

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Service Tax Appeal No. 53577 of 2014

(Arising out of Order-in-Original No. JAI-EXCUS-001-COM-133-13-14 dated 28.03.2014 passed by the Commissioner, Central Excise, Jaipur)

M/s. N.M. Roof Designers Ltd.,
C-41, Tarun Marg, Tilak Nagar,
Jaipur

...Appellant

Versus

Commissioner, Central Excise,
Jaipur

....Respondent

APPEARANCE:

Shri A.K. Prasad, Advocate for the Appellant
Dr. Radhe Tallo, Authorised Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 13.09.2022

Date of Decision: 23.09.2022

FINAL ORDER No. 50897/2022

JUSTICE DILIP GUPTA:

M/s. N.M. Roof Designers Ltd.¹ has filed this appeal to assail the order dated 28.03.2004 passed by the Commissioner, Central Excise, Jaipur². The operative part of this order is reproduced below:

ORDER

“(i) **I confirm the demand of service tax amounting to Rs. 11,50,25,691/-** (Rs. Eleven Crore fifty lakhs twenty five thousand six hundred and ninety one only) (including Education and S&H Education Cess) under section 73(2) of the Finance Act, 1994 and order it to

-
- 1. the appellant**
 - 2. the Commissioner**

be recovered from M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur alongwith interest in terms of Section 75 of the said Act.

- (ii)** I impose under Section 78 of the Finance Act, 1994 a penalty of Rs. 11,50,25,691/- (Rs. Eleven Crore fifty lakhs twenty five thousand six hundred and ninety one only) upon M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur. However, benefit of reduced penalty on Service Tax demanded and payable upto 7.4.2011 (penalty of 25% on Service Tax demanded and payable upto 7.4.2011) as per proviso to Section 78 ibid, is available to the noticee subject to the condition that the Service Tax demanded and payable upto 7.4.2011 and the interest payable thereon under Section 75, is paid within thirty days from the date of communication of this order and further subject to the condition that the benefit of reduced penalty (25% of the Service Tax demanded and payable upto 7.4.2011) shall be available if the amount of penalty so determined has also been paid within the period of thirty days from the date of communication of this order.
- (iii)** I also impose under Section 76 of the Finance Act, 1994 a penalty of Rs. 200/- per day for the period during which such failure continued or at the rate of 2% of the amount of Service Tax due per month (upto 9.5.2008), whichever is higher, till the date of actual payment of outstanding Service Tax, subject to maximum of service tax amount outstanding and payable up to 09.05.2008 upon M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur.
- (iv)** I impose a penalty of Rs 10,000/- (Rs. ten thousand only) upon M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur under Section 77 (1) (c) of the Finance Act, 1994 for not providing information for 7 days i.e. from 4.10.2012 to 11.10.2012 (date of show cause notice).
- (v)** I impose a penalty of Rs. 1000/- (Rs. one thousand only) upon M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur under Section 77 of the

Finance Act, 1994 for not taking registration upto 21.2.2008.

(vi) I confirm the demand of service tax amounting to Rs. 36,30,677/- (Rs. Thirty six lakhs thirty thousand six hundred and seventy seven only) (including Education and S&H Education Cess) under section 73A(4) of the Finance Act, 1994 and order it to be recovered from M/s N.M. Roof Designers Ltd., C-41, Tarun Marg, Tilak Nagar, Jaipur alongwith interest in terms of Section 73B of the said Act.

2. The appellant is in construction business. Based on an intelligence, the Officers of Jaipur-1 Central Excise Commissionerate conducted searches at the office premises of the appellant on 17.08.2012 and during the course of investigations, statement of Shri Nirmal Sanghi was recorded on 17.08.2012 and of Shri Deepak Sogani on 04.10.2012. Shri Nirmal Sanghi and Shri Deepak Sogani are Directors of the appellant.

3. The department formed a view that the appellant had provided the following taxable services but had not paid appropriate service tax during the period 01.04.2007 to 31.03.2012.

4. The appellant has provided a chart relating to the taxable value for the various services and it is as follows:

Service	Taxable Value (in Rs.)
Educational Institutions - commercial & industrial construction service	49,80,90,411/-
Hospitals - commercial & industrial construction service)	02,88,37,120/-
Housing Board Colony - construction of residential complex and commercial & industrial construction service)	05,53,10,870/-
Residential Houses - construction of residential complex and commercial & industrial construction service)	02,55,58,525/-
Temple - not taxable under commercial & industrial construction service, but taxed under section 73A	03,26,67,450/-

Area Based Exemption - commercial & industrial construction service	03,28,81,459/-
commercial & industrial construction service	37,03,70,480/-
consulting engineer service	1,58,08,357/-
supply of tangible goods service	2,32,800/-

5. The calculation of service tax liability has been arrived at in the following manner:

“Commercial & Industrial Construction, Construction of Residential Complex Service and Works Contract Service

Period	Gross Amt.	Value held not liable to service tax	Net value on which ST Payable	Rate of ST in % (including cesses)	ST payable (in Rs.)
2007-08 till 10.05.2007	13718882	0	13718882	12.24	1679191
2007-08 11.5.2007 to 1.3.2008)	213385741	3666840	209718901	12.36	25921256
2008-09 till 23.2.2009)	178934824	13795124	165139700	12.36	20411267
2008-09 24.2.2009 to 31.3.2009)	58373884	682141	57691743	10.3	5942250
2009-10	206058228	2635448	203422780	10.3	20952546
2010-11	181914482	10177341	171737141	10.3	17688926
2011-12	202044819	800000	201244819	10.3	20728216
Total					113323652

Consulting Engineer services and Supply Of Tangible Goods Services

Period	Consulting Engineer Services.	Supply of tangible goods service	Net value on which ST Payable	Rate of ST in % (including cesses)	ST payable (in Rs.)
2007-08	810480	0	810480	12.36	100175
2008-09	1488172	118800	1606972	12.36	198622
2009-10	1592311	114000	1706311	10.3	175750

2010-11	5851804	0	5851804	10.3	602736
2011-12	6065590	0	6065590	10.3	624756
Total					1702039

6. A show cause notice dated 11.10.2012 was issued to the appellant raising a demand of Rs. 11,86,56,367/- and the amount already deposited to the extent of Rs. 69,70,995/- was proposed to be appropriated. The appellant submitted a detailed reply to the show cause notice on 13.10.2013 raising a number of factual and legal points to explain why the said demand was not sustainable. However, by the order dated 19.03.2014/28.03.2014, the Commissioner confirmed the amount proposed and imposed penalties under sections 76, 77 and 78 of the Finance Act, 1994³.

7. Shri A.K. Prasad, learned counsel appearing for the appellant, made the following submissions:

- (i) The demands raised under the heads 'commercial or industrial construction' service ⁴ and 'construction of complex' service ⁵ cannot be sustained since the services provided by the appellant were in the nature of 'works contract' service, as held by the Supreme Court in **Commissioner of C. Ex. & Cus., Kerala** versus **Larsen & Toubro Ltd.**⁶ for the reason that the appellant was not only providing services, but was also providing materials for the same;

3. the Finance Act
4. CICS
5. CCS
6. 2015 (39) S.T.R. 913 (S.C.)

- (ii) As per Annexure IX to the show cause notice, services provided by the appellant have been divided in two categories - (i) construction service upto 30.5.2007, and (ii) works contract service for the remaining period of the demand. Since appellant was providing services as well as materials, the services are in the category of works contract, which became taxable w.e.f. 01.06.2007 in view of the decision of the Supreme Court in **Larsen & Toubro;**
- (iii) For the period w.e.f. 01.06.2007, the demand as per the show cause notice is under the head 'works contract' service but the Commissioner has confirmed the demand under other heads like CICS or CSS;
- (iv) Even otherwise, out of the total receipts in relation to construction activities, about Rs. 49.81 crores relates to construction of seven educational institutes. The service would be taxable only if the building is used for commerce or industry. In this connection reliance has been placed on the decision of the Tribunal in **Chettinadu Constructions versus Commr. of C. Ex. (Service Tax), Madurai** ⁷. Paragraph 13.2 of Board Circular dated 17.09.2004 also makes it clear that construction of buildings for institutions

7. 2016 (46) S.T.R. 143 (Tri.-Chennai)

established solely for educational purposes would not be taxable under this category, being non-commercial in nature;

- (v)** Likewise, an amount of Rs. 2,88,37,120/- received for construction of a hospital cannot be considered under the category of CICS;
- (vi)** Rule 2A of the Service Tax (Determination of Value) Rules, 2006, requires that for any service which involves sale/transfer of some goods/materials also, the value of the goods/materials is to be excluded but the Commissioner has rejected this quantification simply on the ground that the appellant did not exercise the option prior to payment of service tax. Substantive benefits could not have been denied because of any procedural delay/lapse;
- (vii)** Alternatively, the option of Composition Scheme under the Service Tax (Composition Scheme for Payment of Service Tax) Rule, 2007, should have been made available to the appellant and it should not have been denied on account of delay in opting for the scheme;
- (viii)** The houses constructed as part of the Rajasthan Housing Board Colony cannot be categorized as 'construction of a new residential complex or part thereof' under the broad category of 'works contract' service, since residences constructed

were not part of any 'complex' but were part of a colony;

- (ix)** The demands have been raised on the basis of figures retrieved from the appellant's balance sheets and profit & loss accounts. During the period 01.04.2007 to 31.03.2011, as per rule 6 of the Service Tax Rules, 1994, service tax was payable only on amount actually received. Hence, the Order is incorrect to the extent it demands service tax on accruals and not on actual receipts;
- (x)** The demand under 'consulting engineer' service has been confirmed on the basis of gross billing of Rs.1,58,08,357/- when, in fact, the demand should have been calculated on the amount of Rs. 1,19,96,452/- actually realized/received during the impugned period;
- (xi)** The demand in respect of 'supply of tangible goods service' relates to Vibrators and JCB Excavators provided on rent. In terms of sub-clause (zzzzj) of clause (105) of section 65 of the Finance Act service tax is not leviable under this category if there is transfer of right of possession or effective control of the goods. In the instant case, these conditions are satisfied. Hence, demand of Rs. 2,32,800/- on this account is not tenable;
- (xii)** Cum-tax benefits has not been extended to the appellants by the adjudicating authority relying on

the decision of the Supreme Court in **Amrit Agro Industries Ltd. versus Commissioner of C. Ex., Ghaziabad**⁸. This decision relates to valuation under Central Excise law and cannot be applied to service tax;

(xiii) Bulk of the demand is time-barred, since show cause notice was issued on 11.10.2012 for the period 01.04.2007 to 31.03.2012. The appellant did not pay tax in some cases under the bonafide belief that service tax was not leviable on construction activities related to non commercial entities like educational institutions, hospitals, religious bodies etc. Hence, there is no ground for invoking the extended time limit. The bonafides of the appellants is evident from the fact that they had taken registration for service tax in February, 2008, itself and had also paid some service tax as per their own bonafide understanding of the matter and had shown the remaining tax payable in their Balance Sheets; and

(xiv) There is no ground for imposing any penalty also. In any case, this is a fit case for invoking Section 80 of the Finance Act to waive all penalties.

8. Dr. Radhe Tallo, learned authorised representative appearing for the department, however, supported the order passed by the

8. **2007 (210) E.L.T. 183 (S.C.)**

Commissioner and submitted that it does not call for any interference in this appeal.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

10. Admittedly for the construction works, the appellant was not only providing services but was also providing the material. The submission of learned counsel for the appellant is that such a service provided by the appellant would be covered under the 'works contract' service w.e.f. 01.06.2007, as was held by the Supreme Court in **Larsen & Toubro**.

11. Annexure-IX to the show cause notice has divided the services provided by the appellant into two categories. The first is under construction service upto 30.05.2007 and the second is under the works contract service for the remaining period of the demand. Works contract service became taxable w.e.f. 01.06.2007. It is not in dispute that the appellant was providing services as well as materials. In such circumstances, the service could not have been confirmed under any category except works contract which service became taxable only w.e.f 01.06.2007. Thus, confirmation of the demand under CICS and CCS prior to 01.06.2007 cannot be sustained.

12. For the period post 01.06.2007, the demand has been proposed in the show cause notice under works contract but it has been confirmed under CICS or CCS. It is a settled law that the demand proposed under a particular category cannot be confirmed under a different category.

13. In this connection it would be pertinent to refer to the decision of the Mumbai Tribunal in **Ashish Ramesh Dasarwar vs. Commissioner of Central Excise & Service Tax, Nagpur**⁹. The Division Bench of the Tribunal held as follows:

"6. As regards the period after 1.6.2007, since the demand was raised under 'commercial or industrial construction service, whereas admittedly the service is correctly classifiable under works contract service, the demand raised under wrong head of service cannot sustain.

7. As per above discussion, the demand raised under 'commercial or industrial construction service' shall not sustain. Hence, the same is set aside."

14. In **M/s. Choudhary Stone Crushing Company versus Commissioner of Central Excise and Service Tax – Jaipur II**¹⁰, the Tribunal observed as under:-

"8. For period commencing on 1/06/2007, the composite services would be liable for classification under Works Contract Service only. But we note that Show Cause Notice has proposed the demand for service tax under the category of Commercial and Industrial Construction Service as well as Repair and Maintenance Service. Hence we are of the view that the confirmation of demand under the category of WCS will not be proper particularly in view of the decision of the Tribunal in case of Ashish Ramesh Dasarwar (supra) wherein Tribunal has taken the view that demand for Service Tax is to be set aside if the Show Cause Notice proposed a classification different from WCS for construction activity."

15. A Division Bench of the Tribunal in **M/s Gurjar Construction as Commissioner of Central Excise, Jaipur-II**¹¹ also examined

9. 2017-TIOL-3230-CESTAT-MUM.

10. 2017-TIOL-3230-CESTATMUM

11. 2019 (5) TMI 717 – CESTAT, New Delhi

such a position and observed that a demand made under a particular category cannot be sustained under a different category.

16. In view of the aforesaid decisions of the Tribunal, it has to be held that the Commissioner was not justified in confirming the demand of service tax under the category of CICS or CCS for the period post 01.06.2007.

17. Annexure-X to the show cause notice is in connection with 'consulting engineer' service and 'supply of tangible goods' service.

18. In regard to the 'consulting engineer' service, the submission of the learned counsel for the appellant is that it should have been confirmed on the amount of Rs. 1,19,96,452/- which was actually realized/received during period in issue and not on the basis of gross billing of Rs. 1,58,08,357/-. This submission of learned counsel for the appellant deserves to be accepted for the reason that the demand could have been calculated only on the amount actually realized/received during that period.

19. The contention of the learned counsel for the appellant that the demand in respect of supply of 'tangible goods' service relating to Vibrators and JCB Excavators provided on rent could not have been confirmed also deserves to be accepted. This is for the reason that there was a transfer of right of possession and effective control of the goods and, therefore, could not have been subjected to levy of service tax since it would amount to deemed sale under article 366(29A) of the Constitution of India.

20. In this view of the matter it would not be necessary to examine the remaining contentions advanced by the learned counsel for the appellant.

21. Thus, for all the reasons stated above, the impugned order dated 28.03.2004 passed by the Commissioner cannot be sustained and is set aside except to the extent it concerns the services provided under 'consulting engineer' service. This issue relating to levy of service tax on 'consulting engineer' service would have to be remitted for redetermination of the amount of service tax on Rs. 1,19,96,452/- which was the amount actually realized/received by the appellant during the period. The appeal is, accordingly, allowed to the extent indicated above.

(Order pronounced on **23.09.2022.**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

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APPEARANCE:

Shri A.K. Prasad, Advocate for the Appellant
Dr. Radhe Tallo, Authorised Representative of the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 13.09.2022
Date of Decision: 23.09.2022**

ORDER

Order pronounced today.

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**