

**Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

**Service Tax Appeal No.10089 of 2013**

(Arising out of OIO-58/COMMR/2012 dated 10/10/2012 passed by Commissioner of Central Excise and Service Tax-RAJKOT)

**J S Kataria**

**.....Appellant**

Prop. M/S Bhumi Construction, Dharmbhakti, Kothariya Main Road, Subhash Chowk, Near Nanda Hall,  
RAJKOT, GUJARAT

*VERSUS*

**C.C.E. & S.T.-Rajkot**

**.....Respondent**

Central Excise Bhavan,  
Race Course Ring Road...Income Tax Office,  
Rajkot, Gujarat-360001

**APPEARANCE:**

Shri Rahul Gajera, Advocate for the Appellant  
Shri Kalpesh Shah, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR  
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/ 11360 /2022**

DATE OF HEARING: 09.11.2022  
DATE OF DECISION: 11.11.2022

**RAMESH NAIR**

The brief facts of the case are that the appellant being a proprietor of proprietorship firm of M/s. Bhumi Construction during the period financial year 2004-05 to 2008-09 provided services to various principal contractors who were primarily engaged in executing government contracts of erection, commissioning, installation or construction of power transmission towers. The appellant mainly carried out various works/services in relation to transmission of electricity namely concrete foundation, excavation of pits, establishment and maintenance of site for storage of materials relating to power transmission tower in the capacity of sub-contractor. The appellant have not discharged the service tax liability on the service provided to their main/principal contractor. In case of some service the appellant has charged and recovered service tax from service recipient, there the appellant has duly discharged the service tax liability.

1.1 As regard non-payment of service tax, a show cause notice dated 08.09.2009 came to be issued raising the demand of service tax amounting to Rs. 1,17,30,336/- along with interest and penalty invoking extended period of limitation of sub-section (1) of section 73 of Finance Act, 1994. The adjudicating authority vide Order-In-Original dated 10.10.2012, confirmed the service tax demand along with interest and penalty. Being aggrieved by the said Order-In-Original, the appellant preferred the present appeal.

02. Shri Rahul Gajera, learned counsel appearing on behalf of the appellant submits that there is no dispute that the service provided by appellant is in relation to power transmission tower in the capacity of sub-contractor. He submits that the services have been exempted by a notification no. 45/2010 which provides that any service rendered in relation to transmission and distribution of electricity are exempted from service tax. The expression "relating to" is very wide in its amplitude and scope as held by the Hon'ble Supreme Court in the case of Doypack Systems P. Ltd.- 1988 (36) E.L.T. 201 (SC) therefore, all taxable services rendered in relation to transmission/distribution of electricity would be eligible for benefit of exemption under the said notification for the period up to 27.02.2010. In this behalf, he placed reliance on the following judgments:-

- M/S. KALAPATRU POWER TRANSMISSION LTD.- 2019 (7) TMI 503-CESTAT AHMEDABAD
- KEDAR CONSTRUCTIONS- 2015 (37) S.T.R. 631 (TRI.-MUMBAI)
- NOIDA POWER COMPANY LTD.- 2014 (33) S.T.R. 383 (TRI.DEL.)
- VENZA INFRASTRUCTURE LTD.- 2019 (31) G.S.T.L. 460 (TRI.HYD.)
- U.P. RAJKIYA NIRMAAN NIGAM LTD.- 2016 (41) S.T.R. 967 (TRI.DEL.)
- MD. AUB KHAN.- 2015 (40) S.T.R. 267 (TRI.BANG.)

2.1 He submits that as regard the demand in respect of renting of JCB under the category of supply of tangible goods is not being contested as the appellant have already recovered and paid the service tax on the same.

2.2 He further submits that a show cause notice dated 08.09.2009 demanded service tax for the period October 2004 to March 2009 which is to the extent beyond limitation period of one year as applicable in 2010 specified in Section 73(1) of the Finance Act, 1944, the show cause notice is barred by time.

2.3 He submits that in the present case there is no clandestine activity as complete records have been maintained in normal course of the activity

undertaken by the appellant. The non-payment of service tax is on account of belief that no service tax was payable on the activities undertaken by the appellants. He submits that the appellant had a bonafide belief in view of the various decisions, the services provided by them is not taxable activity.

2.4 He submits that it is settled law that where complete records are maintained and there is no clandestine activity and where non-payment of service tax is on account of bona fide belief, no service tax was payable and larger period of limitation cannot apply. He placed reliance on the following judgments:-

- STEELCAST LTD.- 2009 (14) STR 129 (UPHELD IN 2011 (21) STR 500)
- RELIGARE SECURITIES LTD.- 2014 (36) STR 937
- LANXESS ABS LTD.- 2011 (22) STR 587
- K.K. APPACHAN- 2007 (7) STR 230

He further submits that even assuming that the service tax was payable, the question whether sub-contractor is liable to pay service tax itself had not been free from doubt. The C.B.E.C. changed its previous view that service tax is not payable by sub-contractor by Circular No.96/7/2007-S.T. dated 23.08.2007 even after the said circular there were conflicting decisions of the tribunal necessitating reference to larger bench and only recently by its decision in CST V/s. MELANGE DEVELOPERS- 2020 (33) GSTL 116 (Tri.LB) the larger bench has decided the said issue. It is settled law that where the issue has not been free from doubt requiring reference to larger bench, larger period of limitation cannot apply. He prays to allow the appeal by setting aside the impugned order.

03. Shri Kalpesh Shah, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. We have carefully considered the submissions made by both the sides and perused the records. We find that as regard the service i.e. renting of JCB under the category of supply of tangible goods, the appellant have collected the service tax and paid the same to the government exchequer therefore, the same is not under dispute on merit. We accordingly, maintain the service tax demand and payment thereof on supply of tangible goods i.e. renting of JCB.

4.1 As regard other services, there is no dispute that the appellant have rendered the services of construction activity for concrete foundation of power transmission lines and establishment and maintenance of site for

storage of material relating to transmission tower, all these services which are in relation to setting up of transmission tower for transmission of power. The period involved in the present case is 2004-05 to 2008-09, the government has issued a notification giving it retrospective effect under notification no.45/2010-ST dated 20.07.2010 ,the notification is reproduced below:-

*Electricity — Exemption to all taxable services relating to transmission of electricity till 26-2-2010 and distribution of electricity till 21-6-2010*

*Whereas, the Central Government is satisfied that a practice was generally prevalent regarding levy of service tax (including non-levy thereof), under section 66 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as 'the Finance Act'), on all taxable services relating to transmission and distribution of electricity provided by a person (hereinafter called 'the service provider') to any other person (hereinafter called 'the service receiver'), and that all such services were liable to service tax under the said Finance Act, which were not being levied according to the said practice during the period up to 26th day of February, 2010 for all taxable services relating to transmission of electricity, and the period up to 21st day of June, 2010 for all taxable services relating to distribution of electricity;*

*Now, therefore, in exercise of the powers conferred by section 11C of the Central Excise Act, 1944 (1 of 1944), read with section 83 of the said Finance Act, the Central Government hereby directs that the service tax payable on said taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver, which was not being levied in accordance with the said practice, shall not be required to be paid in respect of the said taxable services relating to transmission and distribution of electricity during the aforesaid period.*

*[Notification No. 45/2010-S.T., dated 20-7-2010]*

From the above exemption notification, it is clear that all the taxable service provided by an assessee relating to transmission and distribution of electricity are exempted for the period up to 26<sup>th</sup> February, 2010. Since in the present case, the period involved is prior to 26<sup>th</sup> February, 2010 entire period is covered under exemption therefore, the demand on the services in question except the demand on supply of tangible goods are exempted under Notification No.45/2010-ST. This issue has been considered in various judgments which are cited/reproduced below:-

- Kedar Constructions- 2015 (37) S.T.R. 631 (Tri.-Mumbai)

**5.** *We notice that out of the total demand confirmed of ` 2,04,14,368/-, bulk of the demand of ` 1,90,47,124/- pertains to Commercial or Industrial Construction service rendered to Maharashtra State Electricity Transmission Co. Ltd., Maharashtra*

*State Electricity Distribution Co. Ltd., Sunil Hi-Tech, Suraj Constructions, V.B. Bhike, etc. for transmission of electricity. Vide Notification 45/2010-S.T., all taxable services rendered 'in relation to' transmission and distribution of electricity have been exempted from the purview of Service Tax. The expression 'relating to' is very wide in its amplitude and scope as held by the Hon'ble Apex Court in Doypack Systems P. Ltd. - [1988 \(36\) E.L.T. 201](#) (S.C.). Therefore, all taxable services rendered in relation to transmission/distribution of electricity would be eligible for the benefit of exemption under the said Notification for the period prior to 27-2-2010.*

**6.** *As regards the demand for the period w.e.f. 27-2-2010, the said exemption is available if the taxable services are rendered for transmission of electricity. As held by the Hon'ble Apex Court in the case cited supra the expression "for" means 'for the purpose of'. As per the definition of transmission (given in the Electricity Act, 2003), it covers a very wide gamut of activities including sub-station and equipments. Therefore, the various activities undertaken by the appellant, though classifiable under Commercial or Industrial Construction prior to 1-6-2007 or under works contract service on or after 1-6-2007, would be eligible for the benefit of exemption as held by this Tribunal in the case of Noida Power Co. Ltd., Pashchimanchal Vidyut Vitran Nigam, Purvanchal Vidyut Vitran Nigam and Shri Ganesh Enterprises cited supra. Therefore, the confirmation of Service Tax demand in respect of the construction, maintenance or repair activities undertaken by the appellant so far as it relates to the transmission/distribution of electricity cannot be sustained in law. As regards the other demands which has been confirmed in respect of construction of transformer station for the sugar factory or GTA service etc. the appellant is not disputing the tax liability and therefore, in respect of the other activities of the appellant which are not related to either transmission or distribution of electricity, the demands confirmed are upheld along with interest.*

- Noida Power Company Ltd.- 2014 (33) S.T.R. 383 (Tri.Del.)

**3.** *In issuing Exemption Notification dated 22-6-2010 read with the Notification No. 45/2010-S.T., dated 20-7-2010, the Central Government signalled the clear policy choice that levy of Service Tax on activities in relation to the distribution of electrical energy by a distribution agency is exempt from levy of Service Tax.*

**4.** *The analysis of the Adjudication Authority in relation to the assessee's claim for immunity to Service Tax is predicated on the Notification dated 20-7-2010 vide paragraph 5.1 of the order-in-original under title "Discussion and Findings". The Adjudicating Authority held that the notifications do not exempt the activity/service of installation of various equipments at the consumers premises, as this service is different from and in addition to service of distribution of electricity; that equipment installed by the assessee is not in lieu of hire charges; that the infrastructure (established by the assessee) is used to supply electricity to various consumers and the consumers do*

not have ownership of the transformers. The contention by the assessee that installation of the various equipment, establishing the network is an essential component of his business of distribution of electricity which is carried out in terms of the provisions of the Electricity Act, 2003 was rejected on the ground that all duties required to be delivered by a distribution licensee under provisions of Electricity Act are not exempt from payment of Service Tax. Other contentions were urged on behalf of the assessee has were also rejected by the Adjudicating Authority.

**5.** On true and fair analysis of the Exemption Notification dated 22-6-2010 and the immunity Notification dated 20-7-2010, the conclusion is compelling that all taxable services provided in relation to distribution of electrical energy are exempt from the liability to Service Tax. The expression "in relation to" is of wide import and indicates all activities having a direct and proximal nexus with distribution of electrical energy. Distribution of electricity energy cannot be effectively accomplished without installation of sub-stations, transmission towers and installation of meters to record electricity consumption for periodic billing and recovery of charges.

**6.** In *M.P. Power Transmission Co. Ltd. v. CCE, Bhopal* - [2011 \(24\) S.T.R. 67](#) (Tri.-Del.) Revenue demand of Service Tax on transmission and distribution of electricity was declared unsustainable in view of Notification No. 45/2010, dated 20-7-2010. Again in *Paschimanchal Vidyut Vitran Nigam Ltd. v. CCE, Meerut* - 2012-TIOL-1175-CESTAT-DEL = [2012 \(28\) S.T.R. 412](#) (Tri.-Del) after analyzing the provision of Notification No. 45/2010-S.T., dated 20-7-2010 it was held that for the purpose of billing the consumer for electricity consumed it is essential to install the electricity meter having capacity to withstand the load provided to the customer; any activity or service like erection, commissioning and installation of transmission towers and meters as also technical testing and analysis would constitute the activity of transmission and distribution by the service provider to the service receiver; and such service would be squarely covered under exemption provided under this notification. The earlier decision in *M.P. Power Transmission Co. Ltd.* was affirmed.

**7.** In view of the aforesaid decisions, in particular the decision in *Paschimanchal Vidyut Vitran Nigam*, the impugned adjudication order is unsustainable and is accordingly quashed. This appeal by the assessee is allowed, but in the circumstances without costs. As the appeal is allowed the stay petition stands disposed of.

- *U.P. Rajkiya Nirmaan Nigam Ltd.*- 2016 (41) S.T.R. 967 (Tri.Del.)

**4.** We have considered the contentions of the appellant. Notification No. 45/2010-S.T., dated 20-7-2010 reads as under : -

"Electricity - Exemption to all taxable services relating to transmission of electricity till 26-2-2010 and distribution of electricity till 21-6-2010



*Whereas, the Central Government is satisfied that a practice was generally prevalent regarding levy of service tax (including non-levy thereof), under Section 66 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as 'the Finance Act'), on all taxable services relating to transmission and distribution of electricity provided by a person (hereinafter called 'the service provider') to any other person (hereinafter called 'the service receiver'), and that all such services were liable to service tax under the said Finance Act, which were not being levied according to the said practice during the period up to 26th day of February, 2010 for all taxable services relating to transmission of electricity, and the period up to 21st day of June, 2010 for all taxable services relating to distribution of electricity;*

*Now, therefore, in exercise of the powers conferred by Section 11C of the Central Excise Act, 1944 (1 of 1944), read with Section 83 of the said Finance Act, the Central Government hereby directs that the service tax payable on said taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver, which was not being levied in accordance with the said practice, shall not be required to be paid in respect of the said taxable services relating to transmission and distribution of electricity during the aforesaid period.*

*[Notification No. 45/2010-S.T., dated 20-7-2010]"*

*Thus, the service tax payable on all services relating to transmission and distribution of electricity provided by the service provider to the service recipient is not required to be paid. We have seen the related contracts entered by the appellant with M/s. UPCL. It is evident from there that the service rendered by the appellant is squarely relating to transmission and distribution of electricity and therefore in the light of the Notification No. 45/2010-S.T., dated 20-7-2010 no service tax is recoverable in respect thereof. Indeed CESTAT in the case of NOIDA Power Co. v. CCE, NOIDA [[2014 \(33\) S.T.R. 383](#) (Tri.-Del.)] has held that "the expression 'in relation to' is of wide import and indicates all activities having a direct and proximate nexus with distribution of electrical energy. Distribution of electrical energy cannot be effectively accomplished without installation of sub-station, transmission towers and installation of meters." Indeed similar demands against M.P. Power Transmission Co. Ltd. raised by CCE, Bhopal and Paschimanchal Vidut Vitran Nigam Ltd. raised by CCE, Meerut were set aside by CESTAT in the cases of M.P. Power Transmission Co. Ltd. v. CCE, Bhopal [[2011 \(24\) S.T.R. 67](#) (Tri.-Del.)] and Paschimanchal Vidyut Vitran Nigam Ltd. v. CCE, Meerut [2012-TIOL-1175-CESTAT-DEL] respectively, in the wake of provisions of Notification No. 45/2010-S.T., dated 20-7-2010.*

**5.** *In the light of the foregoing, the impugned demand is not sustainable and is accordingly quashed, and the appeal allowed.*

- MD. Aub Khan.- 2015 (40) S.T.R. 267 (Tri.Bang.)

**2.** *After hearing the learned AR and going through the records, it is seen that the original authority had not considered the liability of Service Tax on the ground that appellant had deposited the entire amount of Service Tax and produced the challan. Before the learned Commissioner (Appeals), appellant had claimed the benefit of notification. However the learned Commissioner has held that services provided by the appellant are provided prior to distribution and transmission of electricity and therefore the appellant is not eligible. However based on which the Commissioner has come to this conclusion is not available. There is no contrary finding that manpower supply service has not been provided to a transmission and distribution company. There is no detail available as to how the service provided by the appellants has to be treated as the one provided prior to transmission and distribution of electricity. Notification No. 45/2010 exempts all the services rendered in relation to transmission and distribution of electricity and there is no distinction made prior to commencement of transmission or distribution subsequently. It is quite clear that in this case services are provided to M/s. APCPDCL which is engaged only in transmission of electricity and therefore services provided by them have to be considered as the one provided for transmission not distribution. Under these circumstances we consider that the appellants clearly are eligible for the benefit of Notification No. 45/2010. In view of the fact that the issue involved has been considered in detail and there is nothing left to look at, it would be appropriate to allow the appeal itself at this stage rather than keeping the matter pending for years before this Tribunal.*

**3.** *In view of the above discussion, the impugned order is set aside and the appeal is allowed with consequential relief, if any, to the appellant. The stay application also is disposed of.*

From the above judgments, it is settled law that all the services provided in relation to transmission of electricity are exempted under notification no.45/2010-ST therefore, in the present case also services being provided are in relation to power transmission tower, the same are exempted hence the demand is not sustainable on merit.

4.2 As regard the submission made by the appellant that the demand is also hit by limitation, we find that the appellant has acted as a sub-contractor. Earlier, there were contrary clarifications by the government that the sub-contractor is not liable to service tax when the main contractor is discharging service. Subsequently vide circular dated 23.08.2007, the C.B.E.C has taken a U-turn and withdrawn the earlier stand and clarified that the sub-contractor is liable to pay the service tax. There were contrary



judgments on the issue that whether the sub-contractor is liable to service tax. Subsequently the matter was referred to larger bench in the case of CST V/s. MELANGE DEVELOPERS- 2020 (33) GSTL 116 (Tri.LB). It is settled law that when the issue is free from doubt and matter is referred to larger bench, the larger period of limitation cannot apply. In the present case, it is not only the larger bench decision which settled the law but there were contrary circulars of the board on the issue of payment of service tax by the sub-contractor. In view of this position, there is no suppression of fact or any mala fide intention to evade payment of service tax on the part of appellant, therefore, we are of the considered view that the demand beyond one year is not sustainable on limitation also. Considering the overall facts and circumstances of the case and also the duty demand not sustainable, the penalties are also set aside.

05. As per our above discussion and finding, the impugned order stand modified to the above extent. Appeal is allowed in the above terms.

(Pronounced in the open court on 11.11.2022)

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**

Mehul