

Cms (India) Operations and Vs. Commissioner of Central Excise

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SooperKanoon Citation : sooperkanoon.com/45542

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : May-21-2007

Reported in : (2007)7STR369

Judge : P Chacko, K T P.

Appellant : Cms (India) Operations and

Respondent : Commissioner of Central Excise

Judgement :

1. Captioned appeals No. S/116/06 & No. S/143/06 filed by M/s. CMS (India) Operations and Maintenance Company Private Limited (hereafter, also referred to as appellants, CMS, contractor or O&M contractor) are against an order of the Commissioner (Appeals), Chennai and an order of Commissioner of Central Excise, Pondicherry, respectively. The impugned orders relate to liability to tax on services rendered by the appellants.

2. In the order impugned in Appeal No. S/116/06, service tax of Rs. 94,40,799/- for the period 6/2000 to 2/2003 under Section 73(2) of the Finance Act, 1994 (the Act) and interest on the service tax payable under Section 75 were demanded. There were also penalties imposed in the order of Rs. 200/- per day from 26/06/2000 to 25/07/2000, Rs. 400/- from 26.07.2000 to 25.08.2000, Rs. 600/- from 26.08.2000 to 25.09.2000 and so on in terms of Section 76, Rs. 500/ in terms of Section 75A and Rs. 1000/- in terms of Section 77 of the Act. In the order impugned in the appeal No. S/143/2006, service tax of Rs. 1,98,54,506/- for the period 3/2003 to

9/2004 and Rs. 1,29,39,582/- for the period 9/2004 to 5/2005 were demanded under Section 73. Interest on the service tax amounts was demanded under Section 75 of the Act. Penalties of Rs. 1,98,54,506/- in terms of Section 78, Rs. 500/- in terms of Section 75A, Rs. 100/- per day for failure to pay service tax amounts in terms of Section 76 and Rs. 6000/- in terms of Section 77 of the Act were imposed. The original authorities have analyzed the contract governing the impugned functions of the O&M contractor. The order impugned in Appeal No. S/116/06 has affirmed the order of the original authority which had categorized the impugned services as of a Management Consultant, Consulting Engineer and Clearing and Forwarding Agent. In the order appealed against in Appeal No. S/143/2006, the same services have been identified as Management Consultancy, Engineering Consultancy, Clearing and Forwarding, Business Auxiliary Service and Maintenance or Repair Service. In this order, various services have been brought under the category 'Management Consultant' in terms of Section 65(2)(b) of the Act. In the order challenged in Appeal No.S/116/2006, there is no break-up of the tax relatable to different services found to have been rendered by the appellants.

3. Facts of the case are that M/s. ST-CMS Electric Company Private Limited, Chennai-8 (hereafter, 'owner') had been formed to finance, construct, own, and operate a 250 MW lignite fired power plant ('facility') in Uttangal near Neyveli. The owner had entered into a contract called 'Operation and Maintenance Agreement' on 15.11.1999 in continuation of an earlier Agreement dated 11.11.99 with M/s. CMS (India) Operations and Maintenance Company Private Limited, a company with registered office in New Delhi, to operate and maintain the facility owned by ST-CMS and perform other obligations. The facility commenced commercial operation in October 2002. The O&M contractor was required to run the plant during the pre-operating period also.

Lignite, the primary fuel needed for the generation of power in the facility is supplied by M/s. Neyveli Lignite Corporation Ltd. (NLC) under an agreement between NLC and the owner. The O&M contractor, with their manpower, operates and maintains the plant in terms of the O&M agreement of 1999.

4. In terms of the Agreement, the important obligations of the O&M contractor are to maintain the facility, generate electricity and supply the same to TNEB as per the Power Purchase Agreement between the owner and TNEB on a continuous basis. They receive a lump sum amount every month from the owner as consideration for operating the plant as per contract. The contractor manned the facility with its staff also during pre-operating period and trained them. The contractor would review and comment on the designs and drawings produced by EPC contractors and the operating manual for the facility. They would recommend to the owner the rectification required of those items not in accordance with the EPC contract and oversee such rectification. They would review and comment on test data provided by EPC contractors and their performance. The O&M contractor would implement the plant management and maintenance system in consultation with the owner and forward within 90 days of the commencement of the facility, the initial seven year forward maintenance plan. They would help the owner and TNEB to develop plans for recovery of the facility from electrical black out and voltage reduction. As per the Agreement, the contractor would test, supervise loading, unloading, schedule deliveries of lignite loads by trucks/wagons and stock lignite. They would ensure a certain level of inventory at the NLC mine head and the plant site. The contractor would raise invoices on behalf of the owner on TNEB.4.1 The Agreement mandates CMS to operate, inspect, maintain and repair the facility and procure necessary equipment, spares and consumables.

They would operate the facility in such a manner as to achieve 85% plant load factor in a normal year and take necessary steps to achieve the same. They would manage the labour efficiently and attend to disposal of ash and waste generated by the operation of the facility.

The O&M Contractor shall be paid management expenses for various services. CMS would run the plant taking care of all incidental contingencies arising in day to day administration including staffing, their training, housing, salaries, employment taxes etc. preparation and implementation of operations and maintenance and repair, for which the contractor is responsible. Responsibilities included alerting the owner of making warranty claims due from EPC contractors and insurance claims that needed to be made. They would aid in selection of

efficient transport contractors.

5. After studying the obligations of the O&M contractor for providing various services as per the Agreement they had entered into with the owner, the Deputy Commissioner tentatively decided that the O&M contractor had provided services to the owner as Management Consultant/Consulting Engineer/Clearing and Forwarding Agent inasmuch as they had managed the facility, rendered technical assistance to the owner and had carried out clearing and forwarding operations in respect of lignite. A Show Cause Notice was accordingly issued to the O&M contractor demanding over Rs. 94.4 lakhs towards service tax, appropriate interest and proposing to penalize them for violations involved in rendering taxable services without registering with the Department, not filing returns etc.

6. The appellants contested the proposals on the ground that they had undertaken the work of operating the facility to produce electricity as per the contract and that all the activities they had undertaken were as per the O&M contract in relation to the day-to-day operation of a power plant and its maintenance. They were not engaged in providing consultancy in the categories of Management Consultant and Consulting Engineer. They were an independent contractor and operated the facility in relation to generation and supply of electricity to TNEB. Consultancy was cerebral and supportive activity and they had not rendered any such service. They had employed engineers and technicians not to render service to any other person. It was bad in law to vivisect the aims of a contract. They denied that they had undertaken the service of C&F Agent. Lignite being the main fuel for generation of electricity, its procurement, movement and inventory had to be undertaken by them for smooth generation of electricity. The activity of transporting lignite from the field to the facility had not been undertaken by them. The appellants cited the decision of the Tribunal in Daelim Industrial Company Ltd. v. CCE, Vadodara (Final Order No.7/36/D/NB/A dated 20.6.2003) and Gujarat State Co-operative Land Development Bank Ltd. v. B.R. Mankad 1997 (3) SCC 123 in support of the plea that the proposal to split a contract and to tax the services was bad in law.

7. In the order passed, the Dy. Commissioner observed that as per Section 65 of the Act, a service provided to a client in connection with the management of any organization in any manner came under the category of Management Consultant's service. The facility was manned by the staff of the O&M contractor including the General Manager. The staff of the O&M contractor had manned the facility even during the pre-operating period. The O&M contractor coordinated scheduling of lignite trucks, supervised loading of lignite, and accepted deliveries of lignite from NLC at the point of supply. The contractor had operated and maintained the lignite truck weighing equipment at the point of supply and used to take samples of lignite loads. They supervised all activities of the transport contractors on behalf of the owner including the responsibilities of the transport contractors such as providing and maintaining adequate number of trucks and drivers to transport lignite which they supervised. They had to further receive, weigh and maintain prescribed inventory at the mine head and at the site. Thus the Deputy Commissioner found O&M contractor to have managed the facility and thereby also rendered service as a Management Consultant.

8. The appellants had employed engineers thereby rendering Consulting Engineer's service to the owner even prior to the commencement of the commercial operations. As per Board's Circular F.No. B43/5/97-TRU dated 2.7.97 supervision of commissioning and initial operation would fall under the category of Consulting Engineer's service. They had also rendered the same service by reviewing and commenting on the designs and drawings produced by EPC contractors. The assessee operated, maintained and repaired the facility on a 24 x 7 hours a week basis which showed that the appellants had rendered service directly or indirectly for the management of an organization in any manner. These indicated that O&M contractor had rendered Consulting Engineer's service apart from the Management Consultant's service. The Dy.

Commissioner relied on Board's Circular F.No. 177/2/2001-CX-4 dated 27.6.2001 which had clarified that 'management' was understood to mean running the affairs of an organization in an organized and systematic manner. In his view, that was what the appellants had done. He found that the appellants had received lignite from NLC and shipped the same on behalf of the owner to the facility. He also

found that another contractor transporting lignite did not mean that the appellants had not acted as C & F Agent. The appellants had carried out functions of C & F Agent enlisted in Board's Circular F.No. B43/7/97-TRU dated 11.07.97. The appellants had received "Management Fee" of Rs. 10,63,06,857/-. The Deputy Commissioner found that the appellants had received an amount of Rs. 18,88,15,972/- towards these three services.

Accordingly, he determined the liability of the appellants towards services rendered to be Rs. 94,40,799/-. The appellants had suppressed the value of taxable service received from the owner with intent to evade payment of tax. He therefore imposed a penalty of Rs. 1,88,81,598/- on the appellants under Section 78 of the Act. He demanded interest on the service tax due and imposed penalties under various sections of the Act. On appeal to the Commissioner of Central Excise (Appeals), he concurred with the findings of the Deputy Commissioner. The Ld. Commissioner cited various clauses in the contract to find that the contractor could not act independently of the owner in the operation and maintenance of the plant. He distinguished the instant case on the above basis from the *Rolls Royce Indus Power (I) Ltd. v. CCE* adopted by the original authority on the ground that the operating cost related to day-to-day expenses in connection with the running of the power plant such as labour employed, their training, travel expenses, office expenses etc. which related to management of the affairs of the owner company. The notice had been issued in time in terms of Section 73 as it existed on 22.9.2003, the date when the Show Cause Notice was issued.

9. In the appeal before the Tribunal against the above order, the appellants submitted that they had administered their own organization and operated the power plant for generation and supply of electricity to TNEB. During 6/2000 to 4/2003 the appellants had been paid a management fee of Rs. 10,63,06,857/-. The expression 'management fee' had been loosely used for the base fee paid by the owner. The owner reimbursed Rs. 8,25,09,115/- for setting up of infrastructure required for operating and maintaining the power station and carrying out such an obligation under an agreement. The pith and substance of the agreement was to operate and maintain the power station so as to generate electricity as was evident from Article 3.4.3 of the O&M Agreement where it had been specified that

the O&M contractor had to ensure that rated capacity was made available to TNEB and had to provide reliable energy at the interconnection point in accordance with the dispatch instructions. All the activities outlined for the pre-operating period as well as others like notifying the owner of the warranty obligations of the EPC contractor were the pre-requisites for operating and maintaining the power station. Furnishing comments on design and drawings were required to ensure that the EPC contractor had built the power station in accordance with prudent utility practices.

The contractor had to submit those comments to the owner so that he (the owner) could take them up with the EPC contractor. All the other services enumerated also facilitated the main function of the O&M contractor. The Commissioner had ignored the ratio of Daelim Industrial Company Ltd. (supra) decision wherein the Tribunal had held that work contract on turn-key basis could not be vivisected. The Tribunal upheld the contention of the appellants that "their contract was a works contract.... The rendering of consultancy service was not involved at all in as much as the drawings were made for their own purpose, for the execution of the works contract. " The Tribunal had followed the above decision in the case of Larsen and Toubro Ltd. 2004 (60) RLT 505. They claimed that the ITAT Ahmedabad in Gujarat State Electricity Corporation Limited and ITO had observed that "The agreement executed between the appellant company and GEB is not an agreement simplicitor for acquiring technical services or professional services from them but it is an agreement requiring GEB to execute the work contract of operating and maintaining the mega power project." The ITAT had upheld the claim of the appellants that they were not providing only technical personnel or consultancy but they were themselves carrying out all the activities required for operation and maintenance of power plants. That was a composite contract for carrying out the operation and maintenance of power projects, which could be properly described as a turnkey project for carrying out the operation and maintenance of the plant (the relevant citation was not furnished). It was argued that the O&M Agreement could not be regarded as a contract for rendering services nor could it be vivisected and taxed. They cited the decision in the Rolls Royce Indus. Power (I) Ltd. case (supra) in support of their appeal. In that case it was held that the operator was fully autonomous and responsible for the

performance of operation and maintenance.

Whatever engineering issues were involved it was for the operator to find solutions for in the course of operation and maintenance. There were no two parties, one giving advice and other accepting it. Service tax was attracted only in a case involving rendering of service, in that case, engineering consultancy. From the order of the Dy.

Commissioner it was obvious that clearing and forwarding services and consultancy services were ancillary to the main purpose of the agreement, the main purpose of the agreement being to produce electricity.

10. In their case, ST-CMS had engaged Chettinad Lignite Transport Services Pvt. Ltd (CLTS) for lifting lignite from NLC and transporting it by road and rail to the plant site. The appellants only nominated the quantity of lignite required on weekly basis needed to generate the dispatch advised by TNEB. The appellants received lignite for the purpose of generating electricity and monitored the quantities received till then so as to provide account to the owner, of the quantity used in generation. The quality of lignite was tested to ensure that lignite was as per the quality specification in the fuel supply agreement with NLC to reduce down time of the plant. By no stretch of imagination that could be classified as clearing and forwarding service. It was submitted that no service tax was payable by them and invocation of longer period was not correct. Theirs was a works contract which did not attract service tax. When there were divergent views possible, longer period could not be invoked. The penalties imposed were liable to be set aside. As the activities were not liable to service tax, interest was also not leviable.

11. In the order impugned in appeal No. S/143/06, the Commissioner has found that the O&M contractor had rendered Management Consultancy/Engineering Consultancy/Clearing and Forwarding/Maintenance or Repair and Business Auxiliary Service during the period 3/2003 to 5/2005 for the same activities covered by the same contract as considered in the orders of the lower authorities discussed in the previous appeal. Following the same reasoning adopted by the authority in passing the Order-in-Original No. 10/2004 dated 3.9.2004, the Commissioner found that the appellants had rendered Clearing and Forwarding

Agent's service, Consulting Engineer's Service and Management Consultant's Service. As regards the Management Consultant's service, the Commissioner also found that the owner continued to have the obligation to supply electricity to TNEB. Therefore, CMS was not independent. CMS had provided service directly or indirectly in connection with the management of the facility. The organization chart of ST-CMS comprised its M.D with two parallel hierarchies under him- one as CMS India (O&M) Co. Pvt. Ltd., O&M Manager and another as Business Manager. Under the latter wing there was Financial Controller and Assistant Manager Engineering. The Financial Controller had a Secretary, Accountants, Computer Specialists and clerical staff.

Similarly the CMS branch had various categories of staff. Therefore, he found that the claim that there was no organization to manage and to render service to, was incorrect (There was a hierarchy of CMS staff reporting to MD, ST - CMS). He extracted various clauses in the contract to buttress his finding and relied on the clarification in Board's Circular dated 27.6.2001 (supra) which had clarified: "thus management of any organization involves carrying out a wide variety of clearly defined activities across a number of organizational sub-units in a coherent and coordinated manner." He found that unlike in the Rolls Royce Indus. Power (I) Ltd. case (supra), CMS was not wholly independent in its operations. In terms of Section 65A(2)(b) of the Act, composite services consisting of a combination of different services which could not be classified on the basis of 'most specific description' shall be classified as if they consisted of a service which gave them their essential character. He found that the obligation of CMS to ST-CMS consisted of a combination of services which received its essential character from the services of a Management Consultant as defined in Section 65(65) of the Act. The Commissioner rejected the plea by the appellants that Business Auxiliary Service did not include any activity that amounted to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944. He felt that only such activity involving production of excisable goods was not liable to service tax.

In his view, electricity not being excisable goods, the services of the appellants could be classified as Business Auxiliary Service. He also held that CMS did not manufacture electricity. ST-CMS manufactured electricity as per PPA with TNEB.

Business Auxiliary Service comprised procurement of goods or service, which were inputs for the clients and also any service incidental or auxiliary to any activity specified in Clauses (i) to (vi) of the definition of the service such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance and inventory, management, evaluation or development of prospective customer or vendor, public relation service, management or supervision. There were provisions in the Agreement requiring CMS to procure equipments, chemicals, lubricants and other consumable materials for ST-CMS. CMS shall retrieve data and prepare invoices on that basis using the owner's software. These obligations established that CMS rendered Business Auxiliary Service. The facility was the power generation station including all equipments forming part of such facility or associated with the operation thereof, structures, pipelines and electrical facilities and equipment for the delivery of fuel to the facility. As per Article 3.2.4 of the agreement, CMS performed periodic inspection, major maintenance, repairs and overhauls and directed and supervised the O&M contractor's staff in such operations. The Commissioner inferred that the appellants did repair equipment though some machines under warranty might have been repaired by their manufacturers. He thus found that the appellants had also rendered maintenance or repair service. Accordingly he passed the impugned order.

12. In the appeal against the above order, the appellants have taken the grounds advanced in the appeal discussed earlier. Additionally the following grounds have been taken.

i) Electricity is goods. Therefore generation of electricity is an activity of manufacture. In terms of sub Section 16 of Section 65 of Finance Act 1994 any activity that amounted to manufacture was not liable to service tax even under the category of "Business Auxiliary Service." Therefore, the operations of the facility did not attract service tax.

ii) The appellants generated electricity on behalf of ST-CMS. Therefore the impugned demand for an activity excluded from the coverage of service tax was not sustainable.

iii) The appellants ran, operated, maintained, repaired, and managed the facility as per contract with ST-CMS for generation of electricity supplied to TNEB. Thus the services of the appellants were executive in nature and were not in the form of any advice or consultancy provided by a Management Consultant or Consulting Engineer. The activities or services undertaken by the appellants were for themselves and consumed in operating the facility for generation of electricity. Therefore the impugned order had drawn an erroneous inference. The terms of the contract did not provide for rendering any of the individual services as found. CMS was responsible for generation of electricity and contract did not envisage providing of separate activities/services. The intention behind the contract was obvious and it was only generation of electricity. It was not the case in the Show Cause Notice or in the impugned order that operation and day-to-day maintenance of a power plant was a service within the ambit of Finance Act 1994.

13. Once the facility had been given under contract to the appellants for operation and maintenance, the question of ST-CMS running/managing the facility utilizing the service of the appellants did not arise.

Further operation and maintenance of the power plant by CMS could not be inferred as management advice, assistance or consultancy given by the appellants to ST-CMS to run/manage the facility. In their view the facility was not an organization but a plant owned by ST-CMS. The organisation of ST-CMS was different from the organization of the appellants. The appellants were not managing the organization of ST-CMS but were managing their own organization to produce electricity.

Therefore, they had not rendered management consultant's service. A management consultant provided solutions to his client in respect of problems in respect of managing any organization. CMS was not engaged in providing Management Consultancy to any organization. The contract provided for achieving an annual plant load factor of 75% during the first year and at least 85% in any other normal year. This only showed that the contract specified a target as a basis to assess performance on an annual basis as regards generation of power supplied to the TNEB as per PPA. The obligation to achieve and maintain AATHR

(Adjusted Acceptance Test Heat Rate) every year and the provision for damages if that was not achieved, clearly pointed out that the appellants were not engaged in giving advice but were engaged in actual operation of the plant. The conclusion of the appellants rendering consulting engineer service was arrived at on the basis of certain terms of the contract relating to pre-operating and operating periods. These were part and parcel of the contract of operation and maintenance and were not for rendering service to ST-CMS.¹⁴ Lignite being the primary fuel for operation of the plant, it was the obligation of the appellants to ensure availability of sufficient stock of lignite in the facility. Taking delivery of lignite from the transporter, maintaining stock and inventory thereof by the appellants, were in relation to operation of the facility. It was incorrect to construe such obligation in terms of O&M contract as providing C& F Service to ST-CMS. Activities relating to procuring, transporting and maintaining stock of lignite fuel were activities incidental and ancillary to operation of the facility. Therefore, those activities could only be in relation to operation and day-to-day maintenance of the facility. The scope of C & F Agent's service covered the activity of clearing the goods from the carrier by furnishing necessary documents as an agent on behalf of the principal as also the activity of moving or transporting the goods for delivery. Lignite was transported and delivered to the appellants at the site by a third party.

15. When the generation of electricity amounted to manufacture, the question of providing Business Auxiliary Service did not arise. The O&M Contract was for generation of electricity. Therefore the activity did not come under Business Auxiliary Service.

16. Since the owner had separate contracts with suppliers of equipments for repair and maintenance, the appellants could not be said to have been engaged in repair and maintenance of equipments installed in the facility. The contract did not provide for repair or maintenance of equipment installed in the facility which was immovable. Sub-section 65(64) applied to maintenance or repair in relation to any goods or equipment. The maintenance or repair of the equipment or goods installed in erection of the power plant was the obligation of the manufacturer of the equipment or the person authorized by the manufacturer. Repair jobs were outsourced from service providers who undertook such jobs. It was also claimed

that the valuation was incorrect. The Commissioner had proceeded to confirm the demand on the entire sum received by the appellants on the premise that they had rendered a combination of services having essential character of management consultant's service while the essence and scope of the O&M contract was of operation and maintenance of a facility for generation of electricity. The appellants were reimbursed expenses of Rs. 26,75,12,700/- for the activity undertaken during the period 1.3.2003 to 31.5.2005. It was submitted that the operating cost purely related to running of the power plant and did not involve rendering of any service. The operating cost included salary, wages, and benefits for the staff, out of pocket expenses for travel and subsistence of personnel deployed to operate the plant, cost of spare parts, expenses of computers, office equipments etc. directly relating to O&M contract, Central, State and local taxes and other taxes other than income or other taxes imposed on the contractor. Without prejudice to the above claim it was submitted that the gross amount realized was to be treated as cum-tax charges and the demand re-worked. This position had been clarified in Delhi II Commissionerate Trade Notice No. 20/2002 dated 23.5.2002.

17. The demand was barred by limitation as the notice was dated 21.1.2005 and the period of taxable service rendered was 1.3.2003 to 30.9.2004. The contracting parties were under the bona fide belief that they were not rendering any service liable to tax. Therefore longer period could not be invoked. Further for the period upto February 2003, proceedings had been initiated earlier invoking longer period.

Therefore longer period was not available for the subsequent period from March 2003. Therefore, the demand raised in the Show Cause Notice dated 21.1.2005 for the period 3/03 to 9/2003 was barred by limitation.

It was also claimed that they were not liable to pay any penalty or interest.

18. During hearing, the Ld. Counsel for the appellants reiterated the written arguments made in support of the appeals. The Ld. Counsel explained the doctrine of "Pith & Substance" which, he submitted, had to be resorted to in interpreting the O&M contract. According to him, maintenance of plant was incidental to operation. The agreement was essentially for operation of plant and production of electricity. The Ld. Counsel took us through the O&M agreement and

highlighted the portions defining the facility and those relating to pre-operating services and operating services. The Article 4.5 had dealt with owner's responsibility to provide the primary fuel at the site. He also invited our attention to the agreement between ST-CMS and CLTS for transportation of lignite to the project site. Article 5.1 of the agreement had dealt with the transporter's responsibility to deliver lignite at delivery point/plant stockpile. CMS were managing only the owner's equipment (facility). As per the definition of Management Consultant, the said service related to those in connection with the management of any organization. The definition envisaged that there must be a connection between the service and the management of an organization. The second half of the definition of 'Management Consultant' after "includes" controlled the first half. In support of the above plea, the Ld. Counsel relied on the decision of the Apex Court in *Godfrey Philips 2005 (2) SCC 515*. He argued that the second half of the definition should be understood as clarifying the nature of service mentioned in the first half. He also brought to our notice the Board's Circular dated 27.06.2001. It was submitted that those clarifications applied to "Engineering Consultancy" *mutatis mutandis*.

Citing the decision in the case of *Rolls Royce Indus. Power (I) Ltd. case (supra)*, it was argued that job of operating and maintaining the plant was not an advisory service. The Ld. Counsel wondered why the appellant had to pay tax as C&F agent for transport of lignite by CLTS. CMS had not awarded C&F service to anybody. As regards maintenance or repair service, the Ld. Advocate cited the Apex Court's decision in *Daelim Industrial Co. Ltd. case (supra)* in support of the plea that a works contract could not be vivisected and service part charged to tax.

19. As regards Business Auxiliary Services, the Ld. Counsel argued that electricity was goods as per the judgment of the Orissa High Court in the case of *Orient Paper & Industries Ltd. v. Orissa State Electricity Board*. The appellants produced goods for the client. However, the exclusion clause in the definition of Business Auxiliary Services prevented CMS being covered as provider of Business Auxiliary Services. CMS manufactured electricity for the owner and not on behalf of the owner. He further explained that the functions were performed by CMS as reporting persons. Section 65A(2)(b) applied only if the service could be classified

under more than one clause of Section 65. He also submitted various case laws to drive home the ratio that it was a "well-settled principle of interpretation of contracts that the contract must be construed as a whole".

20. Ld. SDR defended the demand of tax and interest and imposition of penalties in both the orders. She justified the demand on all the services invoking Section 65A(2)(b), with reference to the essential character of the services in the impugned order in original passed by the Commissioner. The appellants had collected "Management Fee" which expression threw light on the nature of the service rendered. Ld. SDR endeavored to distinguish the Daelim Industrial Co. Ltd., case from the case on hand. The facility (plant) was managed by ST-CMS through CMS. The services of CMS were outsourced by ST-CMS. She cited the Tribunal's decision in 2006 (3) STR 73 (Tri. Del.) to support her plea. CMS had experience to run the plant. They put in this experience and thereby rendered Management Consultancy to ST-CMS. She cited the decision of the Supreme Court in Kone Elevators - 2005 (181) ELT 156 (S.C.), to highlight the distinction between works contract and contract for sale.

She argued that Section 73 of the Finance Act during the material period did not require 'suppression' to invoke the said Section.

21. The hearing was concluded on 08.01.07 and the order reserved.

Later, the Counsel for appellants sought leave to furnish text of a couple of judgments, which had been cited on 08.01.07. On 23.02.07, the said judgments were filed. The Ld SDR objected to the Tribunal accepting documents after the hearing was over. The Bench overruled the objection as the Revenue was not prejudiced by the appellants furnishing, copies of judgments already cited by him to back his arguments made on 08.01.07.

22. We have carefully studied the case records and considered the submissions by both sides. In the appeal No. S/116/06, the appellants have challenged the demand of service tax found to have been rendered by them under the categories Management Consultant Service, Clearing and Forwarding Agents Service and Consulting Engineer Service. In the order impugned in this appeal, the

Commissioner (Appeals) had affirmed the order of the Deputy Commissioner. In the appeal No. S/143/06, the Commissioner as original authority demanded service tax on the same activities of the appellants for the subsequent period. The Commissioner also found that the services rendered by the appellants involved, in addition, Maintenance or Repair Service and Business Auxiliary Service as well. In both the orders, break up of the tax attributable to the different categories of services has not been given. In the second order impugned, the adjudicating authority has classified the impugned services under the category of Management Consultant, identifying the various services the appellants rendered as having the essential character of that service and found the appellants liable to pay service tax under that head. He invoked Section 65A(2)(b) of the Act to demand service tax on the basis of the dominant characteristic of the combined services rendered. Appellants have assailed the orders both on merits and on the ground of limitation.

23. Lower authorities have arrived at their respective findings on the basis of the agreement between ST-CMS and CMS which had entrusted to the latter, the responsibility of operation and maintenance of the Power Plant of the former, to ensure supply of electricity to TNEB as per the PPA entered into by ST-CMS with TNEB. The various provisions of the agreement have been discussed in the early part of this order.

24. We first take up Appeal No. S/116/06 for detailed examination. Our findings also apply to the appeal No. S/143/06, as regards the services covered by appeal No. S/116/06. The order impugned in this appeal has affirmed the original order. As per the original order, the services rendered are separately found to be Management Consultancy, Consulting Engineer Service and C&F Agents Service.

24.1 As per Clause 65 of Section 65 of the Act, "Management Consultant means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization in any manner and includes any person who renders any advice, consultancy or technical assistance, relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organization". As per the O&M agreement, CMS is responsible for maintenance and operation of the facility to

produce electricity to supply it to TNEB as per the PPA between ST-CMS and TNEB. Therefore we find the pith and substance of the agreement, as argued by the appellants, is that CMS shall operate and maintain the facility and produce power for supply to TNEB. In order to serve this object of the agreement, the appellants carry out certain ancillary activities inevitable in the running of a power plant. We find it a fallacy to hold that by carrying out the activities as per the O&M contract, CMS assisted the owner in managing ST-CMS. The O&M contractor has been handed over the facility which it manned with its own staff whom they also trained. The O&M contractor is managing the facility, the power plant, and not managing ST-CMS.24.2 As per CBEC's letter F.No. 177/2/2001-CX4 dated 27/06/01, 'management' has been generally understood to mean the process of application of management principles, methods and practices for the efficient functioning of different systems of an organization such as production, personnel, marketing or finance. We find that CMS has not offered any advice to the owner in applying management principles in running ST-CMS. As per the definition, Management Consultant 'includes any person who renders any advice, consultancy or technical assistance, relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organisation'. As rightly pointed out by the appellants this 'inclusive' portion of the definition helps understand and clarifies the main definition of Management Consultancy. Operation of power plant by CMS cannot be seen as CMS rendering consultancy or technical assistance relating to modification, rectification or upgradation of any working system of ST-CMS, the owner organization. Therefore, as long as the appellant is not offering any advice for the improvement of another organization, management consultancy is not involved in the impugned activities. The appellants operate and maintain the plant.

Their primary function is generating and transmitting power as per PPA. In furtherance of this function, they also carry out certain incidental and ancillary functions such as maintaining the plant with its team of experts including engineers.

24.3 The original authorities found that the appellants rendered Consulting Engineer's Service, mainly by commenting on the designs and drawings prepared

by the EPC contractors and by making suggestions on drafting the operating manual for the plant. These activities, we find, were undertaken prior to the material period. The comments and suggestions had been made in the interest of eventual efficient running of the plant by the appellants, then under erection by the EPC contractors. As the plant is run by the appellants, it cannot be held that they had rendered engineering consultancy to owner or anybody else by the impugned activities sought to be classified as engineering consultancy. As per Clause 31 of Section 65 of the Act, Consulting Engineer is any qualified engineer or an engineering firm who renders any consultancy or technical assistance to a client in engineering. We find that the appellants did not render any such services to any client as Consulting Engineer.

24.4 We also find that appellants in the Rolls Royce Indus. Power (I) Ltd. case had undertaken the activity of operation and maintenance of a power plant of another firm and generated and supplied power on its behalf like CMS did in the subject case. In that case the Tribunal had observed: We have perused the records and considered the submissions made by both sides. The issue raised is the true meaning and scope of operation and maintenance agreement dated 14-3-95. The appellant had taken over the plant and was operating & maintaining it in terms of the agreement. A perusal of the agreement makes it clear that it is a contract between owner and an operator. The terms of the contract vest complete freedom and responsibility on the appellant, without any interference by the owner. The owner's right is restricted to entry and access, to be satisfied that the operation is carried out according to standards. He also receives reports about the relevant aspects of operation, status and output. The payment for operation and maintenance are determined under the various clauses of the contract. In addition to the lump sum payment, it also provides for bonus and penalty. The terms of the contract do not envisage or involve providing any consulting or engineering help to the owner.

The operator is fully autonomous and responsible for the performance of operation and maintenance. Whatever engineering issues are involved, it is for the operator to find solutions for, and attend to in the course of operation and maintenance. He is not required to render any advice or to take any orders from the owner. He

cannot pass on the responsibility for operating the plant in any manner to the owner. Thus, there are no two parties, one giving advice and the other accepting it. Service tax is attracted only in a case involving rendering of service, in this case, engineering consultancy. That situation does not take place in the present case.

Therefore, we are of the opinion that the duty demand raised is not sustainable.

25. We are unable to accept the Ld. SDR's argument that the facts of the case on hand and the facts of the Rolls Royce Indus. Power (I) Ltd. case are different in any important respect. We do not think that the fact that the contractor in that case had more autonomy in its functioning to be such a critical distinction that we cannot be guided by its ratio in deciding the subject case.

26. As regards the finding that the appellants acted as a C&F Agent for the owner, we find that as per Clause 25 of Section 65 of the Act, the term Clearing and Forwarding Agent's services applies to services of clearing and forwarding operations rendered in any manner by any person to any other person. In the subject case the owner is responsible to provide the primary fuel lignite at the project site. For this purpose the owner had entered into a transportation agreement with Chettinad Lignite Transport Services Ltd. The appellants are responsible for maintaining certain level of inventory of fuel at the project site and also at the NLC mine head. The transport of lignite between two points is the responsibility of the owner. CMS coordinating delivery of lignite with transporting agent and ensuring that the fuel of required specification is supplied cannot be held as a separate service rendered by it. Ensuring quality of the fuel and its availability to run the plant without interruption are functions incidental to the operation of the plant for generating power.

27. The order impugned in appeal No. S/143/06 found the services rendered by CMS to be also Business Auxiliary Service and Maintenance or Repair service. As per the definition in the Act, 'Business Auxiliary Services' means any service in relation to: (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or (iv) procurement of goods or services, which are inputs for the client; or (vii) a service incidental or auxiliary to any activity specified in

Sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customers or vendor, public relation services, management or supervision and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944.

As per this definition, any activity involving manufacture of any goods within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944 is not subject to tax under the head Business Auxiliary Service. It is a settled position that electricity is goods manufactured in the sense envisaged in Clause (f) of Section 2 of the Central Excise Act, 1944. The Hon'ble High Court of Orissa in *Orient Paper & Industries Ltd. v. Orissa State Electricity Board* (supra), had upheld imposition of Central Excise duty on electricity, electricity being manufactured goods as defined in the Central Excise Act '44.

Therefore, we find that the argument of the appellants that the services involved are not liable to tax as Business Auxiliary Service has to be accepted. Such an activity is not covered by Business Auxiliary Service.

28. As regards Repair or Maintenance Services, the argument of the appellants that they maintained only the plant and the taxable service of maintenance or repair of goods/equipment covered by the Act were done by the suppliers of the equipment under warranty or Annual Maintenance Contract (AMC) is reasonable and merits acceptance. If the appellants undertook these activities they had rendered the service to themselves and not to another person. Therefore no liability is incurred by the appellants on this account.

29. A works contract for manufacture of an item as prescribed in Section 2f of the Central Excise Act, 1944 cannot be vivisected to charge tax on some part of the activities involved. In our considered view, this is what the lower authorities have done in the cases covered by both the appeals. Moreover, in the first appeal there is demand on different activities of the O&M contractor categorized as Management Consultant, Consulting Engineer and Clearing and Forwarding Agent

without giving the taxable value in each case. We find that tax cannot be levied when the liability of the assessee is not determined precisely with respect to each of the taxable services found to have been rendered. No tax can be levied without specifying taxable value.

30. In the impugned order the Commissioner had rendered a finding that the facility was run by entering into contracts with different organizations such as CMS who had contracted to undertake the operation and maintenance of the facility. He found that though CMS was operating the facility for generating electricity, the entire activity was carried on by CMS on behalf of ST-CMS. The Commissioner also observed: "the agreement also provides for incentive payments/liquidated damages/environmental fines..." This does not happen when any agency provides service to another. A service provider is not responsible to achieve any performance target referring to which it becomes entitled to any reward or incurs penalties. Such provisions in the O&M contract fortify our finding that the appellants were not rendering any advisory services and were engaged in activities which could be measured such as generation of power in the instant case.

31. We have seen that in generating power, the appellant did not render any advice to improve the functioning of the working system of another organization. They ran the facility and organized the required materials through the owner and services of their own staff. These activities did not constitute services to any other person/organisation. These impugned functions were incidental to their main activity of producing power. The O&M contract is a works contract and it is bad in law to vivisection it and tax certain activities covered by the contract. A reading of the whole contract makes it plain that the same was intended to ensure generation and supply of power as per PPA and not for rendering any service to the owner.

32. As we have decided that the appellants did not render any taxable service we do not think it is necessary to examine the question relating to valuation of the impugned services or the question whether the demands were made in time. Accordingly allow both the appeals.