

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

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41426 of 2013

(Arising out of Order-in-Appeal No. TNL-CEX-000-APP-076-13 dated 15.02.2013 passed by the Commissioner of Central Excise (Appeals), Lal Bahadur Shastri Marg, C.R. Buildings, Madurai – 625 002)

M/s. Hari & Co.

4/29-E, Madurai Bye-Pass Road,
Tuticorin – 628 006

: Appellant

VERSUS

**The Commissioner of Central Excise and
Service Tax**

NGO 'A' Colony, Tractor Road,
Tirunelveli – 627 007

: Respondent

APPEARANCE:

Shri N. Viswanathan, Advocate for the Appellant

Shri M. Ambe, Deputy Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40295 / 2023

DATE OF HEARING: 23.03.2023

DATE OF DECISION: 24.04.2023

Order : [Per Bench]

This appeal is filed by the assessee against the Order-in-Appeal No. TNL-CEX-000-APP-076-13 dated 15.02.2013 passed by the Commissioner of Central Excise (Appeals), Madurai.

2. Brief facts, which are relevant for our consideration, are that the appellant, admittedly, is a Customs House Agent and it appears that the Revenue noted the fact that the appellant had rendered services of loading, unloading

and transport of imported Potash from port area to the godown as a sub-contractor of M/s. Aspinwall & Co., Tuticorin, for which they had received an amount of Rs.2,13,41,222/-, and that made the Revenue to assume that although the above service was classifiable under 'cargo handling service', the appellant had not paid applicable Service Tax for the same. This prompted the issuance of the Show Cause Notice dated 20.09.2010 thereby proposing to demand the above from the appellant.

3. It appears that the appellant had filed its reply *inter alia* claiming that the main contractor namely, M/s. Aspinwall & Co., having remitted the applicable Service Tax, there was no liability on the part of the sub-contractor, i.e. the appellant, to pay Service Tax once again. However, after due process, in adjudication, the Adjudication Authority after considering their explanation, vide Order-in-Original No. 06/ADC/ST/2012 dated 05.03.2012, has proceeded to confirm the demands as proposed. Feeling aggrieved, the appellant preferred an appeal before the First Appellate Authority and the First Appellate Authority also disagreeing with their pleadings, thereby dismissing their appeal vide impugned Order-in-Appeal, have assailed the same in this appeal before this forum.

4. Today when the matter was taken up for hearing, Shri N. Viswanathan, Learned Advocate, appeared for the appellant and Shri M. Ambe, Learned Deputy Commissioner, appeared for the Revenue.

5. The contention of the Learned Advocate for the appellant could be summarized as below: -

- (i) The appellant had rendered the service as a sub-contractor of M/s. Aspinwall & Co.; that another CHA, by name M/s. Vinoth Shipping Services, had also rendered sub-contractor services as a CHA to M/s. Aspinwall & Co.;

(ii) There is no dispute that the main contractor has discharged Service Tax liability, as evidenced by the undertaking given by the main contractor namely, M/s. Aspinwall & Co., vide their letter dated 12.07.07, a copy of which is placed on record;

(iii) In the case of *M/s. Vinoth Shipping Services*, who is identically placed, this Bench vide Order reported in *2021 (55) G.S.T.L. 313 (Tribunal – Chennai)*, has held that it was the duty of the sub-contractor to discharge Service Tax even if the main contractor had discharged the liability, but however, had set aside the demand *inter alia* on the ground of invoking of the extended period of limitation since there was no wilful suppression of facts.

6. *Per contra*, the Learned Deputy Commissioner for the Revenue relied upon the findings in the Order-in-Original, which are upheld in the impugned Order-in-Appeal.

7. We have considered the rival contentions and have also carefully gone through the orders of the lower authorities. The only issues to be decided by us, therefore, are: -

(1) Whether the demand of Service Tax in the case of the appellant, who is a sub-contractor, is justified; and

(2) Whether the Revenue is justified in demanding the above Service Tax by invoking the extended period of limitation?

8.1 In the Order-in-Original, the Adjudicating Authority has analysed the main contention of the appellant that the “main contractor has paid the applicable Service Tax” vis-à-vis the factual matrix, in the case of the main contractor viz. M/s. Aspinwall & Co. itself. At paragraph 19 of the Order-in-Original dated 05.03.2012, it has been

recorded that a Show Cause Notice dated 20.10.2009 was issued to the main contractor, i.e. M/s. Aspinwall & Co., wherein it has been specifically alleged that they had not included the value of services rendered by their sub-contractors, including the appellant before us. It appears that the said main contractor had filed their reply dated 19.02.2010, but however, they are non-committal on the specific allegation as regards the tax liability vis-à-vis their sub-contractors. For the sake of convenience, the relevant portion of paragraph 19 contained at page 8 of the Order-in-Original, is extracted hereinbelow: -

"19.

....goes like this - "For Cargo Handling services, they have engaged the other service providers M/s. Hari & Co and M/s. Vinodh Shipping have stated in their bill that service tax on the service rendered by them was payable by Aspinwal. This expenditure incurred by Aspinwal were nothing but input service for Aspinwal relating to their output services and ought to have been included in the taxable value for the periods concerned and paid huge sums for the same. Whereas Aspinwal have not included the value of services rendered by their sub-contractors viz. M/s. Hari & Co. and M/s. Vinodh Shipping in the taxable value shown in the ST-3 returns. The main contractor, vide their reply dated 19.02.2010 to the show cause notice, has not made any pointed reply and is non-committal about their liability. Their one-line reply in this regard is that they have assessed the correct value of taxable income and have not made any short payment of service tax. On the one hand, the main contractor is not paying service tax on such amount, and on the other hand, the sub-contractor is also claiming exemption to the same amount advancing the argument that the burden of payment is on the main contractor. This is double whammy, and I am not

inclined to let the assessee have the cake and eat it too. It is time for the assessee to undergo reality check. And the reality is not far to seek – both the parties are liable to pay service tax on the amount. There is no option left open to either of them, except for the benefit of input service credit facility to be availed by the main contractor on the service tax paid by the sub-contractor. As an adjudicating authority, the issue of payment of tax by the main contractor is not in my purview right now and so I desist from commenting upon that.”

8.2 The above discussions make it clear that the Revenue did not get its due. The sub-contractor pleaded, relying on the alleged letter issued by the main contractor to them, that the main contractor had remitted applicable tax, and the main contractor remains non-committal on the taxes applicable/paid on behalf of its sub-contractors.

9.1 The appellant vide memo filed before the Registry on 05.04.2023 has relied on the order of this Bench in the case of *M/s. Vinoth Shipping Services (supra)* and also an order of the co-ordinate Ahmedabad Bench of the CESTAT in the case of *M/s. Shanti Construction Company v. Commissioner of Central Excise and Service Tax, Rajkot [2023-TIOL-223-CESTAT-AHM]*, wherein the Ahmedabad Bench has held that the extended period of limitation cannot be invoked against sub-contractor and has also, in turn, referred to the order of the Larger Bench in the case of *Commissioner of Service Tax, New Delhi v. M/s. Melange Developers Pvt. Ltd. [2020 (33) G.S.T.L. 116 (Tri. – LB)]*.

9.2 There is no dispute that liability to Service Tax of the sub-contractor has been clarified by the Board vide Circular in F. No. B/11/1/2002-TRU dated 01.08.2002. Further, the order of the Learned Larger Bench in the case of *M/s. Melange Developers Pvt. Ltd. (supra)* has, in clear terms, after referring to various orders of different Benches

of the CESTAT and having also considered various Departmental clarifications, answered the reference by holding that a sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability. Thus, on merits, the order of the Learned Larger Bench is clearly against the appellant.

10. The appellant has also referred to the order of this Bench in the case of M/s. Aspinwall and Company Ltd. [*Final Order No. 40122 of 2023 dated 07.03.2023 – CESTAT, Chennai*], the main contractor, wherein only a passing reference has been made as to the inclusion of value of services provided by the sub-contractor of M/s. Aspinwall & Co. in the bills prepared by them on their clients, which had suffered Service Tax. In any case, that would not absolve the liability on the part of the sub-contractor, as ruled by the Learned Larger Bench in the case of M/s. Melange Developers Pvt. Ltd. (*supra*).

11.1 What appears to us from the above is that though the appellant, as a sub-contractor, was duty bound to discharge the tax liability, perhaps the communication dated 12.07.07 issued by the main contractor i.e., M/s. Aspinwall & Co., prompted them to believe that the tax had indeed been remitted. The villain appears to be M/s. Aspinwall & Co. who misled the appellant or made the appellant believe that it had remitted tax and in turn, made the appellant rely on the letter dated 12.07.07 issued by it in response to Show Cause Notice issued by the Department. This, according to us, is a sufficient reason and other than this, we do not find any documents being brought out on record by the Revenue to prove *mala fides* on the part of this appellant, so as to justify invoking the larger period of limitation in this case. It is also a fact borne on record that the main contractor has not denied the fact of having collected full consideration including Service Tax from the clients. On a similar set of facts, in the case of another sub-contractor viz. M/s. Vinoth Shipping Services (*supra*), we find that the Chennai Bench of the CESTAT has

given a finding that there was no factual basis for invoking the extended period, though declining to entertain the appeal on merits, but allowing the assessee's contention on invoking of the extended period of limitation.

11.2 Viewed thus, the fact of suppression, etc., has not been established by the Revenue to justify invoking the extended period of limitation and therefore, in view of our discussions in the above paragraphs, the ratio of the order of this Bench in the case of *M/s. Vinoth Shipping Services (supra)*, wherein the order of the Larger Bench in *M/s. Melange Developers Pvt. Ltd. (supra)* was followed, squarely applies here too. For these reasons, we are of the opinion that the impugned order, to this extent, cannot sustain.

12. We hold that the appeal fails on merits, but however, the demand pertaining to the larger period, if any, cannot sustain and consequently, the impugned order, to this extent, is set aside. We make it clear that we are not disturbing any demand pertaining to the normal period. For the above reasons, even the penalties imposed cannot sustain and hence, we set aside the same.

13. The appeal is thus allowed on limitation only, as indicated above.

(Order pronounced in the open court on **24.04.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd