

(2021) 02 CESTAT CK 0002

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 50414 Of 2017

**M/s TCL - MMPL Consortium @Hash Commissioner Central Excise
Commissionerate, Jodhpur**

Date of Decision : 01-02-2021

Acts Referred:

Finance Act, 1994 — Section 67, 67(1)(ii), 78

Citation : (2021) 02 CESTAT CK 0002

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Advocate : B.L. Narasimhan, Narendra Singhvi, Dr. Radhe Tallo

Final Decision : Allowed

Judgement

1. M/s TCL - MMPL Consortium, the appellant has assailed the order dated November 29, 2016 passed by the Commissioner of Central Excise

Commissionerate, Jodhpur, the Commissioner, by which the demand of service tax has been confirmed with interest and penalty.

2. The appellant is engaged in providing mining services to M/s Hindustan Copper Limited, HCL under two agreements dated April 24, 2009 and April

19, 2010. The agreements provided for the price payable to the appellant for such mining services. It is not in dispute that the appellant has discharged

service tax liability on this amount. The agreements also provided that HCL shall provide certain items on free of cost basis to the appellant. The issue

involved in this appeal is about the inclusion of the value of items supplied on free of cost basis by the service recipients to the appellant in the value of

mining services provided by the appellant. The appellant believed that providing of such items on free of cost basis was a mere condition of the

contract and not a consideration for provision of mining services by the appellant. It, therefore, did not include the value of such items in the taxable

value of its mining services.

3. However, a show cause notice dated October 23, 2015 was issued to the appellant mentioning therein :

“8. Whereas in view of the above, it appeared that the money value of items supplied free of cost such as diesel, explosives, blasting

accessories, electricity and other items etc. by M/s HCL was includible in the value of taxable service provided by the service provider

during the period from April-2010 to March-2015. M/s HCL, Khetrinagar had supplied the consumable terms such as detonators,

explosives, diesel, other open items etc. & electricity free of cost valued at Rs. 21,64,20,159/- during the said period to the service provider

for execution of the work orders and the service tax amount involved on the value of items supplied and electricity supplied free of cost

come to Rs. 2,52,72,575/- (as per details shown in Annexure-A,B,C,D,E and F to the notice) which appeared to be recoverable from the

service provider.”

(emphasis supplied)

4. The appellant was, therefore, required to show cause as to why service tax on the money value of the items supplied free of cost should not be

demand and recovered from the appellant with penalty and interest.

5. The appellant filed a reply dated April 22, 2016 to the aforesaid show cause notice and asserted that the value of the items supplied on free of cost

cannot be brought within the ambit of the term "consideration" and, hence, cannot be included in the value of taxable services.

6. The Commissioner, however, by order dated November 29, 2016 confirmed the demand of service tax with penalty and interest. The relevant

portion of the order passed by the Commissioner is reproduced below:

“4.3 ***** Thus, it is evident that the assessee while providing mining service to HCL, received free supply of

certain items/facilities without which the taxable service could not have been rendered by them. It clearly indicates that in case the assessee

had provided the same service to any other service recipient, they would have to purchase all these items from open market on payment of

appropriate value thereof. It is beyond doubt that detonators, explosives, diesel, electricity etc. are essential items and have nexus with the

services provided. The value of such items supplied free of cost are includible in the gross value of taxable service provided by the assessee.

I observe that the assessee has mainly placed reliance in the case of M/s Bhayana Builders (P) Ltd. (supra) which is distinguishable in facts

and circumstances. I find that in this case the Honâ??ble Tribunal has discussed the value of free supplies made in case of construction

service and interpreted the term gross amount charged in view of notification no. 15/2004- ST dated 10.09.2004. Whereas, in the instant

case, the issue involved is taxability of free supplies made in mining service where no abatement is available. These two services have

distinct characteristics and execution and cannot be equated. I do not find much force in the contention made by the assessee.â??

(emphasis supplied)

7. The aforesaid order of the Commissioner is based on the fact that without use of the items supplied on free of cost basis, the appellant could not

have provided mining services and thus, the value of these items has to be included in the taxable value of mining services. The decision of a larger

bench of the Tribunal in Bhayana Builders (P) Limited vs CST, Delhi, 2013 (32) STR 49 (Tri-LB), was found not to be applicable as it was concerned

with construction services.

8. Shri B.L Narasimhan, learned counsel appearing for the appellant has made the following submissions:

(i) The value of free of cost items provided by the service recipient, i.e HCL, to the appellant does not form part of the taxable value of mining service

provided by the appellant. Valuation of taxable services is governed by section 67 of the Finance Act, 1994, the Finance Act. When service is

provided for a consideration â??not wholly or partly consisting of moneyâ??, section 67(1)(ii) provides that the value shall be such amount in money,

as with the addition of service tax charged, is equivalent to the consideration. The fact that the consideration has been received in â??other formâ??

must be established in order to invoke the provisions of clause (ii). In case no consideration has been received in other form, the said clause cannot be

invoked;

(ii) The items provided on free of cost basis for provision of service are not

consideration as per section 67 of the Finance Act, as they do not accrue to benefit of the appellant. The said items are provided only as a condition of the contract and are not in the nature of any consideration, monetary or otherwise, paid to the appellant. In such a case, the value of these items does not form part of a consideration for mining services provided by the appellant;

(iii) The fact whether the appellant could provide mining services without use of these items is completely irrelevant in determining whether the same will form part of consideration for mining services. What is important is whether the same are in nature of consideration for mining services in terms of the mutual understanding between the appellant and HCL. In this connection, reliance has been placed on a larger bench decision of the Tribunal in Bhayana Builders which was affirmed by the Supreme Court in CST vs. Bhayana Builders (P) Limited, 2018 (10) GSTL 118 (SC);

(iv) The issue under consideration has also been decided by the Department in the matter of M/s Teknomin Construction Limited by dropping the demand. No different view can be adopted 6 2018 (10) GSTL 118 (SC) 6 E-50104 & 50497/2019 in the present case. The said order was cited by the appellant before the adjudicating authority but no finding has been recorded in the impugned order. In this regard, reliance has been placed on the following decisions :

- a. Damodar J Malpani vs. CCE, 2002 (146) ELT 483 (SC)
- b. Niraj Prasad vs. CCE & ST, 2019-tiol-3237-CESTAT-ALL
- c. Rosmerta Technologies Limited vs. CCE & ST, LTU, Delhi, 2020-TIOL-916-CESTAT-CHD; and

(v) The extended period of limitation could not have been invoked or penalties imposed.

9. Dr. Radhe Tallo, learned Authorized Representative of the Department, however, submitted that there is no error in the order passed by the

Commissioner and the issue involved in this appeal is covered by the decision of a Division Bench of the Tribunal in ABL Infrastructure Pvt. Ltd. Vs.

Commr. of C.EX. Cus & S.T., Nashik 2018 (11) GSTL 106 (Tri-Mumbaid). .

10. The submissions advanced by the learned counsel for the appellant and the learned Authorized Representative of the Department have been

considered.

11. The issue involved in this appeal is as to whether the value of items supplied free of cost by service recipient to the appellant have to be included in

the value of mining services provided by the appellant.

12. This precise issue came up for consideration before the Supreme Court in Bhayana Builders as the issue before the Supreme Court was also

whether the value of goods/material 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 the computation of gross amount for valuation of the taxable service under section 67 of the Finance Act. The

Supreme Court observed that a plain reading of the expression "the gross amount charged by the service provider for such service provided or to be

provided by him" would lead to the 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" for the reason that no price is charged by the assessee/ service provider from the service recipient

in respect of such goods/materials.

13. It needs to be noticed that the Appellant had also placed the decision of the larger bench of the Tribunal in Bhayana Builders before the

Commissioner, which decision, as noticed above, was affirmed by the Supreme Court. The larger bench of the Tribunal had concluded that the value

of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-

monetary consideration, would be outside the taxable value of the "gross amount charged" within the meaning of section 67 of the Finance Act.

14. The decision of the larger bench of the Tribunal in Bhayana Builders and the decision of the Supreme Court in Bhayana Builders are clearly

applicable to the facts of the present case inasmuch as the charge in the show cause notice is that the cost of material supplied free of cost should be

included in the gross value of the taxable service provided by the appellant.

15. Learned Authorized Representative of the Department has, however, placed reliance upon a Division Bench decision of the Tribunal in ABL

Infrastructure Pvt. Ltd. The relevant portion of the aforesaid decision is reproduced below:

"The fact of the case is that the appellant is engaged in providing works

contract service. They have paid the Service Tax on the value which did not include the material supplied free of cost by the service provider during the period January, 2011 to March, 2012. The Department issued a show cause notice dated 12-2-2013 contending that the free supply material should be included in the gross value under the composition scheme of works contract accordingly there is a short payment of Service Tax. The adjudicating authority confirmed the demand and imposed penalty under Section 78 of the Finance Act, therefore the appellant filed the present appeal.

4. We have carefully considered the submissions made by both the sides. We find that the judgments relied upon by the appellant mainly on

the cases of Bhayana Builders (supra) of Larger Bench and G.R. Construction and Company Delhi Tribunal. On going through these

judgments, we find that the issue relates to the eligibility of the abatement Notification No. 15/04-S.T. whereunder 67% abatement from the

value of construction service provided. In the present case undisputedly service is of "works contract". As regard works contract the

relevant provision under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 reads as under :

From the above Explanation clause (a)(1) which can be seen that for the purpose of value of goods used in or in relation to the execution of

the works contract value of all the supplies which for a consideration or otherwise should be added. Therefore it is clear that whether the

goods used by the service provider or otherwise supplied by the service recipient free of cost, value of all the goods should be included to

arrive at the gross value of works contract. Therefore in our considered view the value of free supply material also be added in the gross

value of works contract, therefore the demand is sustainable on merit.

(emphasis supplied)

16. The said decision relied upon by learned Authorized Representative would not be applicable to the facts of the present case. This is for the reason

that the show cause notice issued by the Department in the said case mentioned that the material supplied free of cost should be included in the gross

value under the composition scheme of works contract. The Tribunal noted that

under the works contract composition scheme, Explanation to clause

3(a)(i) clearly provided that the gross amount charged for the works contract shall be the sum, including the value of all goods used in or in relation to

the execution of the works contract, whether supplied under any other contract for a consideration or otherwise. The Division Bench of the Tribunal,

therefore, observed that the value of all goods should be included, whether the goods have been used by the service provider or otherwise supplied by

the service recipient free of cost. It is for this reason that the Division Bench distinguished the decision of the larger bench of the Tribunal in Bhayana

Builders.

17. The aforesaid decision of the Tribunal in ABL Infrastructure is based on the provisions of the works contract composition scheme. The learned

Authorized Representative of the Department has not placed any rule or notification which may provide that the cost of material supplied free of cost

shall be included in the value of mining services in a contract similar to that in the case of the appellant. Such being the position, in view of the

aforesaid decision of the larger bench of the Tribunal in Bhayana Builders and of the Supreme Court in Bhayana Builders, it is not possible to sustain

the demand of service tax that has been confirmed by the Commissioner.

18. It is, therefore, not necessary to examine the other contentions raised by the learned Counsel for the appellant to assail the order passed by the

Commissioner.

19. The order dated November 29, 2016 passed by the Commissioner is, accordingly, set aside and the appeal is allowed.

(Order pronounced in the open Court on February 01, 2021)