

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH**

Dated: 27/08/2014

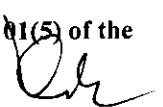
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/53255/2014-CU[DB] dated 26/08/2014

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 81(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	ST/422/2009	KALPIK INTERIORS, G-8, JANAK PALACE, DISTRICT CENTRE, JANAK PURI, NEW DELHI.

	Name and Address of Respondent
2	C.S.T. DELHI 17-B, I.P. Estate, IAEA House, New Delhi.

Copy To

3 Advocate(s) / Consultant(s):

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New Delhi,
Delhi**

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

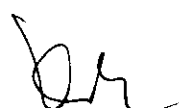
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

13 C.D.R. 14 Office Copy 15 Guard File


Asstt. Registrar(CUSTOMS Appeal Branch)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,**
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Date of Hearing: 06.06.2014
Date of Pronouncement: 26-08-2014

Service Tax Appeal No.ST/422/2009 -Cu[DB]

[Arising out of Order-in-Original No. 13/VKG/2009 dated 4.03.2009 passed by the Commissioner (Appeals), Central Excise, Delhi]

For Approval & Signature :

Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

M/s. Kalpik Interiors

...Appellant

Vs.

CST, Delhi

... Respondent

Present for the Appellant : Shri A.K. Batra, Advocate
Present for the Respondent : Ms. Swhitra Sharma, Comm. AR

FINAL ORDER NO. 532SS/2014

PER: R.K. Singh

The appellants have filed this appeal against Order-in-Original 13/VKG/2009 dated 4.03.2009 in terms of which service tax demand amounting to Rs. 51,18,507(for the period 16.06.2005 to 31.03.2007) has been confirmed alongwith interest and mandatory penalty invoking



the extended period for suppression of facts with intention to evade service tax.

2. The facts, briefly stated, are as under:

The appellants were issued a Show Cause Notice dated 18.02.2008 alleging that they had wilfully and wrongly claimed the benefit of 67% abatement under Notification No. 15/2004-ST dated 10.09.2004 and Notification No. 1/2006-ST dated 01.03.2006 in respect of their completion and finishing services in relation to building or civil structure. The adjudicating authority held that as per the express condition in Notification No. 15/2004-ST as well as Notification No. 1/2006-ST during the relevant period, the completion and finishing services in relation to building or civil structure were not eligible for 67% abatement. In the discussion part of the impugned order the adjudicating authority also discussed the applicability of exemption Notification No. 12/2003-ST dated 20.06.2003 to the appellants which was inter alia subject to the condition that there was a documentary proof specifically indicating the value of the goods and material sold by the service provider to the service recipient. The adjudicating authority observed that there was no segregation between the service & the material component either in the appellants' invoices or in the works orders. The value of the material used by them was not separately indicated in the invoices and still the service tax was paid on the 33% of invoice value. The adjudicating authority further held that the mention of gross value in their contracts indicated that there was no separate sale of goods and material by the service provider to service recipients. Thus the adjudicating authority held that the benefit of Notification No. 12/2003-ST was not available to the appellants.

3. In their appeal the appellants have essentially contended as under:

(1) The adjudicating authority has gone beyond the Show Cause Notice in as much as the adjudicating authority has denied the benefit of Notification No. 12/2003-ST on the ground not mentioned in the Show Cause Notice.

(2) They are eligible for Notification No. 12/2003-ST as there has been transfer of goods and materials in the execution of their works and as per the 46th Amendment to the Constitution, their works contracts involve both sale and service and on "sale" portion service tax can not be charged.

(4) Service Tax can not be charged on the value of goods and materials sold while providing the impugned service.

(5) The decision of CESTAT in Deluxe Colour Lab and others VS. CCE, Jaipur 2008 (17) STT 481 (New Delhi CESTAT) supports their contention.

(6) Bifurcation of goods and material on invoices issued by appellant is not a must and only documentary evidence of value of goods and material sold is required for claiming the benefit of Notification No. 12/2003 dated 20.06.2003.

(7) They also referred to the judgments in case of Express Colour Lab. 2006-(002)-STR-0089-COMMA, and Crystal Colour Lab 2006-(001)-STR-0221-COMMA, and Wipro GE Medical System Pvt. Ltd. Vs. Commissioner of S.T. Bangalore, 2006-(004-)-STR-0442 (Tri.-Ban.) and several others.



(8) They have documentary evidence to substantiate their claim under Notification No. 12/2003 and gave explanations for arriving at the value of material used by them during each of the financial years.

(9) With effect from 01.04.2005, they commenced charging for material separately in their invoices and therefore for the years 2005-06 and 2006-07 the allegation that they did not show value of material separately in their invoices is not correct.

(10) Composite contract cannot be subjected to service tax as composite contract cannot be vivisected and referred to the judgment in cases of Gannon Dunkerley Vs. CCE, Madras [1958] 9 STC 353 (SC) and Daelim Industrial Co. Vs. CCE Vadodara 2003 (155) ELT 457 (Del) as well as some other judgments delivered during the years 2004 & 2005 in this regard.

(11) The works contracts became liable to service tax only with effect from 01.06.2007..

(12) There was no suppression of facts on their part.

4. The Id. AR argued that:

(1) The appellants deliberately wrongly claimed benefit of Notification No. 15/2004-ST dated 10.09.2004 and Notification No. 1/2006-ST dated 01.03.2006 which in respect of the service rendered by them were clearly and unambiguously not applicable.

(2) No evidence of value of goods and material sold was submitted to the adjudicating authority for the purpose of Notification No. 12/2003.

(3) The Hon'ble Delhi High Court in case of G.D. Builders Vs. Union of India 2013 (32) STR (673) (Del.) has held that service tax can be levied on the service component of any contract involving service and goods



and computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax.

(4) In its judgment in case Bhayana Builders, it is inter alia stated that benefit of Notification No. 12/2003-ST is only in respect of value of goods/material sold by a service provider to a service recipient.

5. We have considered the facts and the submissions of both sides.

6. It is seen that the appellants during investigation by Revenue admitted to have claimed the benefit of Notification No. 15/2004-ST and Notification No. 1/2006-ST and the Show Cause Notice issued to them inter alia required them to show cause notice as to why the benefit of those Notifications should not be denied to them as the same were not applicable in respect of completion and finishing services. It is seen that during the adjudication or in their appeal before CESTAT the appellants have not contended that they are eligible for the benefit of exemption under Notifications No. 15/2004-ST and 1/2006-ST. Thus the adjudication authority was right in denying the benefit of the said two notifications to the appellants.

7. It is also seen that the question of appellants' eligibility for benefit of Notification No. 12/2003-ST was not the direct subject matter of Show Cause Notice and the Show Cause Notice did not require them to show cause as to why they should not be denied the benefit of the said notification and understandably so because during investigation, the appellants admitted to have availed of benefit of Notification No. 15/2004-ST and Notification 1/2006-ST and their documents like ST-3 Returns also supported the same and also in their invoices they had uniformly deducted 67% from the gross invoice-value and paid service tax on 33% of gross invoices vlaue. It is only during adjudication that a

claim for the benefit of Notification No. 12/2003-ST was made and the adjudicating authority respecting the appellants' right to make such a claim gave a considered and speaking finding thereon.

8. Notification No. 12/2003-ST is reproduced below for convenience of the discussion to follow.

Notification No. 12/2003-Service Tax

"In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

2. This notification shall come into force on the 1st day of July, 2003.

Thus it is evident that the benefit of this Notification No. (12/2003-ST) can be granted only if there is documentary proof specifically indicating the value of the goods and material sold by the services provider to the service recipient. The adjudicating authority has held that the appellants had not given such proof and therefore they were not eligible for the benefit of the said Notification No. (12/2003-ST)

9. The appellants have contended that for claiming the benefit of Notification No. 12/2003-ST they are not required to show value of goods and material in the invoices. This contention of the appellants



has force as Notification No. 12/2003-ST reproduced above does not prescribe any such condition. It is seen that CESTAT in various decisions including in the case of M/s. M.P. Vs. CCE, Jaipur 2012-ELT- has held accordingly. However, as service tax is required to be paid on a monthly basis it may be pertinent to state that for the purpose of computing the service tax liability under the benefit of Notification No. 12/2003-ST, the documentary proof specifically indicating the value of the relevant goods and material sold would need to be worked out on a monthly basis.

10. Bulk of the appellants' appeal, cited case laws and reference to 46th constitutional amendment are on the point that service tax can't be charged on the value of goods and material as they are liable to sales tax. Indeed, the adjudicating authority in para 51 of the impugned order takes due notice thereof without quarrelling. The exemption Notification No. 12/2003-ST is in effect not in disharmony with the said Constitutional amendment. Indeed, as clearly laid down in the said exemption notification, service tax is not to be levied on the value of the goods and materials sold by the service provider to the service recipients provided there is documentary proof specifically indicating the value of the said goods and materials. Thus what is mandatorily required to claim the benefit of Notification No. 12/2003-ST is nothing short of documentary proof and that too of such a nature which specifically indicates the value of such goods and materials. Thus, mere plausible explanations and/or approximations regarding value of "said" goods and materials are clearly insufficient for the purpose of Notification No. 12/2003-ST.

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In the present case the appellants on being found out having illegally availed of Notification No. 15/2004-ST and Notification 1/2006-ST have attempted to get covered under Notification No. 12/2003-ST. But it is seen from the adjudication order as well as from their submissions in this appeal that they have only given the overall values of goods and materials purchased by them financial year wise and have failed to show with documentary evidence the goods and materials specifically sold to various service recipients in the context of provision of the service for which invoices were raised and payments received. In fact, in those invoices, they have simply and uniformly stated "total job work being 33% amount of total work contracts done." In other words, they have uniformly deducted exact same 67% towards value of goods and material claimed to be sold to various service recipients without giving any documentary proof specifically indicating the value of such goods and materials. That exemption notifications (except the promotional/beneficial notifications) are to be interpreted strictly has been repeatedly held in various judgments like in the case of Konkan Synthetic Fibres Vs. CC (Import) Mumbai 2012 (278) ELT 0037 (S.C.). Indeed, in the case of M/s. Indian Oil Corporation Vs. Commissioner of Central Excise Vadodara 2012-TIOL-04-SC-CX, the Hon'ble Supreme Court went to the extent of laying down that the provisions of exemption have to be construed strictly and if the exemption is subject to certain conditions, the conditions have to be complied with and that the substantial compliance is not enough. Thus, it is simply not acceptable to grant the benefit of Notification No. 12/2003-ST merely on the basis of plausible explanations/approximations to the effect that overall the value of the goods used in providing completion and finishing services to all their services recipients during a certain period would have been more than 67% and therefore 67% deduction (which obviously they initially claimed under Notification Nos. 15/2004-ST and 1/2006-ST and were



caught for having done so illegally) should be allowed to them under Notification No. 12/2003-ST.

11. At this juncture it is pertinent to refer to the appellants' contention and cited case laws that their contracts being composite contracts covered under the scope of works contracts were not liable to service tax prior to 01.06.2007 when works contract service was made taxable. In this regard, it is to state that this contention is rendered untenable by the decision of Hon'ble Delhi High Court in the case of M/s. G.D. Builders (Supra) and the case laws cited by the appellants are of the years prior to the year of the said judgments of Hon'ble Delhi High Court. In this regard, it is pertinent to quote a few relevant paras from the judgement of the Hon'ble Delhi High Court in case of G. D. Builders (supra).

Para 23. The state Legislature is competent to impose tax on transfer of property in goods involved in 'works contract'. The Parliament can enact laws which can specify restrictions and conditions regarding the system of levy, rates or incidence of tax, but this is not a pre-condition. It means that if the Parliament enacts a law, the exercise of legislative power of the State would be subject to a system of levy, rates or incidence of tax. Most importantly it has been observed that measure of levy of tax contemplated by Article 366(29A) (b) is the value of the goods involved in execution of "work contract" since the taxable event is the transfer of property in goods, the said transfer takes place when the goods are incorporated in the works, the value of goods, which can constitute the measure for the levy has to be the value of goods at the time of incorporation of the goods in the works."

"Para 36(2). Service tax can be levied on the service component of any contract involving service with

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sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable."

Para 31. The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term "taxable service., Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as already stated above, rejected the argument of the petitioners on bifurcation/vivisect and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. (emphasis added) The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified under Section 65(105) (zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. (comprises added) But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the "gross amount charged. by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract.

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It is to be noted that the Hon'ble Delhi High Court, in this judgment in case of M/s. G.D. Builders (supra) took due note of the following judgments.

1. *All India Fed. Of Tax Practitioners v. Union of India* – 2007 (7) STR 625 (S.C.)-Followed Para 29.
2. *Association of Leasing and Financial Service Companies v. Union of India* – 2010(20) STR 417 (S.C.) Relied on [Para 30]
3. *Gannon Dunkerley and Co. v. State of Rajasthan* - (1993) 1 SCC 364 –Referred [Paras 23,24,26]
4. *Gujara Ambuja Cements Ltd. v. Union of India* – 2006 (3) STR 608 (S.C.)= 2005 (182) ELT 33 (S.C.) Relied on [Para]
5. *Home Solutions Retails (India) Ltd. v. Union of India* -2011 (24) STR 129 (Del.)-Relied on [Para 19]
6. *Delhi Chit Fund Association v. Union of India* – 2013 (30) STR 347 (Del.)- Relied on [Para 37]
7. *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India* -2013 (29) STR 9 (Del.)-Relied on [Para 37]
8. *K. Raheja Development Corporation v. State of Karnataka* – 2006 (3) STR 337 (S.C.) – Relied on [Para 21,22]
9. *Larsen & Toubro Ltd. v. State of Karnataka* – Civil Appeal No. 8672 of 2013 of Supreme Court –Followed [Para 22]
10. *Mahim Patra, Pvt. Ltd. v. Union of India*- 2007 (7) STR 110 (s.C.)-Referred [Paras 24,25,27]
11. *Nagarjuna Constn. Co. Ltd. v. Government of India*-2012 (28) STR 561 (S.C.)-Relied on [Para 35]
12. *Nagarjuna construction Co. Ltd. v. Government of India* - 2010(19) STR 321 (A.P.) [Paras 34,35]
13. *State of Kerala v. Builders Association of India* – (1997) 2 SCC 183-Relied on.....[Para 32]
14. *Tamil Nadu Kalyana Mandapam Assn.v. Union of India* – 2006 (3) STR 260 (S.C.)=2004 (167) ELT 3 (S.C) – Followed [Paras 20,28]

Thus the Hon'ble Delhi High Court judgment in case of M/s. G.D. Builders (supra) is not per incurium and therefore is good law on the issue.

12. Needless to say, the classification of service is to be determined as per the definitions of various taxable services prevalent during the relevant period and merely because the classification changes with the introduction of a taxable service under which an existing service gets more specifically covered in no way means that the said service was not necessarily taxable during the period prior thereto. The contents of above reproduced para 31 of the Delhi High Court judgment in the case of G.D. Builders (supra) has categorically held that:

"as per the provisions of Section 65(105) (zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes and in case of composite contract, the service element should be bifurcated and ascertained and then taxed". The Hon'ble High Court in the same para goes further to add that:

"the contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clause (zzq) and (zzzh) of section 65(105) stands rejected." Needless to say these are not obiter dicta; these are the distillates of proper analysis of the legal provisions and therefore constitute an integral part of the judgment (decision) in the said case.

13. Coming back to the applicability of Notification No. 12/2003, as discussed earlier the benefit of exemption Notification No. 12/2003-ST cannot be granted merely on the basis of overall estimation/approximations put forth and without any documentary proof specifically indicating the value of goods and materials sold in respect of the individual recipients of service as per the contracts entered into by the appellants with each of them. They have failed to produce such



documentary proof so far. The appellants insist that they have such documentary proof and would be able to produce the same. In such a situation, it is only fair that the case is remanded to the adjudicating authority to enable the appellants to do so.

14. As regards the allegation of suppression of facts, it is seen that the appellants deliberately indulged in deducting 67% from the gross value shown in the invoices and paid service tax only on 33% under Notification No. 15/2004-ST and Notification No. 1/2006-ST, admitted to have availed of the said notifications and even mentioned these notifications in their ST-3 Returns even when the said notifications specifically, unambiguously and expressly debarred completion and finishing services from such benefit and also they (i.e. appellants) nowhere disclosed that the service for which the said exemption notifications were claimed was completion and finishing service. All this clearly establishes suppression of facts on their part with intention to evade service tax. The judgments cited by them in this regard do not come to their rescue as none of them deals with a situation where benefit of an exemption notification was claimed so brazenly and blatantly to evade service tax when there was no scope for any ambiguity or confusion regarding the inadmissibility thereof. In coming to a finding regarding suppression of facts overall facts and circumstances of the case have to be considered in each case as was also held in the case of *Mett Macdonald Ltd. Vs. CCE, Jaipur* 2006(2) STR 524 (Tri.-Del.). In the present case, the fact that the appellants did not inform the department that they were claiming the said exemption notifications in respect of completion and finishing services coupled with the fact that they so brazenly and blatantly indulged in claiming the



benefit under the said notifications in spite of the fact that the said notifications were so expressly, conspicuously and unambiguously not applicable for the said services establishes suppression of facts on their part unquestionably at least on the basis of preponderance of probability. We must hasten to add though that this doesn't debar them from staking a claim for the benefit of Notification No. 12/2003-ST provided, as discussed and elaborated earlier, the conditions stipulated thereunder are fully satisfied in the manner prescribed.

15. In the light of the foregoing, we set aside the impugned order and remand the case for denovo adjudicating for the purpose of enabling the appellants to put forth their claim alongwith documentary evidence required for the benefit of Notification No. 12/2003-ST. The adjudicating authority will consider the appellants submissions afresh with regard to the admissibility of the benefit of Notification No. 12/2003-ST and re-determine the demand of service tax and penalties after recording the findings with regard to the extent, if any, to which the benefit of the said Notification No. 12/2003-ST is admissible to them keeping in view the contents of paras 9 to 13 above.



(Justice G. Raghuram)
President



(R.K. Singh)
Technical Member

Neha