

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70178 of 2019

(Arising out of Order-in-Original No.LKO/EXCUS/CoMM/ST/010/2018-19 dated 07/01/2019 passed by Commissioner of CGST & Central Excise, Lucknow)

M/s ITI Ltd.,
(Mankapur Gonda, U.P.)

.....Appellant

VERSUS

Commissioner of CGST &

Central Excise, Lucknow

....Respondent

(7A, Ashok Marg, Lucknow)

APPEARANCE:

Shri S.P. Ojha, Consultant for the Appellant

Shri Sandeep Pandey, Authorised Representative for the Respondent

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

FINAL ORDER NO.70113/2024

DATE OF HEARING : 10 November, 2023
DATE OF PRONOUNCEMENT : 05 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Original No. LKO/EXCUS//COMM/ST/ 010/2018-19 dtd 07 /01/2019 of the Commissioner, CGST & Central Excise, Lucknow. By the impugned order following has been held:

"ORDER

13.1 I confirm the amount of service tax short paid amounting to Rs. 40,92,45,400/- (Rs Forty Crore, Ninety Two Lakh, Forty Five Thousand, Four Hundred only) on Ms I.T.I, Ltd.. Mankapur Distt. - Gonda (U.P.), and order for its recovery under Section 73 of the Finance Act 1994 read with Section 142(8) & 174 of the CGST Act, 2017 along

with applicable interest under Section 75, of the Finance Act 1994

13.2 I impose penalty of s 4,09,24,540 (Rs Four Crore, Nine Lakh, Twenty Four Thousand, Five Hundred Forty Only) upon the noticee under Section 76 of the Act for having contravened the provisions contained in Section 68 of the Finance Act, 1994"

2.1 A show cause cum demand notice dated 14.04.2018 was issued to the appellant, observing as follows:

2.1 Appellant is engaged in providing "Erection Commissioning or installation Service" and "Management, Maintenance or Repairing Service" to M/s Bharat Sanchar Nigam Ltd (M/s BSNL), which are defined under Section 65 (105) of the Finance Act, 1994. The appellant is providing services from their factory premises situated at - Mankapur, Distt Gonda, Uttar Pradesh, and other centers across the country including Mumbai and for which they obtained Centralized Service Tax Registration.

2.2 Pursuant to the Audit of records of the party. a Demand-cum-show cause notice dated 14.10.2015 for the period 2010-11 to 2014-15 was issued to the party for short payment of Service Tax amounting to Rs 84,35,14,597/-.

2.3 To ascertain the Service Tax liability for subsequent period the F.Y 2015-16 to 2017-18, various communications dated 06.09.2017, 25.10.2017, 28.12.2017 (RUD-3) were made by the Superintendent, CGST & Central Excise, Range - Gonda asking appellant to provide the copies of Balance sheet, ST-3 returns and copies of ledgers for sales of services for the F.Y. 2015-16. 2016-17 and 2017-18 (upto June'17), but the party did not respond. In response to communication dated 28.02.2018 appellant vide their letter received on 26.03.2018, submitted the copies of Balance Sheet for the F.Y. 2015-16 to 2016-17 and copies of electronically filed ST-3 returns They also submitted manually filed revised ST- 3 returns for the period Oct.'15 to March'16 and Oct.'16 to March'17. By communication dated 27.03.2018 and 02.04.2018 appellant was asked again to

provide the copies of ledger for sale of services and legible copies of financial documents for the F.Y 2015-16 and 2016-17 and also for the period April'17 to June'17. 2.4 On comparing the value of sale of services shown in the Balance sheet thereof with ST-3 returns during corresponding period, it was observed that they had short paid the service tax as shown in the table below:

Details of Service Tax short paid by M/s ITI Ltd., Mankapur, Gonda						Amount in Lakh
Period/ Financial year	Value of sale of services as per B/S	Assessable value =(value excluding Service tax)	Rate of Service tax (%)	Actual Service tax liability	Service tax paid by the party as a service provider and shown in ST- 3 returns for the whole F.Y.	Differential amount of service tax which is short paid by the party
2015-16	10501.91	9171.97	14.5	1329.94	1148.247	181.689
2016-17	34761.50	30227.39	15.0	4534.11	623.344	3910.764
Total						4092.454

2.5 Appellant were called upon to show cause as to

- why the amount of Service Tax short paid amounting to Rs. 40,92,45,400/- (Rs Forty crore Ninety Two lacs Forty Five thousand and Four hundred only) should not be demanded and recovered from them under Section 73(1) of the Finance Act 1994 read with Section 142(8) & 174 of the CGST Act 2017 along with applicable interest under Section 75, ibid.
- penalty should not be imposed upon them under Section 76 of the Act for having contravened the provisions contained in Section 68 with intent to evade the payment of service tax

2.6 The show cause notice has been adjudicated as per the impugned order. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri S.P. Ojha, Consultant for the appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned consultant submits that:

- Since, the service under the category of installation and commissioning of GSM based mobile network has been provided in the States of Maharashtra & Goa by the co-contractor and sub - contractors and service tax has also been paid in the jurisdiction of the said States, show cause notice issued by the Commissioner Central Excise & Service Tax, Lucknow so far, it related to payment of service tax made by the co- contractor and sub-contractors is bad in law and the impugned order passed in pursuance thereof is also bad in law.
- In this case, the Learned Commissioner has nullified the payments of service tax made by the co-contractor and sub- contractors and confirmed the demand against the appellants on the same taxable value which has already suffered service tax at the hands of co-contractor and sub contractors and the appellants . The impugned order therefore, is violative of the provisions of Section 66B of the Finance Act, 1994 and the mandate of Article 265 of the Constitution. Reliance is placed on the decision in the case of Reliance Securities Ltd. [2019 (20) G.S.T.L. 265 (Tri. Mumbai)].
- Demand based on comparison of figures shown in ST-3 returns and Balance Sheet is not sustainable as the figures shown in Balance Sheet reflects the full amount i.e value of goods manufactured / procured and sold, the sale of services including other profits whereas, the ST-3 returns contain the details regarding services provided and service tax paid on the taxable value. The appellants rely upon the following
 - A certificate of Chartered Accountant regarding the value of goods and value of service
 - Tempest Advertising (P) Ltd. [2007 (5) S.T.R. 312 (Tri.- Bang.)] Go Bindas Entertainment Pvt. Ltd [2019 (27) GSTL (Tri. Alld)] Annexure-3
- Earlier show cause notice No. 05/Commr/LKO/ST/2017-18 was issued by the Commissioner, CGST and Central Excise

Commissionerate, Lucknow demanding service tax amounting to Rs.3,92,29,264/- (Rs.2,46,83,864/- + Rs.1,46,45,400/-) for the period from 18 April 2014 to 30.09.2016 whereas, the show cause notice under reference has been issued demanding of service tax amounting to Rs. 40,92,45,400/- for the services provided during the period from 2015-16 to 2016-17. The period from 01.04.2015 to 30.09.2016 is common in both the show cause notices. The impugned Order is bad in law inter- alia for the reasons first because the demand of service tax on service provided during the period from 01.04.2015 to 30.09.2016 on similar, services amount to double taxation and violates of Article 265 of the Constitution and secondly, because the demand is barred by the principle of res-judicata. Reliance is placed on

- Vadilal Gases Limited [2014 (301) ELT 321 (Guj.)]
 - Paro Food Products [2005 (184) ELT 50 (Tri. Bang.)]
 - Vicco Laboratories [2007 (218) ELT 647(SC)]
- Services under the category of installation and commissioning of GSM based mobile network have been provided by M/s ALIL, M/S HCL Infosystem Ltd and others who have paid service tax on the value of taxable services provided by each of them in the State of Maharashtra and GOA as being co- contractor and sub- contractors. The appellants have paid service tax on differential value calculated by deducting the taxable value on which service tax has been paid from the taxable value charged from the BSNL i.e the recipients of service. The appellants are entitled to avail set off to the extent of value on which service tax has already been paid by M/s ALIL and sub-contractors and reimbursed by the appellants to the provider of services. The appellants refer to the following decisions:-
- Engineers India Technical Services [2014 (34) STR 358 (Tri. Delhi.)]

- Reliance Infrastructure Ltd. [2017 (6) G.S.T.L. 51 (Tri. All.)]
- Semac Pvt. Ltd. [2006 (4) S.T.R. 475 (Tri. - Bang.)].
- The appellants are paying service tax on Following categories of services:-
 - Maintenance and repair
 - Renting of immovable property
 - Renting of motor vehicle (under reverse charge)
 - Goods transport service (under reverse charge)
 - Installation and commissioning of optic cable network to connect 219 Army Station and 33 Navy Stations In the States of West Bengal Bihar, Jharkhand, Orissa, Andaman Nicobar island and Sikkim.
 - Installation testing and commissioning of GSM based cellular system.
- The services listed at serial No. (i) to (iv) have either been provided or received by the appellants in their factory and services listed at serial nos. (v) & (vi) have been provided through co-contractor or sub-contractor. The details of payments received against each are given in appeal
- From the Copy of Purchase Order No. CT/PO/07 /2014-15 dated 16.09.2014 placed by M/s BSNL for providing services of installation, testing and commissioning of Fibre Optic Cable network to connect Army stations, Air force and Navy Stations in the States of West Bengal Bihar, Jharkhand, Orissa, Andaman & Nicobar Island and Sikkim of ETP regions, it is evident that the service was to be provided to Defence department which is "Government" within the meaning of Section 65B (26A) of the Finance Act, 1994. Works Contract Services provided to Government is exempt as per Serial No. 12 of the Notification No. 25/2012-ST dated 20.06.2012.
- They have provided goods worth Rs. 64,86,987/- for execution of Purchase Order dated 03.08.2010, demand of

service tax on value of goods is bad in law as the value of goods is shown separately in the purchase orders.

- Amendment made in Section 73(1) by virtue of Finance Act, 2016 is prospective in nature and cannot be applied retrospectively. Reliance on case of ELGI Equipment Ltd [2011(128)E.L.T52 (SC)]
- Demand upto April, 2016 is barred by limitation. Reliance on following decisions:
 - Pushpam Pharmaceuticals [1995 (78) ELT 401 (SC)]
 - Nizam Sugar Factory [2008(9) S.TR 314(SC.)]
- Since, the demand of service tax is not sustainable the demand of interest and imposition of penalty are unjustified, as held in H.M.M. Limited [1995 (76) E.L.T 497(S.C.)]
- The appellants are Public Sector undertaking and the service has been provided to M/s BSNL who are also Public Sector undertaking, as such no malafide intention can be attributed. Therefore the imposition of penalty is unjustified as per Garden Reach Ship Builders & Engineers Ltd. [1989 (42) E.L.T. 506 (Tribunal)]

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submits:

- appellants have not provided copies of contract with the Ministry of Defence establishing that they have provided services as a contractor or a sub- contractors to the Ministry of Defence;
- the appellant failed to substantiate that out of the total value of services amounting to Rs.45263.41/- Lakh as shown in Balance Sheet during the disputed period the amount of Rs. 26323.18 Lakh is exempt from service tax under Notification No. 25/2012 dated 20.03.2012;
- With effect from 14.05.2016 amendment was made in Section 73(1) of the Finance Act, 1994 and the normal period was extended to 30 months therefore, there is no

dispute about the fact that the present show cause notice which was issued on 13.04.2018 is not barred by limitation:

- the show cause notice No. 05/Comm./Lko/ST/2017-18 dated 15.06.2017 was issued for recovery of CENVAT credit amounting to Rs. 2,46,83,864/- shown as paid by adjustment of amount paid in advance whereas, the impugned show cause notice has been issued for recovery of service tax short paid due to difference in value of sale of services as shown in the Balance Sheet and the figures recorded in ST-3 return.
- The appeal be dismissed.

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

4.2 For holding against the appellant impugned order records following findings:

"8.The basic issue to be decided in the instant show cause notice hinges on the following points

- a. Whether the noticee is liable to pay service tax short paid for the F.Y. 2015-16 and F.Y. 2016-17 amounting to Rs 40,92,45,400/-.*
- b. Whether the show cause notice is time barred as contended by the noticee.*

9. I find that the instant SCN has been issued based on difference in the figures of sale of service in the Balance Sheets for the financial years 2015-2016 and 2016-2017 vis a vis the figures of service tax paid by the noticee in their ST 3 Returns. The noticee have contended that they have provided services of installation, testing and commissioning of fibre optic cable network to connect Army Stations, Navy Stations and Air Force Stations in the States of West Bengal, Bihar, Jharkhand Orrisa, Andaman and Nicobar sland and Sikkim of ETP Regions and therefore no service tax is payable by them.

I find that the noticee has not provided copies of contract with the Ministry of Defence establishing that the noticee has provided services as a contractor or a sub contractor to the Ministry of Defence. The noticee has also contended that they have provided .services of installation, testing and commissioning of fibre optic cable network to the Ministry of Defence valued at Rs 26323.18 lakh in the F.Y 2016 - 2017 but they have not provided any document (copies of invoices etc.) to establish that the value of sale of service is Rs 26323.18 lakh as well as that the service has been provided to the Ministry of Defence.

Thus the noticee has failed to substantiate their submission that out of the total sale of services amounting to Rs 45263.41 lakh as shown in the Balance Sheets for the F.Y 2015- 16 and 2016-17, the amount of Rs 26323.18 lakh is exempt from service tax as per exemption allowed by Mega Notification No. 25/2012 dated 20/06/2012

10. also find that the noticee has contested that the SCN is barred by limitation as all the documents which were the basis for proceedings initiated vide show cause notice No 05/Commr./LKO/ST/2017-18 dated 15.06.2015 are also basis for the impugned proceeding. It would be pertinent to mention here that the copies of balance sheets for F Y 2015-16 and F Y 2016-17 were submitted by the noticee as late as on 22/03/2018. The short payment of service tax was detected only when the value of sale of services as shown in the submitted Balance Sheets was compared with the value of services provided and service tax paid as shown in ST-3 Returns. Thus had the Balance Sheets not been called for by the Department, this anomaly would not have been detected. I also find that w.e.f 14/05/2016 amendment was made in Section 73(1) of the Finance Act, 1994 and the normal time limit of 18 months was extended to 30 months. Therefore, there is no dispute about the fact that the present Show Cause Notice which was issued on 13/04/2018 is not barred by

limitation because it has been issued within the time limit of 30 months from the relevant date as the noticee has filed their ST-3 Return for April 2015 to September 2015 on 17/10/2015

11. I also find that the noticee has contended that demand for the period 01.04.2015 to 30.09.2016 in the instant SCN is not sustainable as the earlier SCN No. 05/COMMR/LKO/ST/2017-18 dtd 15/06/2107 has already covered this period In this connection I find that the SCN 05/COMMR/LKO/ST/2017-18 Dtd 15/06/2017 was issued to the party for:-

(i) recovery of Cenvat Credit taken and utilized amounting to Rs. 2,46.83 864/- (Rupees Two Crore, Forty Six Lakh, Eighty Three Thousand, Eight Hundred Sixty Four Only) without any proper documents as provided in Sub Rule 1 of Rule 9 of Cenvat Credit Rules 2004 for payment of Service Tax for the period from April, 2014 to September, 2016

(ii) the recovery of amount of service tax of Rs. 1.46.91,296.00 Rs. One Crore Forty Six Lakh, Ninety One Thousand, Two Hundred Ninety Six Only) shown as paid by adjustment of amount paid in advance under Rule 6(1A) of the Service Tax Rules, 1994.

The impugned SCN has been issued for recovery of service tax short paid due to difference in the value of sale of services as shown in the Balance sheet for F.Y. 2015-16 to 2016-16, with assessable value of services provided and service tax payment details as shown in ST-3 returns for the corresponding period. Thus, it is evident that the issues in both the referred SCNs are totally different even though the period of demand from 01.04.2015 to 30.09.2016 is overlapping find that the noticee has not contested the duty liability on the services provided other than

12. their claim of exemption of service tax on services provided to the Defence Establishments which they have failed to substantiate with documents evidencing the proof

that the said services were rendered to Ministry of Defence. In view of the discussions in the foregoing paras, I find that the differential demand of short paid service tax amounting to Rs 4092.454 lakh along with interest should be recovered from the noticee in terms of Section 73 of the Finance Act, 1994 and Section 75 of the Finance Act, 1994. Accordingly, they are also liable to penalty under Section 76 of the Finance Act, 1994"

4.3 Following issues have been raised in this appeal for our consideration:

- Whether show cause notice dated 13.04.2018 could have been issued when another show cause notices dated 15.06.2017 for the same period on the same category of service.
- Whether the amount of service tax has been determined correctly and whether service tax has not been paid so that demand can be sustained;
- Whether the show cause notice has been issued within the period of limitation;
- Whether the demand of interest and imposition of penalty are justified;

Whether show cause notice dated 13.04.2018 could have been issued when another show cause notices dated 15.06.2017 for the same period on the same category of service.

4.4 From the facts available on record and recorded in the show cause notice it is evident that appellant had not provided the copies of the Balance Sheet and ST-3 returns to the revenue authority despite repeated correspondences. The show cause notice dated 13.04.2018 was issued on the basis of comparison of the figures in the Balance Sheet and ST-3 returns. Appellant had himself provided this information only vide its letter dated 22.03.2018. Appellant challenge to the issuance of the show cause notice dated 13.4.2018, for the reason that another show cause notice dated 15.06.2017 had been issued to them for the

some overlapping period. In case of Naresh Kumar & Co. (P) Ltd. [2014 (35) S.T.R. 330 (Tri. - Del.)] Tribunal has held as follows:

"15. Appellants have raised the preliminary objection that when two notices dated 9-10-2002 and other notice under Section 71(2) of Finance Act on 20-5-2003 were issued to them, third Show Cause Notice is not sustainable. On the other hand Revenue's contention is that appellants did not submit any detail about commission received and notice dated 9-10-2002 was issued to them for getting correct details and in absence of details amount of service tax was not specified in the Show Cause Notice dated 9-10-2002. Notice dated 20-5-2003 was issued under Section 71(2) of the Finance Act asking the appellant for producing books of accounts. Notice dated 20-5-2003 was not under Section 73 of the Finance Act. We find that this appeal is against the impugned order passed in adjudication proceeding of the Show Cause Notice dated 23-9-2003. It is not case of the appellants that other two notices have also been adjudicated against them on the same issues and same period. Issue whether extended period of limitation can be invoked in view of earlier Show Cause Notice issued to time will be discussed in subsequent paragraph of this order.

16. Appellants also contended that the Show Cause Notice dated 23-9-2003 cannot be issued when Show Cause Notice was already issued for the same period and appellants relying on decision of Tribunal and Court in the support of this contention.

17. In case of Siddharth Tubes (supra) this Tribunal held Show Cause Notice cannot be issued to same period on different grounds. That case is distinguishable from the present case as assessee did not provide any information to the Department as evident from first Show Cause Notice.

In case of Commissioner of Income Tax, Gujarat v. Bhanji - 79 ITR 582(S.C.), the Apex Court has held that "when the

primary facts necessary for assessment are fully and truly disclosed, he is not entitled to change of opinion to commence proceedings for reassessment.” This decision is also not applicable as appellants have not submitted the information asked for by the Department in Show Cause Notice dated 9-10-2002 and 20-5-2002.

In case of Duncans Industries Ltd. v. CCE, New Delhi - 2006 (201) E.L.T. 517 (S.C), the Apex Court has held that once dues for entire period of dispute settled and paid under Kar Vivad Samadhan Scheme 1998, no further proceedings could be initiated or proceeded by any authority under the Act. This decision is not applicable as the matter is neither under KVSS nor all dues have been paid by the appellants.

In R.C. Fabrics case, assessee waived the Show Cause Notice and hearing and thereafter a adjudication under dated 10/15 Jan, 1991 was passed by the Assistant Collector of Customs. Thereafter DRI took up investigation and issued another Show Cause Notice 18-2-1991 which was adjudicated by the Additional Collector on 25-2-1991 on the basis of Test reports dated Nov., 26/Dec. 4, 1990. Delhi High Court held that since first adjudication order has attained finality and fresh proceedings in report of same goods are null and void. We find that this decision is not applicable to present case on two grounds firstly in present case Show Cause Notice dated 9-10-2002 has not been adjudicated and secondly the said decision of Delhi High Court is reversed by Supreme Court as reported in 2002 (139) E.L.T. 12 (S.C.).

In case of SACI Allied Products Ltd., Tribunal has decided the issue which was not raised is Show Cause Notice and in order passed by Collector. There is no such situation here in the present case :

In Toyo Engineering India Ltd. - 2006 (201) E.L.T. 513 (S.C.) the Supreme Court held that department cannot travel beyond the Show Cause Notice. We find that

impugned order has been passed by the Commissioner as per Show Cause Notice dated 23-9-2003.

Present case is different from above cases as appellants did not provide any information to the Department at the time of issue of earlier Show Cause Notice.

18. It is also pointed out by the appellants that first Show Cause Notice is still valid without specifying the amount of tax in view of decision of Tribunal (LB) in case of Bihari Silk & Rayon Processing Mills (P) Ltd. (supra). In this case the Show Cause Notice which was adjudicated was not specifying any amount and Larger Bench held that Show Cause Notice is not invalid for want of amount specified as other details were mentioned in the Show Cause Notice. This decision also not applicable to present case as Show Cause Notice dated 9-10-2002 is not adjudicated and is not subject matter of present appeal."

This order of Tribunal has been set aside by Hon'ble Allahabad High Court as reported at [2014 (35) S.T.R. 257 (All.)]. However even after considering the arguments Hon'ble High Court has considered the show cause notice to be issued legally and after considering the show cause notice have set aside the demand made on the ground of limitation. Relevant excerpts from the order of Hon'ble High Court are reproduced below:

"2. These two appeals, under Section 35 of the Central Excise Act, read with Finance Act, 1994 are arising from the order passed by the Central Excise and Service Tax Tribunal, dated 16-8-2013 [2014 (35) S.T.R. 330 (Tribunal)]. Appeal No. 337 of 2013 has been admitted on the following substantial questions of law :

"I. Whether after having initiated assessment proceeding twice against the appellant by show cause notice dated 9-10-2002 and notice dated 20-5-2003, the Department was right under the law to issue third show cause notice dated 23-9-2003 (from 1-9-1999 to 31-3-2003) on the same basis, same very issue and

same very period and the said show cause notice dated 23-9-2003 and proceedings thereon is legal and valid under the law?

....

4.

5. The appellant has been issued a notice on 18-4-2002, asking

6. The appellant filed reply, dated 15-5-2002,

7. The appellant received a show cause notice dated 9-10-2002 from the office of the Deputy Commissioner, Central Excise, Division-III, Ghaziabad, demanding service tax for the period 1-9-1999 till the date of issuance of the show cause notice, under Section 73 for making the assessment and also imposing the penalties, under Sections 75A, 76, 77 and 78 of the Finance Act, 1994, under the category of C&F agent services.

8. It appears that no further action has been taken on the show cause notice.

9.

10. Thereafter, the Superintendent, Central Excises, Ghaziabad, issued a notice dated 12-5-2003, under Section 71(2) of the Act for verification of the tax assessed in ST-3 returns for the period from 1-9-1999 onward up to 30-9-2003.

11. The appellant filed the reply to the notice on 28-5-2003 wherein it has been submitted that by a detailed submission made on 15-5-2002,

12. After the notice and the proceeding being taken, neither the Superintendent, Central Excise has passed any order, nor has referred the matter to the Assistant Commissioner, as required under Section 71(3) of the Act, which, at the relevant time, provided that if on verification, under sub-section (2), the Superintendent of Central Excise

is of the opinion that service tax on any service provided has escaped assessment or has been under-assessed, he may refer the matter to the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise, who may pass order of assessment as he thinks fit.

13. Subsequently, third notice dated 6-9-2003 has been issued by the Deputy Commissioner, under Section 73 of the Act. In the notice, it is specifically mentioned that the notice is being issued under Section 73(1)(a) of the Act. In the notice, the petitioner was required to show cause why an amount of Rs. 55,31,773/- should not be determined as service tax on the gross value of Rs. 11,06,35,467, realized towards taxable service rendered to their client, i.e. TISCO during the period from 1-9-1999 to 31-3-2003. To show cause why the appellant should not be asked to pay, by way of penalty, under Section 78, in addition to service tax and the interest, under Section 75; why the appellant should not be required to pay a penalty of Rs. 2,00/-, under Section 76, for every day, for the period during which the appellant failed to pay the service tax and also for the period during which such failure continued; to show cause why penalty should not be imposed, under Sections 70 and 77 of the Act for not furnishing the details in the prescribed ST-3 returns in the manner provided under the Service Tax Rules, 1994.

....

19. Learned counsel for the appellant advanced following submissions:

.....

(e) He submitted that once on the same issue, a notice under Section 73 has been issued and no order has been passed and further a notice under Section 71(2) has been issued on that too no order has been passed, thus, third notice for the same cause, under Section 73 is not justified. The submission is that in

the notice, there is a specific mention that it is being issued under Section 73(1)(a). The Tribunal has illegally observed that the notice was within time as it has been issued within one year from the date of filing of the ST-3 return. The limitation of one year is provided for Section 73(1)(b) inasmuch as no case has been made out that the notice is being issued in consequence of an information. Reliance is being placed on the three decisions of the Tribunal, namely, CCE, Indore v. Siddharth Tubes Ltd. - 2004 (170) E.L.T. 331 (Delhi-Tribunal), Bridgestone India Pvt. Ltd. v. CCE, Indore, 2013 (294) E.L.T. 601 (Delhi-Tribunal) and Shreeji Colourchem Industries v. CCE & Cus., Vadodara, 2013 (294) E.L.T. 615 (Ahmedabad-Tribunal).

.....

32. There is no dispute that show cause notice has been issued under Section 73(1)(a) of the Act for the period 1-9-1999 to 31-3-2003 to show cause that why the amount of Rs. 55,31,773/- should not be demanded as service tax on the gross value of Rs. 11,06,35,467/- and why the interest under Section 75 of the Act be not demanded and the penalty under Sections 76, 77 and 78 may not be levied."

4.5 In case of Varun Beverages Ltd [Final Order No 50207/2022 dated 03.03.2022], Tribunal has considered the similar objection and observed as follows:

"Issue of two show cause notices for the same Period

18. The preliminary objection by the appellant is that a show cause notice dated 10 February 2016 was issued by the Department demanding duty short paid by irregularly availing exemption under Notification No. 1/2011-CE along with interest and penalty. The present show cause notice dated 18 February 2016 was issued for the same audit period seeking to deny Cenvat credit alleged to have been

availed by the appellant. It has been asserted that two show cause notices cannot be issued by the Department on piecemeal basis for the same period and for this submission reliance was placed on the Simplex Infrastructures Ltd.[2016 (42) STR 634 (Cal.)], in which Calcutta High Court held as follows : "there cannot be a double assessment for the period 10 September 2004 to 31 September 2005 as the Department has sought to do. The periods pertaining to which the show cause notice dated 21 April 2006 and the show cause notice dated 7 September 2009 were issued overlap to an appreciable extent". It has also been submitted that this is not permissible in law as held by the Calcutta High Court in Avery India Ltd. Vs. Union of India [2011 (268) ELT 64 (Cal.)]. Learned Counsel also relied upon in Duncans Industries Ltd. Vs. Commissioner of Central Excise, New Delhi [2006 (201) ELT 517 (SC)], Paro Food Products [2005 (184) ELT 50 (Tri.-Bang.)] and Shreeji Colourchem Industries [2013 (294) ELT 615 (Tri.)].

19. We find all these case laws dealt with cases in which the assessment of duty/service tax was proposed for the same period and differential duty/service tax was demanded on different grounds in different show cause notices. The present case is different. Consequent upon the audit report, a show cause notice was issued demanding duty which is not the subject matter of the present dispute. Demand of duty is a matter of assessment. If duty is short paid it can be recovered under Section 11A after issuing a notice. The show cause notice which culminated in the present appeal has nothing to do with duty. It deals with a different issue of Cenvat credit. Irregularly availed Cenvat credit is recoverable under Rule 14 of CCR, 2004. There is no detailed mechanism laid down for recovery under Rule 14 of CCR, 2004 and for this purpose the provisions of Section 11A have been made applicable mutatis mutandis for Rule 14 also. Nevertheless,

any recovery of irregularly availed Cenvat credit under Rule 14 is not demand of duty at all. Section 11A deals with the duty which the assessee has to pay on final products. Rule 14 deals with the credit of duty on inputs which someone else had paid which the assessee has taken credit of. Any denial of Cenvat taken will not affect the duty liability. Similarly, any demand of duty will not affect the Cenvat credit. If Cenvat credit is wrongly availed, a penalty can be imposed under Rule 15 of CCR, 2004. If duty is short paid, penalty can be imposed under Section 11AC. Therefore, we do not find any illegality in the Revenue issuing two show cause notices; one for recovery of irregular availed Cenvat credit (which is subject matter of the present appeal) and another show cause notice for recovery of duty short paid. It does not amount to two assessments for the same period in this case.”

In view of the decisions as above we do not find any merits in this objection raised by the appellant.

Whether the amount of service tax has been determined correctly and whether service tax has not been paid so that demand can be sustained.

4.6 The appellant is engaged in the manufacture of various communication equipments and parts thereof and sell them exclusively to M/s Bharat Sanchar Nigam Limited (BSNL) and to Mahanagar Telephone Nigam Ltd (MTNL) who are also public sector undertakings. They also provide taxable service under the category of maintenance and repair of parts of communication equipments received from the above buyers and pay service tax thereon. Their Corporate Office is situated at ITI Bhawan, Doorvani Nagar, Bangalore.

4.7 BSNL vide purchase order dated 03.09.2010 placed an order for supply of goods and services of installation and commissioning of GSM based mobile network on the Corporate Office together and its Technology, Partner M/s Alcatel Lucent

India Ltd (ALIL). The Corporate Office allotted the aforesaid purchase orders to its project office at Pune, for allotment of purchase order to co-contractor and sub-contractors and supervision of execution and completion of the work by the sub-contractors within the specified period. Pune Office issued purchase orders relating to installation and commissioning of GSM based Mobile Networks to its technology partner M/s ALIL and to sub- contractors M/s HCL Infosystem for installation and commissioning of the equipment on back to back and cost to cost basis. The said co-contractor and sub-contractor executed the service of installation and commissioning of GSM based mobile net work and paid service tax on the taxable value and raised bills on Project Office, Pune. Project Office, Pune was attached to the appellants for the purpose of submission of ST-3 returns and preparation of Balance Sheet as such they submitted to the appellants the details of purchase and sale of service and copies of invoices raised by M/s ALIL & HCL Infosystem and other sub- contractors. The price schedule attached to the said Purchase order is reproduced below:

	Ph1 ITI	Ph2 ITI2	Ph2 ALIT	Total
IMP	91,22,37,87 9	39,71,82,09 1	124,45,89,5 55	255,40,09,5 25
INDG	81,85,06,75 8	189,46,53,2 29	86,53,86,70 1	357,85,46,6 88
SER	9,13,66,172	0	14,98,79,12 5	24,12,45,29 7
TOTAL	182,21,10,8 09	229,18,35,3 20	225,98,55,3 81	637,38,01,5 10

4.8 The Corporate office entered into another contract with M/s BSNL on 16.09.2014 for procurement supply, trenching laying, installation, testing and maintenance of optical fibre cable, PLB Duct and accessories for construction of exclusive optical NLD backbone and optical access routes on turnkey basis for Defence Network. This purchase order was allotted to the appellants for further necessary action. The appellants allotted the aforesaid work to M/s A to Z Maintenance & Engineering

Services Ltd for execution of the work in the State of West Bengal, Bihar, Jharkhand, Odisha, Andman and Nicobar Islands and Sikkim ETP Region on back to back basis. At SI No 10- Prices (Clause 63 section III) the breakup of prices is as indicated below:

1	Material (INR)	356,00,86,363
2	NLD Services (INR)	406,71,29,347
3	Access services (INR)	79,01,94,100
4	Training (INR)	2,09,23,240
5	Total (INR)	843,83,33,050

4.9 From the perusal of the above it is evident that under these purchase orders, the value of the services to be provided and the value of the goods supplied has been shown separately. On the value of the goods supplied against these purchase order, the Customs Duty (on imported goods), Central Excise Duty (On the indigenous goods) and VAT is paid. On the value of Service supplied the service tax as liable is paid. Though the above contract is supply of both goods and services the same is not the work contract, as it itself bifurcates the value of the goods and services. At the best the contracts can be said to be composite contract for supply of the goods and services, rather than work contract. In case of Larsen and Tubro Ltd [2015 (39) S.T.R. 913 (S.C.)] Hon'ble Supreme Court has observed as follows:

"14. Crucial to the understanding and determination of the issue at hand is the second Gannon Dunkerley judgment which is reported in (1993) 1 SCC 364. By the aforesaid judgment, the modalities of taxing composite indivisible works contracts was gone into. This Court said :-

"On behalf of the contractors, it has been urged that under a law imposing a tax on the transfer of property in goods involved in the execution of a works contract under Entry 54 of the State List read with Article 366(29-A)(b), the tax is imposed on the goods which are involved in the execution of a works contract and the measure for levying such a tax can

only be the value of the goods so involved and the value of the works contract cannot be made the measure for levying the tax. The submission is further that the value of such goods would be the cost of acquisition of the goods by the contractor and, therefore, the measure for levy of tax can only be the cost at which the goods involved in the execution of a works contract were obtained by the contractor. On behalf of the States, it has been submitted that since the property in goods which are involved in the execution of a works contract passes only when the goods are incorporated in the works, the measure for the levy of the tax would be the value of the goods at the time of their incorporation in the works as well as the cost of incorporation of the goods in the works. We are in agreement with the submission that measure for the levy of the tax contemplated by Article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. In Builders' Association case [(1989) 2 SCC 645 : 1989 SCC (Tax) 317 : (1989) 2 SCR 320] it has been pointed out that in Article 366(29-A)(b), "[t]he emphasis is on the transfer of property in goods (whether as goods or in some other form)". (SCC p. 669, para 32: SCR p. 347). This indicates that though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. We are, however, unable to agree with the contention urged on behalf of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods

in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b).

Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works, [item No. (i)], amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel, etc. which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price

includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and

deducting therefrom the charges towards labour and services which would cover —

- (a) Labour charges for execution of the works;*
- (b) amount paid to a sub-contractor for labour and services;*
- (c) charges for planning, designing and architect's fees;*
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;*
- (e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and*
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;*
- (g) other similar expenses relatable to supply of labour and services;*
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.*

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and

the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts.”
(at paras 45, 47 and 49)

15. A reading of this judgment, on which counsel for the assessee 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 therefrom 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 assesseees 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 assesseees 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)

....

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.

29. It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament.

41. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery

for levy and assessment of service tax on indivisible works contracts.”

4.10 From the above decision of the Hon’ble Apex Court it is quite evident that in no case whether in the composite contract specifying the value of service and the value of the goods sold while providing the taxable service or in the case of indivisible contract, the value of goods supplied can not be included for determining the taxable value for the purpose of determination of the service tax payable. In case of the indivisible contracts the taxable value needs to be determined in the manner as prescribed by the Works Contract (Composition Scheme for Payment of Service Tax) Rule, 2007. In case of the composite contract, specifying the value of goods supplied and value of services separately, the taxable value needs to be determined by taking the value of taxable service from the contract.

4.11 In the present case we find that the appellant has produced the copies of the contracts/purchase orders before the adjudicating authority who has failed to render any findings for determination of the taxable value in respect of these contracts. The demand has been made by comparing the figures from the Balance Sheet of the appellant with the ST-3 returns filed by the Appellant without rendering any findings in respect of the contracts against which these services have been provided. Appellant has submitted a reconciliation chart reproduced below comparing the figures of taxable services on the basis of balance sheet and that in ST-3 returns, which is reproduced below:

Year	Services Sales (inclusive of Service Tax + Equipment Sales) as per B/s	Service Tax	Equipment sale	Net Service sales	Type of Services	Non Taxable Service Sales	Taxable Services Sales	Total Services Sales	Service Tax	Total Sales (incls of Service Tax.)
	1	2	3	4=1-2	5	6	7	8	9	10=3+7
2015-16	1050190864	129055108	6486987	914648769	NFS Pkg F	0	120074889	120074889	17410859	1050190864
					MKP AMC	0	4014511	4014511	563918	

					Total MKP	0	124089400	124089400	17974777	
					GSM AMC	0	790559369	790559369	111080331	
					Total GSM	0	790559369	790559369	111080331	
Total	1050190864	129055108	6486987	914648769	G Total	0	914648769	914648769	129055108	
2016-17	3476150250	109192088	0	3366958162	NFS Pkg F	2632318133	0	2632318133	0	3476150250
					MKP AMC	0	4006164	4006164	600338	
					GSM AMC	0	730633866	730633866	108591750	
Total	3476150250	109192088	0	3366958162		2632318133	734640030	3366958163	109192088	

4.12 Appellant has relied upon the decisions of Tribunal in the following cases:

A. Tempest Advertising (P) Ltd. [2007 (5) S.T.R. 312 (Tri.- Bang.)]

"5. On a careful consideration and perusal of the Order-in-Original, it is very clear that the Revenue proceeded to levy Service Tax on the basis of gross receipts shown in the Profit and Loss Account and the details shown in the Income-tax Returns. The details filed under Income-tax Returns are different from the returns that have to be filed in terms of the Service Tax. In the case of Service Tax, the tax is required to be calculated on total receipts and not on the amount still due from the customers. This position has been clarified in the cited case of BPL Ltd. The findings recorded in Para 2 is reproduced herein below :

2. We have heard both sides in the matter and have perused the records. T. Velu Pillai & Co., Chartered Accountants have issued certificate based on the verification of books of account of the appellant company, that till date the appellant did not receive payments towards the debit notes raised for various engineering services provided to M/s. B.S. Refrigerators Ltd., and M/s.

B.S. Appliance Ltd., Bangalore. The appellants had been filing returns regularly and informing the department about the outstanding debit notes due to them. There is no dispute about this fact about the appellants not having received the services amounts including the tax from their customers and they had reflected these amounts under the heading sundry debtors. Section 68 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules does not permit recovery of the tax unless the payments are received. Both the Section 68 and Rule 6 (1) are reproduced herein below:-

"Section 68 : Payment of service tax - (1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the Service Tax in relation to such service."

"RULE 6 (1) Payment of Service Tax. - The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable services:"

The Tribunal has granted full stay by Stay Order No. 334/06, dated 24-3-06, in view of the fact that appellants have not received value of taxable services from their customers in terms of Section 68 and Rule 6(1) of Service Tax Rules. The service tax is not liable to be paid as the assessee has not received the payments towards the value of taxable service. The appellants have been filing returns

and informing the department about the non-receipt of the value of services rendered by their customers and about the non-payment of the same. The department is aware of these facts as the returns have been filed. Therefore, the issue of show cause notice beyond the period of one year is barred by time. For the reasons stated above, the appeal is thus allowed with consequential relief if any.

5.1 *The appellant's contention is required to be accepted. The order passed by the Asst. Commissioner is correct and the same is upheld. The impugned order is not just and proper and hence, the appeal is allowed with consequential relief, if any."*

B. Go Bindas Entertainment Pvt. Ltd [2019 (27) GSTL (Tri. All)]

"4. *after hearing both the sides duly represented by Learned Advocate Shri Kamal Jeet Singh for appellant and Learned AR Shri Sandeep Kumar Singh, Deputy Commissioner for Revenue, we note that the entire case of Revenue is based upon the comparison of figures, as pointed out in the balance sheet with the figures reflected in the ST-3 returns. The appellant has explained that such difference has occurred on account of the accounting system as per the Income Tax Law, which explanation, in principle, stands accepted by the lower authorities. Even then the lower authorities have gone ahead and confirmed the demand.*

In any case and in view of the declaration, we note that it is well settled law that no demand can be confirmed by comparing the ST-3 return figures with balance sheet figures, in the absence of any evidence to the contrary that income in the balance sheet, if excess, reflects the providing of taxable services. It is the Revenue who is making the allegations and as such, the onus to prove said allegation lies very heavily upon the Revenue. Inasmuch as, the same has not been done and in view of the

foregoing discussions, we find no merits in the Revenue's stand."

4.13 Appellant had in fact submitted this reconciliation chart before the adjudicating authority (refer para "s)19." Of the impugned order), who has confirmed the demands along with the interest and penalty mechanically without rendering any finding in this respect. The impugned order seemingly is a non speaking order and is set aside on this ground.

5.1 Appeal is allowed by setting aside the impugned order. Matter is remanded back to the original authority for consideration of the case de-novo taking into account the observations as above.

5.2 As the matter is quite old adjudicating authority should finalize the case in de-novo proceedings within three months of receipt of this order.

(Pronounced in open court on-05 March, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp