IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO.ST/181/2010

(Arising out of Order-in-Original No. 01/KLG/Th-II/2010 dated 20.01.2010 passed by the Commissioner of Central Excise Thane – II,

M/s. Wartsila India Limited : **Appellant**
48 Neco Chambers, Sector 11,
C.B.D. Belapur, Navi Mumbai 400 614

VS

The Commissioner of Service Tax, Mumbai II : **Respondent**
4th Floor, New Central Excise Building, Maharshi Karve Road,
Churchgate. Mumbai 400 020

Appearance

Shri V. Sridharan, Sr. Advocate for Appellant

Shri M. Suresh DC (A.R.) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 17.12.2018
Date of decision : 14.06.2019

ORDER NO. A/86114/2019

Per : **P Anjani Kumar, Member (Technical)**

M/s Wartsila India Ltd, the appellants are, *inter alia*, engaged in operation of power plants and generation of electricity therefrom and have entered into operation and maintenance agreements with various customers at various locations. The customers have captive power plants for generation of power which in turn is used for manufacture of dutiable final products; majority of customers belong to steel and automobile industry; under the said operation and maintenance

agreements, the Appellants are required to operate and run the plant for generation of electricity within the norms set for consumption of fuel oil, lube oil, spares parts, etc. and maintain the plant; the agreements also provide for imposition of penalty in case of excess use of fuel oil, lube oil, spares parts, etc beyond the norms set; in terms of the above agreements, the Appellants charge "operation fee" and "maintenance fee" separately from the customers for operating and maintaining their power plants; appellants started paying service tax on the "maintenance fees" collected by them for maintenance of the power plant, with effect from 1.7.2003, although they opined that they were not liable to pay service tax on "maintenance fees". This fact is not in dispute. Revenue contended that power plant is an immovable property & the operation thereof would amount to "management" of an immovable property taxable under the category 'maintenance and repair' service; appellants started paying service tax on "operation fee" w.e.f. 1.5.2006, claiming that as the customer was entitled to credit of the same and the Appellants did not want to litigate as it was revenue neutral situation. Revenue issued a Show Cause Notice, dated 28.8.2007, to the appellants, demanding service tax of Rs.2,31,60,447/- under the head 'Management, Maintenance or Repair Services', for the period 16.6.2005 to 30.4.2006. The demand was confirmed by the Commissioner, vide OIO dated 20.1.2010, while levying penalty of Rs.3.50 Cr under Section 78 of the Finance Act, 1994, Penalty, @2% of the service tax due per month subject to maximum of the duty, under Section 76 of the Finance Act, 1994 and a Penalty of Rs.1000/- under Section 77 of the Finance Act, 1994. Hence, this appeal.

2. The Learned counsel for the appellants submits that the word "management" would take colour from "maintenance" and "repair"; therefore, "management" would not include operation within its scope. Taking though legislative history of the definition of "maintenance or repair" from 14.5.2003 to 1.5.2006, the counsel submits that the Rule of construction '*Noscitur A Sociis'* would apply to construe the term "management" appearing in the definition of 'maintenance or repair'

service. This Rule of construction was applied by Apex Court in following cases:

a) Rohit Pulp and Paper Mills Vs CCE – 1990 (47) ELT 491 (SC)

b) Rainbow Steels Vs. CST – 1981 (2) SCC 141.

He submits that by applying the principle of *Noscitur A Sociis*, the term 'management' would take colour from the words 'Maintenance & Repair' and therefore, "management" would not cover within its scope the activity of generation of electricity, by running the power plant. Hence, the impugned Order is liable to be set aside.

2.1. The Learned counsel for the appellants submits that the most commonly used concept of management involves getting things done through and with people. It however, neglects to say that decision making about things to be done is also a managerial function. Hence, the term "management of any organisation" appearing in Section 65 of the Finance Act, 1994 would not mean the entire range of activities taking place in an organisation. It would include the functions of the "managers" in an organisation. They generally regulate, supervise, direct and control the activities of the other functionaries in the organisation. It is pertinent to distinguish the management from other organs of an organisation. The management would refer to the overall superintendence of the affairs of the organisation whereas the non-management is concerned with the actual execution of work. In the instant case, the Appellants are directly involved in the execution of work i.e., generation of electricity. The Appellants are the actual doers. The Appellants are running the entire plant themselves. Hence, the Appellants submit that, by no stretch of imagination, the activity undertaken by the Appellants would be covered under "management" of immovable property. The phrase 'Management of Immovable Property' would only cover looking after immovable property for e.g. caretaker, supervising, upkeeping, etc. i.e., a passive role. Managing the property means supervising and administering a place for another person. In the present case, the Appellants are themselves actually and physically operating the plant for generating the electricity. In other words, the Appellants are using the plant themselves. The Appellants are not managing the property

for any other client/person. Therefore, the aforesaid activity cannot be treated as management of immovable property. The plant is being operated by the Appellants for generation of electricity. The other activities such as maintenance etc. are incidental to the main activity of generation of electricity. The said activities are undertaken for smooth functioning and operation of the plant. The said activities are in nature of self service. In view of the above, no service tax can be demanded from the Appellants & the impugned Order is liable to be set aside.

2.2. The Learned counsel for the appellants also submits that the dispute is no longer res integra. Settled in favour of Appellants by judgement in CLP Power India Vs CST 2016-TIOL-3125-CESTAT-MUM wherein the Tribunal considered the entry 'Management, Maintenance or Repair' services in the context of operation of power plants & held as under:

"From the above judgments, it can be seen that activity of operation of plant does not fall under category of taxable service in the head of management, maintenance and repair service. In the present case, admittedly there are two agreements into existence, one is clearly for operation of power plant and second is for maintenance on which appellant discharged the service tax. The agreement of operation of plant is neither involved any management of either plant or maintenance or repair. Entire plant was taken over by the appellant for operation. Therefore, the same does not fall under Management, Maintenance or Repair service. As per our above discussion as well as settled legal position on the identical issue as per the above judgments, we are of the view that the impugned order is not sustainable therefore the same is set aside. Appeals are allowed. Revenue's COs also stand disposed of."

The above view has also been reiterated in following decisions:

(i). CST, Mumbai-II Vs Poly drill Engineers Pvt Ltd 2016-TIOL-927-CESTAT-Mum

(ii). Shapoorji Pallonji Infrastructure Capital Company Ltd Vs CST, Chennai

2017-TIOL-2673-CESTAT-MAD.

(iii). GVK Power and Infrastructure Limited 2018-TIOL-788-CESTAT-HYD

(iv). Global S. S. Construction Pvt. Ltd 2016-TIOL-832-CESTAT-Mum

(v). Nuclear Power Corporation of India Limited 2017 (4) TMI 1023 CESTAT Mum.

2.3. The Learned counsel for the appellants also submits that the Hon'ble Tribunal in CMS (I) Operations & Maintenance Co. Pvt. Ltd. Vs. CCE, Pondicherry – 2007 (7) STR 369 (T) held that "28. As regards Repair or Maintenance Services, the argument of the appellants that they maintained only the plant and the taxable service of maintenance or repair of goods/ equipment covered by the Act were done by the suppliers of the equipment under warranty or Annual Maintenance Contract (AMC) is reasonable and merits acceptance. If the appellants undertook these activities they had rendered the service to themselves and not to another person. Therefore, no liability is incurred by the appellants on this account." The dispute in the present case is squarely covered by aforementioned decisions and thus, the impugned order is liable to be set aside.

2.4. The Learned counsel for the appellants also submits that maintenance of immovable property became taxable with effect from 16.6.2005. Hence, service tax paid on maintenance of power plant for the period prior to 16.6.2005 should be adjusted against the present demand. Assuming while denying that the Appellants are liable to pay service tax on "operation fees" for the period from 16.6.2005 to 31.4.2006, the aforesaid amount paid as service tax on maintenance of power plant for the period prior to 16.6.2005 should be adjusted against the demand of service tax on management of power plant for the period from 16.6.2005. Accordingly, no demand of service tax will survive.

2.5. The Learned counsel for the appellants further submits Demand beyond normal period is barred by limitation since there is no suppression of facts much less with intention to evade tax; the Appellants were under *bona fide* belief that they are not liable to pay service tax on the said transaction; even prior to 16.6.2005, facts were known to both the parties. Firstly, the department has already issued a Show cause notice F. No. V /STC /Wartsila/ 29/03/Bel dated

16.9.2003 wherein the department sought to demand service tax under the category of “Consulting Engineer” on operation and maintenance fees received by the Appellants during the period 1999 to 2002. Statement of the employee of the Appellants relied upon in the current show cause notice is dated 7.6.2005 given by Mr. A.S. Desai, Power Plant Manager; the demand raised in the present show cause notice is for the period from 16.6.2005 onwards. Thus, the department was aware of the fact from the first day of the period for which the demand is raised, that the appellants have not been paying service tax on the “operation fee” under ‘maintenance or repair’ service or any other category of taxable service existing as on 16.6.2005. So there is absolutely no suppression during the period under consideration; there are several judicial decisions in favour of the Appellants. Hence, the *bona fide* belief of the Appellants is justifiable; the Appellant has maintained entire records of the said transaction and have duly reflected the same in their books of account maintained in normal course of business; the situation was revenue neutral since the customers were entitled to credit of the tax payable, if any’; in view of the above, demand beyond normal period is barred by limitation since there is no suppression of facts much less with intention to evade tax. Accordingly, demand for the period 16.6.2005 to March 2006 i.e. Rs.2, 02, 34,785 is barred by limitation; since dispute involved is one of interpretation of provisions, imposition of penalty would be unjust & perverse. No penalty can be imposed. Section 80 of the Finance Act, 1994 applies. Further, simultaneous penalty under Section 76 and 78 of the Finance Act, 1994 is wrong. He relied upon.

(i). CST Vs Motor World – 2012 (27) STR 225 (T)

(ii). CCE Vs Silver Oak Gardens Resort – 2008 (9) STR 481 (T)

(iii). Raval Trading Company Vs CST – 2016 (42) STR. 210 (Guj.).

3. The Learned Authorized Representative for the Department reiterated the findings of OIO & OIA.

4. Heard both sides and perused the records of the case. We find that the appellants are engaged in the operations of power plants of others for generation of electricity; most of their clients belong to

Steel/Automobile industry; by virtue of contracts entered thereinto. The appellants charged “operation fee” and “maintenance fee” separately from the customers. They have been discharging Service Tax on “maintenance fee” collected by them from 01.07.2003. Revenue issued a SCN holding that power plant is an immovable property and the operations thereof would amount to management of immovable property taxable under the category “Maintenance & Repair Service “for the period 16.06.2005 to 30.04.2006.

4.1. The definition of “Maintenance or Repair Service” for the period 16.06.2005 to 01.05.2006 is as follows:

(64) “maintenance or repair” means any service provided by-

(i) any person under a contract or an agreement, or

(ii) a manufacturer or any person authorised by him,

In relation to –

(a) Maintenance or repair including reconditioning or restoration, or servicing of any goods or equipment, excluding motor vehicle; or

(b) Maintenance or management of immovable property.

Analyzing the activity undertaken by the appellants vis-à-vis the above definition, we find that the appellants are basically operating the power plants on behalf of their customers. As submitted by the appellants, management would pre-suppose activities like regulating, supervision, direction and control of the activities of the others functionaries in the organization. But in this case, we find that there is no such activity undertaken by the appellants. They are only operating the power plants. It appears that the appellants are not managing the plant for others, in fact, they are themselves operating the plants. In other words, the appellants are using the plants themselves. Other activities such as maintenance etc., are incidental to the main activity of generation of electricity. The said activities are undertaken for smooth functioning and operation of the plant. In effect, the maintenance part of it, the activities are in the nature of self service to the appellants themselves. However, the appellants are discharging Service Tax on the amounts received as maintenance fee. Therefore, we find that the

service rendered by them would not fall under the category of "maintenance or management of immovable property".

4.2. We further find that the issue is no longer *res integra*. We find that this Bench in the case of CLP Power India Pvt. Ltd. v. CST, Mumbai [2016-TIOL-3125-CESTAT-MUM] after considering the entry "management, maintenance or repair" in the context of operation of power plants held as under:

> *"From the above judgments, it can be seen that activity of operation of plant does not fall under category of taxable service in the head of management, maintenance and repair service. In the present case, admittedly there are two agreements into existence, one is clearly for operation of power plant and second is for maintenance on which appellant discharged the service tax. The agreement of operation of plant is neither involved any management of either plant or maintenance or repair. Entire plant was taken over by the appellant for operation. Therefore, the same does not fall under Management, Maintenance or Repair service."*

4.3. Further, we find that Tribunal in the case of Operational Energy Group of India Pvt. Ltd. v. CST, Chennai [2017-TIOL-2673-CESTAT-MAD] has held that "the activity would not fall under 'management of immovable property'. That it will get covered under the definition of Business Auxiliary Service; the dominant activity carried out in the power plant being generation of electricity and maintenance of the power plant being only an incidental one. That generation of electricity amounts to 'manufacture' of goods within the meaning of section 2(f) of the Central Excise Act, 1944. That electricity is mentioned under Chapter Heading 27.16 of the First Schedule to the Central Excise Tariff Act, 1985, with effect from 01.03.2005 and electricity being an excisable product, though with nil rate of duty. We have to say that this argument of the appellant is not without substance. The major activity in the power plant is production of electricity which is an excisable product. Further, activity of production of electricity cannot be equated with management of immovable property. In a situation where the property to raise profits whereas in the present case, it is for generation of electricity. The contention of the department may be applicable to a situation where

the management is handed over to a management company for the sole purpose of management of the immovable property. In the present case, the sole purpose of management of the immovable property. In the present case, the sole purpose is not management of immovable property. Further, the management, if any, of the power plant is done by the appellants and is only incidental to the activity of generation of electricity. The activity carried out in the power plant is not solely management of power plant, but operation of the same. The word 'operation' is not used in the definition of 'Maintenance and Repair' services which is relied by department as amended with effect from 16.06.2005. The said word in seen used in the definition of Business Support Services ('Operational assistance'). Thus, it is very much clear that management of immovable property does not include operation activities. In addition, it cannot be said that the appellants are doing management service for the reason that the management service is done by appellants to themselves and not to any other person. The appellants are operating the power plant to generate electricity on behalf of the owner for supplying the same to TNEB."

5. In view of the above, the impugned order is set aside and appeal is allowed with consequential relief, if any.

(Order pronounced in open court on 14.06.2019)

(D.M. Misra*)*
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM