



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलिफैक्स 07926305136



स्पीड पोस्ट

- क फाइल संख्या : File No : V2(ST)157/Ahd-South/2019-20/14455 TO 14459
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-124-2019-20
दिनांक Date : 20-03-2020 जारी करने की तारीख Date of Issue 04/06/2020
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 09/CX-I/Ahmd/ADC/MA/2019 दिनांक: 23.10.2019 , issued
by Addl Commissioner, Div-Ahd south, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
SPX Flow Technology(india) pvt ltd
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

- (1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।
- (i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :
- (ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।
- (ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

M/s SPM Flow Technology (India) Pvt Ltd, Survey No.275, Odhav Road, Odhav, Ahmedabad (Gujarat) [hereinafter referred to as "appellant"] has filed this appeal against Order-in-Original No.09/CX-1/Ahmd/ADC/MA/2019 dated 23.10.2019 [hereinafter referred to as "impugned order"] passed by Additional Commissioner of CGST, Ahmedabad South [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant is engaged in providing various services including Erection, Commissioning and Installation Service. During the course of audit of the records of the appellant by the departmental officers, for the period January 2015 to March 2017, it was observed that the appellant was engaged by their buyer M/s Emami Agrotech Ltd [for short-M/s Emami] for purchase of certain equipment and support service associated with processing equipment for margarine and shortening at M/s Emami's plant at Krishnapatnam and a contract was entered in to by them. As per four Purchase Order dated 23.09.2015 and 02.02.2016 of M/s Emami, it was observed that the appellant had received an order for supply, installation and commissioning of SPX GS Processing Equipment for margarine & shortening with all its accessories. As per terms relating to the price of the entire supply of goods and installation and commissioning, mentioned in invoices, it was alleged that the order entered into between the appellant and M/s Emami is a composite works contract order for goods and services i.e. supply of the entire plant and complete installation and commissioning of the entire plant and support services. It was further observed that the appellant has charged Rs.11,36,01,200/- for entire works contract, as per purchase order mentioned above, and according to Rule 2A(ii) (A) of the Service Tax (Determination of Value) Rules, 2006, Service Tax liability under Section 66B of the Finance Act, 1944 would come on 40% taxable value of total amount charged. Accordingly, the departmental officer has raised a point to pay Service Tax amounting to Rs.68,16,072/- on taxable value of Rs.4,54,40,4801/-. However, the appellant had discharged Service Tax amounting to Rs.6,00,000/- on the value of Rs. 40,00,000/- of Installation and Commissioning services. Since the appellant has not agreed with the department observation, a Show Cause Notice dated 15.10.2018 was issued to them for demand and recovery of Service Tax amounting to Rs.68,16,072/- along with interest and imposition of penalty under Section 78 of the Finance Act, 1994.

2.1 The adjudicating authority, vide impugned order, has considered 40% of the gross amount of Rs.11,36,01,200/- as taxable value, in terms of Rule 2A (ii)(A) supra and confirmed the demand of Service Tax of Rs.68,16,072/- along with interest and also imposed penalty equal to the Service Tax amount under Section 78 of the Finance Act, 1994.



3. Aggrieved with the impugned order, the appellant has filed the instant appeal on the grounds that:

- There had been no allegation in the show cause notice that transfer of property in goods involved in the execution of the contract in question was leviable to tax as sale of goods, nor is there any find in the adjudication order that this vital condition of transfer of property in goods involved in the contract was leviable to tax as sale of goods; that any and every contract for erection, commissioning, installation of any movable or immovable property cannot be considered to be "work contract"; but a contract for commissioning and installation of any immovable or immovable property is "work contract" only when transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods.
- The transaction with M/s Emami was not that of 'work contract', but it was essentially a contract for supply of goods namely, Margarine and Shortening plant; that for the service of installation and commissioning, a separate value of Rs.40 lakhs had been agreed between the parties and the appellant has charged and recovered only this sum of Rs.40 lakhs from the buyer towards the services in the nature of installation and commissioning of the plant.
- When the transaction in question was not in the nature of 'work contract', the proceedings initiated against the appellant on the basis of Rule 2A of the Service Tax (Determination of Value) Rules 2006 were invalid and impermissible; that the calculation of Service Tax demand in terms of the said Rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules 2006 can only be pressed into service when the value has not been determined by the assessee under the Rule ibid; that in the present case, the value of the service portion in execution of the work contract is available and the Show Cause Notice itself listed the value of property in goods transferred in the execution of the works contract and it is clearly indicated that separate invoices were issued for installation and commissioning of plant as per purchase orders. Therefore, the appellant had correctly assessed the Service Tax on the service and paid Service Tax.
- It is also to be noted that the contract between them and M/s Emami for the supply of entire machinery in "ready to use" condition; that such projects are generally known as turnkey project in the trade; that the turnkey project include entire work stretching from designing, manufacturing, supplying, operation of equipment till the entire machinery is available for immediate use. But merely because certain services are used during supply of complete machinery in ready to use condition, it would not mean that the nature of the contract would become a "works contract".
- In turnkey contracts, any service tax demand cannot be made on the entire value of turnkey project. This view has been taken by the Larger Bench of the CESTAT, New Delhi in case of CCE, Raipur V/s BSBK Pvt Ltd [2010 (253)



ELT 522]. Even otherwise, where the nature of activities is identifiable and separable, whole contract cannot be termed as a composite contract liable to Service Tax as held by the Hon'ble Tribunal in case of M/s Bharat Heavy Electrical Pvt Ltd [2013 (30) STR 269-Tri.Chennai].

- The penalty imposed is bad in law as there was no suppression of facts involved therein.

4. Personal Hearing in the matter was held on 25.02.2020. Smt. Shilpa P Dave, Advocate, appeared for the hearing. She reiterated the submission made in Appeal Memorandum. The Ld. Advocate also submitted written submission during hearing and reiterated the submission made therein.

5. I have carefully gone through the facts of the case and submissions made by the appellant in Appeal Memorandum as well as submissions made during Personal Hearing. It is observed that the issue to be decided in the instant case is relating to determining the Service Tax liability towards supply, installation/erection and commissioning of SPX GS Processing Equipment for margarine & shortening with all its accessories by the appellant on the premises of M/s Emami. The demand pertains to period January, 2015 to March, 2017.

6. I find that the adjudicating authority has decided the instant case on two counts i.e. [i] whether the activity of the appellant is covered under the category of "Work Contract"; and [ii] the matter of valuation for the purpose of levy of Service Tax. As stated in the facts of the case above, the appellant was engaged by M/s Emami for purchase, installation and commissioning of SPX GS Processing Equipment for margarine & shortening with all its accessories to their premises, as per contract entered between them. As per terms relating to the price of the entire supply of goods and installation and commissioning, mentioned in invoices, it was observed by the department officer that the purchase order entered into between the appellant and M/s Emami is a composite works contract order for goods and services i.e. supply of the entire plant and complete installation and commissioning of the entire plant and support services. Therefore, it was proposed in the impugned show cause notice that as per Rule 2A(ii) (A) of the Service Tax (Determination of Value) Rules, 2006, Service Tax liability under Section 66B of the Finance Act, 1944 required to be discharged at 40% of taxable value of total amount charged. After considering all facts viz. [i] terms and condition of purchase order in question relating to supply of goods and services to be provided; [ii] price offered towards the contract which was also a composite price comprising supply of goods, installation & commissioning etc; [iii] definition of "Work Contract" under Section 65B(54) of the Finance Act, 1944 and Rule 2A(ii)(A) ibid, the adjudicating authority has also concluded that the activity carried out by the appellant is a composite contract under the category of "Work Contract" service and the Service Tax is leviable @40% as prescribed under Rule 2A(ii) ibid.



7. "Work Contract" Service is defined under erstwhile Section 65B (54) of the Finance Act, 1994 and reads as under:

" a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property".

As per above definition, a contract wherein transfer of property in goods involved which is leviable to tax as sale of goods and carry out activities viz. Construction, erection, commissioning, installation etc, falls under the service definition of "Work Contract".

7.1 Rule 2 A (ii) (A) of the Service Tax (Determination of Value) Rules, 2006, reads as under:

RULE 2A. Determination of value of service portion in the execution of a works contract. — Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods or in goods and land or undivided share of land, as the case may be transferred in the execution of the said works contract.

(a)

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract.

From the above, it can be seen that the applicability of the provisions of Rule 2A ibid come in force or in a situation where the value of the services, involved in execution of works contract cannot be determined under Section 67. In such situation only the said provisions of Rule 2A would apply and shall be determined in the manner as is indicated in (ii) (A) of the Rule 2A ibid.

8. In the instant case, the appellant has contended that the provisions of the said Rule 2 A (ii) (A) ibid is not applicable to their case, as they have determined the value of service activity viz. installation/erection and commissioning of SPX GS Processing Equipment for margarine & shortening and raised the invoices separately and accordingly they discharged the applicable Service Tax amounting to Rs.6,00,000/- on taxably service value of Rs.40,00,000/-. The adjudicating authority has not accepted the said contention of the appellant. He stated that the agreement clearly indicates that the price has been fixed for the entire contract and such price is inclusive of the supply of goods as well as the activity of Installation & Erection and Commissioning etc.; the contract entered into by the buyer and



assessee was not merely supply of machinery and installation, commissioning but is a composite work contract order for goods and services, i.e supply of the entire plant, i.e "SPX Processing Equipment for Margarine and Shortening" (imported and indigenous components) and complete installation and commissioning of the said equipment, and support service subsequent to installation and commissioning; that at the time of entering into agreement, there was no segregation regarding separate amount for supply of goods and supply of service and the agreement only suggest to hand over the required goods in installed and operational condition/mode. He further stated that the appellant has entered into indivisible contracts which nowhere separate the value of service portion in the execution of work and while issuing invoices, they resorted to segregate the value towards supply and service which is never a part of contract for supply of goods and M/s Emami is not concerned with such segregation.

8.1 I have gone through the contract and find that the contract between the appellant and M/s Emami is for the Supply and Installation & Commissioning of SPX GS Processing Equipments for Margarine and Shortening with all its Accessories as detailed in contract. It essentially involves supply of entire machinery in "ready to use" condition and such projects include entire work viz. stretching from designing, manufacturing, supplying, operation of equipment till the entire machinery is available for immediate use. It is further observed from the contract that it consists within Scope of Supply following items with price and negotiation:

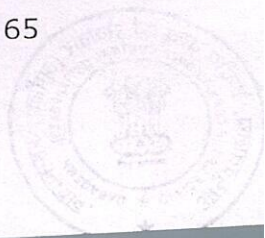
a) Imported Equipments :- the price shall be EURO-965,000/-

The above price of Important Equipment's is inclusive of Packing & Forwarding, Loading, Sea Freight & Marine Insurance i.e CIF Chennai Sea Port & excludes all import duty & any other taxes & duties applicable at the time of customs clearance.

b) Indigenous Equipment's and Installation & Commissioning :- the price for indigenous equipment and service shall be INR 3,65,00,000/-

The above price of Indigenous Equipment's inclusive of Packing & Forwarding, Loading Freight (upto Krishnapatnam Plant), Installation and Commissioning of total system (including Imported & Indigenous Equipment's both), Training of technicians during startup & commissioning, any spares or components (which might be required for satisfactory running of the machine, but in the offer or in order), mechanical, electrical diagrams, 3 copies of maintenance Manuals in English.

I further observe from the contract that copies of all shipping documents in advance is required to be sent by the appellant to M/s Emami. Looking into above description of Scope of Supply in the contract, it is clear that the contract primarily involves supply of entire machine after completion of all payments including import duty and other taxes/duties applicable at the time of customs clearance. Further, it clearly spells out that the value of services are part of indigenous equipment and supply, installation and commissioning. Under the circumstances, the activities of the appellant cannot be considered as "work contract" as defined under Section 65



B (54) of the Finance Act, 1944. From the contention of the adjudicating authority, I find that he classified the transaction of supply of the said entire plant as "work contract" as the Purchase Order speaks about Installation and Commissioning of the plant in working condition which is not correct and not sustainable, in view of the terms of contract entered by the parties.

8.2 The adjudicating authority has further contended that where transfer property is involved in a contract which leviable to tax as sales tax and the purpose of the contract is for the activities stipulated in the definition of "work Contract" supra, then the activities falls under composite contract and Service Tax is leviable as per Rule 2A of the Valuation Rules supra. I find that the entire contract was for sale/purchase of the entire plant in question to till its operation. The Purchase Order also reflects the details of scope of supply and agreed price for the entire project. From the Purchase Order, I find that the primary object of the contract is for supply of the entire plant to M/s Emami and not for the purpose of activities stipulated in the definition of "Work Contract" above. The activity carried out by the appellant in the instant case i.e Installation & Commissioning of plant is an incidental service required to be done by the appellant; that the service is not a part of contract or scope of supply but included in the price which can be segregated at later stage. Further, major portion of goods supplied by the appellant have been on payment of applicable Customs duties after determining the value of such goods which indicates that it is possible to determine the value of transfer of property in goods involved in the execution of the said contract. Therefore, Rule 2 A (ii) (A) of the Valuation Rules supra is applicable only in case the value of activity is not able to determine.

8.3 I find that the Hon'ble Supreme Court in the case of CCE Kerala V/s Larson & Toubro Ltd [2015 (39) STR 913], has held that if some element of transfer of property in goods remains when Service Tax is levied, it would be unconstitutional. The Hon'ble Court has held that:

"..it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm" (para 16)."

8.4 The Hon'ble Supreme Court has further clarified in the said decision that no element attributable to property in goods is transferred pursuant to such contract, enters into computation of Service Tax. In para 26 of the judgment, the Hon'ble Court has held that:



"26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax."

8.5 In view of above judgment, it is clear that the service element in different activities involved in contract is required to be taxed under the Finance Act, 1994 by segregating the activities from the value of goods for levy of sales tax.

8.6 It is observed from the contract that the value of service component is included only in indigenous items and the value of imported goods are separately provided.

9. Further, I find that the issue raised by the adjudicating authority that the composite contract cannot be vivisected is no more res-integra, in view of decision of the Larger Bench of Hon'ble CESTAT, New Delhi in case of CCE, Raipur V/s BSBK Pvt Ltd [2010 (253) ELT 522], wherein, it has been held that "Work Contract" under composite contract can be vivisected.

9.1 I find that the Hon'ble Tribunal, in case of M/s BSBK Pvt Ltd supra, has answered following question which was referred by the Division Bench by order dated 24-10-2008 to Larger Bench for answer observing that the conclusion in *Daelim Industrial Co. Ltd V/s CCE Vadodara's case - 2003 (155) E.L.T. 457*.

"Whether service by way of "advice, consultancy or technical assistance" in the case of turnkey contract will attract service tax will have to be determined on the facts of the case".

The moot question was "whether turnkey contract can be vivisected".

It is noticed that the Hon'ble Tribunal has answered the above question, observing that the conclusion in *Daelim Industrial Co. Ltd's case* was not in accordance with law and required reconsideration. The Tribunal in *Daelim's case* held that "Thus, a perusal of the clauses of the contract leaves no doubt that the appellant contract with IOC was a work contract on turnkey basis and not a consultancy contract, it is well settled that a work contract cannot be vivisected and part of it subjected to tax. The impugned orders have proceeded to do precisely that. Therefore, they are required to be set aside".



9.2 The Hon'ble Tribunal, in BSBK Pvt Ltd's case has noticed that there is no dispute that service element in different activities involved in works contract was held to be taxable vivisecting those activities from the value of goods which are segregated from the gamut of contract under Constitutional provision contained in Article 366 (29A) (b) for levy of sales tax leaving the service element for taxation by Finance Act, 1994. In the instant case, the adjudicating authority has disputed the segregation of service from goods which is not proper, looking to the decision of the Hon'ble Tribunal, wherein, it has held that when the activities undertaken by the applicants are identifiable separately, then, the whole of the activity cannot be termed as "composite contract".

9.3 It is further noticed that the Hon'ble Tribunal has discussed the principles of law laid down in the decision of M/s Gannon Dunkerley & Co V/s State of Rajasthan by Apex Court [1993 (88) STC 204 (SC)], which was incorporated into Rule 2A of Service Tax (Determination of Value) Rules, 2006 to precisely value service elements involved in contracts involving goods and services. Relevant portion as discussed in para 7.4 of the Hon'ble Tribunal's decision are reproduced below:

"7.4 In the case of Gannon Dunkerley & Co. v. State of Rajasthan (1993) 88 STC 204 (SC) it is held that since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of profits expected on such contract. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means the cost of establishment i.e. [overhead expenses of the head office and branch office including rents, salary, electricity, telephone charges, etc., and interest charges to banks and financial institutions] of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amounts so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. Thus the value of goods involved in the execution of a works contract is determined after making these deductions and exclusions from the value of the works contract. It may accordingly be stated that once value of goods involved in composite or turnkey contracts is determinable applying the ratio of Gannon & Dunkerley case - (1993) 88 STC 204 (SC), the remnant part of such contract is attributable to the service element leaving scope for levy of service tax on such element subject to the provisions of Chapter V of Finance Act, 1994."

9.4 It is further observed that, in BSBK Pvt Ltd's case supra, the department itself submitted that Constitution has permitted turnkey contract divisible for levy of sale tax by State has equal application under Constitution for levy of Service Tax on the noticeable/ segreable service portion of such contract. By admitting the above fact, the Hon'ble Tribunal has held that turnkey contract can be vivisected and Service Tax on perceptible element involved therein can be levied. The conclusion arrived by the Hon'ble Tribunal in the said case is as under:

"11. In view of the aforesaid legal and Constitutional provisions it can irresistibly be concluded that a contract whether composite or Turnkey may involve an activity or



cluster of activities in the nature of services and such services may be provided in the course of execution of such contracts while incorporating goods into the contract concerned. Such discernible services may be advice, consultancy or technical assistance and depending upon the nature of the activity, they may be classifiable under appropriate category of taxable service under Section 65A of the Finance Act, 1994. When Article 366(29-A)(b) to the Constitution has made indivisible contracts of the aforesaid nature divisible to find out goods component and value thereof, it can be unambiguously be stated that the remnant part of the contract may be attributable to the scope of service tax under the Provisions of Finance Act, 1994.

12. *On the aforesaid legal and Constitutional back ground as well for the reasons stated, the Reference may be answered stating that turnkey contracts can be vivisected and discernible service elements involved therein can be segregated and classifiable as well as valued for levy service tax under Finance Act, 1994 provided such services are taxable services as defined by that Act and depending on the facts and circumstance of each case, services by way of advice, consultancy or technical assistance in the case of turnkey contract shall attract service tax liability."*

10. In view of above decision of Hon'ble Tribunal in case of M/s BSBK Pvt Ltd. and Hon'ble Supreme Court decision in M/s Larson & Toubro case, I do not find any merit in the finding of adjudicating authority regarding levy of Service Tax on the entire value of plant in question.

11. In the instant case, the element of service activities undertaken by the appellant was identified by the appellant separately and accordingly, they raised invoices towards service element viz. Installation, Erection and Commission. Therefore, the appellant is eligible to pay the Service Tax on such identifiable taxable value of service portion, which they have already paid. In the circumstances, demand confirmed in the instant case is not sustainable and required to be set aside.

11. In view of above discussion, I set aside the demand along with interest as confirmed in the impugned order. Since the demand is not sustainable, the penalty imposed thereof is also not sustainable. Accordingly, I set aside the impugned order passed by the adjudicating authority and allow the appeal filed by the appellant.

12. The appeal stands disposed of accordingly.

Akhilesh Kumar
2015 March, 2020
Akhilesh Kumar
Commissioner (Appeals)
/03/2020

Attested

Mohan V.V.
(Mohan V.V)
Superintendent (Appeals),
CGST, Ahmedabad.



To,

M/s SPM Flow Technology (India) Pvt Ltd,
Survey No.275, Odhav Road, Odhav,
Ahmedabad (Gujarat)

Copy To:-

1. The Principal Chief Commissioner, CGST, Ahmedabad Zone .
2. The Principal Commissioner, CGST, Ahmedabad-South.
3. The Additional Commissioner, CGST, Ahmedabad-South.
4. The Assistant Commissioner, System-Ahmedabad South
- ✓ 5. Guard File.
6. P.A.



