CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1

SERVICE TAX APPEAL NO. 53145 OF 2014

[Arising out of Order-in-Original No. 202-204/GB/2013 dated 20.12.2013 passed by the Commissioner, Service Tax, New Delhi]

COMMISSIONER OF SERVICE TAX-DELHI **Appellant**

Vs.

M/S SIMPLEX INFRASTRUCTURES LTD **Respondent**
82-83 Vaikunth Building,
Nehru Place, Kalkaji,
New Delhi-110019

Appearance:
Present for the Appellant : Shri Rajeev Kapoor, Authorised Representative

Present for the Respondent: Shri Rajeev Agarwal, Advocate

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

FINAL ORDER NO. 51170 /2022

Date of Hearing/Decision: 02/12/2022

JUSTICE DILIP GUPTA:

1. The Department has filed this appeal to assail that portion of the order passed by the Commissioner that drops the demand proposed in the show cause notice dated 22.10.2010 for the period 2006-07 to 2008-09 on the services rendered by the Simplex Infrastructures Limited[1] to the main contractor WPIL Limited and DC Industrial Plant Services Pvt.

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1 **the sub-contractor**

Ltd. The Commissioner has dropped the demand for the work undertaken prior to 23.08.2007, on which date the Master Circular was issued that a sub-contractor would also be liable to pay service tax even if the main contractor had paid the service tax.

2. Learned authorised representative appearing for the Department has placed reliance upon a Larger Bench decision of this Tribunal in **Commissioner of Service Tax, New Delhi vs. Melange Developers Private Limited**[2] that holds that even if the main contractor has paid the service tax, a sub-contractor has necessarily to discharge the service tax liability. It is, therefore, the submission of the learned authorised representative that the Commissioner committed an illegality in holding that a sub-contractor would not be liable to pay service tax if the main contractor had paid the service tax.

3. Shri Rajeev Agarwal, learned counsel appearing for the sub-contractor has, however, submitted that the show cause notice had also invoked the extended period of limitation which, in the facts and circumstances of the case, could not have been invoked as prior to the issuance of the Master Circular dated 28.08.2007, a sub-contractor was not to discharge service tax liability if the main contractor had discharged this liability in view of the numerous decisions of the Tribunal. He, therefore, contends that the sub-contractor

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[2] **2020 (33) GSTL 116 (Tri.-LB)**

was under a *bona fide* belief that he was not liable to pay service tax liability and in such circumstances, the extended period of limitation could not have been invoked. In support of this contention learned counsel placed reliance upon a decision of the Tribunal in **Vinoth Shipping Services vs. Commissioner of Central Excise and Service Tax, Tirunelveli**[3]**.**

4. We have considered the submissions advanced by the learned authorised representative appearing for the Department and the learned counsel appearing for the sub-contractor.

5. Learned authorised representative is correct in his submission that in view the Larger Bench decision of this Tribunal in **Melange Developers,** the finding recorded by the Commissioner deserves to be set aside. The Larger Bench, in its decision rendered on 23.05.2019, after examining the decisions earlier rendered by the Tribunal as also the Master Circular dated 23.08.2007 answered the reference by stating that a sub-contractor would be liable to pay service tax even if the main contractor discharged the service tax liable on the activity undertaken by the sub-contractor in pursuance of the contract. Such being the position, the order passed by the Commissioner to the extent it drops the demand raised in the show cause notice dated 22.10.2010 in regard to the work undertaken by the sub-contractor for the main contractor

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[3] **2021(55) GSTL 313 (Tri.-Chennai)**

WPIL Limited and DC Industrial Plant Services Pvt. Ltd. pursuant to the contract would have to be set aside.

6. However, the submission advanced by learned counsel appearing for respondent that the period of limitation, in any view of the matter, could not have been invoked in the present case would also have to be examined. The submission of the learned counsel for the respondent is that service tax was not paid because the respondent believed that a sub-contractor would not have to pay service tax if the main contractor had paid it.

7. Learned authorised representative appearing for the Department urged that as the sub-contractor had claimed exemption in the ST-3 returns filed before the Department, may be for the reason that a sub-contractor was not required to discharge service tax liability when the same had been discharged by the main contractor, it was clearly an incorrect disclosure and, therefore, nothing prevented the Department from invoking the extended period of limitation.

8. The submissions by the learned counsel for the sub-contractor and learned authorised representative for the Department on this issue have been considered.

9. When the Commissioner had not decided the issue of limitation for the reason that the demand on merits was not being confirmed, in the normal course the Tribunal would have remanded the matter to the Commissioner to take a

decision. However, in the present case it is noticed that the dispute relates to the period from 2006-07 to 2008-09; the show cause notice was issued on 22.10.2010; the Commissioner decided the matter on 27.11.2013; and the appeal was filed before the Tribunal in 2014. In such circumstances, we consider it appropriate to examine this issue instead of remitting the matter to the Commissioner for taking a decision.

10. It cannot be disputed that prior to the issuance of the show cause notice and the Master Circular dated 23.08.2007, sub-contractors were not discharging their service tax liability because of decisions of the Tribunal and this fact has also been noticed by the Larger Bench while referring to the decision of this Tribunal in **Urvi Construction vs. Commissioner of Customs**[4]**.** The Larger Bench also referred to a number of decisions which had taken view that a sub-contractor was not required to discharge service tax liability if main contractor had discharged the liability.

11. Such being the position, it is clearly a case where the sub-contractor was under a *bona fide* belief that he was not required to discharge service tax liability. In view of the decision of the Tribunal in **Vinoth Shipping Services**, it is clear that in such a situation the extended period of limitation could not have been invoked.

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[4] **2010 (17) STR 302**

12. Though we are not inclined to uphold the order passed by the Commissioner on merits discharging the notice dated 22.10.2010 for the work performed by the sub-contractor pursuant to the contract, but for the reason that the extended period of limitation could not have been invoked in the present case, we hold that the service tax demand for the aforesaid work performed by the sub-contractor, could not have been confirmed for the extended period of limitation. The appeal filed by the Department, therefore, deserves to be dismissed and is dismissed.

(Dictated and pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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