

Commissioner of Central Excise Vs. Bsbk P. Ltd.

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SooperKanoon Citation : sooperkanoon.com/43766

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-27-2006

Reported in : (2006)(113)ECC320

Judge : R Abichandani, S T T.V.

Appellant : Commissioner of Central Excise

Respondent : Bsbk P. Ltd.

Judgement :

1. This is an appeal filed by the Revenue challenging the order of Commissioner (Appeals) made on 28.4.2005, setting aside the order-in-original passed by the Assistant Commissioner on 2.2.2005 under which the Assistant Commissioner had demanded Rs. 12,36,516/- along with interest and penalty.

2. The respondent in this case is admittedly an engineering firm engaged not only in the manufacture of fabrication and construction of plants and machines, but also accepting contracts for drawing, designing, engineering, erection, commission and testing of plants and machines. The respondent's contention that they were not qualified professionals was held by the Assistant Commissioner as illogical and incorrect and that they fulfilled the first criteria of the statutory definition of consulting engineering. In paragraphs 13, 14 and 15 of the order-in-original, the learned Assistant Commissioner had an occasion to observe that the services rendered by the respondent, namely, designing and engineering was undoubtedly an engineering consultancy services and that they had "divisible" contract and

charged separately in respect of such services as evidenced by their invoices.

The order made a distinction of the subject matter from the situation dealt with by this Tribunal in *Daelim Industrial Co. Ltd. v. CCE Vadodara* 3. Aggrieved by the above order of the Assistant Commissioner when the matter was taken up before Commissioner (Appeals), the learned Commissioner observed that the work contracts entered into by the appellant were very comprehensive in nature and he made the following observations, to hold that the service tax cannot be charged from the appellant, in paragraph 5 reproduced below: I have gone through the grounds of appeal, oral submissions made and all other evidence on record. It is seen that the appellants have entered into work contracts which are very comprehensive in nature.

These are for design, manufacture, supply and delivery at site of plant and equipment and steel, structures including civil and structural work, storage, erection, start-up, trial run, commissioning and performance guarantee tests. Etc. A very small portion of this contract, relates to design and engineering. As held by CESTAT in the case of *M/s. Daelim Industrial Co. Ltd.* (supra) and also in the case of *M/s. L&T* (supra), the work contract cannot be vivisected to select these activities which comprise taxable services. Therefore, following the decisions of the CESTAT, I hold that service tax cannot be charged from the appellants in respect of design and engineering activities as indicated in the impugned order.

4. Aggrieved by the order of the Commissioner (Appeals) the matter has come before us. None appeared on behalf of the respondent despite notice. The learned authorized representative of the department has drawn our attention to the fact that the respondent had raised separate bills in respect of designing and engineering against which service tax ought to have been paid.

5. Referring to the memorandum of Association of the respondent, the learned authorized representative brought out the fact that the main objects of the company included the work as engineers, designers etc.

He also distinguished the ratio of the decision in *Daelim Industrial Co. Ltd.* (supra) by stating that "vivisect" of the contract entered into by the respondent was carried

out by the department in that case but in the subject case, the contract itself is a "divisible contract" which has isolated the charges in respect of services from those for supplies of goods etc. In view of this, it was pleaded that the Daelim judgment would not be applicable in the respondent's case and service charges on the basis of clear quantification of value made as available becomes payable.

6. After hearing the learned authorized representative and pursuing the record, it becomes clear that the respondent had been rendering the taxable service of consulting engineer for the following reason: 6.1 A perusal of invoice dated 21.6.1997 indicates separate description in respect of "designing and engineering" showing the exact amount charged for the services rendered by the respondent. In the same manner invoices dated 25.4.1997, 23.6.1997 and 1.7.1997 all indicate the specific charges for the said services.

6.2 The letter dated 7.2.1996 from Bhilai Steel Plant addressed to the respondent accepting the tender for design, engineering etc. show a clear cut break-up in respect of the total contract price and the services rendered by the respondent in respect of design, engineering, drawings and documentations. Thus, a contract price of Rs. 23,17,000/- out of the total contract price of Rs. 3,66,82,000/- has been worked out and spelt out in no unclear terms. In the same letter, it has also been stipulated that the total price was inclusive of "all taxes and duties of divisible contract basis as per agreed terms and conditions".

6.3. Referring to the Black's Law Dictionary, the term "divisible contract" whose synonym is "severable contract" is defined as under: Severable contract- A contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promisor in breach of the entire contract. Also termed divisible contract; severable contract.

6.4 It is also noted that the services such as pre-designed services/project report, basic design engineering and detailed design engineering are all covered under the category of "taxable service" rendered by the consulting engineers vide Commissioner of Central Excise, New Delhi Trade Notice No. 54-CE (Service Tax)/97 dated 4.7.1997. It has also been clarified in the said trade notice that in

case the services are rendered to the prime consultant, the levy of service tax does not fall on the sub-consultant. Further, the intention to include the "designing and drawing work" as services in turn-key project is also evident from CBEC circular dated 18.12.2002.

6.5 The turn-key project contract entered into by the respondent is "divisible" as stated in the very letter of acceptance of tender dated 7.2.1996. In the impugned order the learned Commissioner (Appeals) has made the following observations: As held by CESTAT in the case of M/s. Daelim Industrial Co. Ltd. (supra) and also in the case of M/s. E&T (supra) the work contract cannot be vivisected to select those activities which comprise taxable services.

In the subject case the contract itself is "divisible" and no surgery to isolate the Siamese twin of services/goods has taken place. Further the expression "Vivisect" used profusely by both the sides has turned out quizzical, as Concise Oxford Dictionary defines the term "vivisect" to mean "to perform vivisection on" and the word "vivisection" turns out to mean "dissection or other painful treatment of living animals for the purposes of scientific research and unduly detailed or ruthless criticism". We revive here what Oliver Wendell Holmes once said about a word such as "Vivisect" (sic): "A word is not a crystal, transparent and unchanged, it is the skin of the living thought and may vary greatly in colour and content, according to the circumstances and the time in which it is used".

Therefore, even considering the word "vivisect" to mean "dissect", we find the 'divisible' nature of the contract in the appellant's case has prevented any more "dissection" possibility, thus distinguishable from the Daelim situation.

7. In view of the above finding, we fail to find any reason - both logically and etymologically to agree with the reasoning of the learned Commissioner (Appeals) in holding that the services rendered by the respondent are not in taxable category.

8. The impugned order of the Commissioner (Appeals) is therefore, set-aside and the order-in-original dated 02.02.2005 is restored. The appeal filed by the Revenue is accordingly allowed.

