Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11143 of 2016

(Arising out of OIO-AHM-SVTAX-000-COM-25-26-15-16 dated 04/03/2016 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Laxmi Engineering P Ltd **.....Appellant**
15-16, Orchid Mall, Near Gordhan Party Plot,
Thaltej Shilaj Road, Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax – Ahmedabad **.....Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

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APPEARANCE:
Shri Hardik Modh, Advocate for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. A/ 10803-10804 /2023

DATE OF HEARING: 13.03.2023
DATE OF DECISION: 06.04.2023

RAMESH NAIR

Appellant filed these appeals against the common impugned Order-In-Original No. AHM-SVTAX-000-COM-25 & 26 -15-16 dated 04.03.2016 wherein the service tax demand along with interest and penalties have been confirmed against them.

02. The brief facts of the case are that the appellant are engaged in providing of "Erection, Commissioning and Installation" and "Management or repair" services. During the course of audit, it was noticed that the Appellant had rendered Erection, Commissioning and Installation Services to M/s Jaihind Projects Ltd. (M/s JPL) but had not discharged the Service tax on the ground that M/s JPL as the main contractor of GSPL and GAIL had discharged service tax and the sub-contractor need not to pay the same. However Appellant against the audit objection paid the service tax of Rs. 15,60,153/- along with interest. Further the Appellant were requested by the Range officer vide letter dated. 27.09.2010 to intimate whether their contracts for Erection, Commissioning and Installation services were composite contracts or otherwise and to produce the copies thereof, in response, the Appellant vide letter dated 07.12.2010 informed that they are providing erection and commissioning services and they receive the orders from the parties for material and installation separately; and that they raise invoices for material and service portion separately and hence their contracts are not composite contracts. On scrutiny of the documents submitted by the Appellant, it appeared that they had provided complete services of design, supply, erection, commissioning and installation. However Appellant had bifurcated the composite contracts into supply portion and service portion and were not paying service tax on supply portion. Statement of Shri Dipak Patel, Manager (Finance & Accounts) was recorded. After detail investigation, show cause notice dated 23.10.2012 was issued proposing the Service tax demand along with interest and penalties. In adjudication, the Commissioner vide Order-In-Original No. STC/38/COMMR/2013 dated. 04.10.2013 confirmed the demand with interest and imposed penalties. Being aggrieved by the said order, Appellant preferred appeal before CESTAT, Ahmedabad. Vide Order No. A/10865/2014 dated 23.04.2014 the CESTAT remanded the matter back to the adjudicating authority to consider the issue afresh after following the principles of natural justice.

2.1 In the meantime, relevant information was called for by their jurisdictional officers vide letters dated 20.11.2012 and 10.12.2012 to ascertain if the Appellant was following the same practice for short – payment of service tax and wrong availment of exemption Notification No. 12/2003 for the period subsequent to the period covered under the aforesaid SCN dated 23.10.2012 or otherwise. Scrutiny of the documents submitted

by the Appellant revealed that during the FY 2011-12, they continued the same practice of wrong availment of Notification No. 12/2003 and not paid the Service tax amounting to Rs. 1,01,48,866/- under the category of 'Erection, Commissioning and Installation Service'. Therefore, another periodical show cause notice dated 21.05.2013 was issued to the Appellant proposing service tax demand along with interest and penalties.

2.2 The Learned Commissioner vide impugned common Order-In-Original No. AHM-SVTAX-000-COM-25 & 26 -15-16 dated 04.03.2016 decided both the matters. With regard to SCN dated 23.10.2012 he confirmed the demand of Service tax amounting to Rs. 15,60,153/- leviable on the taxable value of Rs, 1,26,22,597/- on the services provided as sub-contractor by Appellant during the FY 2007-08 under the provisions of Section 73 and the same was ordered for appropriation of the payment of Rs. 15,60,153/- made by the Appellant during the investigation; confirmed the service tax demand of Rs.2,20,04,332/- on trading amount treating it as value towards provisions of taxable service for the period 2007-08 to 2010-2011; interest has been ordered to be recovered under section 75 ibid on both amounts of Service tax. Interest of Rs. 7,91,653/- paid on service tax of Rs. 15,60,153/- ordered to be appropriated against the interest demand. He also imposed the penalty of Rs. 10,000/- under Section 77(2) of the Act and penalty of Rs. 2,41,64,485/- under Section 78 ibid. As regard the second periodical show cause notice dated 21.05.2013 he confirmed the service tax demand of Rs. 1,01,48,866/- under Section 73 of the Finance Act, 1994 on the taxable value of Rs.15,21,16,142/- charged and collected from the clients by the appellant during the period 2011-2012; interest is ordered to be recovered on this service tax demand amount. He also imposed penalty of Rs. 10,000/- under Section 77(2) of the Finance Act, 1944 and penalty of Rs. 10,14,887/- under Section 76 of the Finance Act, 1994.

2.3 Feeling aggrieved with the impugned order dated 04-3-2016 passed by the Learned Principal Commissioner of Service Tax, Ahmedabad the appellant has filed these appeals before the Tribunal.

03. Shri Hardik Modh, Learned counsel appearing for the appellant submits that Learned Commissioner has erred in not appreciating the fact that the Hon'ble Tribunal had though kept all the issues open, but the remand order was passed basically to look into the voluminous records and find out the

fact whether or not the appellant had paid service tax on the services rendered and paid VAT on the material supply portion. In earlier proceeding Learned Commissioner came to the conclusion that Appellant had not produced any evidences in support of such claim. The direction conveyed by Tribunal are very clear when it is observed that *"……. remand the matter back to the adjudicating authority to reconsider the issue afresh by going into all the claims by the appellant as regards discharge of VAT on supply portion and discharge on Service Tax on the services portion"*. However Learned Commissioner without appreciating the basic issue on the factual matrix has jumped to the conclusion in the similar fashion as was done by his predecessor, thus, exhibiting absolute non application of mind on his part.

3.1 As regard the findings of Learned Commissioner on the classification of Erection, Commissioning or Installation Service as Works Contract Service even for the period prior to 01.06.2007, he submits that the law is well settled in this regard that for the contracts which have been entered into prior to 01.06.2007 and service provider executing those on-going contracts had paid service tax on the services rendered thereupon under the respective services viz., Erection, Commissioning or Installation in this case, then for those on going projects/ contracts, the classification of services to Works Contract service would not change. Whether service provider is eligible for Composite Scheme or not for the period up to 01.06.2012 was another issue. Therefore, the findings of Learned Commissioner are baseless, contradictory to the law. He relied upon the judgment of Nagarjuna Cement -2012(28)STR 0561(SC).

3.2 He further submits that the Learned Commissioner has also erred in his finding in para 24.5 to say that the Appellant were classifying the services under Erection, Commissioning or Installation Service or Works Contract Services on their whims and fancies. The law itself provided that if the services were provided under a contract which fulfills the conditions laid down for works contract viz., transfer of ownership in goods, etc than it would be classified under Works Contract Service and it can be classified in a particular service category. In Works Contract Service one can take benefit of exclusion of material while paying the service tax if material and labour both are separately identified, or can take the benefit of composite scheme of works contract if material and labour are not separately identified. As well

as one can pay service tax in category of Erection, Commissioning or Installation by taking the benefit of general exemption Notification No. 12/2013-ST for exclusion of material from taxable value of service. So Works Contract is option available with assessee. If one wants to take benefits of Works Contract Services then they can opt for Works Contract Service and pay the service tax under Works Contract Service. Accordingly, the Appellant while performing the service under different contract with their clients, based on the character of the contract classified their services and paid service tax.

3.3 He also submits that in case contracts which were purely for supplying material, the appellant have issued sale invoices and paid VAT at full rate. The contracts which were composite in nature, the service receiver themselves have bifurcated the value of entire contracts towards material portion and towards service portion. In such composite contract which were made by them with the service receivers after 01.06.2007, the appellant have classified the service under works contract service, the service tax has been paid under composite scheme. The third category of contracts which are only for providing service, the appellant have classified the contracts under Erection, Commissioning and Installation Service and paid the service tax at the full rate. In support of this Appellant submitted the detail worksheet along with copy of invoices for sales and service in respect of contracts.

3.4 As regard the finding of Learned Commissioner in para 25.1 that Appellant have been taking contradictory stand for availment of benefit of Notification No. 12/2003-ST, he submits that fundamental question is that if the services were being correctly classified under the Erection, Commissioning and Installation or Works Contract Service depending upon the nature of the contract, were the appellant require to pay service tax on the value of materials supplied free of cost by the service receiver. It has never been the intention of the legislature to demand service tax on the value of the goods and materials. Even when the services are classified under Erection, Commissioning and Installation there are two notification viz., Notification No. 12/2003-ST which allowed specific abatement towards value of goods and materials where the invoices are produced by the Service provider and Notification No. 1/2006 –ST which provided blanket abatement of 67% towards the value of goods and material and on remaining 33% the

service provider was required to pay service tax. Assuming for a while that the adjudicating authority could not be satisfied by the Appellant on the fulfillment of conditions of abatement under Notification No. 12/2003-ST, the availability of abatement at the blanket rate of 67% under Notification No. 1/2006-ST was legally available to the Appellant when the department also believed that the value in dispute on which service tax is being demanded pertains to trading activity. Then again, if it was Works Contract Service, the entire value of Works Contract was taxable value, but the rate of Service tax was only 2.6% or 4.2%. Hence, it is very clear that the department is absolutely on a wrong footing in this case in demanding service tax from the appellant on the amount which department itself terms as "trading amount".

3.5 He argued that Learned Commissioner has erred in considering the taxable value as pertaining to the services provided by the Appellants to M/s GAIL and M/s GSPL on behalf of M/s Jaihind Projects Ltd., in as much as, the said receipt was for the goods and materials used by the Appellants for providing the said services. The Appellant had purchased these goods and materials from the manufacturers and sold it under separate invoices to M/s Jaihind Projects Ltd. The said activity was purely a trading activity of the Appellant. This facts is evident from the books of account viz., Balance Sheet of the Appellant for the year 2007-08 to 2010-11 where this value was shown under the head "Trading". The Learned Commissioner has also erred in holding that the benefit of Notification No. 12/2003-ST was being denied, in as much as, there is no question of the appellant having claimed any such exemption/abatement under Notification No. 12/2003-ST in respect of the said amount of traded goods on which the demand has been confirmed by the department considering the same as receipts of taxable value, as the said trading activity was done under a separate contract and the appellant have paid VAT on this value while issuing sales invoices to JPL.

3.6 He also submits that each contract which is the subject matter in show cause notices, in most of contracts, the clients i.e. the service receiver had themselves bifurcated each contract in two parts i.e. one for value for the goods and materials to be supplied and two the value for the service. In respect of all such contracts, the appellant have paid service tax at full rate on the value of service without availing any exemption or abatement. The allegation of department and findings of the Learned Commissioner that the Appellant had bifurcated the value is not correct. However from the

contracts it will be appreciated that in all these contracts the value has been bifurcated by the clients i.e. service receiver. It is well settled legal position that when there is contract between two parties, third person who is not involved in the contract cannot interfere with the terms of the contract. The contract has to be accepted as legally tenable. Appellant paid service tax on the full value of service, hence there was no need for the appellant to take abatement under Notification No. 12/2003-ST. The finding of Learned Commissioner in this regard that the appellant had availed exemption under Notification No. 12/2003-ST is not factually correct and consequently the entire exercise done by the adjudicating authority to prove that because the M/s JPL, etc., the service receivers who had taken cenvat credit on the inputs, the Appellant were not eligible for exemption under Notification No. 12/2003-ST as amended or Notification No. 1/2006-ST is a futile exercise. The finding of the authority in the same breath that in all the cases, the cenvat credit was taken by the service receiver is also false. The Appellant have already produced the copies of contracts as per which the Appellant were require to supply the goods and materials to the service receiver. The Appellant therefore purchased the goods and materials from the vendors, the invoices of manufacturers are in the name of appellant. In order to save the transportation cost, the appellant asked the manufacturers to consign the goods directly to the site of the client, therefore, the name of the service receiver, for example, M/s Jaihind project is shown as consignee in the invoice scanned in the impugned order and service receiver has taken cenvat credit on the said invoice. Even if it is held that cenvat credit has been erroneously taken, the same has been taken by the service receiver and appellant as service provider has no control over the service receiver. It is for the department to take action against the service receiver and ask them to reverse the cenvat credit. In the present scenario, even though the invoices of manufacturers/ vendors are in the name of the Appellant as "Buyer" still the credit has not been taken, per se gives the appellant a legal right to claim exemption under Notification No. 12/2003-ST.

3.7 He also submits that even as per finding of the Learned Commissioner in para 25.4 of the impugned order as assessee paying service tax under Works Contract Service can pay service tax on the gross amount charged for the work contract less the value of transfer of property in goods involved in execution thereof, and where VAT/CST has been paid on transfer of property, than the value adopted for such payment of VAT/CST is to be

considered for deduction towards value of property transferred. Assuming that all the contracts under which the Appellants have provided services are to be classified under Works Contract Services, the Appellant have provided figures of sales value under each contract and value on which VAT/CST is paid which is clearly evident from the worksheet annexed. Hence, the Appellant are legally eligible for deduction of such value before demanding service tax.

3.8 He further relied upon the following judgments in supports of above submission and arguments.

- SAFETY RETREADING CO. PVT. LTD. VS. COMMISSIONER OF C.EX., SALEM – 2017 (48)STR 97(SC)
- COMMISSIONER OF C.EX., PUNE –I VS. BIOPHARMAX INDIA PVT. LTD. 2016(42) STR 77 (TRI. MUMBAI)
- J.P. TRANSFORMERS VS. COMMISSION OF C.EX& S.T. KANPUR -2014(36)STR 471 (TRI. DEL.)
- COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE VS. J.P. TRANSFORMERS – 2014(36)STR 961(ALL)
- SPACE AGE ASSOCIATES VS. UNION OF INDIA – 2014 (33) STR 372 (BOM)
- TECHNOCRATE TRANSFORMERS VS. COMMISSIONER OF C.EX. KANPUR -2015(39)STR 996 (TRI. DEL.)
- SOBHA DEVELOPERS LTD. VS. COMMR. OF C.E. & SERVICE TAX, BANGALORE -2010(19)STR 75 (TRI. BANG.)
- COMMISSIONER VS. SOBHA DEVELOPERS LTD. 2017(49)STR J 26 (SC)
- UNION OF INDIA VS. MAHINDRA & MAHINDRA LTD. – 1995(76)ELT 481 (SC)
- ESSAR PROJECT (INDIA) LTD. VS. COMMISSIONER OF C.EX. & SERVICE TAX, RAJKOT – 2014 (33) STR 696 (TRI. AHMD.)
- COMMISSIONER OF C.EX. & S.T. AHMEDABAD –III VS. KALPATARU POWER TRANSMISSION LTD. 2021 (48)GSTL 254 (TRI. AHMD.)
- AGRAWAL COLOUR ADVANCE PHOTO SYSTEM VS. COMMISSIONER OF C.EX. 2020(38)GSTL 298 (MP)

3.9 He also argued the matter on limitation and submits that there is not an iota evidence reflecting upon any positive act of suppression or misstatement with intent to evade payment of service tax in this case. On the contrary, it is evident that the demand stand raised against the appellant by taking out the figures from books of accounts and audited financial statements for the relevant year. Balance Sheet of a company is public documents and available to all concerned. Reflection of the income in the ledger account and the financial statement reflects upon the absence of any wilful suppression or mis-statement on their part so as to invoke longer period of limitation. Thus, true and complete details of the transaction are available in specified records and even service tax audit party has verified all these details. In view of there being reasonable and correct belief that service tax is not payable on supply of material, the appellant had not paid the same and their bonafide belief is also based on the departmental clarification and judicial pronouncements in this regards. Under such circumstance extended period of limitation cannot be invoked and penalty cannot be imposed.

04. On the other hand Shri Tara Prakash, learned Deputy Commissioner (AR) appearing for the Revenue reiterated the findings recorded in the impugned order in support of confirmation of the adjudged demands on the appellant.

05. We have heard both sides and perused the records. The issue involved in the present case is that whether the value of materials supplied by the Appellant under a contract is required to be included in the taxable value of Service or otherwise. The same is also clear from the para 21 of impugned order. The relevant portion of impugned order reads as under : -

> *21. Since the SCNs under subject involve multiple demands and sundry issue, I would list out the same below for ease of discussion and would take them up in seriatim.*
> *(i) whether the amount of Rs. 1,26,22,597/- received by the said assessee from their main contractors, namely M/s JPL towards providing "erection, commissioning and installation services" to GAIL and GSPL during the FY 2007-08 would be considered as taxable income and whether service tax of Rs. 15,60,153/- involved thereon would be payable by the said assesseealongwith applicable interest, in their capacity of a sub-contractor as demanded in the SCN dated 23.10.2012 or otherwise.*

(ii) Whether the amount of Rs. 20,55,26,239/- received by the said assessee from their client towards value of goods traded during the provisions of "erection, commissioning and installation service" in the FYs 2007-08 to 2010-11 would be considered as taxable income by disallowing them the benefits of Notification No. 12/2003-ST and whether Service tax of Rs. 2,26,04,332/- involved thereon would be payable by the said assessee along with applicable interest as demanded in the SCN dated 23.10.2012 or otherwise?

(iii)whether the amount of Rs. 15,21,16,142/- received by the said assessee from their clients towards value of goods traded during the provision of "erection, commissioning and installation service" in the FY 2011-12 would be considered as taxable income by disallowing them the benefits of Notification No. 12/2003-ST and whether service tax of Rs. 1,01,48,866/- involved thereon would be payable by the said assessee alongwith applicable interest as demanded in the periodical SCN dated 21.05.2013 or otherwise ?

5.1 As per the facts prevailing on records and argued by both the sides there is no dispute that there is also contract for supply of goods/Sale of goods and contract for services namely erection, installation and commissioning. Appellant have not paid service tax on supply portion on which they have paid VAT/CST. We have also gone through the statement of Shri Dipak Bhailalbhai Patel, Manager (Finance and Accounts) of appellant's company, against the question No. 3 he stated as under:

Q3. It seems that your contract are composite contracts which includes goods and material as well as erection commissioning and installation of these goods and materials. Please specify regarding payment of service tax under works contract service and erection commissioning and installation service.

Answer: - We are paying service on the gross amount received from the customers including value of goods and materials under the category of works contract service. I state that in some case we have availed works contract composition scheme and paid service tax @4.12% on the value and in other cases we have paid service tax @10.3% and taken cenvat credit of inputs. In respect of erection commissioning and installation service category the installation charges and supply of the goods are bi-furcated in the tender it self and according we are paying service tax only on installation charges and showing goods and materials as supply.

5.2 After appreciating the above facts and going through the contracts and documentary evidences in the form of invoices, Balance sheet and Profit and Loss account, VAT return and detailed work sheet showing bifurcation of

supply of goods and service portion separately submitted by the Appellant before us, we find that the contracts entered into by the appellants with their customers also gave the break-up of value of service portion and supply of material/goods portion. The Appellant as per the contract raise the bills and also account for the transaction in their books of account. On service portion they have paid the Service tax and on material supply portion paid the VAT/CST as applicable. We find that there is no dispute about the factual aspects. Admittedly, the contract showed the cost of each and every item separately. In terms of Notification No. 12/2003-S.T., dated 20-6-2003, the value of the goods and materials sold by the service provider to the recipient of services stand exempted from the service tax leviable therein, subject to the condition that there is documentary proof specifically indicating the value of the said goods and materials. Admittedly, the value of the goods and materials, which are required to be used forproviding service stand separately disclosed in the agreement/contract as also separately mentioned in the invoices raised by the appellants and their books of account. Appellants have paid the VAT on the supply of goods, in such case it has to be held that the same were sold to the customers and the service tax cannot be demanded from the appellant on the value of the said goods.

5.3 The Learned Commissioner, in fact accepts the above proposition of law, but does not extend the benefit to the appellants on the ground that Notification No. 12/2013-ST provide a condition for non-availment of Cenvat Credit. Appellant following a practice wherein they procured goods by placing order to manufacturers, such manufacturer supply their goods under invoice by indicating the name of the Appellant as the 'Buyer" and the name of the service recipient as the 'Consignee'. Based on these invoices, service recipients were availing cenvat credit of duty paid on the goods and such Cenvat availment would amount to breach of the restrictions provided in this regard under Notification No. 12/2003-ST. In order to appreciate the said controversy, it would be necessary to reproduce the relevant portion of the said Notification, which reads as under :-

> *"**Notification No. 12/2003-S.T., dated 20-6-2003.** - In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materialssold by the service provider to the recipient of service, from the service taxleviable thereon under Section 66 of the said Act, subject to*

condition that there is documentary proof specifically indicating the value of the said goods and materials.

Provided that the said exemption shall apply only in such cases where -

(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials."

Upon perusal of the same, we find that the benefit is available only subject to satisfaction of conditions specified therein above Notification No. 12/2003-S.T., dated 20-6-2003 provides for excluding the value of goods and materials sold by the assessee to the recipient of service for the purpose of computation of Service Tax liability. This notification applies to all the services including "erection, commissioning and installation services" rendered by the appellant herein. If that be so, benefit of notification cannot be denied to the assessee and has to be allowed, if the assessee has fulfilled the terms and conditions of the notification. The above notification provide the condition that no credit of duty paid on such goods and materials sold has been taken under Cenvat Credit Rules, 2004; or when such Cenvat credit has been taken by the service provider on such goods and materials, he has paid an amount equal to such credit availed before the sale of such goods and material. In this regard, we are in agreement with the Appellant's view that above Notification restricted for availment of Cenvat Credit to Service provider only, the said Notification nowhere imposed the condition related to non- availment of cenvat credit to service recipient. Therefore, the benefit of exemption under Notification No. 12/2003-S.T. cannot be denied to Appellant.

5.4 In the present case, we also find that the Tribunal vide Order No. A/10865/2014 dated 23.04.2014 while remanding the matter in para 3 observed as under:

"3. On perusal of the records, we find that the issue involved in this case is regarding service tax liability on the appellant under the category of erection, installation and maintenance Service on the contracts which were executed by them with different parties. It is the claim of the assessee before the adjudicating authority as well as before us that they had billed separately for the materials and for the services. It is also the claim that the Service Tax liability on the services rendered was discharged and VAT was discharged on the supply of portion. Learned Counsel brings to

> *our notice the findings recorded in para 6.4.1 to 6.4.4, we find that the adjudicating authority has recorded that the appellant has made this plea, came to conclusion against the appellant only on the ground that they had not produced any evidence in support of such claim. From the voluminous record which is produced before us, we find that appellant has, in fact, produced records. Basically, the issue needs to be verified from the factual matrix. Hence, instead of going into the merit of the case, we deem it fit to remand the matter back to the adjudicating authority to reconsider the issue afresh by going into all the claims by the appellant as regards discharge of VAT on supply portion and discharge on service tax on the service portion. We make it clear that we have not recorded any findings on the merits of the case and are leaving all the issue open. We also direct the appellant not to seek the refund of the amount already deposited during the proceedings."*

However without verifying the factual position whether appellant paid the VAT on supply portion and service tax on service portion Learned Commissioner has decided the impugned matter which is legally not correct and against the remand direction of Tribunal.

5.5 Further, from the documentary evidence produced by the Appellant before us we find that the appellant have paid sales tax as also VAT on the material used in providing the said service by them. The ratio of the various decisions of the Tribunal are to the effect that where the salestax and VAT stands paid on the material it has to be held that the goods were sold by the assessee. In such a scenario, the value of the same, cannot be added in the value of taxable service. Reference in this regards is made to the following decisions :-

- *WIPRO G.E. MEDICAL SYSTEMS PVT. LTD.* V. *CST, BANGALORE* - 2009 (14) S.T.R. 43 (TRI.-BANG.)
- *DISPALLA HOTELS LTD.* V. *CCE, VISAKHAPATNAM* - 2010 (18) S.T.R. 75 (TRI.-BANG.)
- *LSG SKY CHEFS (INDIA) PVT. LTD.* V. *CST, BANGALORE* - 2010 (18) S.T.R. 37 (TRI.-BANG.)
- *IMAGIC CREATIVE PVT. LTD.* V. *CCT* - 2008 (9) S.T.R. 337 (S.C.)
- *DELUX COLOUR LAB PVT. LTD.* V. *CCE, JAIPUR* - 2009 (13) S.T.R. 605 (TRI.-DEL.)
- *PLA TYRE WORKS* V. *CST, TRICHY* - 2009 (14) S.T.R. 32 (TRI.-CHENNAI).

5.6 In several decisions it has been held that service tax cannot be levied on that portion of the value representing the sale of the goods on which sales tax has been charged. This position has been elaborately dealt with in the decision of the *Shilpa Colour Lab* v. *CCE*, *Calicut* reported in 2007 (5) S.T.R. 423 (T) supra. This view has been affirmed in many decisions. Once, the sales tax has been paid on the materials, then on the same, service tax also cannot be charged. At this stage, we also take note of the Board's Circular No. 96/7/2007-S.T., dated 23-8-2007 laying down that the value of spare parts sold by a service provider is not required to be taken into consideration if the same are subjected to levy of sales tax and VAT and there is clear evidence to show the sale of the same. Circular further goes on to say that the fact of payment of VAT/sales tax on a transaction value indicates that the said transaction is treated as sale of goods. Keeping in view the Board circular as also the precedent decisions of the Tribunal, we hold that the appellant are not liable to pay service tax on the value of supply of goods/ material.

5.7 As regard the service tax demand of Rs. 15,60,153/- we find that Learned Commissioner confirmed the said demand on the ground that issue regarding payment of service tax by sub-contractor has been finally laid at rest vide CBEC Circular No. 96/07/2007 dated 23.08.2007. Accordingly, there is no reason for any doubt regarding leviability of service tax on the services provided by sub-contractor. However on the said disputed matter, on limitation we find force in the argument of Learned Counsel. We find that during the relevant period there were various Circulars and trade notices by the Commissionerates clarifying that where the principle service provider discharged his service tax liability on the entire value of the services, a separate liability cannot be imposed against the sub-contractor. The said Circulars stand taken note of by the Tribunal in various judgments and its stand held that where the entire service tax has been paid on the full consideration of the services, the sub-contractors' liability would not arise to pay service tax again on the part of principle service. One such reference can be made by following circulars :-

- TRU LETTER F. NO. 341/18/2004-TRU (PT.) DATED 17-12-2004
- CIRCULAR NO. 23/3/97-S.T., DATED 13-10-1997
- MASTER CIRCULAR NO. 96/7/2007-S.T., DATED 23-8-

2007

In fact, also from various following decisions of the Tribunal :-

- *Urvi Construction* v. *CST, Ahmedabad* - 2010 (17) S.T.R. 302 (Tri. Ahmd.)
- *CCE, Indore* v. *ShivhareRoadlines* - 2009 (16) S.T.R. 335 (Tri.-Del.)
- *Harshal& Company* v. *CCE, Vadodara* - 2008 (12) S.T.R. 574 (Tri.-Ahmd.)
- *Semac Pvt. Limited* v. *CCE, Bangalore* - 2006 (4) S.T.R. 475 (Tri.-Bang.)
- *Shiva Industrial Security Agency* v. *CCE, Surat* - 2008 (12) S.T.R. 496 (Tri.-Ahmd.)
- *Synergy Audio Visual Workshop P. Ltd.* v. *CST, Bangalore* - 2008 (10) S.T.R. 578 (Tri.-Bang.)
- *OIKOS* v. *CCE, Bangalore* - 2007 (5) S.T.R. 229 (Tri.-Bang.)

In the Tribunal's decision in the case of *OIKOS* v. *CCE, Bangalore - III* reported in 2007 (5) S.T.R. 229 (Tri.-Bang.) after taking note of the Board's Circular dated 7-10-1998 as also Delhi Commissionerate Trade Notice No. 53/CE (ST)/97, dated 4-9-1997, Tribunal held that as the main serviceprovider has discharged the tax liability, no separate Service Tax can be confirmed against the sub-contractor. To the similar effect the Tribunal decision in the case of *Viral Builders* v. *CCE, Surat* reported in 2011 (21) S.T.R. 457 (Tri.-Ahmd.) observed that service stands provided only once and as such tax is not payable twice for the same service. Further in the case of *Sunil Hi-Tech Engineers Ltd.* v. *CCE, Nagpur* reported in 2010 (17) S.T.R. 121 (Tri.-Mumbai), the service tax confirmed against the sub-contractor was set aside on the ground that the main contractor has already paid the Service Tax and the matter was remanded to verify the above effect. The same ratio was laid down by the Tribunal in the case of *Newton Engg. & Chemicals* v. *CCE, Vadodara* reported in 2008 (12) S.T.R. 378 (Tri.-Ahmd.) and by the Larger Bench decision of the Tribunal in the case of *Vijay Sharma & Co.* v. *CCE, Chandigarh* reported in 2010 (20) S.T.R. 309 (Tri.-LB).

5.8 However the Larger bench of Tribunal in case of Commissioner v. Melange Developers Pvt. Ltd. — 2020 (33) G.S.T.L. 116 (Tribunal) held that

the sub-contractors also needs to pay Service tax in their individual capacity. We observed that in the present matter appellant has acted as sub-contractor. Earlier, as mentioned above, there were contrary clarifications by the government that the sub-contractor is not liable to pay service tax when the main contractor is discharging the service tax. Subsequently vide circular dated 23.08.2007, the CBEC has taken a U-turn and withdrawn the earlier stand and clarified that the sub-contractor is liable to pay service tax. There were contrary judgments on the issue that whether the sub-contractor is liable to service tax. Subsequently the matter was referred to Larger Bench. On the disputed issue, it is not only the larger bench decision which settled the law but there were contrary circular of the Board on the issue of payment of service tax by the sub-contractor. In view of this position, there is no suppression of facts or any mala fide intention to evade payment of service tax on the part of appellant. Further, the ground of *bona fide* belief can be invoked in the present case as the main contractor who entered into agreement with the ultimate client were charging such client along with service tax as claimed by the appellant. There is a reason for a *bona fide* belief in such arrangement regarding non-liability of sub-contractor when the main contractor is liable to discharge full service tax. Though the said principle is not applicable against the tax liability but the question of invoking extended period is to be answered in favour of the appellant. Accordingly, we hold that there is no case of suppression of fact, fraud, misstatement etc. in the non-payment of tax on this disputed activity by the appellant and, we hold that extended period of limitation is not attracted.

06. In view of the foregoing discussion and finding, we set aside the impugned order and allow the appeals with consequential relief to the appellant.

(Pronounced in the open court on 06.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Mehul