IN THE CUSTOMS, EXCISE & SERVICE TAX

APPELLATE TRIBUNAL

West Block No. 2, R.K. Puram, New Delhi- 110 066.

Date of Hearing : 3.9.2015

Date of Pronouncement: 4.12.2015

Appeal No. ST/136/2007 with ST/Misc./55023/2014-CU(DB)

(Arising out of Order-in-Original No. Commissioner/RPR/05/2007 dated 31.1.2007 passed by the Commissioner, Central Excise & Customs, Raipur)

For Approval & Signature :

Honble Mr. Justice G. Raghuram, President

Honble Mr. R.K. Singh, Member (Technical)

1.
Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2.
Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3.
Whether their Lordships wish to see the fair copy of the order?

4.
Whether order is to be circulated to the Department Authorities?

M/s SEPCO Electric Power Construction Corporation Appellant

Vs.

CCE, Raipur Respondent

Appearance:

Shri P.K. Sahu, Advocate- for the Appellant

Shri Prashant Shukla, Advocate

Shri Amresh Jain, D.R.- for the Respondent

Coram : Honble Mr. Justice G. Raghuram, President

Honble Mr. R.K. Singh, Member (Technical)

F. Order No. 53723/2015

Per R.K. Singh :

Appeal has been filed against order-in-original No. Commissioner/RPR/05/2007 dated 31.1.2007 in terms of which service tax demand of Rs. 10,42,71,437/- was confirmed along with interest and penalties on the ground that the appellant had provided consulting engineer service to M/s BALCO in terms of Contract No. BALCO-SEPCO-02 for engineering and technical services for the captive power projects.

2. Ld. Advocate for the appellant has essentially argued/ contended that :

(1) It had a contractual obligation with BALCO to procure, set up and bring into commercial operation captive power plants at their site. The scope of activities included design, engineering, procurement, manufacture, supply, erection, testing, commissioning and reliability run, demonstration of performance guarantees as well total project management in

an integrated manner on turnkey basis. Thus it involved composite works.

(2) For that purpose they entered into four contracts as under :

Contract No. BALCO-SEPCO-01: off shore Supply Contract for the Balco Captive Power Plant Project.

Contract No. BALCO-SEPCO-02: Contract for Off shore Engineering and Technical Services for the Captive Power Plant Project.

Contract No. BALCO-SEPCO-03: On shore Supply contract for the Captive Power Plant Project

Contract No. BALCO-SEPCO-04: On shore Services & Construction Contract for the Captive Power Plant Project

(3) As per the bidding document issued by BALCO the scope of work was described as under :

The scope of Works of SEPCO, in accordance with the Specification for EPC Contract attached to the Notice inviting Tender issued to SEPCO on 4th February, 2002, shall include planning, design, engineering, project management, manufacture & procurement supply, ocean transportation including marine insurance, custom clearance, inland transportation including transit insurance, storage & handling civil works, erection, testing, commissioning, insurance against Erection All Risks, training, trial operation and handling over of the complete equipment and works for 5 x 135 MW coal-fired power plant as described in the Volume II (Technical Proposal) and Volume III (Bid Proposal Sheets) on turnkey basis, SEPCO shall also be responsible for the successful execution of performance guarantees tests for the entire Plant.

(4) The price as per bidding document was quoted on a turnkey basis for the entire project at USD 228923000/- and the payments were depending upon various stages of completion of project as a whole. The performance

parameters were also stated unit wise for each unit and the bank guarantee of 10% of the total contract price was for the entire project. The time schedule is indicated unit wise and not contract wise. The technical specifications are set for all contracts. Thus, the service rendered was works contract service and it was only for the purpose of convenience that four separate contracts were entered into and the breach of anyone contract was to be treated as breach of all contracts. The appellant cited the judgement of Supreme Court in the case of BSES Ltd. Vs. Fenner India Ltd. (2006) 2 SCC 728 wherein the Supreme Court held as under:

Upon a careful reading of this agreement, we are satisfied that the contract though, for the sake of convenience, was split up into four sub- contracts (viz. the four work/ purchase orders), was a composite contract executable on a turnkey basis. The terms of this turnkey contract were reduced into writing by the "wrap-around agreement" of 10.5.2000. We are of the definite view that under the "wrap-around agreement", the Appellant had the right to encash any or all of the guarantees for any breach in any of the terms of the four contracts. Hence, we are unable to accept the submission of Mr. Sorabjee that the first three bank guarantees were only for securing the advances paid and that it was only the fourth bank guarantee (No. 291/99 dated 23.3.2000) that was liable to be called for failure to perform the contract. In fact, an appraisal of the terms of the contract leads us to the conclusion that the bank guarantees were intended for both purposes: for securing the advances paid to the First Respondent and also for securing due performance of the contract.

Ld. Advocate for the appellant stated that the principle set out in the foregoing para of Supreme Court judgement in case of Fenner India Ltd. (supra) is applicable to the present case also. He also referred to the judgement of Tribunal in the case of CCE & Customs, Vadodara Vs. Larsen & Toubro 2006 (4) STR 63 (Tri.-Mumbai) wherein the ld. DR s argument that when the value of the goods is separately mentioned in a composite contract it would cease to be an indivisible works contract was rejected.

(5) Thus the service rendered was works contract service which was not taxable prior to 1.6.2007 as per the judgement of Supreme Court in the case of CCE Vs. M/s Larsen & Toubro Ltd. 2015-TIOL-187-SC-ST. The period involved in this case is August, 2003 to November, 2005.

3. Ld. DR, on the other hand, argued that even if the appellant was given work for four 135MG power plants, it had entered into four separate independent contracts and the contract in question was purely a sweat contract and did not involve supply of any goods at all. Each contract laid down its own terms and conditions and its own scope of work, responsibility and obligation value etc. and therefore the judgements cited by the appellant are not applicable. The manner of payment or the enforceability provisions do not take away from the fact that the contract in question was an independent legally enforceable contract and the service rendered there-under was Consulting Engineer Service.

4. We have considered the contentions of both sides. It is seen that the appellant was given the work which included design, engineering, procurement, manufacture, supply, civil works, erection, testing commissioning, reliability run, demonstration of performance guarantees as well as total project management in an integrated manner and on turnkey basis, and any other works reasonably required for the completion of the Facility and/or for safe, trouble free, normal operation of the facility. Therefore, there is force in the appellants contention that merely because it had entered into four contracts for completing the scope of work would not take away from the fact that it was an operation of erection and commissioning on a turnkey basis and therefore the service rendered was works contract service which was not liable to service tax prior to 1.6.2007 in the light of the judgement of Supreme Court in the case of Larsen & Toubro (supra). However, we find that the works contract service is defined in Section 65(105)(zzzza) of Finance Act, 1995 as under:

To any person, by any other person in relation to the execution of a works contract, excluding works contract in

respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation :- For the purposes of this sub-clause, works contract means a contract wherein, -

i. transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

ii. such contract is for the purposes of carrying out,-

a. erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

b. construction of a new building or a civl structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commercde or industry; or

c. construction of a new residential complex or a part thereof; or

d. completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

e. turnkey projects including engineering, procurement and construction or commissioning (EPC) projects

The particular contract under consideration is however not a works contract per se, because there was no transfer of property in goods involved in the execution of that contract. The contention of the appellant is that it entered into four contracts for the sake of operational convenience and the total work was essentially an EPC/turnkey project involving transfer of property in goods leviable to sales tax and what is

taxable is not a contract but the taxable service which by virtue of that becomes works contract service.

5. Indeed, arguably, each of the four contracts would need to be analysed in greater detail vis-a-vis the other three contracts to arrive at a firm view whether the contract under consideration is essentially inseparable and integral part of other three contracts i.e whether all four contracts are essentially inseparable and constitute one whole under which works contract service was rendered. However, such detailed analysis, is rendered unnecessary in this case for reasons that follow.

6. The impugned demand has been confirmed under Consulting Engineer Service. Definition of consulting engineer during the relevant time as given under Section 65(31) of the Finance Act, 1994 was as under :

Consulting engineer means any professionally qualified engineer or an engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering.

The said definition was amended with effect from 1.5.2006 to read as under :

Consulting engineer means any professionally qualified engineer or anybody corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering.

Honble Delhi High Court in the case of CCE & ST. Vs. Simplex Infrastructure and Foundry Works 2014 (34) STR 191 (Del.) held as under :

4.?It may be relevant to point out that the words an engineering firm appearing in the above definition, were substituted by the Finance Act, 2006 with effect from 1-5-2006 with the words any body corporate or any other firm. It is, therefore, clear that the expression any body

corporate was introduced with effect from 1-5-2006. But, in the present case, the relevant period is 1997-2001. At that point of time, the expression any body corporate was not included in the said definition of consulting engineer.

5.?The learned counsel for the appellant submitted that Section 3(42) of the General Clauses Act, 1897 ought to be pressed into service. He submitted that the word person includes any company or association or body of individuals whether incorporated or not. However, we fail to understand as to how the learned counsel for the appellant can place reliance on Section 3(42) of the General Clauses Act. That provision would only apply where the word person is used in any Act or Regulation. The definition of consulting engineer as provided in Section 65(31) of the Finance Act, 1994, as it existed during the relevant period, did not employ the word person at all. Consequently, the provisions of Section 3(42) of the General Clauses Act, 1897 would not apply.

6.?From a reading of the impugned order, we find that the Karnataka High Court has also taken the view that the expression consulting engineer as it appeared in Section 65(31) of the Finance Act, 1994, at the relevant time (i.e. prior to 1-5-2006), did not include private limited company or any other body corporate.

7. It is seen that the period of dispute in this case is August 2003 to November 2005. Thus during the relevant period, the appellant being a body corporate was not covered under the definition of consulting engineer as per the above quoted judgement of Delhi High Court and consequently, the service rendered by the appellant could not be classified under Consulting Engineer Service under which the impugned demand is confirmed.

8. In view of the aforesaid analysis, the impugned demand is not sustainable. Accordingly, the appeal is allowed.

9. With the disposal of appeal, the Misc. application of the respondent seeking decision on the basis of CESTAT Larger Bench decision in the case of BSBK Ltd. 2010 (18) STR 555 (Tri.-LB) also stands disposed of notwithstanding the fact

that the Supreme Court judgement in the case of L&T (supra) eclipsed the CESTAT Larger Bench decision in the case of BSBK Ltd.

(Pronounced in Court on 4.12.2015)

(Justice G. Raghuram)

President

(R.K. Singh)

Member (Technical)

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