IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41055 of 2013

(Arising out of Pre-Deposit Cum Appeal Order No. 62/2013 (P)(PD) dated 28.01.2013 passed by the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034

M/s. Vaishnovi Infrastructure Engineering Pvt. Ltd. : Appellant
No. 1/96, Pallikuppam, Vanagaram,
PH Road, Near Kumar Theatre,
Chennai – 600 077

VERSUS

The Commissioner of Central Excise : Respondent
Puducherry Commissionerate,
No. 1, Goubert Avenue, Beach Road, Puducherry – 605 001

AND

Service Tax Appeal No. 41600 of 2015

(Arising out of Order-in-Original (Denovo) No. 10/2015 (C)(ST) dated 31.03.2015 passed by the Commissioner of Central Excise, Puducherry Commissionerate, No. 1, Goubert Avenue, Beach Road, Puducherry – 605 001)

M/s. Vaishnovi Infrastructure Engineering Pvt. Ltd. : Appellant
No. 13, 32nd Cross Street, Besant Nagar,
Chennai – 600 090

VERSUS

The Commissioner of Central Excise : Respondent
Puducherry Commissionerate,
No. 1, Goubert Avenue, Beach Road, Puducherry – 605 001

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 NOs. 40395-40396 / 2023

DATE OF HEARING: 12.04.2023

DATE OF DECISION: 02.06.2023

Order : [Per Hon’ble Mr. P. Dinesha]

These appeals are filed by the assessee against the Pre-Deposit Cum Appeal Order No. 62/2013(P)(PD) dated 28.01.2013 passed by the Commissioner of Central Excise (Appeals), Chennai and *de novo* adjudication order / Order-in-Original (Denovo) No. 10/2015 (C)(ST) dated 31.03.2015 passed by the Commissioner of Central Excise, Puducherry.

2.1 Brief and undisputed facts, as could be gathered from the impugned order, are that the appellant is providing the services of "management, maintenance or repair service" and "transportation of goods by road". It appears that during the period under dispute i.e., 2008-09 and 2009-10, the appellant had received amounts towards hire charges from renting out their equipment which, according to the Revenue, fell under the category of 'supply of tangible goods' service in terms of Section 65(105)(zzzzj) of the Finance Act, 1994.

2.2 It appears that the appellant had also, *inter alia*, received Rs.5,61,16,701/- for the periods 2008-09 and 2009-10 which was shown as contract billing under the heading "other income" for the services provided by the appellant towards ‘site formation and clearance services’ on behalf of M/s. Surendra Infrastructure Pvt. Ltd. at Port Blair, Andaman and Nicobar Islands, for which it appeared to the Revenue that the appellant was liable to pay Service Tax.

3.1 The above resulted in the issuance of Show Cause Notices dated 05.08.2010 and 06.03.2012 proposing to recover Service Tax of Rs.21,83,616/- [Rs.1,76,936/- (supply of tangible goods) + Rs.20,06,680/- (site formation and clearance)] and Rs.74,58,305/- [Rs.1,95,350/- (GTA service) + Rs.6,85,355/- (supply of tangible goods) + Rs.1,52,928/- (management, maintenance or repair service) +Rs.64,24,672/- (site formation and clearance)] respectively, *inter alia* alleging that the appellant had wilfully suppressed the value of freight paid, hire charges, warranty charges and site formation and clearance services thereby invoking the extended period of limitation under Section 73(1) of the Finance Act, 1994, apart from applicable interest under Section 75 *ibid.* and also penalty under Section 78 *ibid*.

3.2 It appears that the appellant denied any Service Tax liability, as proposed, on the following grounds: -

- They had already remitted applicable tax along with interest towards the alleged GTA Services before issuance of the Show Cause Notice.
- For the above reason, there was no suppression of the above and hence, invoking Section 73(1) *ibid*. would not arise.
- For the above reason, no penalty, much less under Section 78 *ibid*., could be imposed.
- They had paid Service Tax regularly on the warranty charges. However, there was a short payment of Rs.2,620/- only, which was also remitted along with interest.
- The above payment was made much before the issuance of the Show Cause Notice dated 06.03.2012.
- For the above reason, there was no suppression of the above and hence, invoking Section 73(1) *ibid*. would not arise.
- For the above reason, no penalty, much less under Section 78 *ibid*., could be imposed.
- With regard to the allegation on the supply of tangible goods in respect of the Show Cause Notice dated 06.03.2012, they had submitted that even Service Tax was paid to the extent of Rs.36,34,673/- against the alleged liability of Rs.40,29,239/-. The alleged short payment from the above was also remitted with appropriate interest on 21.06.2011, which was also before the issuance of the Show Cause Notice.

- For the above reasons, there was no suppression of the above and hence, invoking Section 73(1) *ibid*. would not arise.
- For the above reasons, no penalty, much less under Section 78 *ibid*., could be imposed.
- With regard to the demand relating to site formation and clearance service, there was no liability to Service Tax as the said services were relating to laying of roads for the Indian Navy. Recourse was taken under exemption Notification No. 17/2005-S.T. dated 07.06.2005.
- Against the alleged receipt of Rs.5,61,16,701/-, they had only received an amount of Rs.1,62,64,814/- and the balance was never received by them.

3.3 It appears that the appellant seriously contested the demand of Service Tax on 'site formation and clearance service' on the ground that the same was relating to construction of roads at Diglipur site of Project Samudra of the Indian Navy; the said contract was awarded to M/s. Electronics Corporation of India Ltd. (ECIL), a Government of India enterprise, which in turn engaged M/s. Surendra Infrastructure Pvt. Ltd. ('SIPL' for short) for earth work, construction of road, construction of buildings and other related civil and electrical works, and the value of the said contract was Rs.7.76 crores.

3.4 It appears that M/s. SIPL sub-contracted the earth work and construction of roads up to the stage of blacktopping to the appellant and the estimated contract value was Rs.2.90 crores. The rate for excavation, inter-carting, self-cutting and dozing was finalized at Rs.63/- per m^3 and the bill of quantity indicated an approximate quantity of Rs.2.50 lakhs m^3. The scope of work included site formation and clearance of the dense forest area and formation of road in the cleared area from ground level to technical building, DF Antenna, ESM Antenna and staff quarters at the top, which resulted in making a service road for transporting the equipment to the GTS level and clearing the jungle in and around the GTS level.

3.5 It appears that the appellant had pleaded that since the Andaman was known for heavy rains, protective measures like benching and trenching to prevent erosion and caving of earth as well as prevent boulders rolling into the benches / neighbouring lands, were also provided.

3.6 M/s. SIPL simultaneously constructed RCC retaining walls alongside the site formation and clearance work done by the appellant for the proposed roads.

3.7 Based on the above, it appears that the appellant contended that they had carried out site formation and clearance work including the formation of 'Kaccha Road' and hence, were eligible for exemption under Notification No. 17/2005 *ibid.*, as amended.

4.1 In respect of the Show Cause Notice dated 05.08.2010, the Adjudicating Authority vide Order-in-Original No. 35/2011 dated 28.07.2011 confirmed the demand along with interest and penalty, as proposed, against which the assessee had preferred appeal before the First Appellate Authority, who vide Pre-Deposit Cum Appeal Order No. 62/2013(P)(PD) dated 28.01.2013 having dismissed their appeal, the Appeal No. ST/41055/2013 has been filed before this forum.

4.2 The Learned Commissioner, during adjudication in respect of the Show Cause Notice dated 06.03.2012, however, appears to have accepted the pleadings of the appellant as regards GTA, supply of tangible goods and management, maintenance or repair ('MMR' for short) services are concerned and the fact that the appellant had remitted Service Tax along with interest before the issuance of Show Cause Notice and consequently, appears to have dropped further proceedings. On the other issue of site formation and clearance service, however, the Adjudicating Authority, after examining the claim of the appellant vis-à-vis Notification No. 17/2005 *ibid.,* has held that the appellant had not established the fact that the contract was exclusively for the formation of roads and hence, vide impugned Order-in-Original (Denovo) No. 10/2015 (C)(ST) dated 31.03.2015 has confirmed the demand proposed in the Show Cause Notice and it is against this order that the Appeal No. ST/41600/2015 has been filed before this forum.

5. 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 respondent.

6.1 Shri N. Viswanathan, Learned Advocate appearing for the appellant, submitted at the outset that the demand confirmed in the impugned orders is not sustainable mainly on the issue of limitation itself since there was no suppression of facts, etc., much less with an intention to evade payment of Service Tax, for the reason that, in the first place, the construction work carried out by the appellant in the capacity of a sub-contractor was for the Indian Navy, which fact could never be 'suppressed' and secondly, the appellant had believed in good faith that the construction work involved even constructing Kaccha Road for facilitating the movement of vehicles in the dense forest area, therefore, the same being site formation and clearance service in relation to construction of road as well, was eligible for exemption under Notification No. 17/2005 *ibid.*

6.2 Without prejudice to the above contention, he would also submit as under: -

(i) On the same facts, the Joint Commissioner had also issued Show Cause Notice dated 05.08.2010 demanding Service Tax for the period 2008-09 based on audit objections.

(ii) The second Show Cause Notice dated 06.03.2012 which thereafter culminated in the impugned Order-in-Original, was also issued based on the very same audit objection covering the same period 2008-09 and 2009-10, question of suppression does not arise at all and hence, the second Show Cause Notice in question is clearly time-barred.

(iii) Due to landslide at the site, there was a prohibitory order issued by the Tehsildar against carrying on any further activity and therefore, no work could be done at the site from 20.08.2008.

(iv) The demand confirmed in the impugned Order-in-Original dated 31.03.2015 has been made on the entire value of the contract, a part of which i.e., Rs.4,87,23,652/- was never paid by the main contractor even till date.

(v) The ledger account clearly indicated the amount received i.e., Rs.1,61,71,552/- against the billed amount.

(vi) The main contractor had defaulted in making the payment to the appellant, which resulted in the creditors of the appellant approaching the Hon'ble Madras High Court and as a result, the company was placed under an official liquidator.

(vii) Vijaya Bank thereafter, in the year 2012, had initiated action against the assets of the appellant under Securitization and Restriction of Financial Assets and Enforcement of Security Interest (SARFESI) Act, 2002.

(viii) The contractual obligation required the formation of road, though it was incidental to the activity carried out by the appellant, however, the documents placed before the lower authorities i.e., colour photographs, map, copies of invoices with

M-Book extract, clearly indicated that the site formation and clearance works were done in relation to formation of service road and kaccha road before blacktopping.

(ix) Even the Log Book placed before the lower authority clearly indicated that the appellant had done site formation and clearance work in relation to ATR road (Andaman Trunk Road) clearing and new road making, ATR roadside road clearing, road work east side, service road, etc.

(x) The Learned Advocate also relied on the following orders:-

a. *KVR Rail Infra Projects Pvt. Ltd. v. Commr. of C.T., Secunderabad [2019 (27) G.S.T.L. 549 (Tri. – Hyderabad)];*

b. *R.V. Sunkurwar v. Commissioner of Central Excise, Nagpur [2017 (4) G.S.T.L. 387 (Tri. – Mumbai)]*

7.1 *Per contra*, Shri M. Ambe, Learned Deputy Commissioner appearing for the Revenue, relied on the findings of the lower authorities. He would also invite our attention to the Memorandum of Understanding (MoU), a copy of which is placed in the appeal papers, to emphasize that the scope of the MoU was for carrying out the 'earth work' part of the work at Diglipur, for development of station at Diglipur, as composite work and that therefore, the claims of the appellant as regards the construction of service road, kaccha road, etc., were only incidental to the contract.

7.2 He would also submit that the appellant had wilfully suppressed the receipt of the service amount of Rs.5,61,16,701/- for the periods 2008-09 and 2009-10 for providing site formation and clearance service, which attracted Service Tax and therefore, proviso to Section 73(1) of the Finance Act, 1994 was rightly invoked in the Show Cause Notice.

8. We have considered the rival contentions and we have also gone through the documents placed on record.

9. After hearing both sides, we find that the following issues are to be decided by us: -

(1) Whether the appellant was entitled to the benefit of exemption under Notification No. 17/2005-S.T. dated 07.06.2005?

(2) Whether the demand proposed and confirmed later, is barred by limitation?

(3) Whether the tax liability on the amount claimed to have not been received by the appellant is correct?

10.1 A Show Cause Notice No. 49/2010 dated 05.08.2010 came to be issued by the Joint Commissioner, Puducherry and a perusal of the same reveals the following: -

> *"6. On further verification of the documents submitted by M/s. VIEPL it was noticed that M/s. VIEPL was also providing the service of Site Formation on behalf of M/s. Surendra Infrastructure Pvt. Ltd. at Port Blair. M/s. VIEPL were requested to furnish the following before 14.12.2009 :*
>
> > *i. agreement copy with M/s. Surendra Infrastructure Pvt. Ltd. for site formation works at Port Blair site;*
> >
> > *ii. Copies of bills raised by M/s. VIEPL on M/s. Surendra Infrastructure Pvt. Ltd.;*

iii. Ledger account of M/s. Surendra Infrastructure Pvt. Ltd. for proof of payment received and outstanding balance."

10.2 Further, the above Show Cause Notice proposed to demand Service Tax for the services and periods as provided at paragraph 12 therein and for the sake of convenience, the table thereunder is reproduced hereinbelow: -

Service	**Period**	**Value of Service**	**Service Tax**	**E Cess**	**SHE Cess**
Supply of Tangible Goods	30.07.2008 to 31.03.2009	15,33,832.00	1,71,782.00	3,436.00	1,718.00
Site Formation and Clearance Service	09.04.2008 to 31.03.2009	1,62,64,814.00	19,48,233.00	38,965.00	19,482.00
		1,77,98,646.00	21,20,015.00	42,401.00	21,200.00

The proposed demand was made obviously by invoking the extended period of limitation.

10.3 It appears that the appellant had filed a detailed reply to the above Show Cause Notice, but however, it also appears that Order-in-Original No. 35/2011 dated 28.07.2011 came to be passed wherein the proposed demands came to be confirmed. It appears from the record that the appellant preferred an appeal before the First Appellate Authority by also requesting for waiver of pre-deposit, but however, the First Appellate Authority vide Pre-deposit Cum Appeal Order No. 62/2013 (P)(PD) dated 28.01.2013 appears to have directed the appellant to pre-deposit an amount of Rs.3,00,000/- (Rupees Three Lakhs only), against which the appellant has filed the Appeal No. ST/41055/2013.

10.4 It is clear from the records that the appellant instead of complying with the directions of the Commissioner (Appeals), filed an appeal before this forum [ST/41055/2013] and hence, as per the impugned order of the Commissioner (Appeals), the appeal before the first appellate authority stood dismissed for non-compliance, which has given rise to this appeal.

11.1 Further, it appears from the acknowledgement in Form ST-4 that the first appeal was filed on 30.01.2012 and pending disposal of the above first appeal, the Revenue appears to have jumped the gun by issuing a second Show Cause Notice No. 14/2012 (C) dated 06.03.2012, which was issued by the Commissioner, Puducherry.

11.2 Paragraphs 10, 11 and 14 of the above Show Cause Notice record the following: -

> *10. In view of the above definitions, it appears that the warranty charges received by M/s. VIEPL for the services provided by them falls under the taxable service of "Management, Maintenance or Repair Service" and are liable to pay Service Tax on the same. The Service tax payable works out to Rs.1,52,928/- as detailed below. The same is liable to be recovered along with interest.*

Period	***Charges received***	***Service Tax***	***E. Cess***	***S. Cess***	***Total***
2008-09	*1237280*	*148474*	*2969*	*1485*	*152928*

> *11. M/s. VIEPL had also received a service income of Rs.5,61,16,701/- for the periods 2008-09 and 2009-10 shown as contract billing under the heading "Other income". They had provided Site formation and clearance Service on behalf of M/s. Surendra Infrastructure Pvt. Ltd. at Port Blair, Andaman and Nicobar Islands.*

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14. Therefore, as per the above definition, it appears that the services provided by M/s. VIEPL for Site formation and clearance Service on behalf of M/s. Surendra Infrastructure Pvt. Ltd. at Port Blair, Andaman and Nicobar Islands falls under the taxable service of "Site formation and clearance, excavation and earth moving and demolition Service" and are liable to pay Service Tax on the same. The service tax payable works out to Rs.64,24,672/- as detailed below and the same is liable to be recovered along with interest.

Period	***Charges***	***Service Tax***	***E. Cess***	***S. Cess***
2008-09	*31293795*	*3755255*	*75105*	*37553*
2009-10	*24822906*	*2482291*	*49646*	*24823*
TOTAL	*56116701*	*6237546*	*124751*	*62375*

11.3 In fact, in its reply to the second Show Cause Notice, the appellant appears to have contended as under: -

"(m) As regards the "Site Formation and Clearance service", the ADC didn't accept noticee's contention that they are eligible for exemption under Notification 17/2005-ST and he confirmed the demand with interest and penalty against which the appellant had since filed appeal as mentioned above.

(n) Moreover, in the SCN issued by Commissioner, in respect of the "Site Formation and Clearance service" (given in para 12, 13 & 14 of the said SCN) the total bill amount has been shown as "charges

received" and service tax liability has been calculated on the total bill amount. In respect of the same, the noticee had placed Balance Sheet copies to show and prove that against the total billed amount, they had received only Rs.1,62,64,814/- and the outstanding balance amount not so far received from the customer (M/s. Surendra Infrastructure Pvt Ltd) was Rs.4,87,23,652/-. This fact on non-receipt of Rs.4,87,23,652/- was also recognized by the ADC and in the SCN No. 49/2010 dated 05.08.2010 issued by him. ADC had demanded service tax only on the received amount of Rs.1,62,64,814/- and not on the billed amount (mentioned in the Commissioner's SCN).

(o) In view of the same, another SCN issued by the Commissioner for the same matter is not maintainable under law and further proceedings on the same are liable to be dropped."

11.4 It is a matter of record, however, that in respect of the above Show Cause Notice, the Commissioner / Adjudicating Authority proceeded to pass the Order-in-Original which is impugned herein, in respect of Appeal No. ST/41600/2015, wherein he has not touched upon the issue in the Show Cause Notice dated 05.08.2010 issued by the Joint Commissioner which is earlier in point of time, on the very same audit objections which is also the basis for issuance of the second Show Cause Notice.

12. In the light of the above discussions, we find it pertinent to consider the allegation of wilful suppression of facts and whether the Revenue was justified in issuing the Show Cause Notices by invoking the extended period of limitation under Section 73(1) of the Finance Act, 1994 based on the very same audit objections, for the very same periods.

13.1 There cannot be any dispute that the first Show Cause Notice, which was issued based on the audit objections, did consider all the relevant facts and thus, the concerned authority of the Department was very much aware of the relevant facts. Hence, while issuing the second Show Cause Notice, the very same facts could not be held as 'suppression of facts' by the appellant as these facts were very much in the possession / knowledge of the authorities.

13.2.1 At this juncture, we find that the decision of the Hon'ble Apex Court in the case of *M/s. Nizam Sugar Factory v. Collector of Central Excise, A.P. [2006 (197) E.L.T. 465 (S.C.)]* is apt.

13.2.2 Brief facts, as could be gathered from paragraphs 5 and 6 of the above decision of the Hon'ble Apex Court, are as under: -

> *"5. The Department had issued a Show Cause Notice (for short 'the SCN') to the appellant on 28-2-1984 demanding duty for the period February, 1978 to September, 1982 on the production of impure Carbon dioxide emanating as a by-product during the process of fermentation of molasses in the appellants' factory. It was alleged that the assessee had cleared the said carbon dioxide without payment of duty to another unit in contravention of Rule 9(1) of the Central Excise Rules, 1944 (for short 'the Rules') and without obtaining licence for manufacture of carbon dioxide in their factory; without filing Classification/Price List and without maintaining accounts…..*
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> *……*
>
> *6. Appellant was served with a second SCN by the Collector on 16-7-1987 alleging that the appellant was supplying carbon dioxide to another unit as per agreement dated 19-3-1983; that they had not taken necessary licence; had not followed the procedure prescribed under the rules; and had not discharged duty liability. The said SCN covered the period of assessment years 1982-83 to 1986-87. Appellant responded to the second SCN and took the plea that the SCN under consideration was practically a repetition of the allegations contained in the SCN dated 28-2-1984 and for the period April, 1982 to September, 1982 the department had raised demands under two different SCNs……."*

13.2.2 After hearing the rival contentions, the Hon'ble Apex Court has held as under: -

> *"8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :*
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>> *"14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."*
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> *This judgment was followed by this Court in the case of ECE Industries Limited v. Commissioner of Central Excise,*

New Delhi reported in (2004) 13 SCC 719 = 2004 (164) E.L.T. 236 (S.C.). In para 4, it was observed :

> *"4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."*

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in [2004 (166) E.L.T. 151 (S.C.)]. It was observed in para 6 :

> *"......... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."*

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

13.2.3 In view of clear observations of the Hon'ble Apex Court *(supra),* we are of the view that the above ruling squarely applies to the facts of the case on hand.

13.3 We also find that similar view was taken by various CESTAT Benches.

14. It is also a fact borne on record that other than the audit observations, no other material facts have been brought on record by the Revenue. Hence, the allegation of suppression of facts made by the Revenue should fail and therefore, the impugned orders cannot sustain.

Discussion on merits:

15.1 Based on the facts discussed in the earlier part of this order, essentially, we find that the original contract was awarded by the Indian Navy to M/s. Electronics Corporation of India Ltd. (ECIL), which is also a Government of India enterprise, for executing civil, electrical and development works for development of station at Diglipur Site of Project Samudra.

15.2 ECIL in turn placed a work order on M/s. Surendra Infrastructure Pvt. Ltd. (SIPL) for part of the work, which included earth work, construction of road, construction of buildings, interior decorative work, sanitary works, antenna works, trenches, benches, retaining walls, construction of drains, site development works and electrical works.

15.3 SIPL in turn had sub-contracted major portion of the above contract to the appellant, which included earth work and construction of roads at level before blacktopping, the estimated contract value being Rs.2.90 crores, Works relating to excavation, inter-carting, self-cutting and dozing as per the MoU dated 07.04.2008; and the scope of work given to the appellant was in respect of site formation and clearance of the dense forest area and formation of road in the cleared area from the ground level to the technical building, DF Antenna and ESM Antenna and Staff Quarters at the top. It is also a fact borne on record that in connection with the awarded work, the appellant mobilized the following machines: -

- 9 Ton Class Excavator – 1 No.
- 6 Ton Class Excavator – 3 Nos.
- D-50 Komatsu Bulldozer – 2 Nos.
- D-20 Komatsu Bulldozer – 1 No.

which were moved from the lower level to the Great Trigonometrical Survey (GTS) level by making service road from the ground level to the height of about 147 metres.

16.1 It is thus clear that the initial work essentially required the formation of service roads, which was essential for carrying the men and material / equipment and other accessories to the site of work and only thereafter could the clearance of jungle in and around the GTS level get started.

16.2 Hence, it is clear from the above that the appellant did construct road, which was clearly essential in order to reach the place of work. Further, we also note that the contract belonged to a unit of the Government i.e., the Indian Navy, the scope of work was awarded initially to another Government Organization i.e., ECIL, and hence, the service of site formation and clearance, excavation and earth moving and demolition and other similar activities, were rendered to a Government organization, which is also exempt from the purview of Service Tax.

17.1 The appellant has claimed, rightly so, that it did construct roads as well as provide site formation and clearance, excavation and earth moving and demolition service and has thus, claimed the benefit of Notification No. 17/2005 *ibid.*

17.2 Notification No. 17/2005-S.T. dated 07.06.2005 reads thus: -

> *" In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the site formation and clearance, excavation and earthmoving and demolition and such other similar activities, referred to in sub-clause (zzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, from the whole of service tax leviable thereon under section 66 of the said Finance Act.*
>
> *2. This notification shall come into force on the 16th day of June, 2005."*

17.3 After considering the activities of the appellant in the case on hand, we are satisfied that the appellant is entitled to the benefit of the exemption Notification No. 17/2005 *ibid.* for the reasons given by us in the above paragraphs.

18. Viewed thus, we are of the view that the impugned demand cannot sustain for both the above reasons i.e., (i) the service was rendered to a Government organization and (ii) the same is also covered under the exemption Notification No. 17/2005 *ibid.,* and therefore, the impugned demand cannot sustain.

19. Consequently, we set aside the impugned orders on two counts.

20. In the result, the appeals are allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **<u>02.06.2023</u>**)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Sdd