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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 27/12/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/71971/2017-CU[DB] dated 09/11/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/70517/2017	**Interarch Building Products Pvt Ltd** B-30,sector-57 NOIDA UP 201301
		Name and Address of Respondent
2		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

Copy To
3Advocate(s) / Consultant(s):

SPS LEGAL, SHAILESH P. SHETH, (ADV.)
MASKATI MAHAL, 3RD FLOOR, 119/3, KANTILAL M. SHARMA MARG, (LOHAR CHAWL), MUMBAI-400002

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. ST/70517/2017-CU[DB]

(Arising out of Order-in-Original No. 31 to 34/Commissioner/ST/Noida/2016-17 dated 31/03/2017 passed by Commissioner of Service Tax, Noida)

M/s Interarch Building Products Pvt. Ltd. **Appellant**

Vs.

Commissioner of Service Tax, Noida **Respondent**

Appearance:

Shri Shailesh P. Sheth, Advocate for M/s SPS LEGAL, for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 09/11/2017

FINAL ORDER NO-:713-71/2017.........

Per: Anil G. Shakkarwar

The present appeal is arising out of Order-in-Original No. 31 to 34/Commissioner/ST/Noida/2016-17 dated 31/03/2017 passed by Commissioner of Service Tax, Noida.

2. The brief facts of the case are that the appellants were having centralized registration for Service Tax with Central Excise & Service Tax Commissionerate, Noida for Services under "Commercial or Industrial Construction Service" and "Construction Services" in respect of erection, installation and commissioning of "Commercial or Industrial Buildings & Civil Structures." The appellants were engaged in the business of

manufacture, supply and erection at site of pre-fabricated/pre-engineered steel buildings and parts thereof at its three manufacturing units located at (i) Pantnagar – Uttarakhand (ii) Chennai – Tamilnadu (ii) Kiccha – Uttrakhand. The registration for Service Tax was for supply and erection of pre-fabricated/pre-engineered steel buildings and parts thereof. The goods manufactured are cleared from the place of manufacture on payment of Central Excise duty on which Cenvat credit was availed by the appellants. It appeared to Revenue that the appellant should have classified their service activity under "Works Contract Service." It further appeared to Revenue that on classifying service under "Works Contract Service" appellants were not entitled to avail Cenvat credit on Central Excise duty paid on inputs. It was, therefore, examined by Revenue, the transactions entered into by the appellant from January, 2007 to March, 2012. During the said period appellant had classified the service under "Commercial or Industrial Construction Service" and paid Service Tax @10.30 or 10.36 as the case may be on the assessable value or Gross value which was arrived at by following the provisions of Section 67 of the Finance Act, 1994. The total Service Tax paid was Rs.131,34,12,537/- (i.e. 131.34 Crore of Rupees). Out of the said amount, an amount of Service Tax paid through debit of Cenvat credit was Rs.112,60,92,760 (i.e. 112.60 Crore Rupees). The balance amount was paid through debit of gross Cenvat credit through input service of Rs.15.42 Crore. The remaining amount of Rs.3.30 Crore was paid by cash. It appeared to Revenue that the said services should have been classified under "Works Contract Service" and also to Revenue that on classification under "Works Contract Service", it was mandatory for the appellants to either follow Rule 2A of Service Tax (Determination of Value) Rules, 2006 or adopt Composition Scheme. The said Rule 2A and Composition Scheme do not allow availment of Cenvat credit on input. Therefore, it appeared to Revenue that Cenvat credit of Rs.112,60,92,760/- as availed on input was inadmissible to the appellant and therefore, the said debit has resulted in short payment of Service Tax. It, further, appeared to Revenue that by debiting the said amount of Rs.112,60,92,760/- appellant passed on inadmissible Cenvat credit to their customers and also collected from the customers in the name of Service Tax Rs.90,23,90,907/- which was liable to be recovered under the provisions of Section 73A of the Finance Act, 1994. Further under Composition Scheme, Revenue worked out that giving the benefit of inputs service Cenvat credit of Rs.15.42 Crore & Rs.3.30 Crore of cash payment, there was short payment of Service Tax to the tune of Rs.22,37,01,811/-. Therefore, a Show Cause Notice dated 23/10/2012 was issued to the appellant. Through the said Show Cause Notice, the appellant were called upon to show cause as to why (i) their service should not be reclassified under "Works Contract Service" instead of "Commercial or Industrial Construction Service", (ii) The inadmissible Cenvat credit of Building Material amounting to Rs.112,60,92,760/- should not be disallowed in terms of Rule 2 & 3(1) of Cenvat Credit Rules, 2004. (iii) An amount of Rs.22,37,01,811/- on account of short paid Service Tax being adjusted was inadmissible Cenvat credit on Construction Materials, After allowing the credit of input service and deducting tax deposited in cash during the period from 2007-08 to 2011-12, should not be demanded in cash from them under Sub-section (1) of Section 73 of the Finance Act, 1994. (iv) An amount of Rs.90,23,90,907/- collected as cash in excess of the Service Tax assessed/determined by passing the inadmissible Cenvat credit to their recipients of taxable service should not be demanded under Section 73A of the Finance Act, 1994. Further there were proposals to recover interest and imposed penalties under Section 77 & 78 of the Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004.

3. The said Show Cause Notice dated 23/10/2012, on contest, was adjudicated through Order-in-Original No. 78/Commissioner/Noida/2013-14 dated 28/03/2014, wherein all the demands were confirmed on all counts and in respect of the service, it was held to be classified under "Works Contract Service". ~~Feeling~~ Aggrieved by the said order, the appellant preferred appeal before this Tribunal. The said

appeal was decided through Final Order No. A/70073/2016 dated 18/11/2015 allowed the appeal of the appellant by way of remand and sent the matter for de-novo adjudication to the Commissioner, observing as under:-

> *"Having considered the rival contentions, we find it fit and appropriate in the interest of justice set aside the impugned order and remand the issue to the Adjudicating Authority who shall re-determine the tax liability after hearing the appellant and considering the case-law of this Tribunal in S.V. Jiwani (supra) and other case law as may be brought to the notice of the authority. We further make it clear that all the issues are kept open. Thus, the appeal is allowed by way of remand. Stay application also stands disposed of."*

4. In compliance to the said order, ld. Commissioner passed the present impugned Order-in-Original No. 31 to 34/Commissioner/ST/Noida/2016-17 dated 31/03/2017, while passing the said order dated 31/03/2017, he also clubbed 3 more Show Cause Notices that had been issued for covering the period from April, 2012 - March, 2014. He also Stated ~~said~~ that the Show Cause Notices invoked the same provisions of law as invoked in the case of Show Cause Notice dated 23/10/2012 except in the case of Show Cause Notice dated 27/10/2014 and 23/10/2015, wherein Cenvat credit on inputs is demanded by invoking provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Section 73 of the Finance Act, 1994. In Para 42 of Show Cause Notice dated 23/10/2012 as stated, the provisions of Finance Act, 1994 appeared to have been contravened by the appellant which are stated, as follows:- (a) Section 65-A(1) of the Finance Act,

1994, (b) Section 66 of the Finance Act, 1994, (c) Section 68 of the Finance Act, 1994, (d) Section 73A (1) of the Finance Act, 1994 & (e) Rule 2(k) & Rule 3 of the Cenvat Credit Rules, 2004. The Original Authority stated in the opening Paragraph of his impugned Order-in-Original that, it is issued in compliance to the Tribunal's Final Order No. A/70073/2016 dated 18/11/2015. In Para 5.10.13 while dealing with the judgement in S.V. Jivani's case (supra) which had been taken by the Revenue to the Hon'ble Bombay High Court and where the appeal of the Revenue was dismissed by the Hon'ble Court reported at 2016 (42) STR 209 (Bom.), the Original Authority has stated as follows:-

"The observation of the Hon'ble Bombay High Court that there had been no loss of Revenue in case of M/s S. V. Jiwani is not applicable in the instant case of M/s Interarch Building Products Pvt. Ltd. Plot No. 29, Udyog Nagar, Greater Noida,. ~~He has further submitted that~~ It was mandatory for the party to pay the Service tax on the Works Contract Service with reference to the value of service portion determined under Section 67(1) (iii) of the Finance Act, 1994 read with Rule 2A of Service Tax (Determination of Value) Rules, 2006 or in terms of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, and ~~also held that~~ there was no provision for availment of Cenvat Credit of Central Excise

duty paid on the construction materials (inputs) under the said Rules."

In view of the said findings, he passed order as follows:-

"1. I order to classify the impugned service of the assessee under the "Works Contract Service" in place of the "Commercial or Industrial Construction Service" except for the ongoing projects (as on 01.08.2007) mentioned in Annexure-B, as discussed supra in respect of SCN dated 23.10.2012, 22.05.2014, 27.10.2014 & SOD dated 23.10.2015.

2. I disallow the Cenvat credit of building/construction materials as alleged in SCN dated 23.10.2012 to the assessee amounting to Rs.99,25,44,728/- (Rs.1,12,60,92,760/- (-) Rs.13,35,48032/-) (Rupees Ninety Crores Twenty Five Lakhs Forty Fourt Thousand Seven Hundred Twenty Eight) (Including Cess & S.H. Edu. Cess) in terms of Rule 2(k) & 3(1) of the Cenvat Credit Rules, 2004.

3. I confirm the demand of Rs.20,13,18,981/- [(Rs.22,37,01,811/- (-) Rs.2,23,82,830/-) (Rupees Twenty Crores Thirteen Lakhs Eighteen Thousand Nine Hundred Eighty One only) (including Education Cess and Secondary & Higher Education Cess)] as per the allegations made in the SCN dated 23.10.2012 issued to the assessee and direct the party to pay the same in *cash, being short paid under Sub-section (2) of Section 73 of the Finance Act, 1994.*

4. I confirm the demand of Rs.79,12,25,705/- (Rs.90,23,90,907 (-) Rs.11,11,65,202/-) (Rupees Seventy Nine Crores Twelve Lakhs Twenty Five Thousand Seven Hundred Five only)] as alleged in the SCN dated 23.10.2012 to the assessee being the amount collected in cash as the Service Tax and adjusted from the inadmissible Cenvat credit availed on construction/building materials in excess of the Service Tax assessed/determined in terms of provisions under Section 73A of the Finance Act, 1994.

5. I order to charge and recover the interest at appropriate rate(s) as applicable during the relevant periods, under Section 73B and Section 75 of the Finance Act, 1994 from the assessee on the aforesaid amounts adjudged in paras 3 & 4 above with reference to the SCN dated 23.10.2012.

6. I impose a penalty of Rs. 10,000/- (Rupees Ten Thousand only) on the assessee under Section 77 of the Finance Act, 1994 for their various acts of omission and commission as mentioned in the preceding paras with reference to the SCN dated 23.10.2012.

7. I impose a total penalty equivalent to dues payable as above amounting to Rs.99,25,44,686/- [(Rs.20,13,18,981/- (+) Rs.79,12,25705/-) (Rupees Ninety

Nine Crores Twenty Five Lakhs Forty Four Thousand Six Hundred Eighty Six only)] on the assessee under Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 for their various acts of omission and commission as mentioned in the preceding paras with reference to the SCN dated 23.10.2012.

8. I disallow the Cenvat credit of building/construction materials as alleged in the SCN dated 22.05.2014 issued to the assessee amounting to Rs.2,90,92,473/- (Rupees Two Crores Ninety Lakhs Ninety Two Thousand Four Hundered and Seventy Three only) [(Rs.4,39,46,504/- (-) Rs.1,48,54,031/- including Education Cess and Secondary & Higher Education Cess and reflected in Annexure/Chart A & B to the SCN dated 22.05.2014)] in terms of Rule 2(k) & 3(1) of the Cenvat Credit Rules, 2004.

9. I confirm the demand of [(Rs.2,90,92,473/- (Rupees Two Crores Ninety Lakhs Ninety Two Thousand Fourt Hundred and Seventy Three only) (As per Annexure/Chart C & D to the SCN dated 22.05.2014)] upon the assessee being the amount collected in cash as Service Tax and adjusted materials in excess of the Service Tax assessed/determined in terms of provisions under Section 73A of the Finance Act, 1994.

10. I order to charge and recover the interest at appropriated rate(s) as applicable during the relevant *periods under Section 73B & Section 75 of the Finance Act, 1994 from the assessee on the aforesaid adjudged amount as per Para 9 with reference to the SCN dated 22.05.2014.*

11. I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) upon the assessee under Section 77 of the Finance Act, 1994 for their various acts of omission and commission as mentioned in preceding Paras with reference to the SCN dated 22.05.2014.

12. I impose a penalty of Rs.29,09,247/- (Rupees Twenty Nine Lakhs Nine Thousand Two hundred Forty Seven oly) upon the assessee equivalent to 10% of the dues adjudged under Para 9 amounting to Rs.2,90,92,473/- under Section 76 of the Finance Act, 1994 read with Rule 15(1) of the Cenvat Credit Rules, 2004 for their various acts of omission and commission as mentioned in the preceding paras with reference to the SCN dated 22.05.2014.

13. I disallow the Cenvat credit of building/construction materials as alleged in the SCN dated 27.10.2014 amounting to Rs.9,20,75,777/- (Rupees Nine Crores Twenty Lakhs Seventy Five Thousand Seven hundred Seventy Seven only) including Education Cess and Secondary & Higher Education Cess in terms of Rule 2(k) & 3(1) of the Cenvat Credit Rules, 2004 and order to recover the same from the assessee under Rule 14 of the

Cenvat Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994.

14. I order to charge and recover the interest, at appropriate rates), as applicable during the relevant periods, under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance, Act, 1994 from the assessee on the aforesaid amount mentioned in Para 13 above with reference to the SCN dated 27.10.2014.

15. I hereby confirm the demand of Rs.6,08,20,141/- (Rupees Six Crores Eight Lakhs Twenty Thousand One Hundred Forty One only) (as per Chart C & D to the SCN dated 27.10.2014) upon the assessee, being the amount collected in cash as Service Tax and adjusted from the inadmissible Cenvat credit availed on the construction/building materials in excess of the Service Tax assessed/determined in terms of provisions under Section 73A of the Finance Act, 1994.

16. I hereby order to charge and recover the interest, at appropriate rate, as applicable during the relevant periods, under Section 73B & Section 75 of the Finance Act, 1994 from the assessee on the aforesaid confirmed dues with reference to the SCN dated 27.10.2014.

17. I impose the penalty of Rs.60,82,014/- (Rupees Sixty Lakhs Eighty Two Thousand Fourteen only) upon the assessee, equivalent to 10% of the amount adjudged under Para 15 above, amounting to Rs.6,08,20,141/-

(Rupees Six Crores Eight Lakhs Twenty Thousand One Hundred Forty One only) under Section 76 of the Finacne Act, 1994 read with Rule 15(1) of the Cenvat Credit Rules, 2004, for their various acts of omission and commission as mentioned in the preceding Paras with reference to the SCN dated 27.10.2014.

18. I impose the penalty of Rs.10,000/- (Ten Thousand only) upon the assessee under Section 77 of the Finance Act, 1994 for their various acts of omission and commission as mentioned in the preceding Paras with reference to the SCN dated 27.10.2014.

19. I hereby disallow the Cenvat credit of building/construction materials as alleged in the SOD dated 23.10.2015 amounting to Rs.36,81,836/- (Rupees Thirty Six Lakhs Eighty One Thousand Eight hundred and Thirty Six only) including Education Cess and Secondary & Higher Education Cess in terms of Rule 2(k) & 3(1) of the Cenvat Credit Rules, 2004 and order to recover the same from the assessee under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994.

20. I hereby order to charge and recover the interest, at appropriate rate(s), as applicable from the assessee during the relevant periods, under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance

Act, 1994 on the aforesaid confirmed dues in Para 18 with reference to the SOD dated 23.10.2015.

21. I hereby confirm the demand of Rs.53,59,408/- (Rupees Fifty Three Lakhs Fifty Nine Thousand Fourt Hundred and Eight only) upon the assessee, being the amount collected in cash as Service Tax and adjusted from the inadmissible Cenvat credit availed on construction/building materials in excess of the Service Tax assessed/determined in terms of provisions under Section 73A of the Finance Act, 1994 with reference to the SOD dated 23.10.2015.

22. I hereby order to charge and recover the interest, at appropriate rate(s), as applicable during the relevant periods from the assessee, under Section 73B read with Section 75 of the Finance Act, 1994 on the aforesaid confirmed dues in Para 21 with reference to the SOD dated 23.10.2015.

23. I impose the penalty of Rs.5,35,941/- (Rupees Five Lakhs Thirty Five Thousand Nine Hundred Forty One only) upon the assessee, equivalent to 10% of the dues adjudged under Para 21, amounting to Rs.53,59,408/- (Rupees Three Lakhs Fifty Nine Thousand Four Hundred and Eight only) under Section 76 of the Finance Act, 1994 read with Rule 15(1) of the Cenvat Credit Rules, 2204 for their various acts of omission and commission as *mentioned in the preceding Paras with reference to the SOD dated 23.10.2015."*

~~Feeling~~ Aggrieved ~~against~~ by the said order the appellant has moved the present appeal before this Tribunal.

5. The grounds of appeal are as follows:-

(i) The ld. Commissioner disallowed Cenvat credit availed on inputs in terms of Rule 2 & 3(1) of Cenvat Credit Rules, 2004 to the extent of Rs.1,12,60,92,760/- in case of show cause notice dated 23.10.2012 and the amounts in case other 3 notices as specified above and that such order is not sustainable in law.

(ii) The provision of Rule 2A of Service Tax (Determination of Value) Rules, 2006, start with expression "subject to the provisions of Section 67" which means the provision prescribed under said Rule 2A, is subject to the provisions of Section 67 of the Finance Act, 1994.

(iii) Opening Para of Rule 3 of Composition Scheme reads as- " Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay Service Tax in relation to Works Contract Service shall have the option to discharge his Service Tax liability on the Works Contract Service." It clearly indicates that it is one of the options given to the Service Provider to discharge Service Tax liability in respect of Works Contract Service and it is not mandatory to adopt the said Rule under Composition Scheme for discharge of Service Tax liability.

(iv) Section 67 of the Finance Act, 1994 provides for arriving at assessable value which states "subject to the provisions of this Chapter, where Service Tax is chargeable on any taxable service with reference to its value, then such value shall in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provide by him." Therefore, the said provision which is fundamental in nature and is applicable to any taxable service.

(v) The demand towards Cenvat credit confirmed in case of show cause notice dated 23.10.2012 is substantially time barred.

(vi) In the impugned order, ld. Commissioner has distinguished the judgment of this Tribunal in the case of S. V. Jiwani (supra) and the grounds on which ld. Commissioner distinguished the judgment are invalid.

6. Heard the ld. Counsel for the appellant, who has submitted that the Original Authority has disallowed Cenvat credit demanded through Show Cause Notice dated 23/10/2012 & 22/05/2014 in terms of Rule 2(k) & 3(1) of Cenvat Credit Rules, 2004 and further submitted that there was no proposal in the said two Show Cause Notices to

disallow the said Cenvat credit under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73 of the Finance Act, 1994. The only provision for disallowing the Cenvat credit is provided under14 of the said Rules and since said Rule was not invoked, the Cenvat credit which was availed by the appellant was still available to them as it was found to be admissible to the appellant. He further submitted that the proposal to disallow the said Cenvat credit was not under the provisions of Rule 14 of the said Rules, therefore, the said Show Cause Notices dated 23/10/2012 & 22/05/2014 were not sustainable for the proposal to disallow Cenvat credit amounting to Rs.1,12,60,92,760/- & Rs. 2.90 crores respectively. He further submitted that the demand of Rs.20,13,18,981/- was confirmed on the basis that the appellant should have exercised their option under Composition Scheme. He further submitted that as stated in the grounds of appeal, Composition Scheme is optional and they individually opted for Normal Scheme. He has pointed out that only when the Composition Scheme is opted, Cenvat credit on inputs is inadmissible but since they have not opted for Composition Scheme, the provisions of Composition Scheme are not applicable to them. He has further pointed out that provision of said Rule 2A of Service Tax (Determination of Value) Rules, 2006, are subject to provisions of Section 67 of the Finance Act, 1994 and they have arrived at assessable value by applying the provisions of

Section 67of the Finance Act, 1994 and also that Revenue in Para 42 of said Show Cause Notice dated 23/10/2012 did not make an allegation that the appellant had violated provisions of said Section 67 of the Finance Act, 1994. He has further submitted that once the Cenvat credit is admissible to them, then the demand under Section 73A ~~73(A)~~ of the Finance Act, 1994 and as such, does not survive. He has further submitted that provisions of said Rule 2A of Service Tax (Determination of Value) Rules, 2006 are subject to provision of Section 67 of the Finance Act, 1994 and as such, there was no contravention of provisions of said Section 67 of the Act, and that the provisions of said Rule 2A of the Rules, are not applicable to them. Further, Composition Scheme is optional and they did not opt for Composition Scheme, and therefore, conditions of Composite Scheme were not applicable to them. The Composition Scheme and said Rule 2A of the Rules do not allow the availment of Cenvat credit on inputs but since both were not applicable in their case and Cenvat credit was not proposed to be recovered under Rule 14 of the Cenvat Credit Rules, 2004, therefore, the entire Cenvat credit paid on inputs was admissible to them. Once the Cenvat credit is found to be admissible, then the debit of the same will establish that no additional amount was recovered from their customers in the name of Service Tax and which was not deposited. Therefore, the demand Section 73A ~~73(A)~~ of the Finance Act, 1994 raised under all the Show Cause Notices become unsustainable. He further submitted that the demand of around Rs.20 crores confirmed in the First Show Cause Notice was on account of forcibly applying option of Composition Scheme on the appellant and therefore, said demand is also not sustainable. He has further submitted that taking all the aspects into consideration, it is a very clear case that there was not loss to exchequer. He finally submitted that the Commissioner has unjustifiably distinguished the judgment in S.V. Jivani's case (supra) on the pretext that there was a Revenue loss caused by the appellant to the exchequer as no such case was made out by the Revenue at any stage nor any evidence suggesting the same is available on records. As regards the Commissioner's reliance on the case of CCE Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC), he submitted that the reliance placed on this case is misplaced and out of context as the issue for consideration before the Apex Court was entirely different than that involved in the present case. The sole issue before the Apex Court in composite indivisible contract case was, whether service tax can be levied on works contract prior to 01.06.2007 from which date such works contracts were made liable to service tax. The issue, on the other hand, involved in the present case is entirely different. Therefore, the Final Order of this Tribunal in the above sated case of M/s S. V. Jiwani was applicable to the appellant.

7. Heard the ld. A. R. for Revenue, who has also submitted written submission as under-:

"7. The department's Central Excise Appeal No. 252 of 2014 in the Case of CCE & S. Tax Vs. S. V. Jiwani was disposed of by Hon'ble High Court Mumbai vide Order dated 01.02.2016 as the Hon'ble High Court found that Revenue was not put to loss in that case and clarified that such issues as are raised in the present appeal and the substantial question of law can be gone into appropriate case where has sustained any loss or there is evasion of tax.

8. Construction Service was made taxable vide Finance Act, 2004 w.e.f. 10.09.2004 and w.e.f. 16.06.2005, the scope of the service was expanded and re-named as "Commercial or Industrai Construction Service." Taxable services mean any service to be provided to any person, by any other person in relation to commercial or industrial construction – (Section 65(105)(zzq).

Works Contract Service (Section 65(105)(zzzza) means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Works Contract Service seeks to charge tax only on these contracts which are in the nature of works *contract, whereas there is no such restriction under Commercial or Industrial construction service or other service. In case of works contract service, VAT/ WCT shall be charged on value of goods which are transferred and Service Tax shall be charged on the value of Services. Every work contract involves an element of sale of goods and provision of service. The Hon'ble Supreme Court in the case of BSNL {2006 (2) STR 161 (SC)} has settled the law that works contract can be segregated into a contract of sale of goods and contract of provision of service. With a view to bring certainty and sim0plicity the manner of determination of value of service portion in works contracts has been provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. The Government did not want to levy tax on the goods portion of the services which involved both the supply of goods and service parts as that would amount to transgressing on the legislative powers of the state and therefore, provided certain exemption based on percentage of the gross amount charged vide 12/2003-ST dated 20/06/2003 which exempted the value of goods and materials sold from the value of the total amount charged for the service, subject to the condition that there is documentary proof specifically indicating the value of the said goods and materials, 15/2004-ST that exempted tax from the portion that was in excess of 33% of the tax determined* *on the gross amount charged and later a mega Notification No. 1/2006-ST dated 01/03/2006. CBEC also specified vide Circular No. 81/16/2007-TRU dated 22/05/2007 as to when the Erection, Commissioning or Installation Service, Commercial or Industrial Construction Service and Construction of Complex Service fall in the scope of Works Contract Service. In order to specifically provide a mechanism to tax the service component of a work contract, the Works Contract Service was introduced w.e.f. 01/06/2007.*

9. In terms of Section 65A of the Finance Act, 1994, a service is classified to the heading providing the most specific description rather than a more general specification. The Works Contract Service is more specific than the Industrial Construction Service in the present circumstances and thus the service provided by 'M/s IBPPL' merits to be classified under the Works Contract Service.

10. Further, the ***Hon'ble Supreme Court in its Order dated 20.08.2015 in Civil Appeal No. 6770 of 2004 in the case of L &T Ltd and Others {2015 (39) STR 913 (SC)}*** *has held that – (i).. "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 simplicitor without any element in them." (ii)... 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." (iii) It is 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."*

11. Therefore, the method adopted by 'M/s IBPPL' to discharge the Service Tax liability on the gross value of contract i.e., combined value of goods transferred and services rendered instead of discharge of Service Tax liability on the gross value of services rendered only was erroneous as well as unconstitutional and caused loss to the Government exchequer in as much as they availed the credit of the input materials (transferred goods) to set off the tax liability under the proper classification of the service provided by them i.e., "Works Contract Service." In view of the above, the appeal of by 'M/s IBPPL' is liable to be rejected by the Hon'ble CESTAT, Allahabad."

8. Having considered the rival contentions and on perusal of the facts on record, we find that the entire case of Revenue is based on the provisions under Rule 2A of Service Tax

(Determination of Value) Rules, 2006 and Composition Scheme in respect of "Works Contract Service". It is the contention of the Revenue that after 01.06.2007, the services of the appellant were appropriately classifiable under works contract service only in terms of Section 65 (105) (zzzza) of the Finance Act, 1994 and that the appellant had only two options for valuation of its service and that is, either Rule 2A of Valuation Rules, 2006 of under the composition Scheme and in either of these options, Cenvat credit on inputs is not admissible to the appellant. We find that the appellant has contested this claim of the Revenue for reclassification of their services on 01.06.2007. We however abserve that even if the services of the appellant are considered as classifiable under 'works contract services' after 1st June, 2007, as claimed by the Revenue, the further claims of the Revenue that there were only two options as above for valuation of works contract service available to the appellant and consequential non-admissibility of Cenvat credit have no merit. We find that Composition Scheme is optional and provisions of said Rule 2A of the said Rules are subject to provisions of Section 67 of the Finance Act, 1994. We also find that in Para 42 of the said Show Cause Notice dated 23/10/2012, Revenue has not alleged that the appellant had violated the provisions of Section 67 of the said Act. Once the said provisions of Section 67 of the said Act have been complied with, the question of applicability of said Rule 2A of the Rules does not arise. It is further clear from the provisions of Sub-section (4) of Section 67 of the said Act, that where value cannot be determined as provided under Sub-rule (1) to (3) of Section 67 of the said Act, then only the value is to be determined as provided under the Rules. We find that there is no allegation in the Show Cause Notice that provisions of Section 67 of the said Act, are violated by the appellant, therefore, there is no question of application of said Rule 2A of the said Rules, nor there was any question of forcibly applying option of Composition Scheme on the appellant. In both these circumstances, the appellants were entitled for Cenvat credit on inputs. We, therefore, find that appellants were entitled for Cenvat credit on inputs. We find that the entire demand is made out on the presumption that Cenvat credit on input was not admissible and as a result there was short payment and as a result there was also a demand Section 73A ~~73(A)~~ of the Finance Act, 1994. In view of our above discussion and findings, the allegation in the show cause notices based on such presumption are not sustainable. Once it is established that Cenvat credit on input was admissible, then the demand on short levy of Service Tax and also under Section 73A ~~73(A)~~ of the Finance Act, 1994, does not survive. We also find that the finding by the Original Authority that the Final Order of this Tribunal in the case of reported at 2014(35) STR 351 (Tri-Ahmd) M/s S. V. Jiwani was not applicable in the present case due to loss to Revenue, is also not sustainable. We find that the Hon'ble Bombay High Court, while discussing the appeal of the Revenue in S.V. Jivani's case (supra), has made general observation on the aspect of Revenue loss but has otherwise upheld the order of the Tribunal. We find that the Commissioner's reliance on the observations of the Hon'ble High Court on 'revenue loss' are misplaced and without any basis. We find that in the show cause notices, the Department has not made out any such case of the alleged revenue loss against the appellant. The Commissioner's impugned order also does not explain as to in what manner such loss is caused by the appellant. We also find that Revenue did not contest applicability of Final Order in the case of M/s S. V. Jiwani in the present case. We also find that it was held in the said case, that in case of "Works Contract Service" also assessment can be done under the provisions of Section 67 of the Finance Act, 1994 and that valuation methods prescribed under Rule 2A or composition scheme are merely options provided to the assessee. Once this is the legal position, the benefit of Cenvat credit on inputs cannot be denied to the appellants in the absence of any specific bar or prohibition in the Cenvat Credit Rules, 2004 or the Finance Act, 1994 or the rules made there under. We do not find any such restriction or prohibition nor the ld. D.R. has been able to show any such restriction to us. We find that in the present case, assessments were done by the appellant in accordance with the provisions of Sub-section (1) of Section 67 of the Finance Act, 1994, that is not challenged by the Revenue and therefore, the benefit of Cenvat credit on inputs cannot be denied to the appellants. We also find substantial force in the argument of the learned advocate for the appellants that the judgment of the Hon'ble Supreme Court in Larsen & Torbro's case (supra) relied upon by the Commissioner has no applicability in the present case. In that case, the Apex Court was considering the sole issue of leviability of service tax on the composite contract which are in the nature of works contract prior to 01.06.2007, i.e. the date on which the works contract service was brought under the levy by a specific entry. The issue in the present case is about the valuation methodology of works contract service, after 01.06.2007, the option available to the appellant for valuation and its bearing on admissibility of Cenvat Credit on inputs. The judgment of the Hon'ble Apex Court has, therefore, been relied upon by the Commissioner out of context as we find that the issues for determination in that case and in the present case are entirely different.

9. We find that the judgement of this Tribunal in M/s S. V. Jiwani (supra) squarely apply in the present case. The relevant portion of the order of the Tribunal in M/s S. V. Jiwani (supra) is reproduced below:-

***"6.** We have considered the submissions made at length by both sides and perused the records.*

***7.** Undisputed facts are appellant were awarded a contract by Classic Marbles Impex Pvt. Ltd., for setting up of their plant* *which involved procurement of materials and erection. The appellant herein had discharged the Service Tax at 12.36% i.e., full tax on the entire value of the contract under works contract services and availed Cenvat credit of the duty paid on inputs like steel, cement and various other services. It is also undisputed that the Cenvat credit was availed, on correct and valid documents.*

8. *The only question that arises for decision in this case is as to whether the appellant are correct in paying full rate of Service tax @ 12.36% or 10.30% (including education cess and SHE cess) and avail Cenvat credit on the inputs, services utilised for rendering of 'Works Contract Services.'*

9. *At the outset, it has to be recorded that adjudicating authority has proceeded on the ground that the appellant should have discharged Service Tax by adopting the valuation of services as per the provisions of Rule 2A of Service Tax (Determination of Value) Rules, 2006 and or Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.*

10. *In our considered view, the entire issue is misconceived by the Adjudicating Authority for more than one reason.*

11. *Firstly, the appellant entered into works contract service and Service Tax liability on such works contract needs to be discharged based on reading of Section 67 of Finance Act, 1994. In order to appreciate the said provisions we reproduce Section 67 which reads as under :*

"67. Valuation of taxable services for charging service tax. -

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation : For the purpose of this section, -

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value:

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

12. *It can be seen from the above reproduced Section, Service Tax liability is to be discharged on the gross amount charged by the service provider. In the case in hand there is no dispute as to the value or gross amount which needs to be considered for discharge of Service Tax liability. It is admitted by both sides that the value of the works contract executed by the appellant is the value on which the appellant has discharged full rate of Service Tax. We find from the above reproduced Section 67 of Finance Act, 1994, the said provision of Section*

67 can be departed only, and we reiterate only, when value as per the provisions of 67(1)(2)(3) are not ascertainable, and recourse can be taken to provisions of Section 67(4). While applying provisions of 67(4) necessary implication is that the value for discharge of Service Tax liability needs to be determined by referring to Service Tax Valuation Rules. In the case in hand since there is no dispute as to the gross value charged by the appellant there is no necessity to take recourse for determining the value under Service Tax (Determination of Value) Rules, 2006.

13. *Secondly, we find strong force in the contentions as raised by the Counsel as to applicability of the provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. We find that the said rule starts with the expression "subject to the provisions of Section 67" means that value of the services, involved in execution of works contract if cannot be determined under said section, then only the said provisions of Rule 2A would apply and shall be determined in the manner as is indicated therein. In our considered view, this rule will not be applicable to the case in hand.*

14. *Thirdly, we find that the adjudicating authority and assertion of departmental representative, that the appellant being a person and having provided 'works contract services' should have discharged the Service Tax liability under Works Contract (Composite Scheme for Payment of Service Tax) Rules, 2007. We have perused the provisions of Rule 3 of the said Works Contract (Composite Scheme for Payment of Service Tax) Rules, 2007 and after reading the expression in the opening part of the Rule 3 at first blush the use of 'non-obstante clause' may give an impression that the rule will prevail over the provision of Section 67 and Rule 2A of the Valuation Rules for determination of value for discharge of Service Tax liability in cases of works contracts, but on deeper reading we find that the said provisions indicate another intention of legislature.*

15. *In order to appreciate a correct position, the relevant Rule needs to be reproduced :*

*"**1.** (1) These rules may be called the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.*

(2) They shall come into force with effect from the 1st day of June, 2007.

2. ***Definitions.*** *- In these rules, unless the context otherwise requires, -*

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "section" means the section of the Act;

(c) "works contract service" means services provided in relation to the execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act;

(d) words and expressions used in these rules and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. *(1) Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to two per cent. of the gross amount charged for the works contract.*

Explanation. - For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

(2) The provider of taxable service shall not take Cenvat credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of Cenvat Credit Rules, 2004.

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."

16. *It is pertinent to note that the said Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 if read carefully would indicate that the service provider in relation to works contract service has an option to discharge Service Tax liability in respect of works contract* *services in the manner prescribed therein. If there is an option which needs to be exercised and if an assessee chooses not to exercise such an option of discharge of Service Tax liability under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 then only meaning that can be attributed will be that the service provider or an assessee has to discharge the Service Tax liability at the full rate. We are fortified in this view, by Apex Court in the case of Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (supra), We also find that larger Bench of the Tribunal in the case of Bhayana Builders P. Ltd. v. CST, Delhi - 2013 (32) S.T.R. 49 (Tri.-LB) was considering more or less identical/similar situation, wherein it was held that cost of free supply of materials cannot be considered for inclusion is gross value for discharging of Service Tax liability under the provisions of Finance Act, 1994. In our view, if the Rule 3(1) of Works Contract (Composition Scheme) for Payment of Service Tax Rules, 2007 is to be considered as having overriding effect over Section 67 and Rule 2A of Valuation Rules on literal construction of non-obstante clause, then an incongruous result will follow since the statutory provisions will be rendered nugatory and otiose. Further we are of the view that an anomalous situation would arise, if it is held so, as benefit of Rule 2A of Valuation Rules would no longer be available as an option to the service provider if 'non-obstante' clause employed in Rule 3(1) of Composition Rules is read in the manner Revenue wants us to read. In our view, this can neither be the intention of the legislature and no such interpretation can be done which renders a statutory provision nugatory. In our view, Rule 3 of Composition Rules is merely one of the option provided to the service provider to discharge of Service Tax liability vis-a-vis options available in Section 67 of the Finance Act, 1994.*

17. *Further, as there is no dispute to the facts that appellant is discharging full Service Tax under the category of Work Contract Service using inputs and input service are used for rendering of 'output services'; on reading of provisions of Rule 2(l) of the Cenvat Credit Rules, 2004 it would indicate that assessee is eligible to avail Cenvat credit of inputs and input services which are used to provide 'output service' which would include 'setting up' of a factory premises. In the case in hand, it is undisputed that the appellant had provided output services which covered by works contract for setting up of plant, it has to be held that Cenvat credit availed by the* *appellant is in consonance with the provisions of the Cenvat Credit Rules, 2004. We also hold that the discharge of Service Tax liability at full rate by the appellant by applying provisions of Section 67 of the Finance Act, 1994 cannot be called in question by the Revenue.*

18. *Accordingly, in view of the foregoing, we set aside the impugned order and allow the appeal, with consequential relief."*

We are in agreement with the above findings and conclusions of the coordinate bench and find that the same squarely apply in the present case.

10. In view of our above discussions and findings, we hold that the impugned Order-in-Original dated 31/03/2017 is not sustainable and is set-aside. We, therefore, allow the appeal with consequential relief to the appellants. Since, we have decided the issue on merits, we leave the issue of limitation, quantification and various other issues raised by the appellants open.

11. Thus, appeal of the appellant is disposed of on the above terms.

(Dictated & Pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

Ansari

प्रमाणित प्रति/Certified True Copy
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