

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL, CHENNAI**

**Service Tax Appeal No.40026 of 2014**

(Arising out of Order-in-Appeal No. 123/2013 dated 25.9.2013 passed by the Commissioner of Central Excise (Appeals), Madurai)

**M/s. Senthil Engineering Works**

C-78, Shanmugam Street  
3<sup>rd</sup> Bus Stop, Thirunagar  
Madurai 625 006.

**Appellant**

Vs.

**Commissioner of GST & Central Excise**

Central Revenue Building  
No. 4, Lal Bahadur Shastri Road  
Bibikulam, Madurai – 625 002.

**Respondent**

**APPEARANCE:**

Shri M.N. Bharathi, Advocate for the Appellant  
Smt. Anandalakshmi Ganeshram, Supdt. (AR)) for the Respondent

**CORAM**

**Hon'ble Shri P. Dinesha, Member (Judicial)**  
**Hon'ble Shri M. Ajit Kumar, Member (Technical)**

Final Order No. 40694/2023

Date of Hearing : 18.07.2023  
Date of Decision: 18.08.2023

**Per M. Ajit Kumar,**

This appeal is filed by the appellant against Order in Appeal No.123/2013 dated 25.9.2013 passed by the Commissioner of Central Excise (Appeals), Madurai.

2. Brief facts of the case are that during the audit of accounts of M/s. Bharathi Constructions, Erode by the officers attached to Salem Commissionerate in November 2008, it was noticed that the appellants had carried out erection and installation related work to the tune of Rs.34,96,200/- and no service tax had been paid by the appellants. It

was ascertained from the records that the appellants were liable to pay Rs.4,79,603/- towards service tax for the period 2009 – 10. On the above basis, Show Cause Notice (SCN) dated 22/02/1012 was issued to the appellants. After due process of law, the original authority confirmed the proposals for demand of Rs.4,79,603/- under Section 73(1) of the Finance Act, 1994 along with interest, being the service tax liability for the services rendered by them under the category of 'Erection, Commissioning and Installation' under Section 65 (39a) of the Finance Act 1994, for the period 2009 – 10. Penalties were also imposed. Hence the appellant is before us in appeal.

3. No cross-objection has been filed by the respondent-department.
4. We have heard Shri M.N. Bharathi, learned counsel for the appellant and Smt. Anandalakshmi Ganeshram, learned Superintendent (AR) for the Revenue.
5. The learned counsel Shri M.N. Bharathi submitted that the appellant is providing taxable service under the category "Works Contract Service". The condition of the contract entered into with M/s Bannary Amman Sugars Ltd is only for repair of shed by replacing the worn out materials with fresh ones supplied by the said Bannari Amman sugars. The appellant also stated that such an activity being 'manufacture' is not exigible to service tax but only to Central Excise duty. The activity performed by appellants cannot be construed as that of erection, commissioning and installation as the same pertains to the erection, commissioning and installation of plant, machinery, equipment or structure, and other activities like wiring, plumbing, ventilation duct, thermal insulation. Whereas, the activity performed

by appellant pertains to repair of shed which does not fit into the definition of "erection, commissioning or installation" under Section 65(39a). In these circumstances the levy of tax is unsustainable. He further submitted that the value of materials should be excluded from the duty computation and to that extent there is an error in the computation of demand. It's a settled law that wherever service tax is not shown separately in invoice and has not been collected from the customer, the consideration received should be treated as inclusive of service tax component, which has not been considered, in their case. The issue is purely interpretative in nature and does not warrant imposition of penalty. He referred to the following case laws in their favour.

- (a) G. Ramamoorthi Construction (I) Pvt. Ltd Vs CCE., Coimbatore reported in 2019(20) G.S.T.L. 297
- (b) Ninwat Construction Co. Vs CCE, Jaipur reported in 2017 (52) S.T.R. 280 (Tri. - Del)
- (c) Mackintosh Burn Ltd Vs. CST, Kolkata reported in 2020 (35) G.S.T.L. 409 (Tri. - Kolkata)
- (d) Bansal Cylinder & Tubes Ltd Vs. CCE., Haldia reported in 2019 (27) G.S.T.L. 243 (Tri. - Kolkata)

He pleaded for setting aside the impugned order and granting consequential relief.

6. Smt. Anandalakshmi Ganeshram, learned Superintendent (AR) for the Revenue has stated that the activities of the appellant are taxable service carried out as per a works contract and cannot be termed as manufacture. They are the main contractors for M/s Bannary Amman Sugars Ltd as stated by the Original authority at para 18 of the OIO. The service tax liability for the services rendered by them

correctly falls under the category of 'Erection, Commissioning and Installation' under Section 65 (39a) of the Finance Act 1994. She further reiterated the findings given in the impugned order and prayed that the appeal may be upheld.

7. We have heard the rival parties. We find that the issues to be decided are whether,

- a) the activity performed by the appellant amounts to manufacture.
- b) the value of materials should be excluded from the value for computation of duty
- c) since the service tax is not shown separately in the invoice the consideration received should be treated as inclusive of duty
- d) the issue is purely interpretative in nature and is not a fit case for imposition of penalty

We shall examine the issues sequentially.

8. At the outset it must be stated that the activity rendered by the appellant to M/s Bannari Amman Sugars Ltd is the only subject matter of the dispute. The appellant in their written submission during the hearing has stated that the letter of intent given by M/s Bannary Amman Sugars is only for repair of shed by replacing the worn-out materials with fresh ones supplied by the said Bannari Amman sugars. They have taken up the matter before the Commissioner Appeals who held that the specifications shown in the letter of intent pertains to the category of Erection, Commission or Installation Service. We find that a copy of the letter of intent has not been provided with the appeal papers, hence we have to rely on the extract as given in the SCN 22/02/2012 and the OIO dated 17/09/2012. The said document only

speaks of the fabrication and erection of trusses, bracings, purlins etc. Even in the appellants reply to the SCN dated 22/02/2012, quoted quite extensively in the OIO there is no mention of their work being 'repairs'. In fact, at para (5) of the letter it is stated that they received a 'composite contract for fabrication of building material and erection of factory shed awarded by M/s Bannari Amman Sugars Ltd., Coimbatore'. There is no murmur of repairs. Hence, we do not accept their claim of having carried out only repairs.

9. We now examine the appellants' contention that the activity performed by them amounts to manufacture. The principal object and substance of work undertaken by the appellant is one of skill and labour. It is stated at para (5) of the appellants reply to the SCN that they received a 'composite contract for fabrication of building material and erection of factory shed awarded by M/s Bannari Amman Sugars Ltd., Coimbatore'. From para (7) of the said letter it is seen they pre-fabricate trusses using channels, angles, beams etc and use it in the construction of factory shed. The letter of intent also speaks of the fabrication and erection of trusses, bracings, purlins etc. Hence their activity is one of erection of structures using prefabricated items. The particular process did not result in the creation of a new commodity known in the market. The period involved in the impugned order is 2009-10. Section 65 (39a) of the Finance Act 1994, which is relevant to the matter is reproduced below:

(39a) "erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to,—

- (i) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise or

- (ii) installation of–
  - (a) electrical and electronic devices, including wirings or fittings therefore; or
  - (b) plumbing, drain laying or other installations for transport of fluids; or
  - (c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or
  - (d) thermal insulation, sound insulation, fire proofing or water proofing; or
  - (e) lift and escalator, fire escape staircases or travelators; or
  - (f) such other similar services;

The 'Blacks Dictionary' (revised fourth edition) at page 1592 defines 'Structure' as under;

“STRUCTURE. Any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. C. K. Eddy & Sons v. Tierney, 276 Mich. 333, 267 N.W. 852, 855. That which is built or constructed; an edifice or building of any kind. . . .”

The activity of skill and labour provided by the appellant is hence a service covered by the definition of erection, commissioning of structures as per section 105(39a)(i). The appellant has also not referred to any judgment where activities of a similar nature were held to be the manufacture of a factory shed. In fact, the appellant's plea was that their activities are of 'repair' which is far removed from their claim of manufacture of goods.

10. Their next averment is that the value of materials should be excluded from the value for computation of duty. The taxable service of erection, commissioning or installation is provided as per Sub-clause (zzd) of clause (105) of section 65. It states as under;

*"to any person, by a commissioning and installation agency in relation to erection, commissioning or installation."*

We find that the learned Original Authority has referred to the valuation of services under a contract being covered by Notification No-01/2006-ST dated 01.03.2006. The learned Commissioner Appeals in his cryptic impugned order has not discussed the matter. As per the Explanation, given at S. No. (1) of the Notification pertaining to the service of erection, commissioning or installation, the gross amount charged from the customer shall include the value of the plant, machinery, equipment, parts and any other material sold by the commissioning and installation agency, during the course of providing erection, commissioning or installation service. An abatement to the extent of 67% of the gross value was allowed by the notification. The abatement had been denied by the Original Authority as the appellant had received free inputs from their customer. We find that a larger bench of the Tribunal in **Bhayana Builders (P) Limited vs CST, Delhi [2013 (32) STR 49 (Tri-LB)]**, had taken up the reference of a similar matter relating to free supplies of goods received during construction activities for consideration as below:

- (i) “Whether the value of goods/material supplied or provided free by a service recipient and used for providing the taxable service of construction of commercial or industrial complex, must be included in computation of the gross amount (charged by the service provider), for valuation of the taxable service, under Section 67 of the Finance Act, 1994 (the Act). We notice at the hearing of these appeals however, that the issue specifically is: whether the value of the material supplied by the recipient of the taxable service free of cost (hereinafter, for convenience referred to as “free supplies”) should also be included, for availing the benefits under Notification No. 15/2004-S.T., dated 10-9-2004 as amended by Notification No. 4/2005-S.T., dated 1-3-2005. The later Notification added an “Explanation” to Notification No. 15/2004-S.T.”

The reference was answered as below.

“16. In conclusion we answer the reference as follows :

(a) 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 Finance Act, 1994;”

The judgment was affirmed by the Supreme Court. Although a reference to the judgment and its applicability have not been canvassed before us, it is felt that deciding the matter raised without examining the judgement would not help in developing good law, especially when judicial discipline requires us to follow the ratio of the Larger Bench. This being so we abide by the same and hold that the value of goods and materials supplied free of cost by M/s Bannari Amman Sugars Ltd are to be excluded from the value of the taxable service for computation of duty.

11. The appellant has further averred that since service tax is not shown separately in the invoice the consideration received should be treated as inclusive of duty. We find that a similar matter pertaining to Central Excise duty was examined by the Apex Court in the case of **Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd 2002 (141) ELT 3 (SC)** and **Collector vs. Shri Chakra Tyres Ltd. 2002 (142) ELT A279 (SC)** it was held that the total consideration received by the manufacturer be treated as cum-duty. The said consideration has to be apportioned between the assessable value and the excise duty leviable. Review petition filed against the said order also came to be dismissed [2005 (179) ELT A102 (SC)]. Further in **Commissioner of CE & Customs, Patna v. Advantage Media**

**Consultant [2008 (10) STR 449 (Tri. – Kol.)]** the Hon'ble Tribunal held as under;

“3. Service tax is an indirect tax. As per this system of taxation, tax borne by the consumer of goods/services is collected by the assessee (manufacturer/service provider) and remitted to the Government. When the amount is collected for the provision of services, the total compensation received should be treated as inclusive of service tax due to be paid by the ultimate customer of the services unless service tax is also paid by the customer separately. So considered, when no tax is collected separately, the gross amount has to be adopted to quantify the tax liability treating it as value of taxable service plus service tax payable. We find that this principle has been legislated in the following terms with effect from 18-4-2006 in Section 67(2) of the Finance Act, 1994 as amended:

“67(2). Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.”

4. This principle has all along been relevant and had to be applied.”

The Hon'ble Supreme Court after condoning the delay dismissed the Civil Appeal No. D 23523 of 2008 filed by Commissioner of Central Excise & Customs, Patna against the CESTAT Final Order. [Commissioner v. Advantage Media Consultant - 2009 (14) S.T.R. J49 (S.C.)]. We hence agree with the plea made by the appellant and hold that the tax liability has to be calculated by treating the total consideration received as value of taxable service plus service tax payable.

12. The appellant has stated that the issue is purely interpretative in nature and is not a fit case for imposition of penalty. The appellant has relied upon the following judgment cited below in this regard.

- a. G. Ramamoorthi Construction (I) Pvt. Ltd. Vs. CCE, Coimbatore – 2019 (20) GSTL 297
- b. Ninwat Construction Co. Vs. CCE, Jaipur – 2017 (52) STR 280 (Tri. Del.)

- c. Mackintosh Burn Ltd. Vs. Commissioner of Service Tax, Kolkata – 2020 (35) GSTL 409 (Tri. Kolkata)
- d. Bansal Cylinder & Tubes Ltd. Vs. CCE, Haldia – 2019 (27) GSTL 243 (Tri. Kol.)

We, however, find that the appellant has not cited any judgment or circular during the relevant time which would show that there was a difference of opinion in the taxability of the service and help reach a conclusion that the issues involved were purely interpretative in nature, hence we are not able to accept their plea. We find that the appellant had failed to pay the service tax and also have failed to report provision of service in their periodical returns. Hence the fact that these activities were suppressed from the department with intention to evade payment of tax has substance. We are therefore not inclined to interfere with the imposition of penalty or issue of Show Cause Notice invoking the extended period of time limit.

13. Having regard to the facts of the case as discussed above, the matter is remanded back to the lower authority to determine the value of the taxable service afresh allowing cum-tax benefit and by not including the value of goods and materials supplied free of cost by M/s. Bannari Amman Sugars Ltd. Penalty may thereafter be imposed suitably as per law. The impugned order is partially set aside and modified as above. The appeal is disposed of accordingly.

(Pronounced in open court on 18.8.2023)

**(M. AJIT KUMAR)**  
Member (Technical)

**(P. DINESHA)**  
Member (Judicial)