IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – III

Service Tax Appeal No. 41437 of 2015

(Arising out of Order-in-Appeal No. 95/2015-ST dated 20.5.2015 passed by the Commissioner of Central Excise (Appeals – I), Coimbatore Circuit Office @ Salem Commissionerate)

M/s. Sundaram Industries Limited **Appellant**
Kitchilipalayam Main Road
Salem – 636 001.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Foulkes Compound
Anaimedu
Salem – 636 001.

And

Service Tax Appeal No. 41996 of 2017

(Arising out of Order-in-Appeal No. 35/2017 dated 26.7.2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore Circuit Office @ Salem Commissionerate)

M/s. Sundaram Industries Limited **Appellant**
Kitchilipalayam Main Road
Salem – 636 001.

Vs.

Commissioner of GST & Central Excise **Respondent**
No.. 1, Foulkes Compound
Anaimedu
Salem – 636 001.

With

Service Tax Appeal No. 41056 of 2018 &
Service Tax Misc. Application No. 42067 of 2018

(Arising out of Order-in-Original No. 01/COMMR/ST/2018 dated 12.1.2018 passed by the Commissioner of GST & Central Excise, Trichy)

M/s. Sundaram Industries Limited **Appellant**
No. 9925/1-5920, Tyre Solution Division
Thirumayam Road
Pudukottai – 622 001.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Williams Road
Cantonment
Trichy – 620 001.

And

Service Tax Appeal No. 41129 of 2018

(Arising out of Order-in-Original No. MDU-ST-COMMR-01-2018 dated 19.2.2018 passed by the Commissioner of GST & Central Excise, Madurai)

M/s. Sundaram Industries Limited **Appellant**
TVS Tread, Tyre Solutions Division
Usilampatti Road, Kochadai
Arasaradi, Madurai – 625 016.

Vs.

Commissioner of GST & Central Excise **Respondent**
Central Revenue Buildings
Bibikulam, Madurai – 625 002.

And

Service Tax Appeal No. 41985 of 2018

(Arising out of Order-in-Original No. 01/COMMR/ST/2018 dated 12.1.2018 passed by the Commissioner of GST & Central Excise, Trichy)

Commissioner of GST & Central Excise **Appellant**
No. 1, Williams Road
Cantonment
Trichy – 620 001.

Vs.

M/s. Sundaram Industries Limited **Respondent**
No. 9925/1-5920, Tyre Solution Division
Thirumayam Road
Pudukottai – 622 001.

APPEARANCE:

Shri S. Muthuvenkataraman, Advocate for the Assessee
Smt. T. Sridevi, JC (AR) and
Shri Arul C.Durairaj, Superintendent (AR) for Department

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order Nos. **41261-41265 / 2020**

Date of Hearing : 28.10.2020
Date of Pronouncement: 04.12.2020

Per Ms. Sulekha Beevi C.S.

The issue involved in all these appeals being the same, they were heard together and are disposed by this common order. The parties herein are referred to as assessee and department for the sake of convenience.

2. Brief facts are that the appellants are carrying out the business of retreading of tyres. They were registered for the activity under Management, Maintenance or Repair Service. On verification by the officers of the department, it was observed that assessees had availed CENVAT credit on the duty paid on the inputs namely vulcanized rubber etc. and also on the service tax paid on input services and had utilized the same towards payment of service tax for the taxable services provided by them. The officers were of the opinion that with effect from 1.7.2012, the activity would fall under works contract service. Further, that the assessee was discharging service tax on the gross amount received by them. In doing so, the assessee included the value of consumables / goods used for providing service. It appeared to the department that the services

being under the category of works contract service, the assessee is barred from taking CENVAT credit on inputs and ought to have determined the value for payment of service tax as per Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 thereby not including the value of consumables / goods. The assessee had thus not only wrongly availed CENVAT credit but also did not discharge the correct amount of service tax on the taxable service provided by them. Show Cause Notices were issued for different periods alleging the above, proposing to classify the activity as works contract service, to demand the short-paid service tax along with interest and also for imposing penalties. After due process of law, the original authority confirmed the classification of service under works contract service with effect from 1.7.2012 and also confirmed the demands along with interest and imposed penalties. Aggrieved, the assessee approached the Commissioner of Central Excise (Appeals) who upheld the orders passed by the original authority.

3. Appeal No. ST/41985/2018 has been filed by the department against the order passed by the Commissioner vide Order-in-Original No. 1/COMMR/ST dated 12.1.2018. Show Cause Notice was issued to the assessee for the period April 2014 to March 2016 inter alia, alleging wrong availment of CENVAT credit. The department was of the view that the assessee ought to have discharged service tax as determined under Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 and therefore the CENVAT credit availed by them on the inputs is ineligible. According to department, after 1.7.2012, the retreading activity falls under works

contract service. Since the property in the goods is transferred while rendering service, the said activity would fall under works contract service. The assessee has discharged service tax on the gross amount charged, thereby including the value of goods as well as value of service for payment of service tax. They availed CENVAT credit on the duty paid on inputs also. For discharging service tax for works contract service the value of goods are not to be included. Further, assessee is barred to avail CENVAT credit and has to pay service tax under Rule 2A(i)(B) of Service Tax (Determination of Value) Rules 2006 which is the method of determining the value of service portion of works contract service. Thus, they have to pay service tax on 70% of the total amount charged without availing CENVAT credit. Instead they have availed CENVAT credit and paid service tax on the gross amount charged. Such availment of CENVAT credit is contrary to the provisions of law for which Show Cause Notice was issued. After due process of law, the adjudicating authority, inter alia dropped the demand of wrongly availed / used input credit. Aggrieved by such order, the department has filed the above appeal.

4. The following Table would give the details of appeals under consideration.

Appeal Nos.	Details of Show Cause Notice	Period Involved
ST/41437/2015	S. No. 78/2014 JC (ST) dated 24.9.2014	July 2012 to March 2013 / April 2013 to March 2014
ST/41996/2017	Sl. No. 78/2014 JC (ST) dated 24.9.2014	April 2014 to Jul 2015
ST/41056/2015	S. No. 08/2017-ST-COMMR-TRY dated 9.11.2017	July 2012 to March 2016
ST/41129/2018	S. No. 12/2016/COMMR-MDU dated 14.12.2016	July 2012 to Sep. 2015
ST/41985/2018 (Deptt. Appeal)	S. No. 8/2017-ST-COMMR-TRY dated 9.11.2017	July 2012 to March 2016

5.1 On behalf of the assessee ld. Counsel Shri S. Muthu Venkataraman appeared and argued the matter. It is submitted by him that while providing service of retreading of tyres, the assessee utilized inputs in the nature of tread rubber, vulcanizing rubber etc. They availed CENVAT credit of duty paid on such inputs and discharged the service tax on the gross value as under section 67(1) of the Finance Act, 1994. The service tax was paid in cash and also adjusted from CENVAT credit. The department is of the view that the assessee has to discharge service tax liability determining the value of the service portion in the works contract by adopting Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006. It is also alleged that the assessee is barred from availing CENVAT credit when service tax is to be paid under Rule 2A(ii)(B). Show Cause Notices have been issued alleging the above contraventions.

5.2 It is submitted by the counsel that the assessee from the very beginning conceded that the activity of retreading of tyres falls under WCS with effect from 1.7.2012. The authorities below have unnecessarily dealt with the classification of service and that there is no dispute on the issue of classification. He adverted to the definition of service, works contract service and also section 67 contained in the Finance Act, 1994. Rule 2A of Service Tax (Determination of Value) Rules 2006 was also referred to. He submitted that assessee has paid service tax as per section 67 of Finance Act, 1994. Section 67 does not prohibit the availment of CENVAT credit. The goods used for providing works contract service in the nature of retreading of tyres are covered within the definition of inputs under CENVAT Credit

Rules, 2004. The assessee has thus correctly availed credit on inputs. They discharged service tax on the gross amount charged (including the value of goods) as under section 67. In fact, by doing so, since the value of goods are also included in the gross amount charged, the assessee has paid higher service tax than they would be liable to pay when the value is determined under Rule 2A(ii)(B). The department is of the view that being WCS the assessee can determine the taxable value only under Rule 2A(ii)(B) and cannot opt to pay under section 67. That therefore the credit availed as well as amount of service tax paid is wrong.

5.3 He argued that CENVAT credit would not be available if the valuation method of Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 is followed. However, there is no bar to pay service tax for WCS as under section 67. The assessee has an option either to avail CENVAT credit and discharge service tax on the gross value charged including the value of goods as under section 67 or to adopt the valuation method under Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 by excluding the value of goods and without availing the CENVAT credit. This option available to the assessee is clear on reading Rule 2A.

5.4 Rule 2A starts with the wordings 'subject to the provisions of section 67 ….' which would mean that this Rule is subject to section 67 and does not take away the right to pay service tax under section 67. The assessee has option to choose the value determined either under section 67 of the Finance Act or determine value under Rule 2A(ii)(B) of Service Tax (Determination of Value)

Rules 2006. Section 67 of the Finance Act 1994 does not have any condition in regard to availment of CENVAT credit on inputs used in providing output service. Whereas Rule 2A imposes a bar to avail credit. The department cannot thrust upon the assessee the valuation method under Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 when assessee has opted to pay service tax under section 67 on the gross amount charged. The Valuation Rules cannot override section 67 and in case of conflict between Act and Rules, the Act will prevail.

5.5 To support his argument that payment of service tax for WCS under section 67 on gross amount charged is correct, he relied upon the decision of the Tribunal in the case of S.V. Jiwani Vs. Commissioner of Central Excise & Service Tax, Vapi reported in 2014 (35) STR 351 (Tri. Ahmd.). The issue as to whether the assessee can discharge service tax under section 67 of Finance Act, 1994 on gross amount charged after availing CENVAT credit on inputs or whether they have to follow Rule 2A for discharging service tax without availing CENVAT credit was discussed in the said decision. The Tribunal held the issue in favour of the assessee holding that the payment of service tax for WCS under section 67 on the gross amount charged after availing CENVAT credit was proper. This decision was challenged before the Hon'ble High Court of Bombay by the department and vide judgment reported in 2016 (42) STR 209 (Bom.), the Hon'ble High Court dismissed the appeal filed by department. Similar view was taken by the Tribunal in the case of Interarch Building Products P. Ltd. Vs. Commissioner of Service Tax, Noida reported in 2018 (10) GST 360 (Tri. All.). Further, the decision of the Hon'ble High Court of Bombay wherein the decision of the Tribunal was upheld has been accepted by the Department as per their Circular No. 1063/2/2018-CX dated 16.2.2018.

5.6 The ld. counsel also pointed out that in the case of S.V.Jiwani, the Hon'ble High Court of Bombay observed that as both sides had conceded that there is no revenue loss even if tax was paid under section 67 after availing credit, the Court did not go into detailed discussion on the issue. That in the present case also assessee has discharged the service tax liability fully and there is no revenue loss. In fact appellant has paid higher amount of tax than that they would have to pay as under Rule 2A.

5.7 He pointed out that department does not dispute that assessee has discharged service tax on the gross amount charged by following the provision under section 67 of the Finance Act, 1994. If that be so, the department cannot allege that there is short-payment of service tax. The assessee while discharging service tax under section 67 on the gross amount has paid higher amount of tax since the value of goods are also included in the gross amount. He submitted a worksheet to compare the service tax paid by them as well as the service tax liability calculated by adopting valuation as per Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006, which is as follows:-

S. No.	**Particulars**	**July 12 to Mar 13**	**April 13 to Mar 14**	**April 14 to May 15**	**June 15 to Oct. 15**	**Nov. 15 to Mar16**	**Total**
1.	Service tax liability paid by our company (Ref. 1	5867539	7331697	8277777	4697576	4732657	**30907246**

	below) in terms of sec. 67 of the Act						
2.	Service tax liability calculated by adopting valuation as per Rule 2A(i) (Ref. 2 below	4061405	5870063	6429566	3493408	3128910	**22983353**
3.	Additional service tax paid by us in comparison with valuation as per Rule 2A(i) (1 – 2)	1806134	1461633	1848211	1204168	1603747	**7923894**
S. No.	**Particulars**	**Jul 12 to Mar 13**	**Apr 13 to Mar 14**	**Apr 14 to May 15**	**June 15 to Oct 15**	**Nov 15 to Mar 16**	**Total**
1.	Actual service tax paid details						
	In cash	5662803	6967708	7797357	4424992	4522299	**29375159**
	Input Service	204736	363989	480420	272584	210358	**1532087**
	Total service tax paid	5867539	7331697	8277777	4697576	4732657	**30907246**
2.	**Working of Service Tax liability by adopting valuation as per Rule 2A(i)**						
S. No.	**Particulars**	**Jul 12 to Mar 13**	**Apr 13 to Mar 14**	**Apr 14 to May 15**	**June 15 to Oct 15**	**Nov 15 to Mar 16**	**Total**
1.	Gross value charged to customer	104782010	142414603	157284368	66388122	56977943	**527847046**
2.	Taxable value declared for Service Tax	104782010	142414603	157284368	66388122	56977943	**527847046**
3.	Material portion	71922744	94922183	105284368	41435207	35350631	**348895989**
4.	Service portion	32859266	47492420	52019144	24952915	21627312	**178951057**
5.	Service tax liability	4061405	5870063	6429566	3493408	3128910	**22983353**
	Additional service tax paid by us in comparison with valuation as per Rule 2A(i)	1806134	1461633	1848211	1204168	1603747	**7923894**

5.8 From the above chart, it is submitted that the assessee has discharged excess service tax of Rs.79,23,894/-. The department has totally misconceived the provision under Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 to allege short-payment of service tax.

5.9 Further, where an option is not availed by the assessee which results in a revenue neutral situation, the demand raised by the department cannot sustain. To support this contention, he placed reliance on the decision of Commissioner of Central Excise, Vadodara Vs. Narmada Chematur Pharmaceuticals Ltd. reported in 2005 (179) ELT 276 (SC). The decision in the case of Commissioner of Central Excise, Baroda Vs. Indian Petro Chemicals reported in 1997 (92) ELT 13 (SC) was relied to argue that an assessee could avail the benefit of notification which is more beneficial to the assessee.

5.10 He argued on the ground of limitation also. Show Cause Notices have been issued invoking the extended period of limitation. Since the issue is of interpretation and as there were litigations on the very same, the Show Cause Notices issued invoking the extended period and the penalties imposed cannot sustain. He prayed that the appeals filed by the assessee may be allowed. The department appeal may be dismissed.

6. The ld. AR Smt. Sridevi and Shri Arul C. Durairaj appeared and argued on behalf of the department. The summary of written submissions is as under:-

6.1 As far as the classification of the retreading activity is concerned, it is submitted that the issue is no longer res integra and has been settled by the Hon'ble Supreme Court of India in the case of Safety Retreading Co. Pvt. Ltd. reported in 2017 (48) STR 97 that the activity in question would be a works contract. The question to be addressed in these appeals is whether a works contract can be assessed with reference to section 67 of the Finance Act, 1994 without recourse to Rule 2A of the Service Tax (Determination of Value Rules) 2006 which specifically deals with valuation of service portion of a works contract. The Hon'ble Supreme Court in the case of Safety Retreading Co. Pvt. Ltd. supra in para 10 of the judgment has held as follows:-

> *"The finding of the appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%".*

In other words, the Hon'ble Supreme Court has held that the method of assessment adopted by the appellant in the present case of paying tax on the gross value charged including value of goods is not in accordance with law.

6.2 The assessee has placed on record various case laws to the effect that service tax may be paid with reference to the gross value of the works contract. None of these judgments have considered the constitutional validity of adopting such assessment. The appellant cannot claim to adopt an option under the Act when such option would render the assessment to tax contrary to the law laid down by the Hon'ble Supreme Court and beyond the scope of the Act. In the circumstances, the application of Rule2A of the Service Tax (Determination of Value) Rules, 2006 is the only method of assessment that is legal and constitutionally correct. Once Rule 2A of the Service Tax (Determination of Value) Rules, 2006 is applied for assessment of tax, CENVAT credit in respect of goods in which property is transferred in the performance of the works contract is not available as such goods are excluded from the definition of inputs.

6.3 The judgment of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. reported in 2015 (39) STR 913 (SC) was relied by the ld. AR to argue that the element of transfer of property of goods in a works contract has to be segregated and therefore the assessment of the works contract with reference to gross value charged cannot be applied and would be contrary to the legal position laid down by the apex Court in the above decision.

6.4 The ld. AR Shri Arul C. Durairaj filed a calculation sheet to argue that when the assessee discharged service tax by adjusting the CENVAT credit, even though assessee pays service tax is paid on the gross amount charged, there is revenue loss. The chart submitted by ld. AR is as under:-

Appeal No.	Tax assessed u/s 67(1)				Tax assessed u/r2(A)		Difference in cash payment of tax (Revenue loss)
	Gross value	Total Tax	Adjusted in CENVAT Credit	Paid in cash	70% of gross value	Tax payable	
ST/41437/2015	4,45,42,073	21,66,647	1,80,496	19,86,151	3,11,79,451	38,53,780	18,67,629
	6,25,98,864	33,05,941	1,08,998	31,96,943	4,38,19,205	54,16,054	22,19,111
ST/41996/2017	9,07,06,341	51,15,711	3,28,490	47,87,221	6,34,94,439	80,24,820	32,37,599
ST/41056/2018	52,78,47,046	6,76,62,202	3,82,87,043	2,93,75,159	36,94,92,932	4,72,67,922	1,78,92,763
ST/41129/2018	25,93,55,786	3,25,22,032	1,92,20,822	1,33,01,210	18,15,49,050	2,27,65,878	94,64,668

6.5 He prayed that the appeals filed by the assessee may be dismissed. Appeal No. ST/41985/2018 filed by the department with regard to wrong availment of CENVAT credit may be allowed

7. We have heard the arguments of both sides and perused the records.

8.1 Though the assessee had taken registration only under maintenance and repair service and there is detailed discussion in the orders by authorities below with regard to the classification of the service, at the time of argument, the ld. counsel appearing for the assessee submitted that the activity of retreading tyres falls under works contract service and that the assessee does not dispute the classification as WCS.

8.2 The issue for analysis therefore narrows down to the point as to whether the assessee is correct in discharging service tax on gross amount charged under Section 67 of the Finance Act, 1994 after availing CENVAT credit on inputs or whether they have to pay service tax under Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules 2006 as assessed by the department.

8.3 For better appreciation, the relevant provisions of law are reproduced as under:-

Section 65(44) of Finance Act, 1994, defines 'Service'.

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service,* ***<u>but shall not include</u>****—*
>
> *(a)* ***<u>an activity which constitutes merely</u>****,—*
>
> *(i)* ***<u>a transfer of title in goods</u>*** *or immovable property,* ***<u>by way of sale</u>****, gift or in any other manner; or*
>
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
>
> *(iii) a transaction in money or actionable claim;*

Definition of works contract under section 65(54) reads as under

> *"Works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;*

As per section 66E(h) '*service portion in the execution of a works contract*' is a declared service.

From the above definitions, it can be seen that only the service portion in the execution of works contract is a taxable service.

Section 67 talks about valuation of taxable service for charging service tax and the same reads as under:-

> *"(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 purposes of this section, —

(a) "consideration" includes —

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

(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 account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

8.4 The contention of the assessee is that they have discharged the service tax on the gross amount charged for the taxable service of WCS provided by them. While doing so, this gross amount charged takes in the value of goods and consumables also. This means when assessee received Rs.100/- for execution of contract (retreading tyres / WCS) it included the value of vulcanized rubber, tread rubber etc. used by them. The assessee paid service tax on the whole of Rs.100/-. While doing so, they availed CENVAT credit on the duty paid on vulcanized rubber tread rubber which are inputs for providing the output service. The credit so availed was utilized / adjusted to pay part of the service tax.

8.5 It has to be noted that the taxable service in the works contract is only the service portion and not the value of the goods involved. Since there is an element of transfer of property of goods involved (sale) while providing the works contract service which may always not be easy to segregate. Service tax (Determination of Value) Rules, 2006 would help to determine the value of service portion in the execution of works contract. Rule 2A of the said Rules reads as under:-

> ***"2A. Determination of value of service portion in the execution of a works contract.-***
>
> ***Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-***
>
> ***(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.***
>
> *Explanation.- For the purposes of this clause,-*
>
> *(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;*
>
> *(b) value of works contract service shall include, -*
>
> *(i) labour charges for execution of the works;*
>
> *(ii) amount paid to a sub-contractor for labour and services;*
>
> *(iii) charges for planning, designing and architect's fees;*
>
> *(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;*
>
> *(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;*

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and
(viii) profit earned by the service provider relatable to supply of labour and services;

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1. - For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tilling or installation of electrical fitting of immovable property,

Service tax shall be payable on seventy per cent of the total amount charged for the works contract.

(d) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

PROVIDED that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2.--For the removal of doubts, it is clarified that 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."

8.6 According to ld. counsel for assessee, Rule 2A is subject to the provisions of section 67 and therefore the assessee can opt for payment of service tax under section 67 also. On bare perusal of the provisions of law noticed above, it would show that section 67 is the charging section which lays down the liability to pay service tax on the consideration received for providing taxable service. Rule 2A provides for a mechanism to chalk out that part of the consideration in a WCS which can be subjected to service tax.

8.7 Be that as it may, the very same issue was analyzed by the Tribunal in the case of S.V.Jiwani cited supra which categorically held in para 17 that the discharge of service tax liability at full rate by the appellant by applying the provisions of section 67 of the Finance

Act, 1994 cannot be called in question by the Revenue. The issue was thus held in favour of the assessee. The appeal filed by the department against this order was dismissed by the Hon'ble High Court of Bombay as reported in 2016 (42) STR 409 (Bom.). The Tribunal in Interarch Building Products Pvt. Ltd. reported in 2018 (10) GSTL 330 (Tri. All.) has followed the decision in S.V. Jiwani case. It is pertinent to mention that the decision of the Hon'ble High Court of Bombay in S.V. Jiwani was accepted by the Department vide their circular dated 16.2.2018. The relevant portion is reproduced as under:-

> *"3. Decision of the High Court of Bombay dated 01.02.2016 in the matter of M/s SV Jiwani in Central Excise Appeal No. 252/2014 [2016-TIOL-503-HC-MUM-ST].*
>
> *3.1 Department has accepted the order of the Hon'ble High Court of Gujarat in the case of M/s SV Jiwani in Central Excise Appeal No. 252/2014 where the Hon'ble High Court had inter alia held on the question framed, whether input service credit could have been availed without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 or whether CENVAT credit can be claimed after discharging the liability in full, that having paid the service tax in full, Revenue is not incurring any loss of revenue, hence the Court should not undertake an academic exercise.*
>
> *3.2 In the matter the issue that was examined by the Hon'ble Court was that, whether input service credit could have been availed without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 after having discharged the tax liability in full. It was held by the Hon'ble Court that that having paid the service tax in full, Revenue has not incurred any loss of revenue hence Court should not undertake an academic exercise."*

8.8 By judicial discipline, we are bound to follow the decisions of the Tribunal and also accepted by the Department. Needless to say that Circular issued by department is binding on them.

8.9 The ld. AR Shri Arul C. Durairaj has made a strong effort to argue that the assessee cannot be said to have discharged the entire service tax liability and that there is loss suffered by the Revenue when the tax is paid under section 67 of the Finance Act, 1994. On perusal of the worksheet given by the ld. AR, it is seen that if Rule 2A is applied, the assessee would not be able to avail CENVAT credit and therefore would have to pay entire service tax by cash and thus there is revenue loss. This contention of the department that if no CENVAT credit is availed, the assessee would not be able to adjust payment of service tax from CENVAT account and therefore there is short-payment of service tax cannot be accepted since in the above decisions, it has been decided and concluded that the assessee can avail CENVAT credit and discharge service tax under section 67 of the Finance Act. The argument of revenue loss also fails. We hold that the demand raised alleging short payment of service tax cannot sustain. The impugned orders in Appeal Nos. ST/41437/2015; ST/41996/2017; ST/41056/2018; ST/41129/2018 are set aside.

8.10 The issue with regard to whether assessee is eligible to avail CENVAT credit by discharging service tax under section 67 having been held in favour of the assessee, consequently, the appeal filed by the department alleging wrong availment of credit is without any merits.

8.11 The ld.counsel for assessee has argued on the ground of limitation also. The issue is in the nature of interpretation of provisions of law. The very same issue was under litigation and issue is held in favour of assessee which has been accepted by department.

The assessee has indeed discharged service tax as determined under section 67. There is no evidence of deliberate act of intention to evade service tax placed before us. We therefore are of the considered view, that the demand raised invoking extended period cannot sustain. The assessee succeeds on the issue of limitation also.

9. The appeals filed by the assessees are allowed with consequential relief, if any. The appeal filed by department/Revenue is dismissed. The cross-objection filed by the assessee in No. ST/CO/42067/2018 in Appeal No. ST/41056/2018 stands disposed of accordingly.

(Pronounced in open court on 4.12.2020)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. ANJANI KUMAR**)
Member (Technical)

Rex