of the free supplies in the taxable value for discharge of service tax so as to deny the benefit of abatement. The issue is no longer res integra and decided by the Hon'ble Apex Court in the case of *M/s. Bhayana Builders (P) Ltd.* (supra). The said judgment has taken into consideration the issue even

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after the amendment brought forth in Section 67 of the Finance Act, 1994. The relevant portion reads as under:-

> **"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.
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> **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 :
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> 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.
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> 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"
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> ……..
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> …….
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> **18.** In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount *'charged'* from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is

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> charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'."

6. Following the ratio of the said decision, we are of the view that the demand cannot sustain and requires to be set aside which we hereby do. The impugned order is set aside.

7. The appeal is allowed with consequential relief, if any.

(Order pronounced in the Open Court on **07.03.2023**)

(**SULEKHA BEEVI C.S.)**
MEMBER JUDICIAL

(VASA SESHAGIRI RAO)
MEMBER TECHNICAL

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