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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; J., KRISHNA MURARI; J.
CIVIL APPEAL NOS.11400-11401/2018; APRIL 10, 2023
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX *versus* **M/S SUZLON ENERGY LTD.**

Service Tax - Same activity can be taxed as 'goods' and 'services' provided the contract is indivisible and on the aspect of services there may be levy of service tax.

Service Tax - the import of "Engineering Design & Drawings" falls under the category of "design services" under section 65(35b) read with Section 65(105)(zzzzd) of the Finance Act, 1994, and are subject to levy of service tax. On the sole ground that "Engineering Design & Drawings" prepared and supplied by sister company were shown as 'goods' under the Customs Act and in the bill of entry, such services cannot be excluded from the definition of "design services" under the Finance Act, 1994.

For Appellant(s) Mr. Rupesh Kumar, Adv. Mr. Mukesh Kumar Maroria, AOR

For Respondent(s) Mr. V Sridharan, Sr. Adv. Ms. Charanya Lakshmikumaran, AOR Ms. Apeksha Mehta, Adv. Mr. Sahil Parghi, Adv. Mr. Vinay Kumar Jain, Adv. Ms. Neha Choudhary, Adv. Ms. Falguni Gupta, Adv.

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 02.05.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (hereinafter referred to as the 'CESTAT') in Appeal Nos. ST/87589 & 87590/2013, by which the CESTAT has allowed the said appeals preferred by the respondent – M/s Suzlon Energy Limited (hereinafter referred to as the 'respondent') and has held that "Engineering Design & Drawings" of various models imported by the respondent for the purpose of manufacturing of Wind Turbine Generator (for short, 'WTG') are not leviable to service tax under the category of "Design Services" as defined under Section 65(35b) read with Section 65(105)(zzzzd) of the Finance Act, 1994 during the period June, 2007 to September, 2010, the Revenue has preferred the present appeals.

2. That the respondent herein was providing various taxable services. The respondent was also in the manufacture of WTG. It has three subsidiary companies situated in Germany and Netherlands with whom product development and purchase agreement had been entered into.

2.1 The respondent had entered into an agreement dated 01.04.2007 (w.e.f. 01.01.2007) with M/s Suzlon Energy GmbH, Germany, a sister concern for the product development and purchase agreement to be used exclusively for manufacturing of WTG in the territory of India. The products were exclusively defined in para 1.10 of the said agreement.

2.2 The respondent, while importing these designs filed Bill of Entry with the Custom authorities and classified the same as "Paper" under Chapter Sub-heading No.

49119920 of the Customs Tariff and claimed benefit of 'Nil' rate of customs duty under Notification No. 021/2002 for BCD and Notification No. 020/2006 for CVD. That respondent claimed that since the designs and drawings received by it vis customs route by filing the Bill of Entry were "goods" and not "services", it was not required to pay the service tax.

2.3 During the course of audit, it was noticed that the respondent had not paid service tax on "Engineering Design & Drawings" of various models, used in the manufacturing of WTG, which was classifiable under the category of "Design Services" for the period from June, 2007 to September, 2010.

2.4 The appellant herein – Commissioner of Customs, Central Excise and Service Tax, Pune issued a show cause notice dated 15.12.2001 to the respondent calling upon it to show cause as to why the service tax to the tune of Rs.18,42,99,652/- on the value of taxable services provided by it under the provisions of Section 73 of Chapter V of the Finance Act and cess under Section 85 of Chapter VI of the Finance Act be not demanded. The respondent was also called upon to pay the interest leviable under Section 75 and penalty under Section 76 and 78 of the Finance Act. For the subsequent period , i.e., October, 2010 to September, 2011, another show cause notice was issued on 20.04.2012 demanding service tax of Rs.3,36,28,515/- on the value of "design service" from M/s SEG and M/s Suzlon Blade Technology, Netherlands.

2.5 *Vide* Order-in-original dated 25.03.2012, the Commissioner – appellant herein confirmed the demands made in the show cause notices as provider of "design services" taxable under Section 65(105)(zzzzd) and in accordance with the definition of the services in Section 65(35b) of the Finance Act, 1994. The Commissioner also levied interest as well as the penalty.

2.6 Aggrieved by the Order-in-original passed by the Commissioner confirming the demands of service tax and also levying the interest and penalty, the respondent filed appeals before the CESTAT. By the impugned common order, the CESTAT has allowed the said appeals, relying upon its earlier decision in the case of ***Sojitz Corporation v. Commissioner of Service Tax, New Delhi, reported in 2009 (14) STR 642 (Tri. Delhi)*** and has held that the said design and drawings are 'goods' and not 'service'. The CESTAT has also observed and held that the taxation of goods and that of services are mutually and explicitly conceived levies, and therefore the same activity cannot be taxed as goods and as services. Consequently, the CESTAT has set aside the Order-in-original on the ground that "drawing and design" are to be treated as goods and therefore it cannot be treated as service.

2.7 Feeling aggrieved and dissatisfied with the impugned common order passed by the CESTAT, the Revenue has preferred the present appeals.

3. Shri N. Venkataraman, learned Additional Solicitor General of India appearing on behalf of the Revenue has submitted that the substantial question of law arises for the consideration of this Court is, "whether "Engineering Design & Drawings" of various models imported by the respondent for the purpose of manufacturing of WTG are leviable to service tax under the category of "Design Services" as defined under section 65(35b) r/w section 65(105)(zzzzd) of the Finance Act, 1994 during the period June, 2007 to September, 2010?

3.1 Shri N. Venkataraman, learned ASG has submitted that the contentions of the respondent that any intellectual property put in a media at all times would only get classified as 'goods' and never as 'services' may not be the correct statement of law. It is submitted that merely because the intellectual property put in a media, it would not *per se* make them goods. It would depend on whether the contracting parties have understood it as a transfer or a sale of goods. It is submitted that importation of a set of tailor made or readymade drawings will constitute a sale of goods, whereas if a person engages a painter to draw a picture of his choice and to his specifications and the delivery of the painting, even though on a canvas duly framed, may only constitute to a service, since the painter has engaged his entire intellectual effort in drawing the painting for a particular customer and to his specifications and as he progresses with the painting, the same is for a specific customer.

3.2 It is submitted that this can also happen in the case of "designs & drawings". It is submitted that a set of tailor made drawings and designs or readymade drawings and designs would constitute a distinct clause when compared to preparation of drawings and designs under a contract of service for a specific customer to suit his specifications. 3.3 Shri N. Venkataraman, learned ASG has heavily relied upon the decision of this Court in the case of ***BSNL v. Union of India, reported in (2006) 3 SCC 1*** (paras 44 & 45), in support of his submission on the distinction between sale of goods and a contract of service. On the decision of this Court in the case of ***BSNL (supra)*** and the distinction between sale of goods and a contract of service, Shri N. Venkataraman has made the following submissions:

a) it held that sale in the conventional sense would mean the Gannon Dunkerly test and, deemed sale involving both goods and services would be limited only to a work contract and food contract;

b) It made it clear that Article 366(29A) does not give alicense to assume that a transaction is a sale and then to look around for what could be the goods. This would be an incorrect approach since the expression goods had not been altered by the 46th amendment and the ingredients of sale continues to have the same definition;

c) However, this does not mean that the content of the concepts remain static, and the Courts must move with times;

d) It proceeded to hold that Article 366(29A) does not seek to cover hospital services, lawyer services and other professional services, where during the course of rendering such services, there may be a transfer of goods;

e) Treatment of a patient in a hospital and administration of pills in the course of a treatment would not tantamount to sale;

f) When a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client, strictly speaking, with a payment of fees, consideration does not pass from the patient or client to the doctor or lawyer for the documents in both the cases;

g) However, these are mere services and do not involve a sale for the purposes of Entry 54 List 2;

h) The reason is that ultimately one has to apply the Gannon Dunkerly test. If there is an instrument of contract which may be composite in form, in any case other than the exceptions in Article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service and impose tax on sale;

i) The test, therefore, for service contracts, other than the two contracts falling under Article 366(29A), would be 'did the parties have in mine or intend separate rights arising out of the sale of goods? If there was no such intention, there is no sale even if the contract could be disintegrated.'; and

j) The test for deciding whether a contract falls into one category or another is, as what is the substance of the contract otherwise called, the dominant nature test.

3.4 It is submitted that therefore what is required to be considered is, did the contracting parties intend transfer of both goods and services, either separately or in an indivisible manner or in a composite manner.

3.5 Shri N. Venkataraman, learned ASG has also submitted the following illustrations in support of his submission that the "Engineering Design & Drawings" of various models imported by the respondent for the purpose of manufacture of WTG are leviable to service tax and cannot be taxed as goods:

i) If a contracting parties A and B agree to the purchase of a huge boiler for erection, installation and commission in a factory, the intention of the contracting parties would envisage the sale of a boiler as goods and a rendition of erection, installation and commissioning as services. This contract can be either divisible, indivisible or composite. Whatever may be the nature of the contract, the intending parties have contracted for both the sale of goods and the rendition of service.

ii) A patient is under medical treatment at a hospital and the doctor had advised for a heart surgery and insertion of a stent. Here again, it involves two elements. The transfer of the stent from the hospital into the body of the patient and the rendition of medical services by the doctor through the hospital. Even though it involves both goods (stends) and services (medical services/hospital services), the contracting parties, namely, the patient and the hospital, do not intend to buy and sell a stent and also a rendition of medical services as 2 items of sale and service. The contract is essentially for the rendition of medical services and in the course of rendition, based on the advice of the doctor, a stent is inserted into the body of the patient.

3.6 Making above submissions, it is prayed to allow the present appeals.

4. Shri V. Sridharan, learned senior counsel appearing on behalf of the respondent has submitted that the precise question involved in the present appeal is, "whether service tax can be levied on pure sale (not deemed sale) of customises drawings/designs contained in a medium prepared as per the specifications given by the customer." 4.1 It is submitted that as per the settled position of law, supply of goods as per specifications given by the customer is also treated as sale of goods.

4.2 It is submitted that the first question is, whether supply of goods as per specifications given by the customer is a contract of sale of goods or merely a contract for work on labour. It is submitted that in the case of ***Hindustan Shipyard Ltd. v. State of A.P., reported in (2000) 6 SCC 579***, it is held that if the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. Further, if the bulk of material used in construction belongs to the manufacturer who sells the end product for a price, then it is a strong pointer to the conclusion that the contract is in substance one for the sale of goods and not one for labour.

4.3 Learned senior counsel appearing on behalf of the respondent has heavily relied upon the decision of this Court in the case of ***Associated Cement Companies Ltd. v. Commissioner of Customs, reported in (2001) 4 SCC 593***. It is submitted that in the said decision, this Court has held that any media which contain drawings or designs would be regarded as goods under the provisions of the Customs Act. It is observed that these items are movable goods and would be covered by Section 2(22)(e) of the Customs Act. It is observed and held that the fact that the technology or ideas is tailormade would not make any difference.

4.4 It is submitted by Shri V. Sridharan, learned senior counsel appearing on behalf of the respondent that it may be true that the decision of this Court in the case of ***Associated Cement Companies Ltd. (supra)*** may not be an authority for the proposition that service tax cannot be levied on pure sale of goods, the said decision is certainly an authority for the proposition that designs on a medium will be treated as goods under the natural definition of goods. It is submitted that the said decision is also an authority for the proposition that the amount paid by the importer to the original supplier is nothing but price for sale of such goods.

4.5 Shri V. Sridharan, learned senior counsel has also relied upon the Constitution Bench decision of this Court in the case of ***Tata Consultancy Services v. State of A.P., reported in (2005) 1 SCC 308***. It is submitted that in the said decision, the question was, as to whether

canned software soled by the appellants can be termed to be “goods” and as such assessable to sales tax under the Andhra Pradesh General Sales Tax Act, 1957. It is submitted that in the said decision, this Court affirmed the decision in the case of ***Associated Cement Companies Ltd. (supra)*** and held that intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes and marketed would become “goods.”

4.6 It is further submitted that the intent of service tax legislation is not to levy service tax on sale of goods. It is submitted that sales tax is levied on sale of goods whereas the service tax is levied on provision of service. It is submitted that therefore a transfer of goods for a price cannot be subject to service tax.

4.7 It is submitted that it is true that different aspects of a transaction can be taxed through separate provisions. The aspect theory permits taxation of two different aspects or features of a transaction. For instance, in a catering contract, supply of food was subject to value added tax and the service aspect was subject to service tax. However, in the case of ***BSNL (supra)***, this Court has observed that the aspect theory does not allow the value of goods to be included in services and *vice versa*. Reliance is placed on the observations made in para 88 of the said judgment.

4.8 It is further submitted by Shri V. Sridharan, learned senior counsel appearing on behalf of the respondent that before the CESTAT, the respondent raised a specific ground that the services (if any) rendered by a foreign entity will not fall within the purview of “design services”. The respondent also raised a specific ground that the extended period of limitation cannot be invoked. However, though the said submissions have been noted be the CESTAT, the CESTAT has not dealt with those contentions and therefore it is prayed that the matter may be remanded to the CESTAT to decide all these questions.

5. We have heard learned counsel for the respective parties at length.

The issue to be decided in the present appeals is “whether activity of import of “Engineering Design & Drawings” from the sister companies by the notice during the period under dispute i.e., June, 2007 to September, 2010 is classifiable under taxable category “design services” under section 65(35b) read with Section 65(105) (zzzzd) of the Finance Act, 1994 .

5.1 While considering the aforesaid issue, the definition of “design services” under the Finance Act, 1994, as it stood during the impugned period, is required to be considered, which reads as under:

SECTION 65. Definitions. -In this chapter, unless the context otherwise requires,

…….

(36b) design services" includes services provided in relation to designing of furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three dimensional models:

…….

(105) (zzzzd) "taxable service" means any service provided or to be provided,

(zzzzd) to any person, by any other person in relation to design services, but does not include service provided by-

(i) an interior decorator referred to in sub- clause (q); and

(ii) a fashion designer in relation to fashion designing referred to in sub-clause (zv):

and the term "service provider" shall be construed accordingly.”

Thus, it can be seen that the definition of “design services” is a wide and conclusive one, specifically excluding only fashion design and interior designing, which were already taxable under separate taxable category.

6. In the present case, the respondent was engaged in manufacture of Wind Turbine Generator (WTG). It entered into ‘product development and purchase agreement’ with three of its sister companies. Relevant clauses of the agreement, more particularly which defined the ‘product’ read as under:

1.10.1 'Design and Development' of all models of rated capacity geared WTG together with all related and pertinent components and therein required;

1.10.2 'Design and Development' of 'Suzlon Flexislip System' together with all related and pertinent components and therein required;

1.10.3 All and any products that is developed by M/s SEG conceived (whether or not actually conceived during regular business hours), discovered, or made by M/s SEG and its agents and employees during the course of performing its obligations under the Agreement;

1.10.4 Documentation including material and documents containing studies planning activities, manufacturing process details in respect of above.

1.10.5 All modifications made to the above, from time to time, and all other improvements developed and incorporated within the above.

1.10.6 Intellectual property and intellectual property rights relating thereto in so far it belongs to German Inventions Law.

7. At this stage, it is required to be noted that the said designs were to be exclusively used by the respondent in the territory of India and it was a tailormade design. The respondent engaged the sister concern M/s SEG for the activity of “Engineering Design & Drawings” used in manufacturing of WTG, that was reduced as blue print on paper and delivered to the respondent on the same medium. Such “designs” were subjected to the service tax even as per the clarification by the Board dated 18.03.2011 on the issue of applicability of indirect taxes on packaged software. Therefore, as such, the respondent was liable to pay service tax on the “design services” received from abroad under reverse charge. It was also found that M/s SEG was a related unit, i.e., subsidiary of the assessee and the amount received for service by M/s SEG from the assessee-respondent for the said “Engineering design & drawings” services therefore was liable to service tax under reverse charge in terms of the concept of ‘associated enterprise’.

8. Despite the above, M/s SEG raised the invoice/bill on the assessee treating it as ‘paper’. However, when the said bill of entry was presented treating the same as ‘paper’ for which the duty payable was ‘Nil’. Therefore, neither any custom duty was paid due to exemption from payment of duty treating it as ‘paper’ nor the service tax was paid. By a detailed judgment and order, the Commissioner held that the respondent was liable to pay the service tax under taxable category ‘”design services”. However, by the impugned judgment and order, the CESTAT has held that the respondent is not liable to pay the service tax under “design services” under the Finance Act, 1994 mainly on the ground that the custom authority considered the same as ‘goods’ and therefore the same activity cannot be taxed as ‘goods’ and ‘services’. The aforesaid view is absolutely erroneous. As observed and held by this Court in the case of ***BSNL (supra)***, there can be two different taxes/levies under different heads by applying the aspect theory. As per the settled position of law now, the same activity can be taxed as ‘goods’ and ‘services’ provided the contract is indivisible and on the aspect of services there may be levy of service tax. The aforesaid aspect has not at all been considered by the CESTAT while passing the impugned judgment and order. As observed hereinabove, the definition of “design services” is very clear and it is wide enough to cover all

"design services." Merely because "Engineering Design & Drawings" prepared and supplied by sister company were shown as 'goods' under the Customs Act and in the bill of entry, by that itself cannot be a ground to take such services out of the definition of "design services" under the Finance Act, 1994.

9. Even otherwise, as observed by this Court in the case of ***BSNL (supra)***, there is a distinction between the sale of goods and a contract of service. What is relevant is the intention of the contracting parties and whether the contracting parties intend transfer of both goods and services, either separately or in an indivisible manner or in a composite manner. The issue is squarely covered by the decision of this Court in the case of ***BSNL(supra)*** against the assessee and in favour of the revenue. Therefore, the view taken by the CESTAT that the same activity cannot be taxed as goods and services is absolutely erroneous. Nothing further has been discussed by the CESTAT, more particularly on the findings recorded by the Commissioner recorded from para 20 onwards. Under the circumstances, the impugned judgment and order passed by the CESTAT setting aside the levy of service tax is unsustainable and the same deserves to be quashed and set aside.

However, at the same time, as other grounds raised before the CESTAT, namely, "whether the services (if any) rendered by a foreign entity will or will not fall within the purview of "design services" and invocation of extended period of limitation have not been considered by the CESTAT and therefore learned counsel for the respondent is justified in praying to remand the matter to CESTAT to decide the aforesaid two grounds.

10. In view of the above and for the reasons stated above, the impugned judgment and order passed by the CESTAT holding that the respondent is not liable to pay service tax as "design services" on importing various models of "Engineering Design & Drawings" for the purpose of manufacturing of Wind Turbine Generator (WTG), as defined under Section 65(35b) r/w section 65(105)(zzzzd) of the Finance Act, 1994 is hereby quashed and set aside. However, the matter is remitted back to the CESTAT to consider the grounds raised on behalf of the respondent, namely, whether the services (if any) rendered by a foreign entity will not fall within the purview of "design services" and that the department was not justified in invoking the extended period of limitation. It is made clear that the matter is remitted back to CESTAT to consider the aforesaid two grounds and none other. Insofar as the issue of levy of service tax on the "Engineering Design & Drawings" is concerned, the same is decided in favour of the revenue and against the assessee.

11. The instant appeals stand disposed of in terms of the above. However, in the facts and circumstances of the case, there shall be no order as to costs.