

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

**PRINCIPAL BENCH**

**SERVICE TAX APPEAL NO. 51204 OF 2015**

(Arising out of Order-in-Original No. COMMR/RPR/ST/01/2015 dated 19.01.2015 passed by the Commissioner, Central Excise & Customs, Raipur)

**M/s. Dharatal Infrastructures,**  
113, Friends Arcade,  
Shastri Nagar, Supela-P.O.  
Bhilai (C.G.) - 490023

**...Appellant**

versus

**Commissioner,**  
Central Excise, Customs and Service Tax,  
Central Excise building, Tikarapara,  
Raipur (C.G.) - 492001

**...Respondent**

**APPEARANCE:**

Shri B.L. Narasimhan and Shri Kunal Agarwal, Advocates for the Appellant  
Shri Harshvardhan, Authorized Representative for the Department

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**  
**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 14.03.2023**  
**Date of Decision: 03.07.2023**

**FINAL ORDER NO. 50808/2023**

**Justice Dilip Gupta:**

M/s. Dharatal Infrastructures<sup>1</sup> has filed this appeal to assail the order dated 19.01.2015 passed by the Commissioner, Central Excise and Customs, Raipur<sup>2</sup> by which the demand of service tax has been confirmed and the amount already paid by the appellant has been appropriated with penalty and interest.

2. The appellant was, during the period in dispute from April 2008 to March 2012, engaged in providing 'commercial or industrial

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

construction' service and was discharging the service tax liability on 33% of the value declared under the category of 'commercial or industrial construction' service while availing abatement of 67% under the notification dated 1.3.2006.

3. Pursuant to an investigation, a show cause notice dated 22.10.2013 was issued to the appellant proposing to demand the differential service tax on 67% value of the 'commercial or industrial construction' service by denying the benefit of the notification dated 01.03.2006 availed by the appellant on the following two premises:

- a) The appellant had not included the value of free of cost of materials received from the customers in the gross amount while calculating service tax. Thus, the appellant had violated the condition stipulated in 'Explanation' appended to condition to Sl. No. 7 of the notification dated 01.03.2006. Hence, abatement could not be availed; and
- b) The appellant had taken CENVAT credit of inputs, input services and capital goods. Thus, in view of the first proviso to the notification dated 01.03.2006, the abatement could not have been availed simultaneously.

4. The demand has been confirmed by the Commissioner along with interest and penalties on the following findings:

- (i) The decision of the Larger Bench of the Tribunal in **Bhayana Builders (P) Limited vs. Commissioner of Service Tax, Delhi**<sup>3</sup> has not attained finality. The value of free of cost of material has to be included for calculation of service tax for availing abatement; and

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3. **2013 (32) STR 49 (Tri-LB)**

- (ii) CENVAT credit and abatement under the notification dated 01.03.2006 cannot be availed simultaneously. The appellant had, therefore, availed the CENVAT credit and abatement under the said notification wrongly.

5. The appellant has reversed CENVAT credit (including Cess credit) amounting to Rs. 13,82,845, which was taken in the ST-3 returns during the relevant period and copy of the challan evidencing such reversal/payment has been enclosed.

6. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Shashwat Arya made the following submissions:

- (i) The value of free of cost of items is not to be included in the gross value for availing abatement. This position has been clarified by the Supreme Court in **Commissioner of Service Tax vs. Bhayana Builders (P) Limited**<sup>4</sup>, affirming the decision of the Larger Bench of the Tribunal in **Bhayana Builders (P) Limited**;
- (ii) Abatement under the notification dated 01.03.2006 is extendible on subsequent reversal of credit, as reversal of credit tantamounts to non-taking of credit; and
- (iii) The appellant has not suppressed any facts with malafide intention. Thus, the extended period of limitation could not have been invoked.

7. Shri Harshvardhan, learned authorized representative appearing for the department, however, supported the impugned order.

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4. **2018 (10) GSTL 118 (SC)**

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

9. The **first issue** that arises for consideration is whether the value of free of cost items can be included in the gross value for availing abatement. This issue has been settled by the Supreme Court in **Bhayana Builders**, which decision affirmed the decision of the Larger Bench of the Tribunal in **Bhayana Builders** and the relevant portion of the judgment of the Supreme Court is reproduced below:

"13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value."

10. Thus, the value of materials provided free of cost by customers to the appellant cannot form part of the taxable services rendered by the appellant as neither any price was charged by the appellant for such items, nor any monetary benefit accrued to the appellant from such supplies against provision of the service. The free of cost material cannot, therefore, be included in the gross value for claiming abatement. The denial of the abatement under the notification dated 01.03.2006, cannot be sustained.

11. The **second issue** that arises for consideration is whether abatement under the notification dated 01.03.2006 is extendible on subsequent reversal of credit.

12. The appellant had reversed CENVAT credit amounting to Rs. 13,82,845 which was taken in the ST-3 returns during the relevant period. Such reversal of credit would be equivalent to non-availment of credit. Hence, abatement under the notification dated 01.03.2006 could not have been denied to the appellant and the demand is liable to be set aside. In this connection reliance can be placed on the judgement of the Supreme Court in **Chandrapur Magnet Wires (P) Ltd. vs. Collector of Central Excise**<sup>5</sup>, wherein it was held that credit reversed is equivalent to non-availment of credit.

13. In this view of the matter it would not be necessary to examine the contention raised by the learned counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

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5. **1996 (81) E.L.T. 3 (SC)**

14. Thus, for all the reasons stated above, the impugned order dated 19.01.2015 passed by the Commissioner cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **03.07.2023**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**

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