**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**CHENNAI**

REGIONAL BENCH – COURT NO. III

**Service Tax Appeal No. 642 of 2012**

(Arising out of Order-in-Original No. 03/COMMR/ST/2012-13 dated 14.08.2012 passed by the Commissioner of Central Excise, Central Revenue Building, Tractor Road, NGO 'A' Colony, Tirunelveli – 627 007)

**M/s. Vinoth Shipping Services** **: Appellant**
2/91-1, Tiruchendur Road,
Tuticorin – 628 001

**VERSUS**

**The Commissioner of Central Excise & Service Tax** **: Respondent**
Central Revenue Building, Tractor Road, NGO 'A' Colony,
Tirunelveli – 627 007

**APPEARANCE:**

Ms. K. Nancy, Advocate for the Appellant

Shri Arul C. Durairaj (Supdt.), Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)**
**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 41778 / 2021**

DATE OF HEARING: 18.08.2021

DATE OF DECISION: **25.08.2021**

**Order : Per Hon'ble Ms. Sulekha Beevi C.S.**

The above matter was remanded by the Hon'ble High Court vide judgement dated 02.03.2020 in Writ Petition No. 23308 of 2013. The appeal was originally disposed of vide Final Order No. 40373 of 2013 dated 17.09.2013 wherein the appeal was dismissed for failure to make the pre-deposit, as directed by the Tribunal vide Stay Order No. 41734 of 2013 dated 03.07.2013. The Hon'ble High Court has directed to dispose of the appeal filed by the appellant on merits. The operative portion of the judgement of the Hon'ble High Court reads as below:-

> *"5. Considering the facts and circumstances of the case and having regard to the submissions so made by the learned Counsel on either side, this Court directs the 1st respondent to dispose of the appeal filed by the petitioner, on merits and in accordance with law, after affording due opportunity of personal hearing to the petitioner, within a period of six weeks from the date of receipt of a copy of this order.*
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> *6. This writ petition stands disposed of accordingly. Consequently, connected miscellaneous petition is closed. No costs."*

2.1 Brief facts of the case are that the appellant is engaged in providing various services. On intelligence gathered that the appellant did not discharge Service Tax liability for the services rendered under the category of "Cargo Handling Services", summons was issued to the appellant. The appellant stated that they provided Cargo Handling Services only to M/s. Aspinwall and Company Ltd. (hereinafter referred to as 'M/s. ACL') and that the said company had discharged Service Tax liability in full and informed the same to the appellant. The scope of work of the appellant was restricted to transport of imported goods from the port area to godown and transport of goods from the place of exporter to port area and consignment notes were raised on the customers only by M/s. ACL.

2.2 It appeared to the Department that the appellant, being a sub-contractor, is liable to pay Service Tax on the Cargo Handling Services provided to M/s. ACL. Show Cause Notice No. 06/COMMR/ST/2009 dated 03.12.2009 was issued *inter alia* proposing to demand Service Tax on such services along with interest and for imposing penalties for the period 2006-07. After due process of law, the Original Authority vide order impugned herein confirmed the demand of Service Tax along with interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

3.1.1 Learned Counsel Ms. K. Nancy appeared and argued on behalf of the appellant. She submitted that the in the present appeal, the appellant is contesting only the demand confirmed under the category of "Cargo Handling Services". That such services were provided by the appellant as a sub-contractor to M/s. ACL; the appellant had provided transportation services relating to the cargo of the customers of M/s. ACL. For the services rendered by the appellant, M/s. ACL has included the cost along with applicable Service Tax and recovered the entire amount from their clients and have discharged Service Tax liability. That since the entire Service Tax on the consideration received from their clients has been already discharged by M/s. ACL, the appellant, being a sub-contractor, is not liable to pay Service Tax. As there was only one service provided, there cannot be demand for payment of tax again.

3.1.2 She furnished the document issued by M/s. ACL to support the above contention and argued that the Service Tax has been discharged by M/s. ACL.

3.2.1 Learned Counsel for the appellant also put forward arguments on the ground of limitation. She submitted that for the period from 2006-07, the Show Cause Notice is issued on 03.12.2009 invoking the extended period. It is submitted by her that since the appellant was only a sub-contractor of M/s. ACL and since they had informed the appellant that the Service Tax would be discharged by them directly, the appellant did not pay the Service Tax. Since the billing on the clients is done by M/s. ACL, who is the main contractor, and the Service Tax was also collected from the clients by the main contractor, the appellant was under the impression that they are not liable to discharge Service Tax. That there was no wilful intention to evade payment of Service Tax. Further, even if the appellant discharged Service Tax, M/s. ACL, being the main service provider, would be eligible for credit and thus the situation is fully revenue neutral.

3.2.2 Further, the issue being purely an interpretational one, the invocation of extended period is without basis. There were several litigations during the said period wherein the question was as to whether sub-contractors are liable to pay Service Tax when the main contractor has discharged the Service Tax liability. The Tribunal in the case of *M/s. Semac Pvt. Ltd. v. Commissioner of Service Tax, Bangalore* reported in *2006 (4) S.T.R. 475 (Tri. – Bang.)* held that the sub-contractor is not liable to pay Service Tax when the main contractor paid tax on the full value of the consideration. A similar view was taken in *Commissioner of Customs & Central Excise, Indore v. M/s. Shivhare Roadlines* reported in *2009 (16) S.T.R. 335 (Tri. – Del.)* and *M/s. Urvi Construction v. Commissioner of Service Tax, Ahmedabad* reported in *2010 (17) S.T.R. 302 (Tri. – Ahmd.).* There were conflicting views taken by different fora and the matter was also referred to Larger Bench. The Central Board of Excise and Customs had issued Circular in F. No. 341/18/2004-TRU dated 17.12.2004 and 23/3/97-ST dated 13.10.1997 with regard to the liability of the sub-contractor when the main contractor has paid Service Tax. So also, the Master Circular No. 96/7/2007-ST dated 23.08.2007 also referred to such situations. These would show that there was much confusion as to the liability of the sub-contractor to pay Service Tax when main contractor has paid on the full value of consideration.

3.2.3 The Learned Counsel adverted to the Show Cause Notice and submitted that apart from merely stating that extended period is invokable, no reasons have been put forward in the Show Cause Notice.

4.1 Learned Authorized Representative Shri Arul C. Durairaj appeared on behalf of the Department and supported the findings in the impugned order. Learned Authorized Representative vehemently argued that even if the main contractor has discharged Service Tax on Cargo Handling Services, the appellant, being the sub-contractor, is liable to pay Service tax because the appellant is providing services to M/s. ACL, the main contractor. That the consideration received by the appellant from the main contractor is the consideration received for the services provided to the main contractor and therefore, is subject to levy of Service Tax; the correct method would be that the appellant discharges Service Tax on the consideration received from M/s. ACL and the same can be claimed as input tax credit by M/s. ACL.

4.2 With regard to limitation, Learned Authorized Representative supported the findings in the impugned order.

5. Heard both sides.

6. At the time of hearing, Learned Counsel for the appellant has produced the document issued by M/s. ACL wherein it is stated that the said company has discharged the entire Service Tax on the consideration received from the clients. The document reads as under:

*"03.04.2013*

*<u>TO WHOMSOEVER IT MAY CONCERN</u>*

*This is to inform that M/s. Vinoth Shipping Services have undertaken Cargo handling service including transportation of cargo under sub-contract basis for the year 2006-07 and received Rs.4,83,38,281/- (Rs. Four crore eighty three lakhs thirty eight*

> *thousand two hundred and eighty one only) from us which has been subjected to service tax under Customs House Agency services provided by us. The storage charges of Rs.15,14,269.25 included in above for handling of Wheat which is exempted from Service tax..*
>
> *Per Pro Aspinwall & Co. Ltd."*

7. Although the Department was directed to verify and submit as to whether the main contractor had discharged the Service Tax on these services, the Learned Authorized Representative for the Department submits that inspite of sending letters with the above query, they have not received any reply from the concerned Commissionerate.

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

> ***"15.*** *It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in*

*the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefit of the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the Cenvat Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage.*

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***30.*** *Thus, for all the reasons stated above, it is not possible to accept the contention of the Learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.*

***31.*** *The reference is, accordingly, answered in the following terms :*

*A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract."*

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

9.1 The Learned Counsel for the appellant has argued on the ground of limitation also. It can also be seen that during the relevant period, the issue as to whether a sub-contractor has to pay Service Tax separately even when the main contractor had discharged Service Tax on the very same services was subject matter of litigation before various fora. In the decisions of *M/s. Semac Pvt. Ltd.*

*(supra), M/s. Shivhare Roadlines (supra) and M/s. Urvi Construction (supra)*, the Tribunal had held that sub-contractors are not liable to pay Service Tax. There were conflicting views and the issue was referred to Larger Bench. In *M/s. Max Logistics Ltd. v. Commissioner of Central Excise, Jaipur* reported in *2017 (47) S.T.R. 41 (Tri. – Del.),* the question as to whether extended period of limitation can be invoked on the above issue has been analysed as below:

> ***"11.*** *Considering the above discussion and analysis the service tax liability on the appellant cannot be contested as invalid. We uphold the findings in the impugned order regarding tax liability. However, the appellants contested the demand on the question of time bar also. It is their case that the full amount collected by RSIC from the importers and exports has been subjected to service tax. Even if the appellant is held liable on their share of Revenue received from RSIC the said tax is eligible for credit to RSIC. Further, the issue involved is interpretation of law and there is no intend to evade payment of duty in such situation. The appellants relied on various case laws to reiterate their views. We find that the appellant is having a strong ground regarding the question of time-bar. It is to be noted that all invoices, for full consideration, have been raised by RSIC and the amount collected from the clients [importers and exports] were subjected to service tax which was deposited to the Government. RSIC in turn are paying certain amount to the appellants to get the services in these ICDs. In such situation, there is a clear possibility for a bona fide belief that as the whole amount has been subjected to service tax the amount received by the appellant may not be liable to service tax in connection with the services rendered by them. The issue involved has been a subject matter of interpretation by the Tribunal and High Courts. In fact the earlier Circular issued by the Board, covering the period prior to the introduction of Cenvat Credit Rules gave an impression that when the main service provider discharged the service tax on gross value there may not be tax liability on the sub-contractor rendering similar service to the main contractor. The Tribunal in various cases held in such a case involving interpretation of law and also a bona fide belief regarding service tax liability, will not attract the demand for extended period. We also take note that service tax liability on the appellant when discharged will be available as a credit to RSIC which can be used by RSIC for discharging their overall service tax liability. As such, to impute motivation to the appellant for intention to evade payment of duty is not sustainable. A reference can be made to the Tribunal's decisions in British Airways v. CCE (Adjn.), Delhi reported in 2014 (36) S.T.R. 598 (Tri. - Del.), Atul Ltd. v. CCE, Surat-II reported in 2009 (237) E.L.T. 287 (Tri. - Ahmd.). In the facts and circumstances of this case,*

*we find that the demand for extended period is not sustainable. We have also perused the reasons recorded by the Original Authority for invoking extended period of demand. He recorded that but for the Department's investigation the non-payment of tax would not have come to the notice. Further, the balance sheet for certain years have not been furnished in time by the appellant which was obtained from Registrar of Companies. As such, it was held that the appellants wilfuly suppressed material facts. We find that the service tax demand against the appellant was sought to be confirmed mainly on the basis of the terms of agreement between the appellant and RSIC. The gross receipt of RSIC and service tax payment thereupon is available with the Department. A portion of that receipt is now being taxed under BIS at the hands of the appellant. The service tax liability is as such on the arrangement based on agreement which is also the basis for payment of full service tax by RSIC. In other words, the service tax liability of both RSIC and the appellant has common source agreement. As such, we find the demand for extended period is not sustainable in the present case."*

9.2.1 On perusal of the Show Cause Notice, there is no positive act of wilful suppression/mis-statement alleged on the part of the assessee. In the last part of paragraph 3 of the Show Cause Notice, it is merely stated as under:

*"…As the non payment / non-registration came to the notice of the department only after gathering intelligence and discreet investigation conducted by the head quarters preventive unit, it appears that extended period of limitation is applicable to the facts of the case for recovery of service tax."*

9.2.2 Even in the Order-in-Original, the only finding for invoking the extended period is noted in paragraph 19, as under:

*"As regards penal action, M/s. Vinoth Shipping Services, Tuticorin have contravened the Act by suppressing the fact of rendering services and not paying the Tax due during the year 2006 – 07 and by not obtaining registration certificate for service rendered. Hence penalty is imposable under Sections 76, 77 & 78 of the Act."*

9.2.3 There is no clear allegation that the appellants have wilfully suppressed facts with the intention to evade payment of Service Tax. In the present case, the main contractor / M/s. ACL collected the full consideration including Service Tax from the clients, which is clear from the records. Appellants from the very beginning have raised the contention that they were instructed by M/s. ACL that they are not required to pay the Service Tax. We cannot find any factual basis for invoking the extended period.

9.3 We therefore hold that the demand raised by invoking the extended period cannot be sustained and requires to be set aside, which we hereby do.

10. From the discussions, we hold that the appeal fails on merits. However, we hold that the demand for the extended period of limitation, if any, cannot sustain and the impugned order to this extent is set aside, without disturbing any demand that falls within the normal period. For the same reasons, we find that the penalties cannot sustain. We set aside the same. The appellant succeeds on the ground of limitation only.

11. The appeal is disposed of on above terms.

(Order pronounced in the open court on **25.08.2021**)

Sd/-
**(SULEKHA BEEVI C.S.)**
MEMBER (JUDICIAL)

Sd/-
**(P. VENKATA SUBBA RAO)**
MEMBER (TECHNICAL)

Sdd