CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70539 of 2018

(Arising out of Order-in-Appeal No. 155-ST-ALLD-2018, dated 16.03.2018 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s J P Constructions **.....Appellant**
(Misirpur, Sarai Bhimsen, Manshata,
Pratapgarh, U.P. 230001)

VERSUS

Commissioner, CGST & Central Excise, Allahabad
....Respondent
(38-M.G. Marg, Civil Lines,
Allahabad-211001)

APPEARANCE:

Shri Tanmay Sadh, Advocate for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70230/2025

DATE OF HEARING : 10.04.2024
DATE OF DECISION : 25.04.2024

P. K. CHOUDHARY:

The present appeal has been filed assailing the impugned Order-In-Appeal dated 16.03.2018 passed by the learned Commissioner (Appeals), CGST & Central Excise, Allahabad.

2. The facts of the case in brief are that the Appellant is a sole proprietary firm engaged in providing 'Works Contract Services' and 'Erection, Commissioning & Installation Services'. During the Financial Year 2010-11 to 2014-15 the Appellant provided various works contract services to M/s Indwell Constructions Pvt. Ltd.[1] and M/s MGI Infra Nipani LLP, Jammu[2]

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[1] Indwell
[2] MGI Infra

as sub-contractor. It is the case of the Appellant that the services provided by the Appellant to MGI Infra in the non-taxable territory of Jammu & Kashmir and hence the same were exempted from payment of Service Tax. On the basis of certain inquiries conducted by the Department, a Show Cause Notice[3] dated 30.09.2015 was issued to the Appellant proposing to demand service tax amounting to Rs.59,26,161/- and to impose penalty under Section 76, 77(1)(a), 77(2) & 78 of the Finance Act, 1994. Reply to the SCN was filed by the Appellant. The learned Adjudicating Authority vide the Order-In-Original dated 31.03.2017 confirmed the demand as proposed in the SCN and also imposed penalty of Rs.10,000/- each under Section 77(1) & 77(2) and penalty of Rs.59,26,161/- under Section 78 of the Finance Act, 1994. Being aggrieved the Appellant filed appeal before the First Appellate Authority. The learned Commissioner (Appeals) vide the impugned Order-In-Appeal upheld the confirmation of demand of Service Tax of Rs.59,26,161/- and imposition of penalty under Section 77(1) and 77(2). However, the penalty imposed under Section 78 was reduced to 33,67,989/-. Aggrieved, Appellant has filed the present appeal before the Tribunal.

3. It is the case of the Appellant that the entire service tax liability for the Finance Year 2010-11 to 2014-15 has already been discharged by the Appellant as under:-

SR. NO	PARTICULARS	AMOUNT
1.	TOTAL SERVICE TAX LIABILITY AS CONFIRMED BY APPELLATE AUTHORITY	**Rs. 59,26,161/-**
2.	EXEMPTED SERVICES PROVIDED TO MGI INFRA NIPANI IN THE STATE OF JAMMU AND KASHMIR	**(Rs. 2,76,184)**
	TOTAL TAX LIABILITY AFTER REMOVING EXEMPTED SERVICE	**Rs. 56,49,977/-**
3.	CHALLANS BENEFIT OF WHICH NOT GIVEN BY APPELLATE AUTHORITY **CHALLAN NO DATE AMOUNT** 14910 05.03.2014	**Rs. 35,25,935**

[3] SCN

	Rs.8,33,198/- 10519 31.03.2014 Rs,4,32,542/- 05080 05.05.2015 Rs.3,53,403/- 72204 03.12.2015 Rs.3,28,961/- 21575 05.02.2016 Rs.15,77,831/-	
3.	SERVICE TAX DEPOSITED BY INDWELL DURING FY 2010-11 TO 2011-12	**Rs. 22,73,643**
4.	TOTAL SERVICE TAX DEPOSITED	**Rs. 57,99,578/-**
	Excess service tax deposited	**Rs. 1,49,601/-**

4. Regarding the services provided to M/s Indwell in respect of the works sub-contracted to the Appellant the same has been discharged by the Indwell which is evident by the certificate dated 25.08.2015 issued by Indwell to the Appellant. The learned Advocate appearing on behalf of the Appellant vehemently argued that since the majority of service tax has been paid within time and much before the issuance of SCN, therefore, penalty in respect of challans deposited after the issuance of SCN be set aside by exercising power under Section 80 of the Finance Act, 1994.

5. We find that as per the Balance Sheet for Financial Year 2010-11 to 2014-15 the contractual receipt of the Appellant is Rs.9,77,23,316/- on which Appellant is liable to pay service tax and the same is reproduced in the table below:-

F.Y	Receipts	Rate	Service Tax
2010-11	61,24,526/-	10.30%	6,30,826/-
2011-12	1,59,49,685/-	10.30%	16,42,818/-
2012-13	2,30,29,393/-	12.36%	28,46,433/-
2013-14	3,30,69,336/-	12.36%	40,87,370/-
2014-15	1,95,51,376/-	12.36%	24,16,550/-
TOTAL:-	**9,77,24,316/-**		**1,16,23,997/-**

SR.NO	PARTICULARS	AMOUNT
1.	Total contractual receipts during the FY 2010-11 to 2014-15	9,77,23,316
2.	Total Service Tax liability in the aforesaid contractual receipts	1,16,23,997
3.	Total service tax liability deposited by the Appellant	96,78,945
4.	Total service tax liability deposited by Indwell	19,45,052

6. The amount of Rs.96,78,945/- paid by the Challans is under:-

Sl.	Challan No.	Date	Amount
1	00512	5.1.2014	15,01,990/-
2	13603	25.3.2014	6,68,644/-
3	14781	5.5.2014	19,19,227/-
4	14910	5.1.2014	8,33,198/-
5	10519	31.3.2014	4,32,542/-
6	14968	5.5.2014	2,08,551/-
7	14869	5.6.2014	2,15,480/-
8	26192	5.8.2014	1,58,404/-
9	00311	6.9.2014	1,45,745/-
10	01965	5.10.2014	1,41,068/-
11	15327	5.11.2014	1,85,562/-
12	13547	5.12.2014	2,26,654/-
13	26758	5.1.2015	2,88,864/-
14	14734	5.2.2015	1,75,952/-
15	03135	6.3.2015	1,84,626/-
16	63533	31.3.2015	1,32,243/-
17	05080	5.5.2015	35,34,403/-
18	72204	3.12.2015	3,28,961/-
19	21975	5.2.2016	15,77,831/-
	TOTAL TAX PAID		**96,78,945/-**

7. The learned Departmental Representative has justified the impugned order.

8. Heard both sides and perused the appeal record.

9. We find that the dispute in the present appeal is no more *res integra* and is covered by the decision of the Tribunal in the case of **Commissioner of Customs & Central Excise, Indore vs. Shivhare Roadlines [2009 (16) S.T.R. 335 (Tri.Del.]** wherein it has been held that when the Principal Contractor has paid the tax on the whole contract there is no liability on the sub-contractor. In the above case BHEL has given a certificate stating that the service tax on the entire value of work allotted to BHEL by BESCL (Including the work allotted by BHEL to SEW) has been discharged by BHEL. The Tribunal has held that "if the principal contractor has discharged the tax liability in respect of the contract, cascading effects should be avoided and the appellant is entitled to refund". On similar facts in the case of **JAC Air Services Pvt. Ltd. vs. Commissioner of Service Tax, Delhi [(2013) 31 STR 155 (Tri.Delhi)].** M/s JAC Air Services was a sub-contractor under agreement with Airport Authority of India for cargo handling services at Delhi International Airport and has rendered cargo handling service. The service tax liability was discharged by AAI, however, the Revenue held the sub-contractor, JAC Air Services, also liable to pay the tax as sub-contractor for the second time. It was held that service tax cannot be demanded for the second time from the sub-contractor. Further, the services provided to MGI Infra were provided in the non-taxable territory i.e. in the State of Jammu and Kashmir, which is not within the taxable territory as per Section 64(1) read with Section 65 B (52) of the Finance Act, 1994 which provides that this chapter shall extend to whole of India except the State of Jammu and Kashmir.

10. We find that the Appellant had deposited service tax liability to the tune of Rs.96,78,945/- and the remaining service tax liability has already been deposited by the principal contractor.

11. Further, we do not find any ingredients of suppression with an intent to evade payment of service tax on the part of the

Appellant. The Appellant has not charged service tax from M/s Indwell which is clear from the certificate and entire service tax liability for the period was discharged thereafter, which shows that the essential ingredients of proviso to Section 73 are not specified in the present case.

12. In view of the above discussions, the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the Appellant is allowed with consequential relief, as per law.

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

(Separate Order)
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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<u>SANJIV SRIVASTAVA:</u>

I have perused the order prepared by the learned brother. However after even after long hours of persuasion I am not in position to agree with the same.

2. The issue in respect of liability of the sub-contractor, when the main contractor has been paid the service tax in respect of services of Erection, Commissioning etc. The said issue finally got settled by the Larger Bench of this Tribunal in the case of CST Vs Melange Developers P. Ltd., 2020 (33) GSTL 116 (LB). Accordingly, I do not find any reason, whereby it can be held that service tax liability on sub-contractor could not have been demanded from the appellant.

3. Appellant have claimed the benefit of service tax deposited by M/s Indwell is concerned during the financial year 2010-11 to 2011-12 to the extent of Rs.22,73,643/-. In view of the discussions of Larger Bench of this Tribunal in the case of M/s Melange Developers Pvt. Ltd. this amount deposited by M/s Indwell (main contractor) even serve to arrive at to demand the service tax liability of the appellant who is sub-contractor to M/s Indwell. In view of the decision of Larger Bench liability of sub-contractor to pay service tax needs to be discharged by him. However, I find that whether extended period of limitation could not be invoked for making this demand for the reason that there was dispute with regards to liability of service tax in respect of services provided by the sub-contractor. Chandigarh Bench has in the case of M/s Vishal Engineering Company Final Order No.60175 of 2023 dated 05.07.2023 have held as follows:-

> *9. After consideration the submissions made by both the sides and perusal of the material on record, we find that the issue whether subcontract is liable to pay service tax on the services on which the main contractor had paid the service tax, there were contrary decisions on this issue among the various benches of the Tribunal and the matter was referred to the Larger Bench and the Larger Bench has settled the issue in the case of* ***CST Vs.***

Melange Developers P. Ltd., 220 (33) GSTL 116 (LB) *wherein the Larger Bench has observed as under:-*

"8.1 It is seen that the amount received from the clients have been subjected to Service Tax at the hands of the main contractor. However, since the appellant, as a sub-contractor has provided services to the main contractor, is liable to discharge Service Tax on the consideration received from the main contractor namely, M/s. ACL. As correctly submitted by the Learned Authorized Representative for the Department, the main contractor would then be eligible to take credit of such Service Tax paid by the appellant as these are input services for the main contractor. This issue is no longer res integra and is settled by the decision of the Larger Bench of the Tribunal in the case of Commr. of S.T., New Delhi v. M/s. Melange Developers Pvt. Ltd. reported in 2020 (33) G.S.T.L. 116 (Tri. CB). It was observed as under:

15. It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient .e. the main contractor can, however, avail the benefit of the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the Cenvat Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage.

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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 subcontractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the subcontractor. All decisions, including those referred to in this order, taking a contrary view stand overruled 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 subcontractor in pursuance of the contract."*

10. Following the above decisions, we have no hesitation to hold that the appellant/sub-contractor is liable to pay the Service Tax even if the main contractor has discharged the liability. The issue no merits is found against the assessee and in favour of the Department.

11. Further, we find that the issue whether in such cases extended period of limitation can be invoked or not was also considered by various benches of Tribunal and in this regard the Delhi Tribunal in the case of Max Logistics Ltd. Vs. Commissioner of Central Excise, Jaipur, 2017 (47) S.T.R. 41 (Tri.-Del.). In para 11 has held as under:

"11. Considering the above discussion and analysis the service tax liability on the appellant cannot be contested as invalid. We uphold the findings in the impugned order regarding tax liability. However, the appellants contested the demand on the question of time bar also. It is their case that the full amount collected by RSIC from the importers and exports has been subjected to service tax. Even if the appellant is held liable on their share of Revenue received from RSIC the said tax is eligible for credit to RSIC. Further, the issue involved is interpretation of law and there is no intend to evade payment of duty in such situation. The appellants relied on various case laws to reiterate their views. We find that the appellant is having a strong ground regarding the question of time- bar. It is to be noted that all invoices, for full consideration, have been raised by RSIC and the amount collected from the clients [importers and exports] were subjected to service tax which was deposited to the Government. RSIC in turn are paying certain amount to the appellants to get the services in these ICDs. In such situation, there is a clear

possibility for a bona fide belief that as the whole amount has been subjected to service tax the amount received by the appellant may not be liable to service tax in connection with the services rendered by them.

The issue involved has been a subject matter of interpretation by the Tribunal and High Courts. In fact the earlier Circular issued by the Board, covering the period prior to the introduction of Cenvat Credit Rules gave an impression that when the main service provider discharged the service tax on gross value there may not be tax liability on the sub-contractor rendering similar service to the main contractor The Tribunal in various cases held in such a case involving interpretation of law and also a bona fide belief regarding service tax liability, will not attract the demand for extended period. We also take note that service tax liability on the appellant when discharged will be available as a credit to RSIC which can be used by RSIC for discharging their overall service tax liability. As such, to impute motivation to the appellant for intention to evade payment of duty is not sustainable. A reference can be made to the Tribunal's decisions in British Airways v. CCE (Adjn.), Delhi reported in 2014 (36) STR. 598 (Tri. - Del.), Atul Ltd. v. CCE, Surat-II reported in 2009 (237) E.LT. 287 (Tri. - Ahmd.). In the facts and circumstances of this case, we find that the demand for extended period is not sustainable. We have also perused the reasons recorded by the Original Authority for invoking extended period of demand. He recorded that but for the Department's investigation the non-payment of tax would not have come to the notice. Further, the balance sheet for certain years have not been furnished in time by the appellant which was obtained from Registrar of Companies. As such, it was held that the appellants wilfully suppressed material facts. We find that the service tax demand against the appellant was sought to be confirmed mainly on the basis of the terms of agreement between the appellant and RSIC. The gross receipt of RSIC and service tax payment thereupon is available with the Department. A portion of that receipt is now being taxed under BIS at the hands of the appellant. The service. tax liability is as such on the arrangement based on agreement which is also the basis for payment of full service tax by RSIC. In other words, the service tax liability of both RSIC and the *appellant has common source agreement. As such, we find the demand for extended period is not sustainable in the present case."*

12. 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.*

13. 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:

TRU letter F. No. 341/18/2004-TRU (Pt.) dated 17-12-2004

-Circular No. 23/3/97-5.T., dated 13-10-1997 - Master Circular No. 96/7/2007-ST dated 23-8-2007

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

-Urvi Construction v. CST, Ahmedabad 2010 (17) S.T.R. 302 (Tri. Ahmd.) = 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."

14. In view of our discussion above by following the ratio of the above said decisions we hold that the appellant being sub-contractor is liable to pay service tax on 'Erection, Commissioning and Installation service' in view of the Larger Bench decision cited (Supra). But, extended period cannot be invoked to demand service tax from the appellant. In the present case, the period of dispute is from October, 2004 to March 2009 and as per the appellant the demand for the period April, 2004 to September 2008 amounting to Rs. 6019732/- is beyond limitation and is not sustainable and the demand for the normal period from October,2008 to March 2009 amounting to Rs. 11,53,446/- can be upheld. Hence for the purpose of computing the demand of service tax for the normal period along with interest, we remand *the matter to the original authority with the direction to do this exercise within a period of two months after receiving the certified copy of this order."*

4. In view of the above, if any liability is within the period of limitation in respect of service tax payable by the appellant as sub-contractor with the normal period of limitation, the same needs to be recomputed. For the purpose of re-computation matter needs to be remanded back to the Original Authority.

5. During the course of argument appellant have submitted a chart containing the liability of service tax reconciling the demand confirmed against him with the payment of service tax, the same is reproduced below:-

SR. NO	PARTICULARS	AMOUNT
1.	TOTAL SERVICE TAX LIABILITY AS CONFIRMED BY APPELLATE AUTHORITY	**Rs. 59,26,161/-**
2.	EXEMPTED SERVICES PROVIDED TO MGI INFRA NIPANI IN THE STATE OF JAMMU AND KASHMIR	**(Rs. 2,76,184)**
	TOTAL TAX LIABILITY AFTER REMOVING EXEMPTED SERVICE	**Rs. 56,49,977/-**
3.	CHALLANS BENEFIT OF WHICH NOT GIVEN BY APPELLATE AUTHORITY **CHALLAN NO DATE AMOUNT** 14910 05.03.2014 Rs.8,33,198/- 10519 31.03.2014 Rs,4,32,542/- 05080 05.05.2015 Rs.3,53,403/- 72204 03.12.2015 Rs.3,28,961/- 21575 05.02.2016 Rs.15,77,831/-	**Rs. 35,25,935**
3.	SERVICE TAX DEPOSITED BY INDWELL DURING FY 2010-11 TO 2011-12	**Rs. 22,73,643**
4.	TOTAL SERVICE TAX DEPOSITED	**Rs. 57,99,578/-**
	Excess service tax deposited	**Rs. 1,49,601/-**

6. In terms of the above chart appellant has claimed that exempted services were provided to M/s MGI Infra Nipani in the State of Jammu and Kashmir on which service tax of Rs.2,76,184/- is confirmed against the appellant. For rejecting the claim made Original Authority has observed as follows:-

"Thus, the contention of the party is correct to the extent that the services provided in the state of Jammu & Kashmir are not covered under the taxable territory, hence not taxable But, I find that there is no evidence on record which establish that the services were provided in Jammu & Kashmir except a certificate dated-04.11.2015 saying that the services provided by the party in F. Y. 2014-15 to their main contractor M/s MGI INFRA- NIPANI LPP and payment of Rs.2234500/- have been made against such service and was executed in the state of Jammu & Kashmir. The certificate cannot be considered as clinching evidence in this regard. They have not submitted any work orders/work contract Bill/Invoices etc which establish that the services provided within the non taxable territory. Therefore, I hold that the party is liable to pay service tax."

Similarly, Appellate Authority has observed as follows:-

"4.4 As regards to the submission of the appellant that they had provided services in the State of Jammu & Kasmir, to M/s MGI Infra Nipani LLP, it is observed that the Adjudicating Authority had confirmed the demand of Service Tax on such services provided by the appellant, on the ground that they did not produce any documentary evidence to show that the services were provided in the State of Jammu & Kashmir. Even, during the appeal proceedings, the appellant, despite seeking repeated adjournments, failed to submit any documents (except a copy of the certificate dated 04.11.2015 of M/s MGI Infra Nipani LLP which was enclosed with the appeal), such as, copies of their invoices and agreement etc., Further, the certificate issued by M/s MGI Infra Nipani LLP shows their corporate office at New Delhi and thus, in terms of Rule 3 & Rule 8 of the Place of Provision of Services Rules, 2012, the location of the service

receiver being in the taxable territory, is the place of provision of service. Thus, I do not find merit in this submission of the appellant."

7. Appellant have produced a copy of work order no.JMU/PEB/2014/04 dated 2nd May, 2014, at Annexure-3 (along with the appeal) to establish that these services were provided in respect of Pre Engineer Residential Building at Narwal Bala Jammu (J & K). As the matter is being remanded back to original authority he should take note of this work order while re-computing the demand if any.

8. Appellant have claimed that authorities below have not taken note of four challans by which they have already deposited service tax of Rs.35,25,935/-. In the remand proceedings authorities should verify the claim made by the appellant for re-computing the demand if any.

9. Appeal is partly allowed, matter is remanded back to the Original Authority for re-computation as indicated in para no.4,7 & 8 above.

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

POINTS OF DIFFERENCE

In view of the difference in the opinion recorded by Member (Judicial) and the Member (Technical), following question is referred to Hon'ble President for referring to Third Member,-

(i) Whether on issue in respect liability of sub contractor to pay service tax,-

the demand should be quashed following the decisions of Tribunal in case of Shivhare Roadlines [2009 (16) STR 335 (T-Del)] and JAC Air Services Pvt Ltd. [2013 (31) STR 155 (T-Del)] as has been held by Member (Judicial);

Or

The issue has been settled by Larger Bench of this Tribunal in the case of Melange Developers Pvt. Ltd. [220 (33) GSTL 116 (LB)] and following the ratio of the Larger Bench demand needs to be confirmed but limited to normal period of limitation as has been held by the Member (Technical).

(Pronounced in open court on-06.08.2024)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp

BINU TAMTA:

1. The present appeal has been listed before me on account of difference of opinion in the Bench, referring the following questions:- **"Points of Difference**

> In view of the difference in the opinion recorded by Member (Judicial) and the Member (Technical), following questions is referred to Hon'ble President for referring to Third Member:-
>
> (i) Whether on issue in respect of liability of sub-contractor to pay service tax-
> the demand should be quashed following the decisions of Tribunal in case of **Shivhare Roadlines [2009 (16) STR 335 (T-Del.)** and **JAC Air Services Pvt. Ltd. [2013 (31) STR 155 (T-Del.)]** as has been held by Member (Judicial);
>
> **OR**
>
> The issue has been settled by Larger Bench of this Tribunal in the case of **Milange Developers Pvt. Ltd. [2020 (33)GSTL 116 (LB)]** and following the ratio of the Larger Bench demand needs to be confirmed but limited to normal period of limitation as has been held by the Member (Technical).

2. From the reference as made above, the controversy is whether the decision of the Tribunal in the case of **Commissioner of Customs & Central Excise, Indore Vs. Shivhare Roadlines[4] and JAC Air Services Pvt. Ltd. Vs. Commissioner of Service Tax[5]** would apply or the issue having been settled by the Larger Bench in the case of **CST Vs. Melange Developers P.Ltd.[6]** would apply and, therefore, the demand needs to be confirmed, however, only for the normal.

3. Considering the decision of the Tribunal in the case of **Shivhare Roadlines,** I find that the said decision has been rendered on account peculiar circumstances as the period in

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[4] 2009 (16) STR 335 (Tribunal-Delhi)
[5] 2013 (31) STR 155 (Tribunal-Delhi)
[6] 2020 (33) GSTL 116 (LB)

dispute and the impugned order passed therein was before the issuance of the Master Circular dated 23.08.2007 clarifying that sub-contractors are also liable to service tax. In that view, it was held that the sub-contractor shall not be doubly taxed if the principal-contractor has already paid the duty amount.

4. The issue 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 was considered by the Larger Bench **(Melange Developers)** in view of the conflicting decisions of the various Division Benches of the Tribunal. The Larger Bench considering the earlier decisions and the provisions of the Act and also the Master Circular dated 23.08.2007 decided the reference that 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. Once the decision has been rendered by the Larger Bench, judicial discipline demands that the same shall be followed in all the subsequent cases. I am, therefore, of the opinion that the said decision is binding and has to be followed in the present case as well as in all the future cases unless a decision contrary to that is rendered by a higher forum. As has already been held above, the decision in **Shivhare Roalines** was rendered on account of the peculiar circumstances prevailing therein and the same having been rendered on 17.02.2009, the subsequent decision of the Larger Bench dated 23.05.2019 would prevail over all other orders. During the course of arguments, the learned counsel for the appellant had very fairly conceded that the issue on merits stands concluded by the decision of the Larger Bench in **Melange Developers P. Ltd.** I, therefore, conclude that the appellant is liable to discharge the service tax liability on the activity undertaken as sub-contractor for the period 20.10.2011 and 20.11.2012.

5. Since the issue on merits has been decided against the appellant holding them liable to pay service tax, it is necessary to examine the issue of limitation as referred to by the Member

(Technical). The period in question for which the liability of the appellant has been fastened as a sub-contractor is from 20.10.2011 and 20.11.2012, for which the show cause notice has been issued on 30.09.2015. As per the provisions of Section 73(1), the normal period for issuance of the show cause notice is 18 months and, therefore, the submission of the learned counsel is that the show cause notice has been issued beyond the period of limitation. The extended period of 5 years is not invokable as it is not a case of suppression, fraud, collusion or wilful mis-statement, which are necessary ingredients for justifying the invocation of the extended period of limitation in terms of proviso to Section 73(1).

6. The law on invoking the extended period of limitation has been settled over the period by various decisions of the Apex Court and other forums. The principle of law enunciated by the Apex Court in **Collector of Central Excise versus Chemphar Drugs & Liniments** [7] subsequently followed in **Pushpam Pharmaceuticals Company Vs. CCE, Bombay**[8] **& Easland Combines, Coimbatore Vs. CCE, Coimbatore**[9] is that extended period of limitation is applicable only when something positive other than mere inaction or failure on the part of assessee is proved. Conscious or deliberate withholding of information by manufacturer is necessary to invoke larger limitation of five years. Similar view was expressed by the Apex Court in **Uniworth Textiles Ltd versus Commissioner of Central Excise, Raipur** [10]**,** where the Court was concerned with the invocation of extended period under Section 28 of the Customs Act and it was observed the conclusion that mere non-payment of duties is equivalent to collusion or willful mis-statement or suppression of facts is untenable. The relevant portion of the judgement is reproduced below:-

> **"12. …….In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of**

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[7] 1989 (40) ELT 276 (SC)
[8] 1995 (78) ELT 401 (SC)
[9] (2003) 3 SCC 410
[10] 2013 (288) ELT 161 (S.C.)

> **collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellants as fit for the applicability of the proviso."**

7. With reference to the concept of suppression which has been used in the proviso to Section 11A of the Act, the Supreme Court in **Continental Foundation Joint Venture versus Commissioner of Central Excise, Chandigarh** [11] observed that it has been accompanied by very strong words as "fraud " or "collusion "and therefore has to be construed strictly. Mere omission to give correct information is not suppression of facts, unless it was deliberate to stop the payment of duty.

8. The Madras High Court in **Commissioner of C.EX., Chennai–III versus Supreme Industries Ltd.**[12] had emphasized that the authorities are bound to record a prima facie finding about intent to evade payment of duty by suppressing the material facts or by making wilful misstatement or by committing fraud or collusion. The relevant para of the decision is reproduced below:-

> **"10.** We have perused the show cause notice, the Order-in-Original, the order passed by the appellate authority and the impugned order passed by the Tribunal. **In the show cause notice dated 10-10-2001, except for stating that the respondent/assessee has contravened the provisions of the Rules, there is no specific allegation so as to hold the respondent/assessee guilty of having committed fraud, collusion or suppression of facts or made any wilful misstatement with an intent to evade payment of duty.** In terms of the provision of Section 11AC of the Act, the authority is bound to record a *prima facie* finding that there was an intent to evade payment of duty by suppressing the material facts or by making wilful misstatement or by committing fraud or collusion. Thus, in the absence of any such specific allegation in the show cause notice, the authorities cannot mechanically impose penalty under Section

[11] 2007(216) ELT 177 (SC)
[12] 2014 (303) ELT 513 (Mad.)

> 11AC of the Act. After the assessee submitted their explanation, the adjudicating authority while passing the order dated 24-9-2002, only observed that there is possible manipulation of scrap accounts to show higher production than what would have been normally produced and there is no finding that the first respondent/assessee was guilty of wilful misstatement or suppression of facts or act of fraud with an intention to evade payment of duty."

9. The Supreme Court in the case of **Commissioner of C.EX. & Customs versus Reliance Industries Ltd.**[13] once again held that mere act of omission could not be interpreted as a deliberate act of non-disclosure aimed at evasion of duty and that for invoking the charge of suppression of facts, element of intention must be established. The said judgement is relevant for the principle that if a bonafide belief is held that the duty liability is being correctly discharged and if the belief is ultimately found to be wrong by the judgement of a superior court does not render such belief of the assessee, a malafide belief particularly when such a belief was emanating from the view taken by the decision of the Tribunal. It was further observed that in such cases of dispute of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bonafides. In this context, the Court noticed that the assessee who is required to self assess his liability, determined the assessable value on the basis of an interpretation given by CESTAT in its order dated 28.07.2000 and therefore, it could not have foreseen that the view taken by the Tribunal would be upset and overturned by the Supreme Court. In the circumstances, it was concluded that the assertion that there was suppression of facts is therefore clearly untenable.

10. The learned counsel for the appellant has relied on the decision of the Chandigarh Bench of the Tribunal in the case of **M/s. Vishal Engg. Company**[14], where the issue whether in

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[13] 2023 (385)ELT481(SC)
[14] Final Order No.60175 of 2023 dated 5.7.2023

such cases, the extended period of limitation can be invoked or not was considered and referring to the earlier decisions of the Tribunal, it was concluded that if any liability is within the period of limitation in respect of service tax payable by the appellant as sub-contractor within the normal period of limitation, the same needs to be re-computed and remanded the matter to the Original Authority for the purpose of re-computation.

11. The principle that emerges from the aforesaid decision is that during the relevant period there was difference of opinion between the various Benches and also various Circulars and Trade Notices were issued by the Commissionerate. The issue being one of interpretation has been held to be a bonafide belief on the part of the assessee that there is no liability towards the service tax.

12. In the present case also, there was divergence of opinion as to the liability of the sub-contractor to discharge the duty liability, even when the principal contractor had already discharged the same and in that view, the appellant bonafide believed that they were not liable to pay the duty as the principal contractor had already paid the same. It being an interpretational issue which was set at rest by the decision of the Larger Bench, no malafides can be attributed to the appellant. The invocation of the extended period of limitation is, therefore, devoid of any merits.

13. I am, therefore, of the opinion that no liability of service tax can be fastened on the appellant by invoking the extended period of limitation as the very ingredients for invoking the same in terms of Section 73(1) proviso are not satisfied. It is not a case of suppression, fraud or wilful mis-statement. In the circumstances, the demand in question for the period 2010-11 and 2011-12 is not sustainable. However, the liability needs to be ascertained for the remaining period and hence, the matter is remanded back to the Original Authority for re-computation of the service tax liability, if any.

14. In view of my discussion above, I answer the reference as under:-

> (i) The demand towards service tax liability as sub-contractor cannot be quashed in terms of the decision of the Tribunal in **Shivhare Roadlines** and **JAC Air Services Pvt. Ltd.**
> (ii) On merits, the issue stands settled by the decision of the Larger Bench in the case of **Melange Developers P.Ltd.** and the appellant is liable to pay service tax in terms thereof.
> (iii) The extended period of limitation cannot be invoked in the present case and the liability has to be restricted to the normal period of limitation.

15. With these observations and findings, I return the reference made, to the Division Bench for further necessary action.

Sd/-

(Binu Tamta)
Member (Judicial)

Ckp.

In view of the majority order :-

(i) The demand towards service tax liability as sub-contractor cannot be quashed in terms of the decisions of the Tribunal in **Shivhare Roadlines** and **JAC Air Services Pvt. Ltd.**

(ii) On merits, the issue stands settled by the decision of the Larger Bench in the case of **Melange Developers P.Ltd.** and the appellant is liable to pay service tax in terms thereof.

(iii) The extended period of limitation cannot be invoked in the present case and the liability has to be restricted to the normal period of limitation.

The demand for the extended period of limitation is therefore, set aside and the demand for the normal period is upheld. The Appeal filed by the Appellant is partly allowed in the above terms.

(Pronounced in open court on 25.04.2025)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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