Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 12657 of 2013- DB

(Arising out of OIO-25-26/DEM/VAPI/2013 dated 26/04/2013 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

Hamon Shriram Cottrel Pvt Ltd **.....Appellant**
3a/8a, Main Frame,
Royal Palm Complex, Goregaon,
Mumbai, Maharashtra

VERSUS

Commissioner of C.E. & S.T.-Vapi **.....Respondent**
4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi, Gujarat, 396191

WITH

(i) Service Tax Appeal No. 11442 of 2018- DB (Hamon Shriram Cottrell Pvt Ltd)
(ii) Service Tax Appeal No. 12959 of 2018- DB (Hamon Shriram Cottrell Pvt Ltd)
(iii) Service Tax Appeal No. 10302 of 2019- DB (Hamon Shriram Cottrell Pvt Ltd

[(Arising out of OIA-CCESA-SRT-APPEAL-PS-468-469-2017-18 dated 08/01/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I), (Arising out of OIA-CCESA-SRT-APPEAL-PS-235-2018-19 dated 13/08/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I), (Arising out of OIA-CCESA-SRT-APPEALS-PS-573-201819 dated 27/11/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)]

APPEARANCE:
Shri Prakash Shah & Shri Mohit Rawal Advocate for the Appellant
Shri Rajesh Nathan, Assistant Commissioner(AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10875-10878/2024

DATE OF HEARING: 14.12.2023
DATE OF DECISION: 15.04.2024

RAMESH NAIR

All these appeals being involved a common issue are taken together for disposal. The details of the appeals are as under:-

Sr. No.	Appeal No.	SCN Date	Period	Amount	OIO Date	OIA Date
1	12657/2013	22.10.2012	Apr 2007 to Oct 2011	3,74,50,915	19.06.2013	-
		26.12.2012	Nov 2011 to Sep 2012	1,33,88,712		
2	11442/2018	21.08.2013	Oct 2012 to Mar 2013	28,27,737	27.02.2015	08.01.2018
			Apr 2013 to Dec 2013	29,55,754		
3	12959/2018	19.01.2015	Jan 2014 to Oct 2014	11,76,717	09.11.2015	13.08.2018
4	10302/2019	02.05.2016	Nov 2014 to Dec 2015	8,54,317	27.03.2017	27.11.2018
Total				5,79,17,675		

1.1 The brief facts of the case are that the Appellant is engaged, inter alia, in the manufacture of cooling towers and parts. The Appellant also provides consulting engineers, maintenance & repairs, erection, commissioning and installation services, works contract services etc. The Appellant is registered with the department under excise registration No. AAACT2254QXM001 and as service provider vide registration number AAACT2254QST002.The Appellant either enters into three types of contracts for supply of parts of cooling towers or executes works contract for erection, installation and commissioning of cooling towers at their customer's site, the details whereof are as follows:-

(i) Type 1-Order for supplying of cooling towers and parts thereof;

(ii) Type 2-Separate orders for supply of cooling towers and separate orders for carrying out erection, installation and commissioning of the cooling towers;

(iii) Type 3 Single orders, showing separately the quantity and value of supply of cooling towers and parts; and separately the nature and value of erection, installation and commissioning of the cooling towers

1.2 Irrespective of the type of contract entered into by the Appellant, separate values of the goods supplied and the values towards erection, commissioning and installation services of cooling towers are available, which are separately disclosed in the executed contracts and on the invoices raised. Thus, there is clear basis of bifurcation between the supply of goods and the supply of services. The Appellant discharges the appropriate excise duty / sales tax / VAT in respect of the value of transfer of property and goods and service tax in respect of the value of erection, commissioning, installation services etc. The Appellant manufactures certain parts of the cooling towers in their manufacturing unit for execution of contract entered into for installation of cooling towers, while other parts required thereof are procured from independent suppliers and supplied directly to the customer's site on sale-in- transit basis, Goods purchased from independent suppliers are supplied directly to the customer's site and corresponding invoices are issued at contracted value, which is higher than the Appellant's purchase value.

1.3 With respect to the goods purchased from independent suppliers and supplied to customer's site directly on a sale-in-transit basis or by way of high seas sale, the Appellant issued corresponding commercial invoices for the supply of goods as per the contract value, which was higher than the purchase price of the said goods. Thus, the Appellant has invoiced distinct amounts with respect to the supply of Goods as well as the supply of services, of installation. Accordingly, the tax leviable on these distinct transactions is calculated and the Sales Tax/VAT/ Service Tax are all discharged by the Appellant. During the course of an EA-2000 Audit for the period of September 2010 to October 2011, it was observed that the Appellant failed to pay Service Tax on the gross taxable value, being the additional value charged by the Appellant to its customers on the goods purchased from independent suppliers and supplied to the customer's site. Consequently, a demand of service tax was made on the profit margin, i.e., the difference in the sale price and purchase price of the subject goods.

1.4 Pursuant to the above, show cause notices were issued to the Appellant, demanding service tax on the said price differential in respect of the goods sourced from independent suppliers and supplied to the customer's site. It was alleged that the said supply of goods is a part of the works contract carried out by the Appellant. The Ld. Adjudicating Authority vide its Orders-in-Original confirmed the demand for service tax along with interest and penalties. Further, the Ld. Commissioner (Appeals) also upheld the demand for service tax along with interest and penalties.

1.5 Hence, the present appeals.

2. Shri Prakash Shah Learned Counsel with Shri Mohit Rawal Advocate appearing on behalf of the appellant made the following submission:-

THE SHOW CAUSE NOTICES ISSUED FOR THE PERIOD FROM OCTOBER 2012 TO DECEMBER 2015 INVOKE INCORRECT PROVISIONS

1. It is submitted that the show cause notices issued for the period from October 2012 to December 2015 invoke incorrect provisions of the law and therefore, the entire demand based on such incorrect show cause notices is liable to be set aside.

2. From a bare perusal of the show cause notices pertaining to the period from October 2012 to December 2015, it is manifest that the said show cause notices allege that the Appellant has violated Section 65(105)(zzzza) of the Finance Act, 1994 ("Act") along with the Notification No. 29/2007-ST dated 22.05.2007. The entire charge in the show cause notices revolves around the said provision and notification.

3. However, it is pertinent to note that w.e.f. 01.07.2012, with the introduction of the negative list, the provisions of Section 65(105) of the Act were repealed. Further, vide Notification No. 24/2012-ST dated 06.06.2012, the earlier Notification No. 29/2007-ST dated 22.05.2007 was rescinded.

4. Thus, for the period of October 2012 to December 2015, the said provisions and Notification alleged to have been violated by the Appellant, were no longer in force.

5. Therefore, the demand for the periods covered by the said show cause notices invoking repealed provisions are liable to be set aside on this ground itself.

THE SUBJECT CONTRACTS DO NOT CONSTITUTE WORKS CONTRACT AND THERE IS NO SERVICE ELEMENT INVOLVED IN THE SUPPLY OF GOODS

6. It is submitted that the subject contracts do not constitute works contract as defined under the Act.

7. From perusal of the definition of the term 'works contract' as provided under the Explanation to Section 65(105)(zzzza) of the Act, for the period up to 01.07.2012, and Section 65B(54) for the period from 01.07.2012. it is manifest that in order to qualify as a works contract the following conditions are sine qua non:

(i) There shall be a transfer of property in goods involved in the execution of such contract;

(ii) Such contract shall be leviable to tax on sale of goods (ie, sales tax, VAT. WCT, CST, etc.)

(iii) Such contract shall be for the purpose specified in the provisions, such as for the erection, commissioning or installation of any plant or machinery

8. It is pertinent to note that Contract Type I executed by the Appellant, is exclusively for the sale of cooling towers without any stipulations as regards their installation. There is no service element involved and it is a transaction involving pure sale of goods. Further, since mere sale of goods is not covered by the above third condition, the said contract cannot be held to be a works contract.

9. Contract Type 2 involves two separate purchase orders, one for sale of cooling towers and second for erections, commissioning and installation, which are independent to each other. Thus, the contract is not a singular transaction of works contract but involves two separate transactions of sale and installation.

10. In Contract Type 3, although a single purchase order is involved, the value for supply of goods and erection, installation and commissioning is separately indicated. Thus, the subject transaction is not singular and indivisible but instead involves two distinct values, one for sale and other for service.

11. In this regard, it is pertinent to note that the Appellant has discharged the appropriate excise duties (where self-manufactured) and sales tax / VAT/CST on the value of goods supplied to the customer and has discharged service tax on the value of services involved as distinctly identified in the purchase orders. He placed reliance on the following judgments:-

- BSNL v. Union of India (2006 (2) STR 161 (SC)
- Commissioner of Central Excise, Raipur v. BSBK Pvt. Ltd. (2010 (18) STR 555 (Tri.- LB)

14. In the present case, it is submitted that both the Contact Type 2 and Type 3 clearly bifurcate the goods and service portion which is required to be executed by the Appellant. He placed reliance on the judgment of Union of India v. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)],

15. It is submitted that the Respondent / Ld. Commissioner (Appeals) has erred in holding that the difference between the sale price and purchase price of the goods supplied by the Appellant to its customers is exigible to service tax.

16. It is submitted that the Respondent has erred in taxing the profit margin under the guise of treating the same as an additional charge towards works contract service.

17. It is submitted that the profit margin, being a part of the sale value of the goods to the customers, is not attributable to the service element in the contract and is, thus, liable to be excluded from the value of taxable services.

18. Thus, it is submitted that in light of the above judicial precedents, once the value of the contract is bifurcated into the sale and service portions, no service tax can be levied on the sale portion of the contract which does not involve any service element.

THE VALUE OF GOODS SOLD CANNOT BE INCLUDED IN THE TAXABLE VALUE OF SERVICES

19. In any event, even assuming without admitting that the subject contracts amount to works contract, it is submitted that the value of the goods sold cannot be included in the value of taxable services on which service tax is payable in terms of Rule 2A of the Service Tux (Determination of Value) Rules, 2006 Valuation Rules

20. Rule 2A(i) of the Valuation Rules, as it stood both before and after 01.07.2012 provides that the value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract. He placed reliance on the following judgments:-

- Commissioner of C. Ex. & Cus., Kerala v. Larsen & Toubro Ltd. [2015 (39) STR 913 (SC)),
- Total Environment Building Systems Pvt. Ltd. v. Commissioner of Commercial Taxes [2022 (63) GSTL 257 (SC)],

21. In the present case, even assuming that the contracts under dispute are indivisible works contracts, the value of property in goods transferred under the contract is separately available.

22. It is submitted that the Appellant having discharged service tax on the service portion of the contracts, i.e. on the said contract value as reduced by the value of goods transferred, has applied the valuation mechanism prescribed under Rule 2A(i) of the Valuation Rules.

23. Thus, the Respondent/Ld. Commissioner (A) has erred in confirming the demand of service tax on the value of goods supplied by the Appellant to the customers under the subject contracts.

THE SAME TRANSACTION CANNOT BE SUBJECT TO BOTH SERVICE TAX AND VAT

24. In any event, it is submitted that the Appellant has discharged the VAT/CST /Sales Tax liability on the sale value of the goods supplied to its customers and thus, the same cannot be subjected to service tax again. He placed reliance on the following judgments:-

- Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes [2008 (9) STR 337 (SC)
- Commissioner of Service Tax-V, Mumbai v. UFO Moviez India Ltd. [2022 (61) GSTL 4 (SC)
- Nayana Premji Savla v. Union of India [2022 (66) GSTL 417 (Bom.)

25. In the present case, admittedly, the Appellant has discharged the appropriate sales tax/VAT/CST liability on the supply of goods to its customers. It is submitted that the high seas sale and sale in-transit are treated as interstate sale of goods under the CST Act.

26. It is pertinent to note that the said interstate sale being made by way of transfer of documents of title during the movement of goods from one state to another is exempt in terms of Section 6(2) of the CST Act. However, the Appellant has undisputedly disclosed the same as interstate sales in its returns filed under the CST Act.

27. Thus, since the said supply transactions have been subject matter of CST Act, no service tax can be levied on the same transaction again

NO SERVICE TAX IS PAYABLE ON TRADING OF GOODS

28. Without prejudice to the above, it is submitted that no service tax is payable on trading of goods.

29. In terms of the Explanation to Rule 2(e) of the CENVAT Credit Rules, 2004, as it stood prior to 01.07.2012, the term exempted services includes trading. Further, post 01.07.2012, in terms of Section 66D(e) of the Act, trading of goods is specified under the negative list on which no service tax is leviable.

30. In the present case, undisputedly, the Appellant has purchased the subject goods from independent suppliers and sold the same to its customers.

31. Thus, irrespective of whether the said goods were sold in transit or by way of high seas sale, when the provisions itself prescribes non-taxability of trading of goods, no service tax can be levied on the profit margin arising from such trading of goods. In this regard, reliance is placed on the following judgments:-

- Commissioner of Service Tax, Ahmedabad v. Om Air Travels Pvt. Ltd., 2019 (25) GSLT 460 (Tri-Ahmd)
- Orion Appliances v. CST, Ahmedabad, 2010 (19) STR 205 (Tri. Ahmd.)
- Prem Motors Pvt. Ltd. v. Commissioner of C. Ex. & CGST, Jaipur, 2023 (73) GSTL 97 (Tri.- Del)

LIMITATION, PENALTIES AND INTEREST

32. In any event, it is submitted that the extended period of limitation prescribed under the proviso to Section 73(1) of the Act cannot be invoked in the present case and thus, the first show cause notice dated

22.10.2012 covering the period from April 2007 to October 2011 is barred by limitation

33. It is submitted that the Appellant has not suppressed any information from the department. Admittedly, the entire demand is based on the information procured from the financial statements of the Appellant and thus, there is no question of any suppression on the part of the Appellant.

34. In any event, it is submitted that the issue pertaining to the value of taxable service and levy of service tax in respect of works contract has been a subject of various conflicting decisions of the Hon'ble Supreme Court as well as the Hon'ble High Courts and is thus a highly interpretational issue Thus, extended period of limitation cannot be invoked in the facts and circumstances of the case and the demand raised in the first show cause notice is barred by limitation.

35. The Appellant also submits that in the absence if any wilful suppression, and contraventions of provisions of Central Exe Act, 1944, CCR and other allied rules, penalty under Section 78 of the Act is not imposable.

36. in view of the submissions made above, it is manifest that no service tax is payable on the profit margin of the goods supplied to the customers it is a settled position in law that no penalty can be impound where there is no demand. Coolade Beverages Limited, (2004) 172 ELT 451 (All)] Thus, no penalties can be imposed on the Appellant under Section 76 and 77 of the Act.

37. Further, in the present case, the Appellant is not liable to pay any service tax and thus, the question of levying interest under the provisions of Section 75 of the Act does not arise.

38. The Appellant prays for allowing the appeals.

3. Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal the records, we find that the entire case of the department is that the appellant should have included the cost of material for which they have raised the separate bill in providing the services for the reason that the service is classifiable under 'works contract service' and accordingly all the goods used for providing such 'works contract service' should be included in the gross value of the service under the composition scheme. As per the facts of the present case there are clear contracts between the appellant and the service recipient separately for sale of goods and for Erections, Commissioning and Installation services. Since there is a clear contract for supply of material and supply of services and in respect of the goods sale bills were issued by the appellant and VAT on the sale of goods were paid the transection of supply of goods is clearly and independently a transection of sale of goods which has no connection with the provision of service. As per the definition of 'works contract' the following conditions are to be fulfilled :-

(i) There shall be a transfer of property in goods involved in the execution of such contract;

(ii) Such contract shall be leviable to tax on sale of goods (ie, sales tax, VAT. WCT, CST, etc.)

(ii) Such contract shall be for the purpose specified in the provisions, such as for the erection, commissioning or installation of any plant or machinery

4.1 In the present case the supply of goods has already been taken place at the time of supply therefore the transfer of property in the goods has already taken place at the time of receipt of the goods by the service recipient accordingly at the time of the execution of the service i.e. erection commissioning and installation it is not the case that the transfer of the property goods is involved in the execution of such contract as the transfer of property has already taken place before execution of the contract. In the present case the contract of the service namely erection, commissioning,

installation service being a pure service the same is not exigible to Sales Tax, VAT/CST etc. as per the law therefore the condition Number 2 above is also not applicable therefore in the present case being a service simpliciter as per the separate contract the same is not classifiable under works contract service. The appellant have admittedly paid the service tax on the erection, commissioning, and installation at the applicable rate of service tax therefore the allegation of the department that the appellant have not included the value of goods in the works contact service is incorrect.

4.2 This issue has been considered by the Hon'ble Supreme Court, in BSNL v. Union of India (Supra), wherein it has held that works contracts involved a kind of service and sale at the same time. In such a case, the splitting of the service and supply was constitutionally permitted. Further, it has been held that if there is an instrument of contract which may be composite in form in any case and if the transaction in truth represents two distinct and separate contracts and is discernible as such, in that case it has become permissible to separate agreement to sale from the agreement to render service.

4.3 Further, the Larger Bench of this Hon'ble Tribunal in Commissioner of Central Excise, Raipur v. BSBK Pvt. Ltd. (Supra), has held that where the value of goods is determinable in a turnkey or composite contract, the same must be removed to identify the value of taxable services. In other words, a turnkey or composite contract can be vivisected to levy service tax exclusively on the service portion of the contract.

4.4 Similarly in Union of India v. Intercontinental Consultants and Technocrats Pvt. Ltd. (Supra), the Hon'ble Supreme Court has held that service tax is payable only on the services actually provided by the service provider.

4.5 In view of the above judgments it is clear that since as per the facts of the present case the value of goods and the value of service is clearly distinct the value of goods for which sale invoice has been issued before

execution of the contract the same need not to be added in the gross value of service.

4.6 We further find that even if it is assumed that the subject contract amount to works contract the value of goods cannot be included in the value of taxable services on which service tax is payable in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. In terms of Rule 2A(i) of the Valuation Rules, as it stood both before and after 01.07.2012 provides that the value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

4.7 In this regard, the appellant relied on of the Hon'ble Supreme Court in Commissioner of C. Ex. & Cus., Kerala v. Larsen & Toubro Ltd. (Supra), wherein it is held that the valuation mechanism prescribed under Rule 2A(i) of the Valuation Rules complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

4.8 Further considering the aforesaid Apex Court judgment in the case of Larsen & Toubro Ltd. in the case of Total Environment Building Systems Pvt. Ltd. v. Commissioner of Commercial Taxes (Supra), the Hon'ble Supreme Court, on the principle of stare decisis, expressed a firm view that the judgment in the case of Larsen and Toubro Limited (supra), neither needs to be revisited, nor referred to a Larger Bench of this Court as prayed for by the revenue.

4.9 For the above reason also the value of goods included in the gross value of the service. we further submits that in any event there is no dispute that the appellant has discharged the VAT/CST/ Sales Tax liability on the sale value of the goods supplied to its customers and thus the same cannot be subjected to the service tax again. In this regard the Hon’ble

Supreme Court in the case of Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes (Supra), the Hon'ble Supreme Court has categorically held that payments of VAT and service tax are mutually exclusive. Further, it was observed that even in case of indivisible contracts, it would be difficult to hold that the entire contract value be subjected to service tax or VAT.

4.10 Similarly in the case of Commissioner of Service Tax-V, Mumbai v. UFO Moviez India Ltd. (Supra), the Hon'ble Supreme Court has held that where a person has regularly paid sales tax on a particular transaction, there is no question of levying service tax on the same transaction.

4.11 In an identical case The Hon'ble Bombay High Court, in Nayana Premji Savla v. Union of India (Supra), has also held that VAT and service tax are mutually exclusive and that the same transaction cannot be subjected to both levies simultaneously.

4.12 In the present case undisputedly there is a separate transection of sale of goods right from beginning that is much before of execution of contract and the appellant have discharged the VAT/CST. Therefore, in view of the above settled legal position the sale of goods by any stretch of imagination cannot be brought into for levy of service tax. Having observed as above we find that no service tax is payable on trading of goods in the present case, the trading of goods is not in dispute. Even post 01.07.2012 in terms of section 66D(e) of the Act trading of goods is specified under the negative list on which the service tax is not leviable. in the present case undisputedly the appellant had manufactured and also purchased the goods from the independent supplier and sold to its customers therefore irrespective of whether the said goods were sold in transit or by way of high seas sale, when the provisions itself prescribes non-taxability of trading of goods, no service tax can be levied on the profit margin arising from such trading of goods. This position is supported by following judgments:-

- Commissioner of Service Tax, Ahmedabad v. Om Air Travels Pvt. Ltd., 2019 (25) GSLT 460 (Tri-Ahmd)
- Orion Appliances v. CST, Ahmedabad, 2010 (19) STR 205 (Tri. Ahmd.)
- Prem Motors Pvt. Ltd. v. Commissioner of C. Ex. & CGST, Jaipur, 2023 (73) GSTL 97 (Tri.- Del)

4.13 As per over above discussion and finding we are of the clear view that no service tax can be demanded on the sale of goods or by way of including the value of goods in the service. Further as per the contract and the transaction made thereunder there is clear distinction between the provision of service and transaction of sale of goods therefore the service has been correctly classified under erection commissioning and installation service and paid the service tax correctly. Since we decide the matter on merit we are not addressing other issues such as limitation etc.

5. The impugned orders are set aside. Appeals are allowed with consequential relief.

(Pronounced in the open court on 15.04.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha