IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal Nos. 42153 and 42154 of 2013

(Arising out of Order-in-Original No. 17 & 18/2013 dated 28.02.2013 passed by the Commissioner of Service Tax, Newry Towers, No. 2054 – I, II Avenue Anna Nagar, Chennai- 600 040.)

M/s. Apex Viswa Engineering Services Private Limited **: Appellant**
New No. 45, 5th Trust Cross Street,
Mandaveli,
Chennai – 600 028.

VERSUS

Commissioner of Service Tax, **:Respondent**
Newry Towers, No. 2054 I,
IInd Avenue, Anna Nagar,
Chennai – 600 040.

APPEARANCE:

Shri Prasanna Krishnan V., Chartered Accountant
For the Appellant

Smt. K. Komathi, Additional Commissioner
For the Respondent

CORAM:

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

FINAL ORDER Nos. 40525-40526/2023

DATE OF HEARING : 02.05.2023

DATE OF DECISION: 28.06.2023

Order : [Per Hon'ble Mr. Vasa Seshagiri Rao]

M/s. Apex Viswa Engineering Services Pvt. Ltd., Mandaveli, Chennai – 600 028 (the appellants herein) are engaged in construction of commercial/industrial buildings and structures and received construction charges for the services provided which they have accounted under contract receipts.

2. The appellants have challenged the Order-in-Original No. 17 & 18/2013 dated 28.02.2013 passed by Commissioner of Service Tax, Anna Nagar, Chennai, confirming the demand of Service Tax of Rs.7,59,82,639/- for the period from April 2006 to September 2010 and also of Service Tax of Rs.59,87,226/- for the period from October 2010 to June 2011 under Section 73 (1) of the Finance Act, 1994 read with Section 73 (2) of the Act along with recovery of interest under Section 75 of the Finance Act, 1994 on the Service Tax demanded and also imposed penalties under Section 77 and Section 78 of the Finance Act, 1994. The Order also appropriated the Service Tax of Rs.21,00,000/- paid by the assessee.

3. The facts in brief in these appeals are that the Revenue noticed during the course of audit of accounts of the assessee that the appellants have collected Service Tax on the taxable value but did not pay to the credit of government on the construction services provided. Investigation conducted revealed that the appellants undertook construction of commercial and residential buildings and construction charges were received and accounted as "income from contract receipts". The appellants have not filed Service Tax returns for more than five years i.e. from March 2006 onwards. Construction materials such as cement, steel etc., were supplied by the customers free of cost for construction service provided by the appellants, but did not include the value of such free supply materials to arrive at the gross receipts though they have availed the abatement provided under Notification No. 1/2006-ST dated 01.03.2006 and also concessional rate of duty as prescribed under Works Contract Composition Scheme.

4.1 In their written submission, the appellants have put forth that their entire funds got blocked during the period from January 2009 to March 2011 due to disputes in respect of some projects executed by them.

4.2 The Ld. Consultant Shri V. Prasanna Krishnan for the appellants have contended that there are circulars which provide that in an arrangement involving contractors and sub-contractors, there cannot be double taxation at any stage for the same service and as long as main contractors pay Service Tax there is no liability for the sub-contractors to pay Service Tax relying on TRU's letter F.No. 341/18/2004-TRU (Pt) dated 17.12.2004. It has been contended that they have been executing the works in the capacity of sub-contractors to various main contractors in several projects and as the main contractors were registered with the Service Tax department under Works Contract Service and must have paid Service Tax. Even, if the Service Tax is paid by them the same would be available as input credit to the main contractors.

4.3 Further, the appellant has put forth that the clarification about the Service Tax liability of sub-contractor was issued by CBEC only on 23.08.2007 *vide* it's Master Circular on Service Tax but the period of dispute in these appeals pertained to the period from April 2006 onwards. They relied on the decisions rendered in the following case laws in support of their above contentions, as given below:-

> *(i) Viral Builders vs. Commissioner of Central Excise, Surat [2011 (21) STR 457 (Tri. Ahmd.)]*
>
> *(ii) Evergreen Suppliers vs. Commissioner of Central Excise, Mangalore [2008 (9) STR 467 (Tri. Bang.)]*
>
> *(iii) AP Enterprises vs. Commissioner of Service Tax Chennai [2008 (12) STR 585 (Tri. Chennai)]*
>
> *(iv) Commissioner of Central Excise, Nagpur vs. Solar Explosive Ltd. [2011 (21) STR 448 (Tri. Mum.)]*

4.4 They have argued that as their case involves genuine legal interpretation and also financial hardship faced by them, there is no suppression of facts, mis-statement of fraud etc., and hence, the proposal to invoke larger period under proviso to Section 73 (1) is not justifiable.

4.5 The cum-tax benefit and wrong Service Tax rates were applied and the Revenue has unjustifiably denied the abatement in terms of Notification No. 1/2006-ST and the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 though materials value was included.

5.1 The Ld. adjudicating authority have found the appellant's contentions as not correct and not justifiable since as early as on 10.09.2004, i.e, at the time of imposition of levy on commercial construction service, the Ministry *vide* para 13.1 of F.No.B2/8/2004-TRU dated 10.09.2004 has clarified that contractor is liable to pay Service Tax for the services provided to real estate owners as given below:-

> *"13. Construction Service (Commercial and Industrial Buildings or Civil Structures)*
>
> *13.1 …….Estate builders who construct buildings/civil structures for themselves (for their own use renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/contractors, the payment made to such contractors would be subjected to service tax under this Head. The tax is limited only in case the service is provided by a commercial concern."*

5.2 The adjudicating authority has also relied on the Ministry letter *vide* F.No. 332/35/2006-TRU dated 01.08.2006 which has clarified that the contractors/sub-contractors are liable to pay Service Tax for the services provided to promoter/developer, as given below:-

Sl. No.	**Issue**	**Legal Position**
1	Is service tax applicable on Builder, Promoter or Developer, who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors, whose total bill does not increase 4.0 lakhs in one financial	In a case, where a Builder, Promoter or Developer builds a residential complex having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction service provided to the builder/promoter/developer under

	year?	"Construction of Complex" service falling under Sec.65(105)(zzzh) of the Finance Act, 1994.

5.3 The Ministry has unambiguously clarified that contractors are liable to pay Service Tax for their services provided to promoter/developer. Further, the above clarifications are reiterated in the Master Circular No. 96/7/2007-ST dated 23.08.2007, which is reproduced as under:-

Ref. code	**Issue**	**Clarification**
1	Whether Service Tax is liable under Construction of Complex Service (Sec) 65(105)(zzzh) on Builder/Promoter/ Developer or any such person,- a) Who gets the complex built by engaging the services of a separate contractor?	a) In a case, where a Builder, Promoter or Developer or any such person builds a residential complex having more than 12 residential units, by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (Builder/Promoter/Developer or any such person) shall be liable to pay service tax on the gross amount charged for the construction service provided to the builder/promoter/developer under "Construction of Complex: service falling under Section 65(105)(zzzh) of the Finance Act, 1994.

5.4 Replying to the appellant's contention placing reliance on the TRU's letter F.No. 341/18/2004-TRU dated 17.12.2004 that as long as main contractors pay service tax, sub-contractors need not pay service tax so as to avoid double taxation, Ld. adjudicating authority has commented that this circular was issued in connection with Goods Transport Agency Service, which is given below:-

> *"5.7 If service tax due on transportation of a consignment has been paid or is payable by a person liable to pay service tax, service tax should not be charged for the*

> *same amount from any other person, to avoid double taxation."*

would not be relevant to finally determine the tax liability of the sub-contractor on construction service.

5.5 It is seen from the above clarification that if service tax on transportation of a consignment is paid, then the same should not be charged again from any other person. The above clarification cannot be interpreted to mean that sub-contractor is not liable to pay service tax as in the case of GTA Service, Tax is payable on the freight charges paid to GTA either by consignee or consignor and therefore the Board has clarified that service tax should be charged from only one person. Whereas in the case of construction service, as already pointed out, specific clarifications were issued by Board during 2004, 2006 and 2007 that sub-contractors are liable to pay service tax and these clarifications will prevail over the clarification relating to GTA which was rendered in a totally different context.

5.6 It was also observed that the appellants continued to default in payment of Service Tax even after issuance of Master Circular and there cannot be any dispute relating to sub-contractor's liability to pay Service Tax right from the imposition of levy on construction service.

6. The learned adjudicating authority has relied on the following Tribunal judgments on the issue of tax liability of contractors and sub-contractor as given below:-

- In the case of Sew Construction Limited Vs. CCE, Raipur [2011 (22) STR 666 (Tri.-Del.)], the CESTAT, Delhi Bench held that,

  > *"5. We do not find any provision in the Finance Act, 1994 to grant immunity to the sub-contractor from levy of service tax when undisputedly taxable services were provided by them. No evidence was before us to notice whether the service provided by the sub-contractor to the contractor was ever been taxed. We noticed that para 9 of the Larger Bench decision in the case of M/s. Vijay Sharma & Co. cited by the learned AR clearly speaks that a sub-contractor shall not be*

immune from service tax under Finance Act, 1994. The said para 9 is reproduced below for appreciation.

> *"9. It is true that there is no provision under Finance Act, 1994 for double taxation. The scheme of service tax law suggest that it is a single point tax law without being a multiple taxation legislation. In absence of any statutory provision to the contrary, providing of service being event of levy, self same service provided shall not be doubly taxable. If service tax is paid by a sub-broker in respect of same taxable service provided by the stock-broker, the stock broker is entitled to the credit of the tax so paid on such service if entire chain of identity of sub-broker and stock broker is established and transactions are provided to be one and the same. In other words, if the main stock broker is subjected to levy of service tax on the self same taxable service provided by sub-broker to the stock broker and the sub-broker has paid service tax on such service, the stock broker shall be entitled to the credit of service tax. Such a proposition finds support from the basic rule of Cenvat credit and service of a sub-broker may be input service provided for a stock-broker if there is integrity between the services. Therefore, tax paid by a sub-broker if there is integrity between the services. Therefore, tax paid by a sub-broker may not be denied to be set off against ultimate service tax liability of the stock broker if the stock broker is made liable to service tax for the self same transaction. Such set off depends on the facts and circumstances of each case and subject to verification of evidence as well as rules made under the law w.e.f. 10-9-2004. No set off is permissible prior to this date when sub broker was not within the fold of law during that period.""*

- In the case of Safe & Sure Marine Services P Ltd. Vs. CST, Mumbai [2012 (28) STR 30 (Tri. Mumbai)], the Tribunal held that,

> **"***5.3 The appellant has also argued that as far as M/s. SICAL is concerned, after 1-5-2006 M/s. SICAL has discharged the Service Tax liability on the entire amount and, therefore, they are not required to pay Service Tax as they are only sub-contractors. This argument is totally incorrect especially in the context of a Value Added Tax regime, which is in force in India. Under the Value Added Tax regime, which applies to Service Tax also, the provider of taxable services has to discharge the Service Tax liability and if such services are used as input services by other service provider or manufacturer of the goods down the line, they can avail input service credit on the Service Tax paid by the input service provider. There is no exemption on input service or input service provider under the law. The entire scheme of invoice based Value Added Tax, which is in force, envisages payment of tax at each stage of taxable event and availment of credit of tax so paid at the subsequent stage. If this tax, regime, which is in force, has to be given any meaningful effect, then it is mandatory that the Service Tax liability is discharged as and when taxable services are rendered by the service provider."*

7. The Ld. adjudicating authority has also observed that the appellant have not provided any documentary evidence to prove that the projects undertaken by them are sub-contracted projects and the main contractor had

discharged the Service Tax by including the value of such sub-contracted projects.

8. On the issue of non-extending the benefit of abatement under Notification No. 1/2006-ST dated 01.03.2006 and Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the Ld. adjudicating authority has observed that the assessee received free issue materials viz., cement, steel, etc., from their clients but not included the value of such materials for arriving at the taxable value and have submitted the tabular statement indicating the value of materials received from their customers without any supporting documents or evidence. The appellants had merely shown the cost of steel and cement used in the projects without giving the details of the quantity of material used or how the value has been arrived at. Thus, the appellant have failed to produce any documentary evidence on the basis of which they arrived at the cost. In respect of the work orders entered into with their clients namely, Arjun Gokaldas & Associates, Classic Habitat Private Limited, Central Park West Venture specifically mentioned that materials like cement, steel, etc., would be supplied by their clients free of cost but the statement furnished by the assessee relating to the above contracts did not include the cost of such materials. For the above reason, the adjudicating authority has not extended the benefit of Notification No.1/2006-ST dated 01.03.2006 and Works Contract Composition Scheme etc.

9. On the issue of invoking extended period of limitation, the adjudicating authority has recorded his findings as follows:-

(i) The assessee provided construction service in respect of both commercial and residential projects and for the period covered in the notices from 2006-2007 had paid Service Tax of Rs.55,41,139/- on their own prior to initiating investigation. It was noticed that they had not paid Service Tax in many commercial projects and all

their residential projects and only after initiation of investigation, the fact of non-payment of Service Tax on many of their commercial projects and all their residential projects right from 2006-2007 onwards came to light.

(ii) Further, it was noticed that the assessee had not filed the ST-3 returns for the entire period of demand covered from March 2006 to March 2010.

(iii) The fact of providing taxable services was suppressed by the assessee as they have not made any payment of Service Tax for various residential projects right from 2006-2007 and they have stopped payment of Service Tax after their initial payment though they bagged various orders which are liable to Service Tax under Commercial or Industrial Construction Service.

(iv) The extended period of limitation has been invoked as the appellant on their own never informed to the Department, at any point of time, the details of providing construction services in respect of both commercial and residential projects and the facts would not have come to light but for the investigation by Service Tax Department and the assessee has also not established that there was bonafide belief on their part. It was found that the appellant have paid Rs.55.41 lakhs on their own shows that they are aware of the legal provisions. If the assessee were having doubt in their mind they should have approached the Department for clarification by giving the details of transactions.

10. The Ld. adjudicating authority has relied on the following decisions:-

Winner Systems – 2005 (191) ELT 1051 (Tri.)	A blind belief cannot be a substitute for bonafide belief

Aircell Degilik Ltd. – 2006 (3) STR 286 (Tri.)	There was nothing on record to suggest that the appellants ever approached the office of the service tax authorities to ascertain the details of their liability to pay service tax
Interscope – 2006 (198) ELT 275 (Tri.)	A belief can be said to be bonafide only when it is formed after all the reasonable consideration are taken into account

11. Ld. Authorised Representative Ms. Komathi, Additional Commissioner has reiterated the findings of the learned adjudicating authority. She has relied upon the decisions in the case of *Commissioner of Service Tax, Mumbai-II Vs. DGS Gupta Constructions Pvt. Ltd. [2019 (28) GSTL 149 (Tri. Mum.)* and in the case of *Commissioner of Service Tax, New Delhi Vs. Melange Developers Private Limited [2023 (33) GSTL 116 (Tri. LB)* to affirm the fact that sub-contractor is liable to pay Service Tax on the value of the services provided.

12. We have heard both sides. We have also considered all the records as available in these appeals.

13. The main issues that arise for decision in these appeals are:

(i) Whether the demand of Service Tax and imposition of penalties are justified in these appeals as confirmed by the Ld. adjudicating authority.

(ii) Whether the assesse is eligible for availing the benefit of Notification No. 1/2006-ST dated 01.03.2006 and Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and

(iii) Whether invocation of extended period for the demand of Service Tax is justified.

14. We find that the appellant has executed construction works as a contractor/sub-contractor during the impugned period of the notices and consideration

received for their services was accounted as 'contract receipts' in their financial statements. In many contracts executed, as investigation has revealed, materials like cement, steel, etc., were supplied by the customers of the appellant. On the scrutiny of the Show Cause Notices and the Order-in-Original and related appeal papers indicate that the contracts entered into are contracts simpliciter.

15. We find that contractors/sub-contractors are liable for payment of Service Tax as held in the case of *Sew Construction Limited Vs. CCE, Raipur [2011 (22) STR 666 (Tri.-Del.)]*, wherein in the CESTAT, Delhi Bench has held that there is no immunity to the sub-contractors from levy of Service Tax when taxable services are provided by them. (as referred to in paragraph 6 of this order). We concur with the reasoned findings of the Ld. adjudicating authority.

16. We find that the benefit of Notification No. 1/2006-ST dated 01.03.2006 and Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was not extended in computation of Service Tax payable apparently as the appellant has not included the value of the materials supplied by its customers to arrive at the gross value of the services rendered. One of the important conditions that has to be satisfied to be eligible for the abatement of the above Notification and the benefit of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 is that the gross value of the services provided shall include the value of goods and materials supplied or provided or used for providing taxable service by the service provider. Though the appellant has pleaded that they submitted statements about free supply of materials and the values arrived, but, the Ld. adjudicating authority has confirmed that the appellant has not substantiated about adopting correct value regarding the value of free issue materials supplied by its customers. We find that the tax liability has been computed as apparent from the Show Cause Notices and

the findings in the Order-in-Original No. 17 &18/2013 dated 28.02.2013, with reference to '**contract receipts'** shown in their financial statements. It is obvious where there is free supply of materials, their value would not form part of 'contract receipts'. In the absence of the documentary evidence to arrive at gross value for the services provided, the findings of the lower adjudicating authority could not be found fault with for denying the benefit/abatement of Notification No. 1/2006-ST dated 01.03.2006 and Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. 'Contract Receipts' indicate consideration received for the value of the services provided. And obviously Service Tax at applicable rate has to be computed on this value. To be eligible for abatement under Notification No. 1/2006-ST dated 01.03.2006, it is essential that the value of free supply materials by the developer/main contractor, have to be included to arrive at the gross value of services or else computation of tax on contract receipts is as per the law, since the conditions of Notification and Rules cited *supra* are not fulfilled. We find that the appellant has not produced any evidence to oppose the above findings of the Ld. adjudicating authority.

17. We find that the appellant have relied upon the decision in the case of *Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd. [2018 (10) GSTL 118 (S.C)]* wherein it was held that the value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service being neither monetary or non-monetary consideration paid by or flowing from the service recipient accruing to the benefit of service provider would be outside the taxable value or the gross amount charged within the meaning of later expression in Section 67 of the Finance Act, 1994. However, in these appeals Service tax was not demanded on the value of free materials supplied but only on 'contract receipts'. The issue involved in this dispute is determination of availability of the benefit of Notification

No.1/2006-ST dated 01.03.2006 and also of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The appellant has also referred to the decisions rendered in the case of *Real Value Promoters Pvt. Ltd. Vs. Commissioner of GST & Central Excise, Chennai Final Order Nos. 42436-42438/2018 dated 18.09.2018* and in the case of *Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd. [2015 (39) STR 913 (SC)*, but these are relevant in respect of composite contracts. Whereas, in these appeals, services provided are simple contracts where services provided did not include the materials used having been supplied free of cost. These are contracts simpliciter and Service Tax liability has been computed on the contract receipts which purportedly did not include the value of free supply materials like steel, cement, etc.,

18.1 The impugned period in the first Show Cause Notice is from March 2006 to September 2010. The appellant has not filed ST-3 returns for this taxable services rendered from March 2006 to March 2010. It was noticed that the appellant has paid Service Tax of Rs.55,41,139/- for the period from 2006 to 2007 which was prior to initiating investigation. It is evident that Service Tax liability was not worked out or paid in many commercial projects and in all their residential projects justifing invoking extended period. The apellant's reliance on the decisions in the cases of *Winner Systems [2005 (191) ELT 1051 (Tri.)], Aircell Degilik Ltd. [2006 (3) STR 286 (Tri.)]* and *Interscope [2006 (198) ELT 275 (Tri.)]*, would not be of any help in view of his failure to produce evidence that the main contractor or his customers have discharged Service Tax liability.

18.2 Further, on the issue of Revenue neutrality, we place reliance on the decision of the Hon'ble Supreme Court in the case of *Dharmapal Satyapal Vs. Commissioner of Central Excise, New Delhi* reported in

2005 (183) ELT 241 (S.C), wherein at paragraph 25, it was observed as under:-

> ***"25.*** *Modvat is basically a duty collecting procedure which provides relief to the manufacturer on the duty element borne by him in respect of the inputs used by him. The relief is given under the modvat scheme on the actual payment of duty on the input. On such payment, the assessee gets a right to claim adjustment/set-off against the duty on the final product. The question of duty adjustment/set-off against duty on the final product was not in issue. In any event, no record on credit entitlement was produced. A right to claim proforma/modvat credit against duty on final product was different from the defence of* bonafides *in a case where circumstances mentioned in the proviso to section 11A(1) stands proved by the department for invoking larger period of limitation. The burden to prove the defence of* bonafides *was on the assessee and the assessee in this case has failed to prove its* bonafides*. Under modvat, excisable finished products made out of duty-paid inputs are given relief of excise duty to the extent of duty paid on inputs. In the circumstances, we are satisfied that the department was justified in invoking the extended period of limitation under the proviso to Section 11A(1)."*

The Tribunal, Mumbai in the decision rendered in the case of *Bharat Automotive Pressings (I) Pvt. Ltd. Vs. Commissioner of Central Excise, Pune reported in 2010 (262) ELT 720 (Tri. Mum.)* has observed at paragraphs 5 and 6, as under:-

> ***"5.*** *We have considered these submissions also. Though we are not impressed with the submissions relating to the 'test audit', we are not in a position to ignore the submission of the ld. SDR that the appellant continued to exclude the amortized cost of moulds from the assessable value of the goods supplied to Telco even after the Tribunal's decision in Flex Industries case (1997), which was to the effect that such cost was liable to be included in the assessable value of the goods. A contra decision of the Tribunal came, admittedly, after January 1999. Having made an endeavour to derive benefit out of the so-called "confusion arising out of conflicting decisions of the Tribunal", the appellant cannot turn around and say that they were not aware of the Tribunal's decision in Flex Industries case. The facts and circumstances of this case are explicit enough for us to hold that the appellant deliberately excluded the amortized cost of moulds (supplied free of cost by Telco) from the assessable value of the excisable goods supplied to Telco (buyer) even after the Tribunal's decision (1997) in Flex Industries case, which was in favour of the Revenue. It appears to us that this conduct of the appellant was wilful with*

> *intent to evade payment of appropriate duty on the goods in question. For the period prior to 1997, the appellant seems to be in a position to claim support from the view taken in Bright Brothers Ltd. case (supra) and Star Glass Works case (supra).*
>
> **6.** We also find a valid point in the submission of the ld. SDR that the demand of duty for the extended period cannot be resisted by the appellants on the premise that whatever duty paid by them would ultimately be available as Modvat/Cenvat credit to the buyer. The submission of the ld. SDR is well-founded vide *Jay Yuhshin Ltd.* (supra)."

19. The provisions of proviso to Section 73 (1) of Finance Act, 1994 are *pari pasu and pari materia* to the provisions of proviso to Section 11A of the Central Excise Act, 1994. The intention to evade payment of tax is clearly manifest and articulated by the non-disclosure of the details of the provision of services and receipt of consideration. Non-filing of ST-3 returns for such a long period i.e, from March 2006 to March 2010 will make the intent to evade tax obvious. So invocation of extended period is justified, consequently, the imposition of penalty are also required to be upheld.

20. In view of the above, the appeals are devoid of any merits and so rejected.

(Order pronounced in the open court on 28.06.2023)

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

MK