IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

C.M.A. No.2032 of 2019

GE T & D India Ltd
(formerly known as Areva T&D India Limited)
rep.by Senior Manager-Indirect Taxs S.Sivaramakrishnan
19/1, GST Road, Pallavaram, Chennai 600 043.
... Appellant/Appellant

-Vs-

Commissioner of Central Excise and
Service Tax, Large Tax Payer Unit
1775, J.N.Road, Anna Nagar (W) Extension
Chennai 600 101. ... Respondent /Respondent

For Appellant : Mr.Joseph Prabakar

For Respondent : Mr.K.Ravi

Prayer : Civil Miscellaneous Appeal under Section 35G of the Central Excise Act, to set aside the second portion of the order contained in Paragraph 8(ii) in Page No.8 of Final Order No.41709 of 2018 dated 01.06.2018 in Appeal No.ST/33/2011-DB passed by the CESTAT South Zonal Bench, Chennai.

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

The assesse M/s.GE T & D India Limited (formerly known as M/s.Areva T&D Limited) has filed this appeal aggrieved by the order dated 01.06.2018, by which the learned Tribunal remanded the case to the assessing authority with regard to applying of Works Contract Composition Scheme to the case of the Assessee, who is engaged in the works contract services of Supply and Installation of Electrical Equipments.

2. The relevant portion of the order of the learned Tribunal is given below for ready reference

" 7.3. Now we turn to the claim of appellant for the benefit of concessional rate of duty under Works Contract (Composition Scheme). The appellant has paid service tax availing the above construction contract definitely involves supply of materials such as cement and steel, such contracts are rightly classifiable under the works contract service. But the adjudicating authority has denied the benefit of composition scheme for the reason that the appellant has failed to exercise the option for payment of service tax under the scheme prior to the payment of service tax under the respective works contract. Even though such a stand adopted cannot be 'faulted', we are of the view that appellant will be entitled to assessment under Works Contract service for such contracts and entitled to payment of service tax only on the value of service portion. The adjudicating authority is directed to extent such a benefit subject to appellant producing satisfactory documentary proof of evidencing the value of service.

8. In view of the above discussions, we pass the following order:-

i) Order denying abatement under Notification No.1/2006-ST dated 01.03.2006 is set aside and abatement allowed.

ii) Regarding assessment under Works Contract Service, matter remanded to the adjudicating authority."

3. The Assessee filed a Rectification Application, seeking rectification of the said order dated 01.06.2018, which too came to be rejected by the learned Customs, Excise and Service Tax Tribunal, South Zonal Bench, Chennai by the same learned Member (Mr.V.Padmanabhan, Member-Technical) on 07.08.2018. The relevant portion of the said order is also quoted below for ready reference.

" 4. After hearing both sides and on perusal of the records, we note that the Tribunal, in the said decision has failed to exercise the option under the relevant Rules. To a specific query from the Bench, learned Advocate admitted that the said decision of the Tribunal was not brought to the notice of the Bench during the hearing. In the circumstances, we are of the view that there is no ground for modification of the final order already issued. Any such modification as prayed by the appellant would amount to review of the order already passed, which is not permissible under rectification of mistake application. Under ROM only such mistakes which are apparent from the record may be correct.

5. In the result, the ROM application is dismissed."

4. Aggrieved by the said order, the Assessee filed a writ petition before this Court, which was later on converted into the present C.M.A.No.2032 of 2019. Learned counsel for the Assessee Mr.Joseph Prabakar submitted that in order to avail the benefit of the Works Contract Composition Scheme, there was no prescribed format of indicating the option in the same, but the Assessee in the present case had paid only 2% of service tax as per the said Composition Scheme and therefore, the relief of the said Composition Scheme could not be denied to the Assessee in the present case. But, since the learned Tribunal, in the order dated 01.06.2018 had remanded the case back to the assessing authority with the observation in Paragraph 7.3 quoted above that the appellant will be entitled to assessment in Works Contract services for such contracts and entitled to payment of service tax only on the value of the services portion, therefore, in fact Assessee will have to face regular assessment proceedings under the said remand order. He further submitted that the view of the Tribunal on the said question of availing the Works Contract Composition scheme was beyond pale of doubt and that the Tribunal at the Principal Bench of the said Tribunal, CESTAT at Delhi in the case of “Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 authored by the same member (Mr.V.Padmanabhan) had held that, even though the option for adopting the Composition scheme was indicated by the Assessee at later stage and even though the Assessee initially paid service tax at the prescribed rates, it was permissible to switch over to the Composition Scheme. Therefore, the learned Tribunal in the case of the present Assessee ought not to have taken a pedantic approach and instead of rectifying the earlier order dated 01.06.2018, it has erred in rejecting the same vide order dated 07.08.2018.

5. Learned counsel for the Assessee brought to the notice of this Court the judgment of the learned Tribunal in the case of

"Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 cited supra, wherein the said Tribunal has held as under.

" 7. We have gone through Tribunal decision cited by the Ld.counsel for the assessee. In the case of ABL Infrastructure Pvt.Ltd (supra) where a similar issue was considered by the Tribunal. The Tribunal observed in the above case as follows:-

> 6.3. Having viewed that the appellant have executed the new contract w.e.f.5-6-2007 and the activity is eligible to be classified as a Works Contract Service, we may now examine whether they are eligible for paying duty at the lower rate under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The objection of Revenue is that the appellant has fulfilled condition of Rules. The convenience, Rule 3 is extracted below:-

The above Rule requires that the provider which opts to pay tax under the Rule shall exercise such option prior to payment of Service Tax. We find force in the appellant's contention that the fact they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-09-2007, the substantial benefit cannot be denied for procedural deficiency of delay in adopting for Works Contract Service by a specific declaration under Rule 3. More so, when no format has been prescribed for making / exercising an option nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme. Reliance is placed on the case of Bridge and Roof Company (supra), wherein it was held as under:-

> "After hearing both sides, duly represented by Shri Bipin Garg, learned AR appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract. However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said

rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."

We have also seen Board's Circular and the judgment of Nagarjuna Construction (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 01-06-2007 and after 01-06-2007. In the present case, we have held above that the appellant was executing work in a new contract from 05-06-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax."

8. By following the decision of the Tribunal in the above case, we conclude that there is no justification for denying the benefit of payment of Service Tax under the Works Contract Composition Scheme. In view of the above discussion, the impugned order cannot be sustained in its present form. We set aside the impugned order and remand the matter to the Adjudicating Authority for deciding the issue de novo after extending the benefit of the Works Contract Composition Scheme and requantify the Service Tax payable thereon. He will decide the issue of penalties also accordingly."

6. He therefore submitted that the learned Member ought to be directed to reconsider the appeal in the light of the view taken by the Tribunal in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 and allow the benefit of the Works Contract Composition scheme to the Assessee.

7. Learned counsel for the Revenue, submitted that the Assessee has wrongly approached this Court by way of writ petition, but later on the same was converted into the present C.M.A. Learned counsel for the Revenue could not support the impugned order of the learned Tribunal rejecting the Rectification Application of the Assessee, particularly in view of the view taken by the Tribunal in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 itself.

8. We may note here that the view of the Tribunal in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217

at the Principal Bench of CESTAT at Delhi was delivered on 06.03.2018 before the order impugned in the present appeal was rendered in the case of the present Assessee on 01.06.2018 after about 3 months, but on 01.06.2018 apparently the Assessee's counsel could not bring to the notice of the learned Tribunal at Chennai, the view of the Principal Bench of the Tribunal at Delhi in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217. That is precisely why the Assessee filed a Rectification Application, citing the said judgment of the said Tribunal authored by the same learned Member. But unfortunately, the Rectification Application also came to be dismissed by the same learned Member on the ground that the said decision of the learned Tribunal ought to have brought to the notice of the learned Member at Chennai when the order dated 01.06.2018 was delivered and that since it was not brought to the notice of the Tribunal at that time, the Rectification Application came to be rejected.

9. Having heard the learned counsel for the parties and upon perusal of the sequence of the events and various orders passed by the learned Tribunal, we are constrained, with great respects to the members of the learned Tribunal, that a bonafide lapse, if at all, it can be called to be one, on the part of the learned counsel for the Assessee to have brought to the notice of the learned Tribunal at Chennai, the order which the same Honourable Member passed at the Principal Bench at Delhi on 06.03.2018, ought not to have been put against the Assessee as a reason for rejecting the Rectification Application, more so, when the order of the Principal Bench at Delhi was authored by the same Honourable Member, who refused to apply the same to the case of the present Assessee without any distinction of facts. While considering the case of the Assessee from the angle of rendering substantial justice.

10. We do not find anything in the order of the learned Tribunal, which could deny the benefit of the Composition Scheme to the Assessee and therefore, the order of remand passed by the learned Tribunal on 01.06.2018 directing the Assessee to go for regular assessment instead of Composition Scheme merely because the option was not conveyed to the Department on the part of the Assessee in writing, even though the Revenue had not prescribed any format for the same, could not be a valid ground to deny the benefit to the Assessee. If a previously rendered judgment of the same Tribunal authored by the same Member was brought to the notice of the learned Tribunal by way of a Rectification Application, it was all the more duty of the learned Members of the Tribunal to have rectified their mistake in their order dated 01.06.2018 by applying their previously rendered judgment

in the case of Vaishno Associates -Vs- CCE &ST, Jaipur" [2018] VIL 217 rendered on 06.03.2018 to the case of the present assessee.

11. The failure on the part of the learned Tribunal to do so resulted in miscarriage of justice and unnecessary litigation brought before this Court firstly in the form of writ petition, which upon the objection raised from the side of the Revenue, which also cannot be appreciated much, had to be converted into a regular appeal under the provisions of Section 35G of the Act.

12. Therefore, we are inclined to allow the present appeal of the Assessee and set aside the order of the learned Tribunal to the extent of paragraph 8(ii) of the impugned order quoted above dated 01.06.2018. Consequently, the entire ROM dated 07.08.2018 is also set aside. We remit back the matter to the learned Tribunal with a request to pass fresh orders in accordance with law. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner,
Customs Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

2.The Commissioner of Central Excise and Service Tax,
Large Tax Payer Unit,
1775, J.N.Road, Annanagar (Co)Extn,
Chennai-104.

+1cc to Mr.Joseph Prabakar, Advocate Sr.102397

C.M.A.No.2032 of 2019

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srg 20/01/2020