CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II

Service Tax Appeal No.52255 of 2016
With
Service Tax Cross No.51556 of 2016 (by the respondent)

[Arising out of Order-in-Original No.UDZ-EXCUS-000-COM-0073-15-16 dated 30.03.2016 passed by the Commissioner (Appeals), Central Excise Commissionerate, Udaipur]

Commissioner of Central Excise and Service Tax, **Appellant**
Udaipur.

VERSUS

M/s.Kshitij Infra Project Pvt. Ltd. **Respondent**
Reg. Office:4B, Atwal Nagar,
Baran Road, Kota (Rajasthan).

APPEARANCE:

Shri Pradeep Gupta, Authorised Representative for the appellant.
Shri Yash Dhadda, Chartered Accountant for the respondent.

CORAM: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51664/2021

DATE OF HEARING/DECISION:06.07.2021

ANIL CHOUDHARY:

Revenue is in appeal against the order-in-original dated 30.03.2016 passed by the Commissioner accepting the VCES declaration filed by the respondent/assessee on 30.12.2013 and further, confirming demand of service tax of Rs.1,53,100/- along with interest and imposing an equal amount of penalty under Section 78. It has been further ordered to pay interest on the tax amount relating to free of cost material supplied to the respondent/assessee by the Principal, in execution of works contract during the period 2011-2012 and 2012-2013 amounting to Rs.74,96,779 and Rs.22,21,802 respectively. Further, late fee for late filing of the Return was imposed Rs.20,000/- under Rule 7 C of Service Tax Rules.

2. Brief facts are that the respondent is engaged in Works Contract and is registered with the Service Tax Department since 2008. They had filed their returns and paid the service tax for the financial year 2008-2009 and 2009-2010. However, Returns (ST-3) were pending for the period 2010-2011 and 2011-2012 and also the tax was not deposited. In view of the 'Service Tax Voluntary Compliance Encouragement Scheme, 2013' (VCES), the respondent filed an application declaring service tax dues at Rs.16,03,551/- for the period 2010-2011 to 2nd December, 2012 (2012-13) and accordingly, paid the tax, which is as follows:-

Table

S.No.	Period	Gross Receipt Taxable	@of Service Tax plus Cess	Service Tax	Ed.Cess	H.S. Ed.Cess	Total Tax	Amt. Deposited & challan No.(CIN NO.) & date
1.	2010-2011	1,2378340	4.12%	513301	3266	1633	518200	00001 dt.25.09.14 00002 dt.25.09.14 00003 dt.25.09.14 00001 dt.30.12.13, 00001dt.15.10.14 and interest Rs.41,506 deposited vide challan no.00001 dt.15.10.14.
2.	2011-2012	20214343	4.12%	808574	16171	8086	832831	
3.	2012-2013	5103562	4.944%	244971	4899	2450	252320	
	Total			1566846	24336	12169	1603351	

3. On scrutiny of the declaration under VCES, it appeared that the respondent had filed a substantially false declaration. Further, the Revenue received information from a third party source, informing that the respondent has received an amount of Rs.11,17,79,859 during the financial year 2012-2013 for providing taxable services, for which clarification was sought. Further, Revenue also wanted to clarify the claim of abatement and availment of Composition Scheme. The respondent has discharged their service tax liability under VCES after availing 'Composition Scheme' applicable to works contract. The Revenue further in reference to Profit &

Loss Account filed by the respondent with Income Tax Return for the period 2008-2009 to 2012-2013, calculated the service tax dues at Rs.2,75,13,319/- as follows:-

Table

Sl.No.	Period	Gross Receipt	Rate of Service Tax	S.T. Payable	Ed.Cess	Higher Ed.Cess	Total S.T. payable
1.	2008-09	9503664	ST @12%+(EC2%+SHEC1%) of ST	1140440	22809	11404	1174653
2.	2009-10	23402827	ST @10%+(EC2%+SHEC1%) of ST	2340283	46806	23403	2410491
3.	2010-11	44552725	ST @10%+(EC2%+SHEC1%) of ST	4455273	89105	44553	4588931
4.	2011-12	53623813	ST @10%+(EC2%+SHEC1%) of ST	5362381	107248	53624	5523253
5.	2012-13	111779859	ST @12%+(EC2%+SHEC1%) of ST	13413583	268272	134136	13815991
	Total	242862888		26711960	534240	267120	27513319

4. Further, as per VCES declaration, it appeared that the respondent has declared nil receipt during the financial year 2008-2009 and 2009-2010 which appeared to be incorrect. It further appeared to Revenue that the tax liability of the respondent/assessee appeared to be Rs.2,75,13,319/- for the period 2008-2009 to 2012-2013, wherein they have declared the tax dues as Rs.16,03,351/- only. Accordingly, a show cause notice dated 19.12.2014 was issued requiring the respondent /assessee to show cause as to why the tax dues as calculated by the Revenue should not be demanded and recovered with proposal for appropriation of the amount of Rs.16,03,351/- already paid. It was also proposed to reject the declaration filed under VCES, with further proposal to impose penalty under Sections 76 and 78, with proposal to charge late fee for late filing or non-filing of the Returns in terms of Rule 7 C of Service Tax Rules. The respondent contested the show cause notice and demonstrated that they have filed the returns for the period

2008-2009 and 2009-2010 and have paid the admitted tax. The respondent further demonstrated that they have also done road construction work, which is fully exempt. After deducting the turnover towards road construction, they have declared the balance turnover as taxable turnover and have paid the service tax under the Composition Scheme. The respondent further contended that there is no case of non-compliance on their part, and they have made available the details of their financial accounts i.e. Form AS-26, relevant work orders to the Department. It was contended that the respondent was entitled to either claim abatement for the material components or pay tax on the gross amount under the Composition Scheme, on the taxable turnover. Accordingly, they have rightly calculated and paid the tax, and there is no error in their declaration under VCES. It was also contended that they maintained regular books of accounts in the normal course of business, which are audited by the Chartered Accountant under the Companies Act as well as Income Tax Act, etc. They also contended that that the materials supplied 'free of cost' by the principal for use in the works contract is liable to tax and not liable to be included in the gross turnover, as held by the Larger Bench of this Tribunal in the case of **Bhayana Builders Pvt. Ltd. – 2013 (32) STR 49 (Tribunal-LB),** which has been affirmed by the higher court. Accordingly, following the said decision, the respondent has not added this value or cost of free materials supplied by the principal, for use in the works contract. The respondent has submitted as follows in support of their contention that they have filed true declarations under VCE Scheme:-

a. That the details related to FY2008-2009 and 2009-2010 have already been disclosed in the Service Tax Returns duly filed for these years.

b. That for FY 2010-11, 2011-12 and 2012-13, only that amount of Turnover has been declared which is taxable under service tax. Turnover which is exempt from service tax i.e. Construction of Road is not declared in the VCES declaration as no service tax is applicable on such contracts.

c. That regarding service tax on the value of free material issued by service receiver they submitted that the value of free material issued during the FY 2008-2009, 2009-2010 and 2010-2011 has been incorporated in the declaration given for the FY 2011-2012.

5. It was also stated that they have already added and declared the value of materials received free of cost, in their taxable turnover for the period 2008-2009 to 2010-2011. As regards the free materials received from M/s. Adani Infra of Rs.8,71,053/- during the period 2011-2012 and Rs.4,30,625/- during the period 2012-2013, such details were provided to the respondent only in the month of March, 2013 and the same have been declared in the Return for the period October to March, 2013. Further, TDS (Income Tax) for the same has also been deducted, which has also been reflected in Form 26 AS for the said period. It was also submitted that the value of the materials received free of cost during the year 2011-2012 with respect to the principal – Jai Prakash Associates was Rs.1,38,570/- involving service of Rs.5,709/-.

6. Ld. Commissioner recorded the findings that the respondent has deposited the tax of Rs.8,01,775- i.e. 50% of the declared liability paid on 31.12.2013 and remaining 50% up to 31.12.2014 along with the applicable interest. Thus, the respondent has complied with the payment procedure under VCE scheme. The ld. Commissioner verified and calculated the tax liability for each financial year from 2008-2009 to 2011-2012, which was the subject matter of the show cause.

For the period 2008-2009 to 2009-2010

7. The finding recorded is that the respondent/assessee has included the cost of materials received free of cost in the taxable turnover. It was declared in the ST-3 Returns. However, due to calculation error, short payment was worked out to Rs.3,344/- only.

8. During 2009-2010, the service tax payable was worked out to Rs.9,27,409/- whereas as per Return, the respondent has paid tax of Rs.7,93,874/-. Thus, the short payment worked out at Rs.1,33,535/-. It was found that the respondent has received free of cost materials for Rs.6,46,960/-, which is also to be taken into consideration for charging service tax. Further, it is observed that as regards the free of cost materials, the same has been considered by the respondent/assessee in the declaration filed for the year 2011-2012, and the said amount is not includible again and accordingly, the tax liability declared in the declaration is Rs.5,18,200/- whereas the correct tax liability was worked out to Rs.5,34,421/-, hence, the tax short paid was Rs.16,221/- only.

For the Period 2011-2012

9. It is found that any additional service tax is required to be recovered, in respect of free of cost supplied materials for Rs.74,96,779/-, the assessee was liable to pay service tax of Rs.3,70,640/-. Further, it is found that they have declared the said value in the revised return filed on 23.10.2015 for the period October 2012 to March, 2013, and thus, they were liable to pay only the interest on the said amount from the due date till the date of actual payment.

For the Period 2012-2013

10. Finding recorded is that the assessee has declared the taxable value and paid the service tax by including the value of free of cost supplied materials. So far free of cost supplied materials for this year of Rs.22,21,802/-, they were liable to pay service tax of Rs.1,09,846. Whereas the Return for April, 2013 to September, 2013 is concerned, they are liable to pay interest from due date to the date of actual payment of the tax. Further, observed that no additional service tax is liable to be recovered for the period 2012-2013. Accordingly, ld. Commissioner (Appeals) worked out the liability of service tax as follows:-

Table

Year	Additional Liability of Service Tax (Rs.)
2008-2009	3,344
2009-10	1,33,535
2010-11	16,221
Total	1,53,100

11. It was further observed that difference in tax liability is mainly on account of change in calculation of service tax. Further, such difference or short paid tax is not malafide and is out of bonafide error or interpretation. Thus, the declaration under VCES does not come under the criteria of substantial false declaration as clarified by the Board vide a Circular No.170/5/2013-ST dated 08.08.2013.

12. Accordingly, ld. Commissioner dropped the proposal to reject the declaration under VCES and was further pleased to confirm the tax demand of Rs.1,53,100/- along with interest. He further imposed equal amount of penalty under Section 78. Further, interest was demanded on service tax

paid on the 'free of cost supplied materials', which appeared to be deposited late. Further, late fee of Rs.20,000/- for late filing of service tax Return for the period Jan. 2013 to March, 2014 under Rule 7C, read with Section 70 of the Finance Act.

13. Being aggrieved, the Revenue is in appeal, *inter alia*, on the grounds that ld. Commissioner has erred in holding that the declaration under VCES was not substantially false and further urged that, agreeing with the short paid service tax as calculated by the ld. Commissioner at Rs.1,53,100/-, it is contended that the declaration is substantially false under VCES, which is to be rejected. Further, the respondent was required to declare the free of cost supplied materials, which was only declared later on by them. As such, the respondent has short declared the service tax liability of Rs.6 lakhs (approx.).

14. The respondent has also filed cross objections, which have been registered and are considered. The respondent/assessee has given bifurcation of demand as per order-in-original, which is as follows:-

Table

Year	Amount of Service Tax	Remarks
2008-2009 to 2010-11	Rs.153,100/-	Amount confirmed in OIO passed by Commr.
2012-13	Rs.3,69,498/-	Alleged service tax on free supplies of materials by service recipient
2013-14	Rs.1,09,846/-	Alleged service tax on free supplies of material by service recipient.
Total	Rs.6,32,444/-	

The alleged liability of service tax is challenged in precise points as under:-

15. It is explained that the demand of Rs.1,53,100/- is attributable partly to 2008-2009 and 2009-2010, for which, admittedly the returns were filed and service tax was paid. It is also contended by the respondent that as regards construction of 'Mustard Packing House', they paid service tax under Works Contract claiming benefit under notification no.106/ST and discharged service tax of 33% on the gross value. However, the said work was classifiable under Industrial Construction Service. Thus, difference in tax is attributable to mode of calculation, as it is classifiable under works contract service, tax should have been paid and on 40% of the gross value, under the Service Tax Determination of Value Rules. Thus, admittedly, there is no case of mis-declaration made out. Further, the Larger Bench of the Tribunal has held that the materials received free of cost from the principal, is not to be included in the gross turnover for calculation of service tax, which has been upheld by the higher court in favour of the assessee. Further, the contention of the respondent is that the principal informed the value of the supply of free materials for 2011-2012 only in March, 2013 and hence the same could not be included in the transactions till 31.12.2012, being the cut off date for declaration of turnover and tax payable under VCES. Thus, it is correctly held by the ld. Commissioner that the declaration filed by the respondent is not substantially false, and the minor difference in tax is due to change in interpretation.

16. Having considered the rival contentions, I find that the calculation of tax short paid, as made by the ld. Commissioner in the impugned order, is not due to any mis-declaration or false declaration under VCES. Ld. Commissioner has categorically observed that difference in tax liability is mainly due to interpretation and change in calculation of service tax,

therefore, the mistake of the respondent/assessee in the declaration is *bona fide* and there is no *malafide* on their part.

17. I further, hold that in view of the decision of the Larger Bench in the case of **Bhayana Builders** (supra), the respondent is not required to pay service tax on the receipt of materials supplied free of cost, received from the principal. Thus, the amount demanded in the impugned order for the period 2012-2013 and 2013-2014 is set aside. Hence, the respondent is only required to pay the differential duty of Rs.1,53,100/-. Further, penalty under Section 78 is also set aside, there being no case of falsification or contumacious conduct, in the facts and circumstances on the part of the respondent/assessee. The late fee of Rs.20,000/- under Rule 7C is reduced to Rs.10,000/-. In view of my findings, the appeal of the Revenue is dismissed and the cross objections by the respondent/assessee are allowed. The respondent/assessee are entitled to consequential benefit in accordance with law.

[operative portion of the order already pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.