

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 237 OF 2016

M/s. Aditya Vidyut Appliances	}	Appellant
versus		
The Commissioner of Service Tax	}	Respondents

Mr. M. H. Patil i/b. M/s. Manasi Patil for
the appellants.

Ms. P. S. Cardozo for the respondents.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE :- JANUARY 16, 2018

P.C. :-

1. The assessee is aggrieved by a limited direction of the tribunal. The tribunal, in the order dated 30th December, 2015 and its further order dated 23rd May, 2016, refused to remand the matter back to the adjudicating authority as prayed by the appellant. In other words, it directed a restricted remand. Secondly, the appellant assessee is aggrieved by the finding of the tribunal on the point of invocation of the extended period of limitation.

2. Bearing in mind the nature of the order and direction, by which the appellant assessee is aggrieved, we are of the view that the present appeal raises substantial questions of law. We

proceed to admit it on the following two substantial questions of law:-

“(i) Whether the CESTAT was justified in remanding the matter only for reconsideration of certain deductions, ignoring various other provisions like the amount of service tax paid on the value of transportation of goods included for demanding the tax; no liability of tax on the value for service not received; payment of service tax on such value on receipt; taxability of testing/value of damaged parts/scrap; job-work done under Rule 4(5)(a) of CCR, 2004 etc.?”

(ii) Whether the CESTAT was justified in restricting the remand to adjudicating authority in the above manner, without assigning any reasons for not considering the various other deductions as contended in the Grounds of Appeal from Ground 'D' to 'I', in a case where, if all the aforesaid deductions/contentions are considered no demand would sustain and it would be clear that the Appellants have correctly paid service tax?”

3. As far as the third question is concerned, it is common ground that in para 6.6 of the order under Appeal, the issue of limitation has been discussed by a cryptic finding. Though that appears to be incomplete, with the assistance of Mr. Patil and Ms. Cardozo, we have perused the relevant materials. The tribunal has taken a view of the issue of limitation and invocation of the extended period by perusing the correspondence. It may have not entirely faulted the assessee, but in the peculiar facts and circumstances of the case, it sustained the demand by invocation of the extended period of limitation. Since the finding is on mixed questions of fact and law and peculiar to the assessee's case, we do not deem it proper to disturb it. It cannot

be said to be wholly perverse or vitiated to such an extent as would enable us to frame a substantial question of law for admission of this appeal. We clarify that the appeal stands dismissed to the extent of question no. (iii) at page 16 of the paper book.

4. However, we would dispose of this appeal finally on the above two admitted questions for the simple reason that the assessee before us is engaged in the business of manufacture of excisable goods falling under Chapter Heading 8504 of the Schedule to the Central Excise Tariff Act, 1985. Apart from manufacturing activity, the appellant also undertakes repairing of electrical transformers manufactured by them. For the repair service rendered by them, in respect of electrical transformers manufactured by them and received for repairing from their customers from time to time, the appellant is registered with the Service Tax Department under the head "Maintenance and Repair Service" and under "Commissioning and Installation Service" and paying appropriate service tax.

5. Then, the appellant also undertakes repairing of goods manufactured by other manufacturers and belonging to various State Electricity Boards as well as industrial users as per the repairing contracts obtained through tender/quotations. The

repairing work of electrical transformers undertaken by the appellant are manufactured by other manufacturers like M/s. Crompton Greaves Ltd., M/s. Bharat Heavy Electricals Ltd. (BHEL) and others. After explaining in details as to how the activity of repairing of electrical transformers is undertaken, it is stated that it is against the fixed consideration mutually agreed under a contract/agreement for repairing of electrical transformers. This is an activity involving transportation of the said goods to their factory, dismantling, reassembling and re-transportation to the site of customers. The repair work to be done is always specific qua specific transformer, with a requirement for entering a contract for repair work. The maintenance or repair service was made taxable with effect from 1st July, 2003 and the scope of the said service was defined in the Finance Act, 1994. The appellant states that they had a doubt whether the repairing work carried out in respect of the transformers not manufactured by them would be covered by the expression "Maintenance or Repair Service" as it was not done under any repairing contract, but under a rate contract. Hence, various letters were sent to the department and finally, what they were visited with is a communication dated 24th February, 2004 and 25th August, 2004 asking them to pay service tax under "Maintenance or Repair Service" without clarifying as to why and

how an activity carried out other than under annual maintenance contract would be taxable.

6. The appellant was proceeded against, but there was an objection raised by the audit team, to which also a reply was given by the appellant-assessee. Then, without prejudice to its contentions, the appellant started paying service tax under protest with effect from 21st September, 2004 for the period 1st July, 2003 to 15th June, 2005 under intimation to the department.

7. As far as the period 16th June, 2005 to 31st March, 2006 is concerned, the service tax was paid for repair charges under the “Maintenance or Repair Service” and on the commissioning and installation charges, under “Erection, Commissioning and Installation Service” on receipt basis in terms of the provisions of Rule 6 of the Service Tax Rules, 1994. The service tax paid under this head was to the tune of Rs.1,34,05,568/-. That is over and above the amount of service tax already paid and considered in the show cause notice. It is in these circumstances, the dispute was raised to the demand in the show cause notice, but, what transpires is that the show cause notice dated 25th May, 2007 demands from the appellant a sum of Rs.2,37,52,286/- along with interest and penalty on the activity of repairing of transformers

done under rate contract during the period 1st July, 2003 to 31st March, 2006. It is that show cause notice, which was adjudicated by the order-in-original dated 9th February, 2012. The relevant part of the order-in-original reads as under:-

“ORDER

i) I confirm the demand of Rs.2,34,10,538 and education cess amounting to Rs.3,41,748 totally amounting to Rs.2,37,52,286/- (Rupees two crores thirty seven lakhs fifty two thousand two hundred eighty six only) raised vide Show Cause Cum Demand Notice No. ST/Mum/Div-VI/MRS/AVAL/EA-2000/SCN-06/2007 dated 25th May 2007 against M/s. Aditya Vidyut Appliances Limited under proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994;

ii) I order for recovery of interest, at the appropriate rate on the above confirmed demand under Section 75 of Chapter V of the Finance Act, 1994;

iii) I impose a penalty of Rs.2,37,52,286/- (Rupees two crores thirty seven lakhs fifty two thousand two hundred eighty six only) upon M/s. Aditya Vidyut Appliances Limited under Section 78 of Chapter V of the Finance Act, 1994.”

8. Aggrieved and dissatisfied by this order, an appeal was filed before the CESTAT. By the impugned order, the CESTAT considered all the contentions but not restricted to the plea that the demand raised in the show cause notice and confirmed by the adjudicating authority concerns various material costs which was used while undertaking the repairs during the period 16th June, 2005 to 31st March, 2006 and which requires re-quantification. The tribunal dealt with all the contentions and framed two points, namely, taxability of maintenance and repair services

undertaken by the appellant in a situation wherein they undertake repairs of electrical transformers manufactured by other manufacturers and installed by various State Electricity Boards, under repairing contracts. The rival contentions, including the definitions were noted and the tribunal, supported by its earlier view, held that prior to 15th June, 2005, no service tax liability arises on the activity of the appellant on repairs undertaken of transformers received by them from various State Electricity Boards. Then, the activity of repairs post 15th June, 2005 was dealt with and the contention based thereon was dealt with in the following manner:-

“6.5 As regards the activity of repairs post 15.6.2005, we find that the activity as per the definition (reproduced herein above) will cover the services rendered and the appellant herein is liable to discharge the service tax liability. The submission of the learned Counsel that they had discharged the service tax liability but the tax liability in the show-cause notice needs re-quantification, as the demand is also on the materials consumed for such repairing activity. Casual perusal of the invoices produced before us indicates that the appellant has charged separately for the material consumed and for the services of repairing of the said transformers. In our considered view the payment of the service tax liability under “maintenance or repaired” services post 15.6.2005 needs re-quantification. Upholding the demand of service tax liability and the interest thereof for the period post 15.06.2005, we remit the matter back to the adjudicating authority to reconsider the limited prayer of the appellant regarding the cost of the material that needs to be reduced from the value on which tax liability is due. Appellant is also required to discharge the interest on requantification of tax liability.”

9. It is with regard to this finding that Mr. Patil joins issue with the tribunal. He would submit that the appellant had argued in details and even placed relevant materials, which are on record of the case. The tribunal should not have remanded the matter for its own observation and conclusion is that it casually perused the invoices. Mr. Patil would submit that the remand was not necessary at all. He would submit that if the demand itself was not sustainable and on the grounds which are mentioned in the grounds of appeal, duly highlighted, then, there was nothing to be remanded and for re-quantification. The appellant had pointed out that the value of parts/materials manufactured as well as bought out, on which central excise duty as well as value added tax/sales tax was paid and sold to the customers while repairing and shown separately in the invoices, is not includible in the taxable value, as no cenvat credit thereon was availed. The benefit of Notification No. 12/2003-ST dated 20th June, 2003 is available in such cases. Alternatively, if the value of parts/components sold is being held to be includible in taxable value, then, the appellant is entitled for set off by allowing credit of central excise duty on these parts/components/materials. Further, once the service tax has been paid on the transportation charges under the head "Transport of Goods by Road" during the disputed period, the same amount/value for transportation/

transportation charges cannot be again subjected to service tax under “Maintenance or Repair Service”, as the same would lead to double taxation. The demand of service tax worked out by considering the bills/invoices without taking into consideration Rule 6 of the Service Tax Rules, 1994 is not sustainable.

10. Finally, Mr. Patil would argue that the service Tax already paid has not been adjusted. There are various contentions, according to Mr. Patil, raised for testing charges, value representing damaged parts, coils, scrap arisen during the course of repair of goods, which are retained by the assessee by giving credit of the same to the customers. On erection, commissioning and installation, service tax has already been paid under that head. Hence, no service tax can be payable again under the “Maintenance or Repair Service”. These are the contentions which have not been considered and yet a remand is directed.

11. On the other hand, Ms. Cardozo would support the findings, which we have reproduced above. She would submit that the order of remand and for a limited purpose raises no substantial questions of law and therefore, we should not admit this appeal.

12. We have noted the contentions of both sides. Any

expression of opinion would prejudice the case of both sides. Therefore, we do not wish to say anything, but only invite the attention of the tribunal to the detailed arguments and noted in paras 2 and 3 of the order under appeal. The tribunal just picks up one of the various contentions forgetting that the primary one was repairing activity of the transformers, undertaken by the appellant, in respect of other manufacturers of transformers, would not be covered under the “Maintenance or Repair Service” as the definition says, it is restricted to undertaking maintenance or repair work under maintenance contract. Apart therefrom, the argument was that no maintenance contract was entered into by the appellant with the State Electricity Board. Then, the change in the definition post 15th June, 2005 was referred and it was urged that tax liability may arise from that date and which has been discharged, but the demand raised in the show cause notice and confirmed by the adjudicating authority includes various material cost which was used while undertaking repairs during the period 16th June, 2005 to 31st March, 2006, which requires re-quantification.

13. Various facets of that aspect were highlighted in the grounds of appeal itself, but the tribunal understood it as only a limited request and for re-quantification. We do not see how the

tribunal could have concluded that a casual perusal of the invoices produced before it indicates that the appellant assessee has charged separately for the material consumed and for the service of the repairs of transformers. The tribunal holds that the payment of service tax liability in relation to maintenance or repair service post 15th June, 2006 needs re-quantification, but if that is how it has understood the matter, re-quantification is not reconsideration of the limited prayer of the assessee regarding cost of the material that needs to be reduced from the value of tax liability due. We have noted the contentions of Mr. Patil in some details because at page 314 of the paper book, the tribunal had before it the application for rectification of mistakes. In that, the tribunal should have noted the aspects highlighted and once again brought before it, particularly in para 7 of the same. We do not, therefore, think that a restricted remand was sought by the appellant, as is erroneously understood in the order under appeal.

14. Be that as it may, both aides agree before us that for this limited extent, the matter should go back to the tribunal itself and need not be sent to the adjudicating authority. Mr. Patil says that all the relevant and necessary materials in relation to this plea are before the tribunal. Nothing in addition thereto is required to

be placed on record. The assessee would rely on those very materials, which were before the adjudicating authority and forming part of the paper book or records before the tribunal and nothing more. On these materials itself, the assessee would be able to convince the tribunal that the segregation or re-quantification, as prayed should be made. If this is how the matter is understood by the assessee, then, we see no justification for remanding the matter to the adjudicating authority.

15. We allow this appeal to the limited extent. We set aside that part of the order, which we have reproduced above i.e. para 6.5 and the ultimate direction in para 6.7 with regard to liability of the appellant to pay service tax post 15th June, 2005 and direct that even if the said service attracts tax and which is admissible and payable, its computation be done afresh in accordance with law. The tribunal should note all the contentions canvassed before it insofar as this plea is concerned and by referring to the grounds in the memo of the appeal. It shall also take into consideration the pleas of the appellant, which are raised in the rectification of mistakes application. It should pass a fresh order after hearing the assessee as also the Revenue. The tribunal should only consider this aspect of the matter. We clarify that we maintain and uphold the order of the tribunal insofar as the rest of the issues are concerned.

16. This appeal is allowed in the above terms, but by clarifying that all contentions on the issue sent back to the tribunal are kept open. Needless to clarify that once we send the matter back to the tribunal for reconsideration of the above issue, not only the order under appeal, but the order on the application for rectification is also set aside.

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)