CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 55814 of 2014

(Arising out of Order-in-Original No. 26/COMMR/ST/ADJ/BPL-I/2014 dated 28 August, 2014 passed by Commissioner, Customs & Central Excise, Bhopal)

Madhya Bharat Telecom Infrastructure .... **Appellant**
119, Malviya Nagar
New Market
Bhopal

VERSUS

Commissioner, Central Excise .... **Respondent**
48, Administrative Area,
Arera Hills, Hoshangabad
Bhopal (MP)

APPEARANCE:

Shri Narendra Singhvi, Advocate for the Appellant
Shri Vivek Pandey, Authorised Representative for the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50371/2019

DATE OF HEARING : 25.02.2019
DATE OF DECISION : 25.02.2019

JUSTICE DILIP GUPTA :

This appeal seeks to assail the order dated 28 August, 2014 passed by the Commissioner of Customs & Central Excise,

1,10,54,916/- said to have been short paid by the Appellant on 'Commercial Construction Services' has been confirmed and it has been ordered to be recovered together with interest and penalty.

2. The Appellant claims to be engaged in providing 'Commercial or Industrial Construction Service' and 'Consulting Engineer Service' taxable services as defined under section 65(105)(zzq) of the Finance Act, 1994 (hereinafter referred to as the 'Act') and section 65(105)(g) of the Act respectively. It provides infrastructure related construction service to the telecom companies, which includes constructions of civil work and telephone towers. It has paid Service Tax on the said activities under the category of 'Commercial or Industrial Construction Service' from 2006 to 2009 and from 2009 under 'Works Contract'.

3. A show cause notice dated 12 March, 2012 was issued to the Appellant mentioning therein that Notification dated 01 March, 2006 exempts 'Commercial or Industrial Construction Service' from so much of Service Tax leviable thereon as in excess of the Service Tax calculated on a value which is equivalent to 33% of the gross amount charged by the Service Tax providers for providing the service, but the exemption is admissible only if the gross amount on which Service Tax has been paid, includes the cost of material supplied free by the service recipient for use in the construction. The notice mention that the work orders executed by the Appellant for different clients indicate that it had received free issued material for use in the

declared by the Appellant in the Service Tax returns and, therefore, the Appellant suppressed the value of taxable service with intent to evade service after availing abatement of 67% in terms of Notification dated 01 March, 2006. The show cause notice also mentions that the aforesaid Exemption Notification dated 1 March, 2006 is subject to a further condition that the Cenvat Credit on inputs, capital goods and input services used for providing the construction service is not availed, but the Appellant had availed the Cenvat Credit on input services, namely, testing of concrete cube, safe bearing testing, soil investigation testing which are directly used in construction service and, therefore, the benefit of Exemption Notification would not be available to the Appellant. The notice also mentions that the Appellant received payment of Rs. 63,19,012/- for providing the taxable service, but the Service Tax due on the said amount was not paid, resulting in non-levy of Service Tax amounting to Rs. 7,81,030/-.

4. The Appellant submitted a reply on 12 April, 2012 stating therein that the Explanation to the Notification dated 01 March, 2006 provides that the 'gross amount charged' shall include the value of goods and materials supplied or provided or used by the provider of the construction service or providing such service and, therefore, the value of free supplied material was not required to be included in the gross value declared by the Appellant in the Service Tax Returns. The Appellant also pointed out that it had not availed any Cenvat Credit under 'Industrial & Commercial Construction Services' on inputs,

that the amount of Rs. 63,19,012/- included the details of invoices submitted to M/s GTL from May 2007 to August 2007, against which payment was not received on those dates and that Service Tax was paid by challan dated 09 July, 2008 when payment were received against these invoices and the same was included in the ST-3 Returns filed by the Appellant for the period April, 2008 to September, 2008. The Appellant also submitted Written Submissions at the time of personal hearing on 12 March, 2014. In regard to free supply of material, it was pointed out that the matter stood answered in favour of the Appellant by a larger Bench of the Tribunal in **Bhayana Builders (P) Ltd. vs Commissioner of Service Tax, Delhi,** reported in **2013 (32) STR 49 (Tri.-LB),** which held that value of goods and materials supplied free of cost by a service recipient to a provider of taxable construction service would be outside the purview of taxable value or the gross amount charged.

5. The show cause notice came to be decided by the Commissioner by order dated 28 August, 2014.

6. As regards the issue of non-inclusion of value of free supplied material, the Commissioner observed :

> **"19.** .....After careful study of all the case laws cited by the party, I have come to the conclusion that the facts of the present case are not squarely covered by any of the said case laws. As the decisions cited are distinguishable on facts, in view of the Hon'ble Apex Court's ruling given by in the cases of *Fiat India, Escorts Ltd.* and *Alnoori Tobacco Products (*supra), there ration cannot be applied to the present case.

> **20.** In view of the above, I find that the party has short-paid service tax by way of paying service tax on abated value instead of gross value.**"**

7. As regards the denial of Exemption Notification dated 01 March, 2006, the Commissioner observed :

> **"21.** Further, it is noted that the second pre-requisite condition for availing the benefit of the said Notification is that the service provider claiming benefit would not avail CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service under the provisions of the CENVAT Credit Rules, 2004. The party has availed cenvat credit on input services namely testing of concrete cube, safe bearing testing, soil investigation testing. In this regard, the party has contested that they have not taken any Cenvat credit in respect of the 'Commercial Construction Service'. Here, it is pertinent to note that the party is also providing 'Consulting Engineer Service'. However, in view of the fact that these services are directly related to provision of 'Commercial Construction Service', the party's contention does not appear to be tenable. In their additional submission dated 12.02.2014, filed at the time of personal hearing, the party has submitted that :
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> "*In our case, credit of Cenvat involved for testing of concrete tube, safe bearing testing soil, investigation testing is of Rs. 175138/- and if directed by the department, we are ready to reverse the credit for dropping of the demand".* Thus, availing of cenvat credit is established. Otherwise also, as the party has not included the cost of free issue materials in the gross value, benefit of said Notification was not available to them on this count only and charge of short-payment of service tax amounting to Rs. 1,02,73,886/- is established against them.**"**

8. In regard to non-payment of Service Tax amounting to Rs. 7,81,030/-, the Commissioner observed :

> **"22.** It is also alleged that the party has not paid service tax amounting to Rs. 7,81,030/- on the taxable value Rs. 63,19,012/- received by them for provision of taxable services

and has only claimed that the benefit of the 67% abatement in terms of the Notification No. 1/2006(supra) would be available to them. As the party has not fulfilled the condition of the said Notification, as discussed above, 67% abatement would not be available to them and the service tax amounting to Rs. 7,81,030/- is also recoverable from the party."

9. Shri Narendra Singhvi, learned counsel for the Appellant has submitted that :

(i) The Commissioner committed an illegality in holding that the value of the goods supplied free of cost to the Appellant was required to be included in the gross value inasmuch as the issue stands decided in favour of the Appellant by a larger Bench of this Tribunal in **Bhayana Builders (P) Ltd.,** which decision was placed before the Commissioner, but the Commissioner distinguished it only on the ground that the facts are different without even indicating how they were different. It has also been submitted that this decision of the larger Bench of the Tribunal was affirmed by the Supreme Court in **Commissioner of Service Tax, Delhi vs Bhayana Builders (P) Ltd.,** reported in **2018-TIOL-66-SC-ST**;

(ii) The finding recorded by the Commissioner that the benefit of the Notification dated 01 March, 2006 would not be available to the Appellant because the Appellant had availed Cenvat Credit on input services for providing Consulting Engineer Services like concrete cube, safe bearing testing, soil investigation testing is incorrect inasmuch as the Appellant had availed the benefit of Cenvat Credit

not in regard to 'Commercial Construction Service' for which the requisite amount of Service Tax had been paid;

(iii) It cannot be said that the activity of testing is directly related to 'Commercial Construction Service' and, in any case, two separate work orders relating to soil testing and actual construction were issued; and

(iv) The Commissioner committed an illegality in holding that the Service Tax amounting to Rs. 7,81,030/- was recoverable from the Appellant since 67% abatement would not be available to the Appellant for the reason that the Appellant had not fulfilled the condition set out in the Notification dated 01 March, 2006.

10. The learned Representative for the Department has, however, supported the impugned order and has submitted that :

(i) The activity of soil testing is an integral part of the construction services and, therefore, the Commissioner committed no illegality in denying the benefit of the Notification dated 01 March, 2006 to the Appellant for the reason that the Appellant had availed the Cenvat Credit on the works order relating to soil testing;

(ii) In this connection, reliance has been placed to the provisions of Section 65A(2)(b) of the Act which provides that when for any reason, a taxable service

clauses of Clause (105) of Section 65, classification shall be effected as composite services consisting of a combination of different services as if they consisted of a service which gives them their essential character; and

(iii) That the benefit of the Exemption Notification dated 01 March, 2006 has been rightly denied by the Commissioner for the reason that the Appellant short paid Service Tax on cost of free services.

11. We have considered the submissions advanced by learned counsel for the Appellant and the learned Representative of the Department.

12. **Cost of material supplied free by the service recipient** :

It is not in dispute that the cost of free supplied material has not been included by the Appellant in the gross value indicated by it in the ST-3 Returns. It is, however, submitted by the learned counsel for the Appellant that the Explanation to the description of taxable service contained in Section 65(105)(zzg) in the Notification 01/2006 clearly provides that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service and, therefore, shall necessarily not include the cost of free material. In support of his submission, he has placed reliance on the decision of the Supreme Court in **Bhayana Builders (P) Ltd.** The issue that fell for

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 computation of gross amount for valuation of the taxable service under Section 67 of the 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 placed the decision of the larger Bench of the Tribunal in **Bhayana Builders (P) Ltd.** before the Commissioner, which decision, as noticed above, was affirmed by the Supreme Court. The larger Bench 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 paid by or flowing from the service recipient, accruing to the benefit of service provider, would be outside the taxable value or the 'gross amount charged', within the meaning of the later expression in Section 67 of the Act.

14. The decision of the larger Bench of the Tribunal in **Bhayana Builders (P) Ltd.** and the decision of the Supreme Court

to the facts of the case inasmuch as the charge in the show cause notice was that the cost of free supplied material should have been included in the gross value. The Commissioner has ignored the decision of the larger Bench by simply observing that the facts of the case before the Commissioner were not squarely covered, without even giving any reason as to why they were not covered. In fact, as noticed above, the issue required to be decided by the Commissioner stood answered in favour of the Appellant in the said decision.

15. We, therefore, have no hesitation in setting aside the finding recorded by the Commissioner that the value of goods supplied free of cost to the Appellant was required to be included in the gross value.

16. **Denial of benefit of Exemption Notification :**

The Commissioner has denied the benefit of the Exemption Notification dated 01 March, 2006, for the reason that the Appellant had availed the benefit of Cenvat Credit in relation to the work order relating to soil testing. The Commissioner noticed that the Appellant had availed the Cenvat Credit on input service, namely, testing of concrete cube, safe bearing testing, soil investigation testing.

17. The contention of the learned counsel for the Appellant is that two separate work orders were issued to the Appellant; one in regard to soil testing and the other for construction service. In regard to the former works order, the Appellant had paid Service Tax

Cenvat Credit input services, but no Cenvat Credit had been utilized in regard to the second works order relating to construction which would be under the category of 'Commercial Construction Service'. According to the Appellant, these are two separate activities falling under separate category of services, namely, 'Consulting Engineer Service' and 'Commercial Construction Service' and cannot be clubbed together for the purpose of the Exemption Notification. In this connection, learned counsel placed reliance on the proviso to the Notification dated 01 March, 2006, wherein it has been stated that the Notification shall not apply in cases where the Cenvat Credit of duty on inputs or capital goods or the Cenvat Credit of Service Tax on input services, used for providing **such taxable service**, has been taken under the provisions of the Cenvat Credit Rules, 2004. It is his submission that 'such taxable service' would be the service under consideration and not any other service. In this connection, learned counsel for the Appellant also pointed out that soil testing has necessarily to be done prior to the actual construction to find out whether it would be feasible to construct on that particular area or not and no useful purpose would be served by having a composite contract because in the event the report of the soil testing is in the negative, it would not be necessary to carry out any construction on that site. It is, therefore, his submission that the Commissioner committed an error in holding that the service of soil testing is directly relating to the 'Commercial Construction Service'.

18. The learned Representative of the Department, however, emphasised, in view of the provisions of Section 65A(2)(b) of the Act, that when for any reason the taxable service is *prima facie* classifiable under two or more sub-clauses of Clause (105) of Section 65, classification shall be effected as composite services consisting of a combination of different services as if they consisted of a service which gives them their essential character. It is his submission that two separate orders were executed only for the purpose of getting Cenvat Credit in one and benefit of abatement in another and, therefore, the Commissioner committed no illegality in holding that the first work order of 'Consulting Engineer Service' is directly related to 'Commercial Construction Service' and, therefore, should be clubbed under the category of 'Commercial Construction Service' and since Appellant had taken the benefit of Cenvat Credit, the benefit of the Exemption Notification was rightly denied.

19. We have examined the contentions advanced by the parties and the documents on the record as also the findings recorded on this issue by the Commissioner. The Commissioner has taken note of the fact that two separate works orders had been issued; one for soil testing (Consulting Engineer Service) and other for construction (Commercial Construction Service) and that the Appellant had availed the Cenvat Credit in regard to the first works order relating to soil testing and had also availed Cenvat Credit. It is not in dispute that the Appellant had not availed any Cenvat Credit for the second works order relating to 'Commercial Construction Service'. It is difficult to

instance, as submitted by the learned counsel for the Appellant, soil testing is carried out to determine the feasibility of actually constructing the tower. In a particular case if the result of soil testing is in the negative, it would not be feasible to carry out the construction. For this reason two separate works orders were executed; one for soil testing and the other for construction of tower. For the first service rendered by the Appellant Service Tax had been paid as 'Consulting Engineer Service' and input credit had been availed. The Appellant had not availed any input credit for the second works order relating to actual construction. It cannot be urged that the taxable service of 'Consulting Engineer Service' can be considered as a composite service with 'Commercial Construction Service' since it has an essential character of construction. What also needs to be remembered is that the proviso to the Exemption Notification dated 01 March, 2006 provides that the Notification shall not apply if the Cenvat Credit has been used for providing **'such taxable service'.** The taxable service under consideration is 'Commercial or Industrial Construction Service'. The Cenvat Credit availed by the Appellant in regard to 'Consulting Engineer Service' cannot, therefore, be taken into consideration.

20 The finding recorded by the Commissioner in this regard is, therefore, set aside and the benefit of Exemption Notification dated 01 March, 2006 cannot be denied to the Appellant for this reason.

21. **Service Tax amounting to Rs. 7,81,030/- on amount of Rs. 63,19,012/-:**

The Commissioner has recorded that the benefit of 67% abatement obtained by the Appellant would not be available as the Appellant did not fulfil the condition of the said Exemption Notification dated 01 March, 2006.

22. The Appellant had taken a specific stand in response to the show cause notice that the details in the data sheet were of invoices submitted to M/s GTL from May 2007 to August 2007 against which the Appellant expected payments to be made, but had actually received payment in 2008 and, thereafter, the Service Tax on the payment received against these invoices were paid on 09 July, 2008 and were included in the ST-3 Returns for the period April, 2008 to September, 2008. This factual position has been found to be correct by the Commissioner, but what prevailed upon the Commissioner to deny the benefit of 67% abatement claimed by the Appellant was that the conditions set out in the Exemption Notification dated 01 March, 2006 had not been fulfilled.

23. The two grounds mentioned by the Commissioner for denying the benefit of Exemption Notification, namely, not including the cost of material supplied to the Appellant free of cost and for availing the Cenvat Credit for 'Consulting Engineer Service', have been set aside. Thus, the finding recorded by the Commissioner cannot be sustained and is, accordingly, set aside.

24. Accordingly, for all the reasons stated above, the order dated 28 August, 2014 passed by the Commissioner is set aside. The consequential benefits, if any, shall be available to the Appellant.

(Dictated and pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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