

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/56/2024
IA NO: GA/1/2024
COMMISSIONER OF SERVICE TAX KOLKATA
VS
M/S ELECTROSTEEL CASTINGS LIMITED

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COMMISSIONER OF SERVICE TAX KOLKATA
VS
M/S ELECTROSTEEL CASTINGS LIMITED

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

HEARD ON : 03.01.2025
DELIVERED ON : 03.01.2025

Appearance:

Mr. Uday Sankar Bhattacharyya, Adv.
Mr. Tapan Bhanja, Adv.

...for the appellant.

Mr. Rahul Dhanuka, Adv.
Mr. Niraj Baheti, Adv.
Ms. Sreeja Chakraborty, Adv.

...for the respondent.

T.S. Sivagnanam, C.J. :

1. These appeals filed by the revenue under Section 35G of the Central Excise Act, 1944 (the Act) are directed against the orders passed by the

Customs, Excise and Service Tax Appellate Tribunal, Calcutta, (the Tribunal) in Service Tax Appeal No. 75419 of 2014 and 75420 of 2014 dated 9th August, 2024. The revenue has raised the following substantial questions of law for consideration:-

- (i) Whether the impugned order dated 09.08.2024 passed by the Learned Tribunal is in contrary to the Provisions of Section 11B of Central Excise Act, 1944?
 - (ii) Whether the issue of unjust enrichment is squarely applicable in the case of the respondent ?
 - (iii) Whether the order dated 09.08.2024 passed by the Learned Tribunal on the issue No. (c) is against the decisions of the Hon'ble Supreme Court as well as the Hon'ble High Courts?
 - (iv) Whether the Learned Tribunal committed gross error of law in sanctioning the refund to the respondent by ignoring the statutory obligation, finding of the adjudicating authority as well as the Appellate Authority when the respondent had voluntarily deposited the service tax by correctly classifying the service under "Commercial and Industrial Construction Service" and later under "works Contract Service"?
2. We have heard learned Advocate appearing for the appellant/assessee and learned standing Counsel appearing for the respondent department.
 3. The first issue is to be considered in the instant case is whether the services rendered by the respondent/assessee is liable for payment of

service tax. It is not in dispute that the assessee performed the composite service including the construction/laying down of drinking water supply line awarded to Kerala Water Authority (KWA) in Thiruvananthapuram City Region for the period from 01.06.2007 to 31.10.2012. The assessee entered into an agreement with the Kerala Water Authority on 3.10.2006 prior to which a letter of acceptance dated 19th September, 2006 was given to the assessee by the Kerala Water Authority. The works included construction of distribution system for water supply for Thiruvananthapuram City. Prior to 1st June, 2007 such service although was classifiable as commercial and industrial commercial service (CICS) was not taxable as the same was not commercial and not industrial in nature and service tax was not charged on the invoices raised upon Kerala Water Authority before the period 01.06.2007. With effect from 01.06.2007 "Work Contracts Services" were covered as taxable services under Section 65(105)(zzzza) of the Finance Act, 1994. The assessee opined that the services provided by them were covered under works contract services and they started raising invoice reflecting service tax and suo-motu depositing the same with the Government exchequer.

4. The assessee parallelly approached the Kerala Water Authority for payment of service tax. The assessee was informed that laying of pipeline for drinking water supply project for State Agency do not fall under the expression CICS and as such no service tax was payable.

5. Accordingly, the service tax deposited by the assessee was never paid to the assessee by the Kerala Water Authority.
6. Upon receipt of such information the assessee filed refund application under Section 11B of the Central Excise Act covering the period from 01.06.2007 to 30.09.2010 and from 01.01.2011 to 31.10.2011.
7. The adjudicating authority by order dated 18.10.2012 rejected such application, firstly on the ground that supporting documents for exemption of service tax for work awarded by the Kerala Water Authority was not provided by the assessee.
8. Further it was alleged that in the bid document which has been mentioned that all duties, taxes and other levies payable by the director under the contract shall be included in the rates and prices and the total bid price submitted by the bidder should include the same. Thirdly, there was some discrepancy pointed out in the R.A. Bill value etc. Once again there was an allegation that the assessee has not submitted supportive documents whether Kerala Water Supply project being established solely in the interest of the public service and not for the purpose of profit. Those were some of the allegations in the show-cause notice for which the assessee submitted their reply along with the supportive documents. The adjudicating authority by order dated 18th October, 2012 rejected the explanation offered and confirmed the proposal in the show-cause notice and rejected the refund applications.

9. Aggrieved by the same the assessee preferred appeal to the Commissioner (Appeals) Central Excise, Appellate No. 1 Calcutta, who by order dated 30th December, 2013 rejected the appeal.
10. Aggrieved by such order the assessee preferred appeal before the learned Tribunal. The learned Tribunal by impugned order had allowed the appeal and set aside the orders passed by the adjudicating authority as affirmed by the first appellate authority.
11. Aggrieved by such order passed by the learned Tribunal the revenue is before us by way of this appeal. The first issue has to be decided whether the contract which was performed by the assessee for the Kerala Water Supply Authority was a taxable service under Works Contract Service in terms of Section 65(105) (zzzza) of the Finance Act or not.
12. To answer these questions, certain factual details have to be taken note of. It is not disputed by the revenue that the Kerala Water Authority is not a wing of the Government or a Government of Kerala Enterprise. The allegation in the show cause notice was that the assessee did not produce supporting documents for exemption of service tax. The reply given by the assessee ought to have been accepted by the adjudicating authority as the assessee, in no uncertain terms, stated that the question of claiming exemption does not arise since the service involved does not fall within the scope and ambit of taxable service. In this regard, the assessee also referred to a Circular issued by the CBEC. The learned Tribunal has also taken note of the said Circular. The Circular dated 15th

September 2009 was issued on a reference being received by the Board with regard to the issues as to what would be the correct meaning of the commercial or industrial construction services as per Section 65(25b) of the Finance Act, 1994. It was clarified by the Board that the essence of the definition is that the commercial or industrial construction service is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government project is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. This Circular was taken note of by the Tribunal in yet another Circular dated 24.5.2010. The Central Board discussed about the applicability of service tax on laying of cables under or alongside roads and similar activities and clarification was issued. In the said circular, it was clarified that even in case of works contract if the nature of the activities is such that they are excluded from the purview of commercial or industrial construction services, or erection, commissioning or installation services, then they would generally remain excluded from this taxable service as well. These circulars are sufficient indication to hold that when the Government projects are being implemented, the service tax liability cannot be fastened. This very issue was considered by the larger Bench of the Tribunal in the case of *Lanco Infratech Ltd. v. CC, CE & ST, Hyderabad*, reported in 2015 (38) STR 709 (Tri.-LB). Five questions were framed by

the larger Bench of the Tribunal of which two questions would be relevant for the cases on hand, which are quoted hereinbelow:

“ (A) Whether laying of pipelines for lift irrigation systems, transmission and distribution of drinking water or sewerage, undertaken for Government/Government undertakings should be classified under ECIS as erection, commission or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise; or installation of plumbing, drain laying or other installations for transport of fluids, enumerated in Section 65(105)(zzd) and defined Section 65 (39a), during 16-6-2005 to 31-5-2007; or must be classified under CICS, as amounting to construction of pipeline or conduit, and if classifiable under the later provision, whether the activity is not taxable since it is not used or to be used, engaged or to be engaged primarily for industry or commerce?

(B) Whether construction of canals for irrigation purposes and laying of pipelines including as part of lift irrigation systems, undertaken for the Government/Government undertakings is liable to Service Tax under WCS as turnkey projects, including engineering, procurement and construction or commissioning projects under clause (e) of Explanation (ii) in the definition of WCS or is excluded from the ambit of WCS since it is in respect of a “Dam” and thus stands excluded from WCS, as defined?”

13. The larger Bench of the Tribunal considered the matter in depth and answered the abovementioned questions as under :

“21. In the light of the foregoing analyses, we record our conclusions on the several issues framed, as follows:

(a) Issue (A) : Laying of pipelines/conduits for lift irrigation systems for transmission of water or for sewerage disposal, undertaken for Government/Government undertakings and involving associated activities like trenching, soil preparation and filling, supporting masonry work, jointing of pipes, electro-mechanical works or pumping stations and like activity, is classifiable only under Commercial or Industrial Construction Service (CICS) for the period up to 1-6-2007 and not under Erection, Commissioning or Installation Service (ECIS).

(b) Issues (B), (C) and (D):

(i) Construction of canals for irrigation or water supply, construction or laying of pipelines/conduits for lift irrigation conceived and integrated into a dam project must be classified as works contract “in respect of dam” and is thus excluded from the scope of “Works Contract Service” defined in Section 65(105)(zzzza) of the Act, in view of the exclusionary clause in the provision.

- (ii) Turnkey/EPC project contracts, enumerated in clause (e), Explanation (ii) in Section 65(105)(zzzza) of the Act is a descriptive and ex abundant cautela drafting methodology. In the light of the decision in Alstom Projects India Ltd., fortified by the Special Bench decision (dated 19-3-2015) in Larsen & Toubro Ltd. reference, a turnkey/EPC contract is taxable prior to 1-6-2007 as well. On and since 1-6-2007, turnkey/EPC contracts must be classified on the basis of the essential character of the service provided thereby, with the aid of classification guidelines set out in Section 65A(2) of the Act. Consequently, a turnkey/EPC contract must be classified under any of the clauses (a) to (d), Explanation (ii), Section 65(105)(zzzza) of the Act. The bundled bouquet of services provided as turnkey/EPC contract, classifiable as Commercial or Industrial Construction Service (CICS) prior to 1-6-2007, would be classified under clauses (b), Explanation (ii), Section 65(105)(zzzza) on and from 1-6-2007 and would not be exigible to Service Tax if the rendition of service thereby is primarily for non-commercial, non-industrial purpose, in view of the exclusionary clause in clause (b) of the definition of WCS.

This is the only possible and harmonious interpretation possible of the several clauses under

Explanation (ii) of Section 65(105)(zzzza), a distinct taxable service defined with constituent elements thereof substantially drawn from elements of pre-existing taxable services like ECIS, CICS or COCS; and other services when bundled to amount to turnkey/EPC;

- (iii) Construction of canals/pipelines/conduits to support irrigation, water supply or for sewerage disposal, when provided to Government/Government undertakings would be for non-commercial, non-industrial purposes, even when executed under turnkey/EPC contractual mode and would fall within the ambit of clause (b), Explanation (ii) of Section 65(105)(zzzza); and would consequently not be exigible to Service Tax, in view of the exclusion enacted in clause (b); and”

14. The larger Bench of the Tribunal held that the construction of canals/pipelines/conduits to support irrigation, water supply or for sewerage disposal, when provided to Government/Government undertakings would be for non-commercial, non-industrial purposes and even when executed under turnkey/EPC contractual mode and would fall within the ambit of clause (b), Explanation (ii) of Section 65(105)(zzzza); and would consequently not be exigible to Service Tax in view of the exclusion enacted in clause (b).

15. The revenue preferred an appeal as against the said decision which has been disposed of. However, the learned advocate appearing for the respondent/assessee is unable to obtain a copy of the said decision.

16. Thus, when the factual position is not in dispute namely, that the assessee has performed the work for the Kerala Water Authority, which is undoubtedly a Government/Government undertaking and the project was aimed at providing civic amenities to the public at large, it can never be termed to be a commercial or an industrial project. Furthermore, the revenue does not dispute the fact that the Kerala Water Authority is the State Government authority under the Public Health and Engineering Department of Kerala State Government and the project was aimed to provide civic amenities to the public at large, namely the citizens of Thiruvananthapuram city and if that be the admitted factual situation, the Water Supply Board cannot be said to be a project for the purpose of profit.

17. Thus, we are in full agreement with the view taken by the learned Tribunal holding that the service, which was rendered by the assessee to the Kerala Water Authority, will not be a taxable service under Works Contract Services. Having held so, the question would be as to whether the other issues regarding the applicability of provisions of Section 11B of the Central Excise Act, 1944, is a case of unjust enrichment, has to be considered.

18. Under normal circumstances, the question need not be considered because it has been held by us that the activity undertaken by the assessee is

not a taxable service under the Works Contract Service. However, since Mr. Bhattacharyya, the learned senior standing Counsel appearing for the department had vehemently contested these issues as well, we are constrained to record our opinion on those issues. Firstly, the question would be whether the provision of Section 11B of the Act would stand attracted. Mr. Bhattacharyya places reliance on the decision of the Division Bench of the High Court of Karnataka in the case of *M.C.I. Leasing (P) Ltd. v. Commissioner of Central Excise, Mysore*, reported in 2014 (33) STR 497 (Kar.). In fact, the said decision would support the case of the assessee since it has been held in the decision that if the amount paid is not within the Act then the provision of the Act is not applicable. Admittedly, the amount which was paid by the assessee on a mistaken impression that the activity undertaken by them would attract service tax was not a payment under the Act and therefore, the question of Section 11B getting attracted would not arise. Identical issues arose for consideration before the High Court of Karnataka in the case of *Commissioner of Central Excise (Appeals), Bangalore v. KVR Construction*, reported in 2012 (26) STR 195 (Kar.). The Hon'ble Division Bench after noting several decisions held as follows:

“23. Now we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to

pay this service tax, the amount of Rs.1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or “service tax” payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act.”

19. The legal position is loud and clear that once tax is not payable in law, there was no authority for the department to retain such an amount. The decision in KVR Construction was challenged before the Hon’ble Supreme Court by the revenue and the revenue’s appeal was dismissed (*Commissioner of C.Ex (Appeals) vs. KVR Construction, reported in 2018 (14) GSTL J70 (SC)*). In the decision in M.C.I. Leasing (P) Ltd., the Hon’ble Division Bench has referred to the decision in KVR Construction to point out the correct legal position.

20. In the light of the above decision, the question of Section 11B of the Central Excise Act, 1944 would not stand attracted to the facts and circumstances of the case.

21. The next aspect is with regard to unjust enrichment. It was never the case of the department that the assessee had opposed on the tax liability. In any event, when tax was not payable under the Act and when Section 11B of the Act would not apply, the theory of unjust enrichment would not stand attracted.

22. In the light of the above, we hold that the learned Tribunal was right in allowing the assessee's appeal and setting aside the order passed by the adjudicating authority as well as the first Appellate Authority.

23. Accordingly, the appeals fail and are dismissed and the substantial questions of law are answered against the revenue.

24. Consequently, the stay applications are also dismissed.

(T.S. SIVAGNANAM, C.J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH/SN/SM.