(2021) 09 CESTAT CK 0055

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Miscellaneous Application No. 85190 Of 2021, Service Tax Appeal No. 86593, 87638 Of 2018

M/s. Greatship (India) Ltd. APPELLANT

Vs

Commissioner of CGST And Central Excise Mumbai Central RESPONDENT

Date of Decision : 21-09-2021

Acts Referred:

Finance Act, 1994 — Section 65(25b), 65(105)(zzq), 66, 67, 68, 73(1), 73(2), 73B, 75, 76

Service Tax (Determination of Value) Rules, 2006 — Rule 3(b), 5

Citation : (2021) 09 CESTAT CK 0055

Hon'ble Judges : Dr. Suvendu Kumar Pati, J;Sanjiv Srivastava, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. These two appeals, one by assessee and one by Revenue, are directed against order-in-original No. 14-16/COMMR/Dr.KNR/CGST & C.EX/MC/2018 dated 07.12.2017 passed by Commissioner of CGST & Central Excise, Mumbai Central. By the said order, the Commissioner has held as under:-

"ORDER

1. I determine and confirm the demand of Service Tax of Rs.33,54,84,537/- (Rs. Thirty Three Crores Fifty Four Lakhs Eighty Four Thousand Five Hundred Thirty Seven only) under Section 73(2) of Finance Act, 1994, (Rs.13,61,89,309/- with reference to Show Cause Notice Nos.1197/COMMR/2014-15 dated 17.04.2014, Rs.12,75,87,994/- with reference to SCN No. Commr./36/2014-15 dated 13.04.2015/- and Rs.7,17,07,234/-with reference to SCN No. Commr/175/2014-15 dated 17.12.2015) being levied on fuel supplied in respect of "Mining Service" against the Noticee, under Section 73(2) of the Finance Act, 1994.

2. I order for recovery of interest as applicable on the demand confirmed of

service tax amounting to Rs.33,54,84,537/- in terms of Section 73B of the Finance Act, 1994.

3. I order to impose penalty of Rs.3,00,00,000/- (Rupees Three Crores only) on M/s. Greatship (India) Ltd., under Section 76 of the Finance Act, 1994.

4. I drop the demand of Rs.79,64,04,288/- (Rs. Seventy Nine Crores Sixty Four Lacs Four Thousand Two Hundred Eighty Eight only) in respect of "supply of Tangible goods" (Rs.39,19,14,082/-) with reference to SCN No. Commr./36/2014-15 dated 13.04.2015, and Rs.40,44,90,206/-with respect to SCN No. Commr/175/2014-15 dated 17.12.2015). Consequently there will be no liability of interest or penalty against the dropped amount."

2.1 The issue involved in the case is that the assessee is providing taxable services, viz. supply of tangible goods services, mining service, business support service, banking and financial service, repair and maintenance service.

2.2 During the course of audit, it was observed that while discharging service tax due on the category of supply of tangible goods and mining services, the assessee has not included the value of free diesel supplied to them for providing these services by the service recipient.

2.3 Accordingly show cause notices dated 13.04.2014, 17.04.2014 and 17.12.2015 were issued to the assessee. Show cause notice dated 13.04.2014 sought as to why:-

"i) the amount of Rs.51,95,02,076/- (Rupees Fifty One Crore Ninety Five Lacs Two Thousand Seventy Six only) as the Service Tax liability not paid by them during the period April, 2013 to March 2014 should not be demanded and recovered from them under Section 73(1) of Chapter V of the Finance Act, 1994;

ii) interest at the appropriate rate should not be demanded and recovered from them under provisions of Section 75 of the Finance Act, 1994;

iii) penalty should not be imposed upon them under Section 76 of the Finance Act, 1994."

Show cause notice dated 17.04.2014 sought as to why:-

"(i) An amount of Rs.13,61,89,309/- (Rs. Thirteen Crores Sixty One Lakhs Eighty Nine Thousand Three Hundred and Nine only), as Service Tax liability (along with Education Cess and Secondary & Higher Education Cess), not paid by them, during the period 2008-09 to 31.03.2013 as detailed at para 2 to 7 above, should not be demanded and recovered from them under proviso to Section 73(1) read with section 66 of Chapter V of the Finance Act, 1994.

(ii) Interest should not be demanded and recovered from them for non-payment of Service Tax within the period specified under Section 68 read with Rule 6 ibid, under the provisions of Section 75 of the Finance Act, 1994.

(iii) Penalty should not be imposed on them under Section 76 of the Act for failure to pay Service tax within the prescribed time as required under Section 68 of the Act and Rule of the Rules."

Show cause notice dated 17.12.2015 sought as to why:-

"i) the amount of Rs.47,61,97,440/- (Rupees Forty Seven Crores Sixty One Lacs Ninety Seven Thousand Four Hundred and Forty only) as the Service Tax liability not paid by them during the period April, 2014 to March 2015 should not be demanded and recovered from them under Section 73(1) of Chapter V of the Finance Act, 1994;

ii) interest at the appropriate rate should not be demanded and recovered from them under provisions of Section 75 of the Finance Act, 1994;

iii) penalty should not be imposed upon them under Section 76 of the Finance Act, 1994."

2.4 The show cause notices were adjudicated as per the impugned order referred to in para 1 above.

3.1 Aggrieved by the confirmation of demand in respect of free diesel supplied for providing mining services the assessee has filed this appeal and against dropping of the demand in respect of free diesel attributable to supply of tangible goods, Revenue has filed the appeal.

3.2 Revenue has also filed a miscellaneous application for early hearing of appeal No. ST/86593/2018 on the ground of huge amount of revenue involved in the case. Since the appeal itself has been taken up for hearing, the early hearing application filed by Revenue is infructuous and is accordingly dismissed.

3.3 We have heard Shri V. Sridharan, Senior Advocate, for the assessee and Shri Nitin M. Tagade, Joint Commissioner, Authorised Representative, for Revenue.

4.1 We have considered the impugned order along with the submissions made in appeals and during the course of arguments.

4.2 We find that the issue is squarely covered by our decision in the case of Vantage International Management Company vs. CCGST, Mumbai East [2021 (48) GSTL 265 (Tri.-Mumbai)]. The relevant paragraphs of the said decision are reproduced below:-

"5.The issue involved in this case for consideration by the Tribunal is, whether the appellant has taken the correct legal stand in not including the cost of free supply diesel made by M/s. ONGC in the value of taxable service for running the drilling vessel.

6.On perusal of the agreement dated 29-4-2009, we find that the recipient of service M/s. ONGC was required to supply the fuel (diesel) for running of the drilling equipments; that it was not required to make payment of fuel to the appellant and that the same was in fact, supplied free of cost to accomplish the assigned task. This factual aspect has also been accepted by the department in the show cause notice as well in the impugned order.

7.The period of dispute involved in this case is from December, 2010 to December, 2015. The provisions of valuation of taxable services for charging service tax are contained in Section 67 ibid. The said statutory provision has defined the term 'consideration', to include any amount that is payable for the taxable services provided or to be provided for provision of taxable service. Section 67 ibid was amended by the Finance Act, 2015 (20 of 2015), w.e.f. 14-5-2015. The effect of amendment was that sub-clauses (ii) and (iii) were inserted in clause (a) in the definition of consideration contained in the explanation part appended to Section 67 ibid. The amended provisions include inter alia, any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, subject to the fulfilment of the prescribed conditions. In the present case, it is an admitted fact on record that the appellant had never charged any cost of fuel to M/s. ONGC over and above the amount claimed by it for providing the taxable service. Since, M/s. ONGC was not required to make payment of fuel to the appellant, its value cannot be added to the taxable value both under the un-amended and amended provisions of Section 67 ibid. Further, the appellant herein had received the entire consideration for provision of service in monetary terms. Hence, it cannot be said that it was not properly able to determine the value of taxable service, in order to attract the provisions of Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006. Similarly, the provisions of Rule 5 ibid also would not attract in this case inasmuch as no cost of fuel was charged or billed by the appellant to the recipient of service.

8.We find that the issue arising out of the present dispute is no more res integra, in view of the judgment of Hon'ble Supreme Court in the case of M/s. Bhayana Builders (P) Ltd. (supra), relied upon by the Learned Advocate for the appellant. The relevant paragraphs in the said judgment are extracted hereinbelow :

11. As already pointed out in the beginning, 11. 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.

12. On a reading of the above definition, it is 12. clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients :

(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.

(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.

13. A plain meaning of the expression 'the 13. gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/ service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the

service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

9. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the Learned Commissioner of Service Tax. Therefore, by setting aside the same, the appeal is allowed in favour of the appellant."

4.3 The distinction sought to be made by the Commissioner while confirming the demand in respect of free supply of diesel in case of mining services is not having any legal basis. Section 67 does not make any such distinction.

5.1 In view of the above discussion, we do not find any merits in the appeal filed by Revenue and dismiss the same.

5.2 The appeal filed by the assessee is allowed.

(Order pronounced in the open court)