CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10059 of 2022-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-COM-0010-21-22 dated 03.11.2021 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

Perfect Ready Mix Concrete **.... Appellant**
Nr Mehboob Jabir Patel Survey No 176/1/2 Nr Bryosis
Soft Caps Pvt Ltd Rasulabad Road Jarod
Vadodara, Gujarat-391510

VERSUS

Commissioner of Central Excise & ST, Vadodara **.... Respondent**
1st Floor... Room No.101,
New Central Excise Building,
Vadodara, Gujarat-390023

APPEARANCE :

Shri A. Banerjee, Advocate for the Appellant
Shri R P Parekh, Superintendent (AR) for the Revenue.

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

DATE OF HEARING : 18.07.2022
DATE OF DECISION : 14.11.2022

FINAL ORDER NO. A/11366 / 2022

RAMESH NAIR :

The brief facts of the case are that the appellant are engaged in the manufacture of Ready-Mix-Concrete(RMC) falling under the chapter heading 38245010 of the first schedule of the Central Excise Tariff Act, 1985 and they had been discharging their Central Excise liabilities on the manufacturing of RMC @2% in terms of Sr.No. 46 of the Notification No. 01/2011-C.E. dated 01.03.2011 without availment of Cenvat Credit. While supplying their RMC, they are also undertaking the activity of laying of RMC using of concrete pumping at the site of the buyer of RMC. On removal of RMC from the factory, the appellant are paying Central Excise duty. Having

entered into contract with the buyer of RMC which is of works contract which include supply of RMC and laying of RMC at the buyer's site. The case of the department is that it is a composite contract for supply and laying of RMC falls under works contract and liable to service tax. Appellant also filed VAT returns under (Form -202) section 14A of Gujarat VAT Act, 2003 after taking permission under Rule, 28 of the Gujarat VAT Rules. On scrutiny of Balance Sheet it also appears that they received rent income on account of transfer of tangible goods service and received legal services. On which they are liable to pay service tax. Accordingly, a show cause notice dated 23-12-2020 was issued and the impugned order-in-original No. VAD-EXCUS-002-COM-0010-21-22 dated 03-11-2021 came to be passed wherein it was held that activity of the appellant *i.e.* supply of RMC at buyer's site is classifiable as Works Contract service. Consequently demand of service tax amounting to Rs. 2,22,53,396/- for the period April 2015 to June 2017 was confirmed and Service tax demand of Rs. 5,990/- was also confirmed on legal service under reverse charge under Section 73 of Finance Act, 1994. Interest under Section 75 was demanded and penalties were imposed on the appellant. Therefore, being aggrieved with the impugned order the appeal is filed by the appellant before us.

2. Shri A. Banerjee, Learned Counsel appearing on behalf of the appellant submits that the contracts based on which the service tax demand is confirmed are related to Concrete providing and laying at the buyers premise. The product ready mix concrete attract Central Excise Duty @2% and is classified under Central Excise Tariff heading 38245010. The goods have a very limited shelf life so this product if manufactured away from the buyer's premises has to be transported and laid at the place specified by the buyer and thus cost of the product includes all the incidental and ancillary

services value on the principal supply of ready mix concrete and the Appellant has suffered Central Excise Duty on this complete value.

3. He also submits that department assessed the service tax liability on the taxable value @40% of the invoice value considering the supply to be Original Work under Rule 2A of the Service tax (Determination of value) rules, 2006, which is totally incorrect as there is no activity of any original works as far as the Appellant is concerned. The whole case is developed on the basis of sales tax assessment of the goods @0.06% under composition scheme without Cenvat credit applicable to work contract service. But the definition of Works Contract Service under Service tax regime is more specific & restricted to construction activity as compared to Sales Tax or VAT law. It is a guiding principle that once the whole value is assessed to Central Excise Duty then the same value cannot be re-assessed to Service tax again. He placed reliance on the following judgments.

(i) Final Order No. A/12558/2021 dated 01.12.2021 passed in the matter of M/s Wagad Infra Projects Pvt. Ltd. Vs. CCE, Vadodara.

(ii) GMK Concrete Mixing Pvt. Ltd. Vs. Commissioner of Service tax – 2012 (25) STR 357 (Tri. Del)

(iii) Vikram Ready Mix Concrete(P) Ltd. vs. Commissioner of S.T., Delhi – 2016 (42) STR J282 (SC)

4. He further submits that demand of service tax to the tune of Rs. 22,500/- on renting of tangible goods in the year 2016-17 based on the amount of Rs. 1,50,000/- reflected in Balance Sheet but actually the appellant is only engaged in manufacture of Ready Mix Concrete and no other outward supply of services involved so the appellant would be eligible for small scale service provider exemption to the turnover limit of taxable services of Rs. 10 Lacs as per the Service tax Notification No. 33/2012-ST

dated 20.06.2012. Hence there is no service tax demand surviving in the case also.

5. As regard the demand of service tax on reverse charge mechanism for legal charges to the tune of Rs. 5,900 he submits that this demand is hit by bar of limitation as the Appellant has been audited vide Audit report No. 965/2018-19/CE in the year 2018-19 covering the period April 2013 to 2017.

6. Shri R P Parekh, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that appellant with their client has agreement in respect of works contract which includes supply of RMC along with some services such as laying of RMC at the recipient's site and therefore, it is correctly falls under the service of works contract.

7. We have carefully considered the submissions made by both the sides and perused the record.

8. As regard the demand of Service tax under work contract service, we find that the entire case of the department is based only on the contract between appellant and buyer of RMC. As per the contract, the entire transaction is of Works Contract. However, the appellant is mainly engaged in the manufacture of Ready-Mix-Concrete and selling the same to various buyers. As per the nature of product, it is necessary to supply RMC in a specialized container and after reaching at the customer's site RMC is delivered by carrying out the process of pouring, pumping and laying of concrete at the customer's place. The RMC cannot be unloaded at a particular place and thereafter shifted the same to a different particular

place at site. Due to peculiar nature of RMC, it is unavoidable to deliver at particular place where the RMC is required to be laid-down. It is also the fact that appellant being manufacturer of RMC, paying excise duty not only on the value of the goods but also on the value of service of pumping, laying of concrete and the same is included in the sale value. Therefore, no value is escaped from payment of excise duty. Accordingly, the entire activity right from the manufacturing of RMC and delivery at the site of the customer is excisable activity. Merely because the contract says that it is works contract, the actual nature of transaction cannot be overlooked. The appellant is treating the transaction of Works Contract in terms of VAT Act only. However, there is a specific definition of Works Contract in the Finance Act, 1994 which reads as under:-

> *"(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;"*

9. From the above definition, it is clear that manufacturing activity of RMC cannot be covered under Works Contract by any stretch of imagination. Therefore, even though there is contract of Works Contract basically for the purpose of VAT Act, cannot be applied in the present transaction of manufacture and sale of goods in terms of Section 2(f) of Central Excise Act, 1944. The department has very much accepted the activity of the appellant as manufacturing and collected the excise duty on the entire value of RMC which includes the pumping and laying of RMC at site. Therefore, the department cannot take two stands, in one hand manufacturer for demanding excise duty and on the same activity, on the other hand demanding service tax under Works Contract.

10. We also noticed that in various judgments this issue has been considered. Tribunal in the case of *GMK Concrete Mixing Pvt. Ltd.* v. *CST, Delhi* reported in 2012(25) S.T.R. 357 (Tri. - Del.) has held that the entire exercise is sale of ready-mix-concrete and there is no service element involved so as to create service tax liability against the assessee.

11. As per above view, which is clearly supported by various judgments relied upon by Ld. Counsel above, we are of the clear view that the activity of the appellant is predominantly of manufacture and sale of goods. Accordingly, the same cannot be charged with service tax under Works Contract service.

12. As regard to the service tax demand on supply of tangible goods service, the appellant has put forward the contention that it would be within the threshold limit. The details of rent collected covered by the show cause notice for the year 2016-17 is of Rs. 1,50,000/- and 2015-16 is NIL. It would go to show that the amount related to supply of tangible goods service is within the threshold limit of exemption of service tax provided under the Notification 33/2012-ST. dated 20.06.2012. Therefore, we are of the view that the demand of service tax on the supply oftangible goods services also cannot sustain and requires to be set aside, which we hereby do so.

13. As regard the demand of Rs. 5,990/- on legal services under reverse charge mechanism, we find that Appellant is contesting the said demand only on limitation and submitted the copy of departmental audit report in

support of their arguments. We agree with contentions and arguments of the Ld. Counsel and set aside the demand on time bar.

14. In view of above discussion and finding, we hold that the impugned order is required to be set aside and we do so. The appeal is allowed with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 14.11.2022*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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