

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

E-Hearing
REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70364 of 2022

(Arising out of Order-in-Original No.57/Pr. COMM.R./ST/NOIDA/21-22 dated 29.03.2022 passed by Principal Commissioner, Central Goods & Services Tax, Noida)

**M/s AECS Engineering and
Geotechnical Services Pvt. Ltd.,**

.....Appellant

(17-A, Pocket-5, MIG Flats, Mayur Vihar,
Phase-III, Noida-201301)

VERSUS

**Principal Commissioner of Central Goods &
Services Tax, Noida**

....Respondent

(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Abhinav Kalra, Chartered Accountant for the Appellant

Shri A. K. Choudhary, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70307/2025

DATE OF HEARING : 20.02.2025
DATE OF PRONOUNCEMENT : 21.05.2025

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Original No.57/Pr. COMM.R./ST/NOIDA/2021-22 dated 29.3.2022 passed by the Ld. Principal Commissioner, CGST Noida.

2. The facts of the case in brief are that the Appellant was registered with Service Tax Department vide registration No. AAICA3141RSD001 under the Finance Act, 1994 for providing and receiving taxable services. On scrutiny of third party information received from Income Tax Department, it was found that value of services provided by the Appellant during F.Y. 2015-16 & 2016-17 was Rs.10,24,46,218/- and Rs.17,01,72,959/-, respectively. Further scrutiny of ST-3

Returns revealed that the said returns were not filed for the period from October, 2015 to March, 2017. Difference in the value of service declared in ST-3 returns and Form 26AS was noticed to the tune of Rs.7,35,97,122/- and Rs.17,01,72,959/- for the F.Y. 2015-16 and 2016-17 respectively. It was further found that the Appellant had not paid service tax on the aforesaid differential value of services. The amount of Service Tax as payable by the Appellant on the differential amount for the F.Y. 2015-16 & 2016-17 was worked out to be Rs.1,06,71,583/- and Rs.2,55,25,944/- respectively. Show Cause Notice¹ dated 26.3.2021 was issued to the Appellant by the Principal Commissioner, CGST, Noida to demand Service Tax amounting to Rs.3,61,97,527/- (Rs.1,06,71,583/- for F.Y. 2015-16 and Rs.2,55,25,944/- for F.Y. 2016-17 under the provisions of Section 73(1) of the Finance Act, 1994 alongwith interest and equal penalty. Penalty was also proposed under the provisions of Section 77 of the Finance Act, 1994.

3. The Appellant agitated against the allegation leveled against him and contented that appropriate Service Tax was already paid but ST-3 returns for the period from October, 2015 to March, 2017 could not be filed due to serious illness and subsequent demise of the working director of the company. The case was adjudicated vide the impugned OIO. Services rendered by the Appellant were classified as Works Contract Service, Renting of Machinery Service and Engineering Consultancy Service. Out of total demand of Rs.3,61,97,527/-, an amount of Rs.1,27,68,835/- was confirmed alongwith interest and equivalent penalty was imposed. Remaining demand was dropped. Penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994 was also imposed.

4. Being aggrieved with the OIO, the Appellant filed the instant appeal. Shri Abhinav Kalra, Chartered Accountant, appeared on behalf of the Appellant and Shri A. K. Choudhary learned Departmental Authorized Representative appeared on behalf of the Respondent and represented their respective cases.

¹ SCN

5. The learned Chartered Accountant argued that the Appellant had provided Works Contract Service and Consultancy Service during the intervening period. The tax liability on the services provided by the Appellant was duly discharged as contended by the learned counsel. It was pointed out that the adjudicating authority observed that Consulting Engineering Service was taxable under the provisions of Section 65(105)(g) of the Finance Act, 1994 and Works Contract Service was taxable under Section 65 (105)(zzzza) of the Finance Act, 1994 during the period under appeal. He submitted that this finding of the adjudicating authority was patently incorrect as the provisions of Section 65 were omitted with effect from 01.07.2012 after the introduction of negative list of services concept. Since the demand has been confirmed by holding the taxability of services undertaken by the Appellant under incorrect provisions, he contended that the same is liable to be quashed.

6. The Ld. Counsel further submitted that the Appellant was a sub-contractor of M/s JMC Project India Ltd., Plot No. B-21, Sector-58, Noida who were awarded work order number JMC/DL/B&F/WO/SCAO/2015/09 dated 9.2.2015 for providing and installing *temporary earth retaining structure with soil nailing with insertion of nails in all strata for the soil including fixing wire mesh on exposed excavated surface, bearing plates, nuts, PVC drainage pipes, shotcrete etc.* The said work relates to installing of drainage system in connection with sewerage treatment or disposal pertaining to Supreme Court, Additional Office Complex, Pragati Maidan, New Delhi. The award was for Rs.2,82,40,000/-. During F.Y. 2016-17, the Appellant provided services in terms of said contract for an amount of Rs.36,36,586/-. The Service Tax involved on such value of services was worked out to be Rs.2,18,195/-. The said service was exempt from Service Tax in terms of clause (e) of Sl. No.12 of Notification No.25/2012-ST dated 20.6.2012. Thus, the demand of Rs.2,18,195/- is liable to be dropped.

7. It was also submitted that the amount received during 2015-16 from service recipients namely M/s Krishna Build Estate P. Ltd., was considered as receipt towards renting services of machine while it was towards Works Contract Service as is evident from copy of the contract, invoice, ledger account submitted by the Appellant. He contended that merely because the receipts from said service recipient were shown in Form 26AS under Section 194 (1)(a) of Income Tax Act, it cannot be considered as income from Renting of Machine Service. The Ld. Consultant relied upon the following decisions and argued that the service tax demand cannot be confirmed on the basis of figures shown in Form 26AS:-

- a. ***Synergy Audio Visual Workshop Pvt. Ltd. vs. CST, Bangalore{ 2008-TIOL-809-CESTAT-BANG},***
- b. ***TIL Ltd. vs. CST, Kolkata 2008-TIOL-181-CESTAT-KOL,***
- c. ***Collector of Customs, Calcutta vs. Hindalco Industries Ltd. 2007 (217) E.L.T. 343 (Cal.) ,***
- d. ***Indus Motor Company vs. CCE, Cochin 2007-TIOL-1855-CESTAT-BANG: 2008 (9) S.T.R. 18 (Tri.-Bang.).***
- e. ***CCE, Bhopal vs. M/s. Handa Disc Sharda Colony-2006-TIOL-873-CESTAT-DEL.***

8. It is the case of the Appellant that the Adjudicating Authority considered figures shown in Balance Sheet for determination of service tax while in the SCN, the demand was raised on the basis of figures reflecting in Form 26AS. Thus, he argued that considering the figures of Balance Sheets for confirming the demand of Service Tax would be beyond the scope of the SCN and is therefore, liable to be dropped.

9. The case was also agitated on the ground of limitation.

10. Learned Departmental Authorized Representative Shri A. K. Choudhary reiterated the findings of the Adjudicating Authority made in the impugned order and emphasised that differential demand is liable to be confirmed along with interest and penalty.

11. Heard both the sides and perused the Appeal records.

12. We find that the SCN was issued on the basis of third party information received from Income Tax Department. The value shown in TDS statement, i.e. Form 26AS was considered as Taxable Value and Service Tax was demanded @14.50% for the F.Y. 2015-16 & 15% for the F.Y. 2016-17 without any investigation to identify the nature of services and the manner of determination of value for the purpose of charging service tax. During adjudication proceedings, the Appellant submitted that he had provided services under Works Contract and Engineering Consultancy during the F.Y. 2015-16 & 2016-17. It was also submitted that due to illness of active director who subsequently died, the Appellant could not file ST-3 returns for the period from October, 2015 to March, 2016, April, 2016 to September, 2016 and October, 2016 to March, 2017, but due tax was deposited.

13. The Appellant submitted that during 2015-16, in the category of Works Contract, they provided services of Rs.9,54,44,841/- and in the category of Engineering Consultancy Rs.70,01,377/-, totaling Rs.10,24,46,218/ which is equal to the value of services shown in Form 26AS. The Adjudicating Authority has shown his disagreement with the above calculation on the ground that the Appellant had provided Renting of Machinery Services to M/s Krishna Build Estate Pvt. Ltd. on the basis of receipts shown under Section 194 I(a) in Form 26AS. It is a trite law that no demand of Service Tax can be made on the basis of entries shown in Form 26AS. In the case of Jain Housing & Construction Ltd. [2023 10 Centax 170 (T)] which has also been affirmed by the Hon'ble Supreme Court reported as [2023(10) Centax 171 (SC)], it has been held that liability of Service Tax cannot be fastened on the basis of entries and figures of Form 26AS, Income Tax statement. We find that the Appellant has produced evidences like, invoice, ledger etc. to prove that services provided to M/s Krishna Build Estate Pvt. Ltd. would qualify under the category of Works Contract, and not under the category of Renting of Machine. We, therefore find that the finding of the Adjudicating authority to treat the services provided to M/s Krishna Build Estate Pvt. Ltd. in the

category of Renting of Machinery is not maintainable. Moreover, under Section 194 I(A) of Income Tax Act, payment received on account of transfer of immoveable property is included. In the present case, it is not a case of transfer of Immovable property. Hence, services provided to M/s Krishna Build Estate Pvt. Ltd. are of the category of Works Contract only.

14. It is observed that in the case of service provided to M/s WAPCOS Ltd. during 2016-17 amounting to Rs.16,47,000/-, the Adjudicating Officer categorized the said service under the category of Engineering Consultancy Service on the basis that receipts from the service recipient were shown under Section 194J of the Income Tax Act while the Appellant had claimed it in the category of Works Contract Service. In support of its contention, the Appellant has produced copy of ledger where the receipt of M/s WAPCOS Ltd. was shown in the category of Works Contract. As already held that no demand can be made on the basis of entry and figures shown in Form 26AS, we find sufficient force in the contention of the Appellant that the services rendered to M/s WAPCOS Ltd. was under the category of Works Contract.

15. Further, the value for charging Service Tax in the case of Works Contract Service determined in accordance with provisions of Rule 2(A) of the Service Tax (Determination of Value) Rules, 2006. In case of original work, the value for charging Service Tax would be forty percent of the aggregate value as per Rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006. In the present case, it is an admitted fact that original service was provided under the category of Works Contract Service. Hence, Service tax would be charged only on forty percent of the value of Works Contract Service.

16. We find that the Adjudicating Authority has determined Service Tax liability on the basis of figures of Balance Sheets of the Appellant for the F.Y. 2015-16 & 2016-17 and Service Tax demand was worked out to be Rs.44,59,059/- and Rs.1,11,68,487/-. The Appellant has submitted that during F.Y. 2016-17 the Appellant had been given sub-contract by M/s JMC

Project India Ltd., Plot No. B-21, Sector-58, Noida for providing and installing *temporary earth retaining structure with soil nailing with insertion of nails in all strata for the soil including fixing wire mesh on exposed excavated surface, bearing plates, nuts, PVC drainage pipes, shotcrete etc.* The said work relates to installing of drainage system in connection with sewerage treatment or disposal pertaining to Supreme Court, Additional Office Complex, Pragati Maidan, New Delhi. The award was for Rs.2,82,40,000/-. During F.Y. 2016-17, the Appellant provided services in terms of said contract for an amount of Rs.36,36,586/-. The Service Tax involved on such value of services was worked out to be Rs.2,18,195/-. The said service was exempt from Service Tax in terms of clause (e) of Sl. No.12 of Notification No.25/2012-ST dated 20.6.2012. As per clause (h) of Sl.No.29 of the said Notification, sub-contractor of Works Contract was also exempt from Service Tax if main contractor was exempt from Service Tax. Thus, the demand of Rs.2,18,195/- is liable to be dropped. The Service Tax payable during 2016-17 is Rs.1,09,50,292/- (Rs.1,11,68,487/- Rs.2,18,195/-).

17. The Appellant has deposited Rs.66,02,978/- in cash and Rs.10,41,790/- by adjusting through Cenvat during F.Y. 2015-16 and Rs.30,92,779/- in cash and Rs.36,27,094/- by adjusting through Cenvat for the F.Y. 2016-17. Total Service Tax deposited was Rs.1,43,64,641/- before issuance of the SCN. The Cenvat credit claimed by the Appellant for the period from October, 2015 to March, 2017 was rejected by the Adjudicating Officer simply on the ground that ST-3 returns were not filed. It is noticed that manner of availment of Cenvat credit of duties or service tax paid on inputs and input services is provided under Rule 9 (5)(6) of the Cenvat Credit Rules, 2004. It is reproduced as below:-

"(5) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods in which the relevant information regarding the value, duty paid, CENVAT credit taken and utilized, the person from whom the input or capital goods

have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit. (6) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit"

The above provisions make it absolutely clear that Cenvat credit is taken by way of maintaining record, not on the basis of filing of ST-3 returns. We therefore do not find any reason to reject eligible Cenvat Credit to the Appellant. There is no short payment of Service Tax during F.Y. 2015-16 and 2016-17.

18. As regards penalty under Section 78 of the Finance Act, 1994, it is found that the same is imposable equal to the amount of Service Tax short paid or not paid. As there is no short payment of Service Tax, no penalty is imposable under Section 78 of the Finance Act, 1994.

19. We further find that services rendered by the Appellant namely Works Contract Service and Engineering Consultancy Service were declared taxable services under wrong provisions. Hence, the impugned order is not maintainable on the said count also.

20. In view of the above discussions, we are of the considered view that 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.

(Order pronounced in open court on - **21.05.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

LKS