CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO.-1

SERVICE TAX APPEAL NO. 53022 of 2014

[Arising out of Order-in-Original No. COMMISSIONER/RPR/ST/09/2014 dated 28.02.2014 passed by the Commissioner, Central Excise and Customs, Raipur]

M/S HIRA INDUSTRIES LIMITED **APPELLANT**
(known as Godawari Power & Ispat Ltd.)
Iron Ore Crushing Unit
Pandripani, Geedam Road
Jagdalpur (CG)

Versus

THE COMMISSIONER, CENTRAL EXCISE **RESPONDENT**
& CUSTOMS, RAIPUR
Central Excise Building,
Dhamtari Road, Tikrapara, Raipur (CG)

Appearance
Shri K Krishna Mohan and Ms. Parul Sachdeva, Advocates - for the appellant

Shri Vivek Pandey, Authorized Representative - for the respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 23.07.2019

FINAL ORDER NO. 51783 /2019

BIJAY KUMAR:

1. The present appeal is directed against the Order-in-Original dated 28/02/2014 passed by the Commissioner of Central Excise and Customs, Raipur in compliance of CESTAT, Remand Order No. ST/A/123/2012-CU-DB dated 22.02.2012 in Appeal No. ST/A No. 294/2009 filed by the Appellant against the order dated 05.02.2008 passed by the Commissioner of Central Excise and Service Tax, Raipur.

The CESTAT, had partially allowed the appeal filed by the Appellant by granting the disputed cenvat credit but remitted the case to the adjudicating authority for deciding the quantum of service tax to be paid. It was further observed by the CESTAT that while re-adjudicating the matter in terms of remand order, the Adjudicating Authority should also consider the submission of the Appellant regarding demand being time barred and quantum of penalty.

2. In view of above direction, the impugned order was passed confirming the demand of service tax amounting to Rs. 44,03,673/- (Rs. Forty Four Lakhs Three Thousand Six Hundred Seventy Three Only) and recovery of it with interest under Section 73 read with Section 75 of Chapter V of Finance Act, 1994 (for short 'Finance Act'). Further demand of service tax amounting to Rs. 9,92,721/- (Rs. Nine Lakhs Ninety Two Thousand Seven Hundred Twenty One Only) in respect of incidental charges was also confirmed and was ordered to be recovered under Section 73 of the Finance Act along with interest there under. The Adjudicating Authority also appropriated the amount paid towards service tax and interest. The impugned order, however, permitted availment of cenvat credit amounting to Rs. 15,97,450/- (Rs. Fifteen Lakhs Ninety Seven Lakhs Four Hundred Fifty Only) claimed by the Appellant, during period 2005 to September, 2006, on the strength of sub-contractor invoices subject to the condition that the they had paid service tax on full value of service including the amount claimed as reimbursement for transport charges. The Adjudicating Authority also imposed penalty of Rs. 53,96,394/- on the Appellant under Section 78 of the Finance Act. Being aggrieved by the

impugned order the Appellant is once again in appeal before this Tribunal.

3. Brief facts of the case are that the Appellant is engaged in business of crushing of 'ore lumps' into 'sized ore' and is registered under the category of 'Business Auxiliary Service' (in short 'BAS') and 'Transport of Goods by Road Service' (in short 'GTA'). During the period April, 2004 to September, 2006, the Appellant entered into various contracts for crushing of iron ore on the PMT rate basis. The scope of contractual work involved the following activities is:

(i) Placement of Rake at NMDC, Bacheli

(ii) Engagement of Contractors for unloading of lumps at Jagdalpur Railway Depot

(iii) Loading of lumps to HIL crushing unit.

(iv) Crushing

(v) Loading and sending the crushed lumps and fines back via transporters.

(vi) Clearing of Waste etc.

4. For the above work, four kinds of invoices were raised by the Appellants on which the service tax payments are as follows;

Sl No.	**INVOICE**	**PURPOSE**	**SERVICE TAX PAYMENT**
1.	CRC Series	Crushing Charges	Paid
2.	TRC Series	Transportation, loading and unloading reimbursement	Paid in reverse charge. Not included in output value to pay ST
3.	LIA series	Reimbursement of Liasoning Charges	Paid
4.	Debit Note under CRC Series	Reimbursement of incidental charges/expenses	Not paid

5. In the aforementioned background, the Appellant was issued a show cause notice dated 6.09.2007 invoking the extended period of limitation by demanding service tax under the heads of Business Auxiliary Service/Cargo Handling Services (in the alternative) on the amount mentioned at Sl. No. 2 and 4 in the table hereinabove. The Notice also sought to deny the claim of input service credit on the transport service tax paid under reverse charge. The demands were as follows:

   a. Service tax plus cess: Rs. 53,96,394/-
   b. Credit denied: Rs. 15,97,450/-
   c. Penalty: Section 78

6. The Appellant contested the levy of service tax vide reply dated 03.12.2007. The Adjudicating Authority passed the impugned order confirming the demand under 'Cargo Handling Service'/'Business Auxiliary Service'. As per the remand direction, the Appellant filed another reply dated 26.06.2013 which also did not find any favour from the Adjudicating Authority and the present impugned order dated 28.02.2014 was passed by the Adjudicating Authority confirming the demands.

7. Learned Advocate on behalf of the Appellant submits as under;

(i) That a substantial portion of the demand is barred by time. The learned Advocate submits that the demand is for the period April, 2004 to September 2006 but for the period from April, 2004 to March, 2006, the extended period being beyond one year from the relevant date, could not have been invoked as if there was no suppression of fact with intent to evade the service tax as provided under the proviso to Section 73(1) of the Act. Further, the term 'Relevant date' is defined under Section 73(6), being the last date of filing of periodic returns by the assessee. Rule 7 of the Service Tax Rules, 1994 provides that the return shall be half-yearly and to be filed before the 25th of the month following the half year.

(ii) That there is no suppression of fact in the instant case for the following reasons:

(a) The issue related to includablity of reimbursable expenses in service tax valuation and the same has been held in favour of the assessee by the Supreme Court in **UOI vs. Intercontinental Consultants [2018 (10) GSTL 401 (SC)]**

(b) The issue also related to payment of service tax by main contractor when the sub-contractor had already paid the same. There were divergent views in **Speed and Safe vs. Commissioner [2010-TIOL-493-HC-KERALA-ST and CST vs. Melange Developers Pvt Ltd. [2019 TIOL 1684 CESTAT DEL LB].**

(c) The amount was declared in the invoices issued.

(d) Service tax was paid on the remaining amount and ST-3 returns were filed.

(e) Post September, 2006, Service Tax is being paid on the entire amount declared in the ST-3 returns.

(f) Appellant paid Service tax on reverse charge on transport amount and declared.

(g) Demand was under two different service heads and affirmation was done under a third service head which itself indicates the confusion.

8. Since Section 78 of Finance Act is parimateria with the proviso to Section 73(1), and also in view of the provision Section 80, there was valid reason for non-payment of tax as pleaded above, the violation, if any, was bona fide, and the penalty imposed is liable to be set aside.

9. Learned Authorised Representative on behalf of Revenue, however, has supported the impugned order on the basis of the finding contained therein.

10. We have considered the rival submissions and also perused the case records. It is on record that the show cause notice was issued on 06 September, 2007 pertaining to period April, 2004 to September, 2006 by invoking the extended period' in terms of the proviso to Section 73 of Finance Act. The issue regarding levy of service tax on reimbursement expenses stands decided in favour of the Appellant in **Union of India vs. Inter Continental Consultant [2018 (10) GSTL 401 (SC)].** The issue also relates to payment of service tax by main contractor when the sub-contractor has already paid the same. This issue was not free from the doubt and has been settled only by the Larger Bench decision of this Tribunal in **Commissioner of Service Tax vs. Melange Developers Pvt Ltd. [2019 TIOL 1684 Cestat-Del (LB)].** The contention of the Appellant that they were not required to disclose non-taxable income in their invoice and also in ST-3 returns. Post September, 2006 the service tax was paid on the entire gross amount and the same was also declared in their ST-3 returns deserves to be accepted. The Appellant has also paid the

service tax under reverse charge for GTA service, and therefore, in both the situations it cannot be alleged that the Appellant has suppressed any information from the Department so as to attract the extended period of limitation for raising the demand on account of non payment/short payment of service tax. The learned Advocate has fairly conceded that demand pertaining to period which is within normal period pertaining to April, 2006 to September, 2006 is leviable and the Appellant is required to pay the same with interest. As the issue regarding inclusion of reimbursement expenses and also service tax to be paid by a sub-contractor was not free from doubt till the decision of **Intercontinental Consultant (supra)** and **Melange Developers (supra)**, hence the extended period for raising demand is not available to the Revenue.

11. Therefore, the demand pertaining to extended period is set aside. However, the Appellant would be liable to pay service tax which is within the normal period. The Adjudicating Authority is required to quantify the amount which would be payable by the Appellant. The demand pertaining to extended period is set aside. The penalty imposed is also set aside.

12. The appeal is allowed in the above terms.

(Pronounced in open court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(JUSTICE DILIP GUPTA)
PRESIDENT

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