CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70140 of 2016

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-006-15-16 dated 28/08/2015 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

M/s Vishal Enterprises, ...**Appellant**

(Proprietor Shri Vishalji Nigam, 365/3, Civil Lines, Unnao)

VERSUS

Commissioner of Central Excise &

CGST, Kanpur ....**Respondent**

(Commissionerate-Kanpur)

<u>APPEARANCE:</u>

Shri Dharmendra Srivastava, Chartered Accountant &
Shri Suhail, Advocate for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70107/2024

DATE OF HEARING : 23 February, 2024
DATE OF DECISION : 23 February, 2024

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-in-Original No.KNP-EXCUS-000-COM-006-15-16 dated 28/08/2015 of the Commissioner of Customs, Central Excise & Service Tax, Kanpur. By the impugned order following has been held:-

<u>ORDER</u>

(i) I confirm the demand of Service tax of ***Rs.1,89,00,604/- (Rupees One Crore Eighty Nine Lacs Six Hundred & Four Only) (including Education cess and SHE cess)*** *against M/s Vishal Enterprises, Proprietor-Shri Vishalji Nigam, 365/3, Civil Lines, Unnao, under the provisions of Section 73(2) of the Finance Act,*

1994 on the services of "Commercial & Industrial Services" provided by them.

(ii) I also demand interest from them, payable under Section 75 of the Finance Act, 1994, at the applicable rate, on the amount of service tax confirmed at (i) above.

(iii) I impose a penalty of ***Rs. 1,89,00,604/- (Rupees One Crore Eighty Nine Lacs Six Hundred & Four Only)*** *upon M/s Vishal Enterprises, Proprietor-Shri Vishalji Nigam, 365/3, Civil Lines, Unnao under the provisions of the Section 78 of the Finance Act, 1994, as amended.*

(iv) I also impose a penalty of ***Rs.10,000/- [Rupees Ten Thousand only]*** *upon the party under the provisions of section 77 (2) of the Finance Act, 1994 for violation of various provisions alleged in the demand notice and as discussed in the preceding paragraphs."*

2.1 Appellant was providing services to his clients for which he is registered under the category of 'Commercial or Industrial Construction Service'.

2.2 On the basis of third party information, it was gathered that during the Financial Year 2012-13 appellant has received gross amount of Rs.3,83,49,884/- for the services provided by them. Appellant though registered did not pay the service tax due nor filed ST-3 return w.e.f. 2010-11.

2.3 Investigations were made and revenue was of the view that the actual value of taxable services provided by appellant was suppressed, deliberately with intent to evade payment of Service Tax. It was for the investigations undertaken the evasion of Service Tax by the appellant was unearthed.

2.4 Appellant's contention that they had not paid Service Tax during relevant period, as the tax was not leviable on the sub-contractor, is not tenable, in as much as, the CBEC, vide Circular No.96/7/2007-ST Dated 23/8/2007 [para 999/03/23.08.2007), has clarified that a sub-contractor is also a taxable service provider.

2.5 Appellant by his acts of omission and commission contravened the following provisions of the Finance Act, 1994 and the Service Tax Rules, 1994, deliberately with intent to evade the payment of Service Tax:

- Section 66, 66B and Section 67 of the Finance Act, 1994, in as much as, they failed to declare the correct value of services rendered by them and failed to pay the Service Tax on the correct value during the period from 01.04. 2009 to 31.03.2014 for the said services rendered by them;
- Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, in as much as, they failed to pay appropriate Service Tax for the said services rendered by them;
- Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, as they failed to assess the tax due on the services provided by them and also failed to timely furnish the periodical returns in prescribed format with the jurisdictional Superintendent, Service Tax and accordingly, they rendered themselves liable for penal action under Section 77 of the Finance Act, 1994.

2.6 A Show cause notice dated 22.10.2014 was issued to the appellant asking them to show cause as to why-

(i) Service Tax amounting to Rs.1,89,00,604/- (incl. EC & SHEC) should not be demanded & recovered from them under the provisions of Section 73(1) of Finance Act, 1944. Since, the party have already deposited Service Tax amounting to Rs.34,167/-, (including cess), the same should not be confirmed and appropriated against the said liability of service tax;

(ii) Interest should not be demanded & recovered from them on the aforesaid amount of Service Tax under the provisions of Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 and

(iv) Penalty should not be imposed upon them under the provision of Section 78 of the Finance Act, 1994.

2.7 This show cause notice was adjudicated vide the impugned Order-in-Original stated in para-1 above. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Dharmendra Srivastava, Chartered Accountant for the appellant and Shri Santosh Kumar Authorized Representative for the revenue.

3.2 Appearing for the appellant learned Chartered Accountant submits that-

- there is no dispute with regard to the fact that the service tax was required to be paid by the Sub-contractor and in view of the decision of the Larger Bench of this Tribunal in the case of CST Vs Melange Developers P. Ltd. 2020 (33) GSTL 116 (LB).
- He claims that during the period in dispute he was under a bonafide belief that service tax was not leviable on him being the sub-contractor.
- Circular No.56/5/2003-ST dated 25.05.2003 clarified that the service tax was being paid by the main contractor and he was not required to pay the same.
- the services provided by him are equally classifiable under the category of 'Work Contract Services'.
- He should be allowed the bonafide belief of Notification No.1 of 2006 for computing the taxable value.

3.3 Learned Authorized Representative appearing for the revenue reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that the appellant was acting as a sub contractor of the main contractor providing services for which he claims to be classified under the category of 'Works Contract Service'. Undisputedly, the contracts against which these services have been provided are individual composite contract for supply of goods and service. In the impugned order the services have been held to classified under the category of *'Commercial and Industrial Construction Services'* the benefit of composition scheme has been denied to them. In para 27.5 & 27.6 of the impugned order following is observed:

> *27.5. I have also gone through the contents of contracts/work orders in search of any indication, which confirms that the contracts were with material or without material and also to ascertain the cost of material supplied by them. Although the party had pleaded in their defence reply that they have enclosed the Work Contract Deduction certificates as Annexure-8 but, I have failed to find any such certificate. The documents attached as annexure-8 are the photocopies of bunch of contracts entered between the party and their main contractor, which do not contain any information about real deduction of WCT. Not a single bill raised by them, to recover the amount from main contractors, has been produced before me to prove that material has been supplied while providing the services. The party in their reply had referred to the para 9 of the TRU letter B1/16/2007-TRU dated 22-05-2007, which explains the provisions of taxation in respect of work contract. I agree with the party's submission that contracts where sales tax vat has been levied the services shall be classified under the category of execution of works contract. I also agree with the party's submission that the Board clarification is binding upon the department but, at the same time, 1 would like to record that the department cannot go beyond the declaration of the party. When, the party itself had sought registration under the category of "Commercial & Industrial Construction" service and had never opted to assessment under the category of "Works Contract", how the department on its own can change the classification and extend benefit and that too in absence of any evidence on record to prove that the services provided by them were "Work Contract" services. Accordingly, I hold that the party's claim to reclassify their services is not acceptable and their services have rightly*

> *been classified under the category of "Commercial & Industrial Construction" Services.*
>
> *27.6. A s regards, the claim for valuation as per Rule 2A of the Service Tax (Determination of Values) Rules, 2006 or as per Composition Scheme under Work Contract (Composition Scheme for payment of Service Tax) Rules, 2007, I have examined the provisions and have noticed that the valuation sought by the party can be allowed only if the services provided by them are classifiable under work contract. In the above paragraphs, I have discussed the issue of classification in detail and have arrived at the conclusion that the classification sought by the party cannot be accepted in absence of any evidence on record and also due to the fact that the party itself had sought classification under commercial and industrial construction services. Moreover, in absence of any option for assessment under work contract composite scheme, the benefits sought for valuation/working out the tax liability as per Composition Scheme under Work Contract (Composition Scheme for payment of Service Tax) Rules, 2007 cannot be extended at this stage."*

4.3 The services provided by the appellant will be classified as "Work Contract Services" as has been held by the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)]. Relevant excerpts from the said decision are reproduced below:

> *"15. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting there from charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be*

made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts. 16. At this *stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.), as follows :- "No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :- "The cost of establishment of the* *contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods." For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India [(2005) 4 SCC 214], SCC at p. 228, para 23 :- "This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89) 17. We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows :- "To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for* *work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427) 18. Similarly, in Kone Elevator India (P) Ltd. v. State of T.N. - (2014) 7 SCC 1 = 2014 (34) S.T.R. 641 (S.C.) = 2014 (304) E.L.T. 3 (S.C.), this Court held :- "Coming to the stand and stance of the State of Haryana, as put forth by Mr. Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly,* *we unhesitatingly repel the same." (at para 60) 19. In Larsen & Toubro Ltd. v. State of Karnataka, (2014) 1 SCC 708 = 2014 (34) S.T.R. 481 (S.C.) = 2014 (303) E.L.T. 3 (S.C.), this Court stated :- "In our opinion, the term "works contract" in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of clause (29-A) in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods" and overcome Gannon Dunkerley (1) [State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd., AIR 1958 SC 560 : 1959 SCR 379]. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term "works contract". Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all* *genre of works contract in view when clause (29-A) was inserted in Article 366." (at para 72) 20. We also find that the assessees' argument that there is no charge to tax of works contracts in the Finance Act, 1994 is correct in view of what has been stated above. 21. This Court in Mathuram Agrawal v. State of M.P., (1999) 8 SCC 667, held :- "Another question that arises for consideration in this connection is whether sub-section (1) of Section 127-A and the proviso to sub-section (2)(b) should be construed together and the annual letting values of all the buildings owned by a person to be taken together for determining the amount to be paid as tax in respect of each building. In our considered view this position cannot be accepted. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter. This construction, in our considered view, amounts to supplementing the charging section by including something which the provision does not state. The construction placed on the said provision does not flow from the plain language* *of the provision. The proviso requires the exempted property to be subjected to tax and for the purpose of valuing that property alone the value of the other properties is to be taken into consideration. But, if in doing so, the said property becomes taxable, the Act does not provide at what rate it would be taxable. One cannot determine the rateable value of the small property by aggregating and adding the value of other properties, and arrive at a figure which is more than possibly the value of the property itself. Moreover, what rate of tax is to be applied to such a property is also not indicated." (at paras 12 and 16) 22. Equally, this Court in Govind Saran Ganga Saran v. CST, 1985 Supp SCC 205, held :- "The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity." (at para 6) 23. To similar effect is this Court's judgment in CIT v. B.C. Srinivasa Setty, (1981) 2 SCC 460, held :- "Section 45 charges the profits or gains arising from the transfer of a capital asset to income tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings Section 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head, "Capital gains". Section 45 is a charging section. For the purpose of imposing the charge. Parliament has enacted* *detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head." (at para 10)*

24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section

65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner. 26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract *is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.*

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated :- "State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract."

4.4 The issue with respect to classification of services and admissibility of the abatement as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006 or as per the Work

Contract (Composition Scheme for payment of Service Tax) Rules, 2007 has to be decided in light of the above referred decision of the Hon'ble Supreme Court in favour of Appellant.

4.5 Appellant do not dispute that as per the decision of larger bench, in case of Melange Developers P. Ltd. [2020 (33) GSTL 116 (LB)], sub contractor is liable to service tax, but he claims that during the period of dispute he was under bonafide belief on the basis of various circulars issued from time to time on the subject. In the case of Melange Developers, following has been held:

> *"A Division Bench of this Tribunal in its order dated 23 March, 2018 noticed that there were conflicting decisions of Division Benches of the Tribunal on the issue as to whether a sub-contractor is liable to pay Service Tax even if the main contractor has discharged the Service Tax liability on the gross amount and, therefore, considered it appropriate to place the matter before a Larger Bench. This Larger Bench has, accordingly, been constituted.*
>
> ***30.*** *Thus, for all the reasons stated above, it is not possible to accept the contention of the Learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.*
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> ***31.*** *The reference is, accordingly, answered in the following terms :*
>
> > ***"A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract.""***

4.6 The issue with regards to invocation of extended period also needs to be considered in the light of decision in the case of M/s Megh Raj Bansal Final Order No.60187 of 2023 dated

07.07.2023 wherein in identical situation Chandigarh Bench of this Tribunal has held as follows:-

> *11. The said findings on limitation has also been approved by the Larger Bench of the Tribunal in the case of* ***Melange Developers Pvt. Ltd. cited (Supra)****. Further, we find that this issue has also been considered recently by the Division Bench of the Ahmadabad Tribunal in the case of* ***Shanti Construction Company Vs. CCE & S.T., Gujarat reported in 2023-TIOL-223-CESTAT-AHM*** *wherein the Hon'ble Tribunal has considered various circulars issued by the department from time to time and also considered various decisions given by the Tribunal and thereafter held that extended period of limitation cannot be invoked to demand service tax in such cases.*
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> *12. In this regard, it is relevant to reproduce the said findings of the Tribunal in para 5.2 as under:*
>
>> *"On limitation also we agree with the argument of Ld, Counsel. We find that during the relevant period there were various Circulars and trade notices by the Commissionerate 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 stands 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:*
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>> *TRU letter F. No. 341/18/2004-TRU (Pt.) dated 17-12-2004*
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>> *-Circular No. 23/3/97-5.T., dated 13-10-1997 - Master Circular No. 96/7/2007-ST dated 23-8-2007*
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>> *In fact, also from various following decisions of the Tribunal:-*

- Urvi Construction v. CST, Ahmedabad 2010 (17) S.T.R. 302 (Tri. Ahmd.) = 2009- TIOL-1890-CESTAT-AHM

-CCE, Indore v. Shivhare Roadlines - 2009 (16) S.T.R. 335 (Tri.-Del.) =2009-TIOL-526-CESTAT-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.) 2006-TIOL- 1546-CESTAT-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.)= 2008-TIOL-809-CESTAT-BANG

- OIKOS v. CCE , Bangalore 2007 (5) S.T.R. 229 (Tri-Bang)= 2006- TIOL-1760-CESTAT-BANG

In the Tribunal's decision in the case of OIKOS v. CCE, Bangalore - III reported in 2007 (5) S.T.R. 229 confirmed against the subcontractor. 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.) =2010-TIOL-1575-CESTAT- AHM 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) 2009- TIOL-1867-CESTAT-MUM, the service tax confirmed against the subcontractor 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) 2010-TIOL-1215-CESTATDEL-LB."*

13. In view of our discussion above by following the ratio of the above said decisions we hold that the appellant being a subcontractor is liable to pay service tax on of 'Commercial or Industrial Construction Service' in view of the decision of the Larger Bench cited (Supra). But, extended period cannot be invoked to demand service tax from the appellant and in the present case the entire demand is barred by limitation as the demand pertains to the year 2004-05 and 2005-06 whereas show cause notice was issued on 28.03.2009 which is completely time barred."

4.7 As we find that the issue is squarely covered by the said decision of this Tribunal, we hold that the demand for the normal period of limitation will have to be upheld, by classifying the services provided by the appellant under the category of "Work Contract Services", and by extending the benefit of 2A of the Service Tax (Determination of Values) Rules, 2006 or as per Composition Scheme under Work Contract (Composition Scheme for payment of Service Tax) Rules, 2007.

4.8 As we have observed that the extended period of limitation should not be invoked, penalty under Section 78 is also set aside. However, penalty under Section 77 (2) is upheld.

5.1 Appeal is partly allowed by modifying the impugned order in the manner as indicated in para 4.7 & 4.8 above.

(Dictated and pronounced in open court)

Sd/-

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp