CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi
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PRINCIPAL BENCH – COURT NO. III

Service Tax Appeal No. 51732 Of 2017

[Arising out of OIO No. UDZ-EXCUS-000-COM-0008-17-18 dated 05.07.2017 passed by the Commissioner of Central Goods and Central Excise, Udaipur]

Commissioner of Central Excise & Central Goods, Service Tax, Udaipur : **Appellant (s)**
142-B, Sector 11, Hiram Magri, Udaipur

Vs

Jogniya Mata Transport Company : **Respondent (s)**
19, IPIA, Near Central Bank of India,
Jhalawar Road, Gobaria Bawari, Kota, Rajasthan

APPEARANCE:
Shri Harsh Vardhan, Authorized Representative for the Appellant
Ms. J. Kainaat, Advocate for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 55501/2024

Date of Hearing:15.01.2024

Date of Decision:10.04.2024

HEMAMBIKA R. PRIYA

Revenue is in appeal against the Order-in-Original No. UDZ-EXCUS-000-COM-0008-17-18 dated 05.07.2017 passed by the Commissioner of Central Goods and Central Excise, Udaipur wherein demand of Rs. 85,20,278/- was confirmed alongwith interest while dropping the demand of Rs. 1,23,45,815/- and imposing penalties.

2. The brief facts of the case are that the Respondent-Assessee is engaged in providing taxable services such as 'Site formation and Clearance, Excavation, Earth Moving and Demolition Services', Work
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Contract Services', 'Supply of Tangible Goods Services" and "Erection Commissioning & Installation Services".It appeared that the respondent had evaded Service tax amounting to Rs.2,61,97,972/- for the period 2010-11 (Oct-2010 to March-2011) to 2015-16 (April-2015 to Sept-2015) in contravention of the provisions of Section 68 and 70 of Finance Act, 1994 read with Rule 6 and 7 of the Service Tax Rules, 1994 by not paying service tax, and by not filing the statutory returns in respect of the taxable services provided by them. The respondent registered with the Service Tax Department in August, 2013 and began paying service tax and the statutory returns were also filed with the department.

2.1 Consequently, a show cause notice dated 22.04.2016 was issued to the appellant proposing:-

(i) Recovery of Service Tax amounting to Rs. 2,61,97,972/- under proviso to Section 73(1) of Finance Act, 1994 alongwith interest and appropriation of Rs.1,42,94,158/- already deposited.

(ii) Penalty under Section 77(1)(a),77(1)(c) &78 of Finance Act, 1994.

(iii) Late fees for non filing /late filing of each of half yearly/quarterly returns during the period Oct, 2010 to Sept. 2015 in terms of Rule 7C of the Service tax Rules, 1994 read with section 70 of Finance Act, 1994.

2.2 The appellant filed a detailed reply to the said show cause notice, denying all the allegations. Out of total demand of Rs.2,61,97,972/- the Commissioner vide impugned Order-in-Original dropped the demand of Rs.1,23,45,815/- holding that the demand is not sustainable. Against confirming of demand and penalties, the respondent came in Appeal before this Tribunal in Appeal No. ST/51606/2017(DB). Thereafter, the respondent opted for SVLDR Scheme, 2019 and settled the demand.

2.3 The Department has filed the instant appeal against the dropped demand of Rs. 87,14,512/- and also challenging that the penalty imposed under Section 78 should be 100% of the tax evaded.

3. Learned Authorized Representative for the Revenue has submitted that the adjudicating authority found demand of service tax of Rs.87,14,512/- not sustainable as being related to 'site preparation" provided in relation to exempted services i.e. construction of road, tunnel and bridge, whereas the respondent has provided these services as a sub-contractor to the main contractor who further used these services in providing exempted services. The benefit of exemption is not available to such persons unless the activities carried out by the sub-contractor independently and by itself falls in the ambit of the exemption. In this regard, he drew attention to the clarification in para 7.11.11 of the Education Guide on service tax reads as under-

> *"7.11.11 Whether the exemption provided in the mega-exemption to services by way of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., is also available to the sub-contractors who provide input service to these main contractors in relation to such construction?*
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> *As per clause (1) of section 66F reference to a service by nature or description in the Act will not include reference to a service used for providing such service. Therefore, if any person is providing services, in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., such as architect service, consulting engineer service, which are used by the contractor in relation to such construction, the benefit of the specified entries in the mega-exemption would not be available to such persons unless the activities*

carried out by the sub- contractor independently and by itself falls in the ambit of the exemption.

It has to be appreciated that the wordings used in the exemption are 'services by way of construction of roads etc and not 'services in relation to construction of roads etc. It is thus apparent that just because the main contractor is providing the service by way of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as an exempt service.

However, a sub-contractor providing services by way of works contract to the main contractor, providing exempt works contract services, has been exempted from service tax under the megaexemption if the main contractor is engaged in providing exempt services of works contracts. It may be noted that the exemption is available to sub-contractors engaged in works contracts and not to other outsourced services such as architect or consultants."

3.1 The Learned Authorized Representative contended that the Board had issued similar clarification vide Circular No. 147/16/2011-S.T., dated 21-10-2011. The relevant para 2 is reproduced below for ease of reference:-

"2. The matter has been examined. Vide the circular referred above, it was clarified that when the service provider is providing WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc. and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service, then while exemption is available to the main contractor [as per Section 65 (zzzza) of the Finance Act), as regards the services provided by its subcontractors, the same are distinctly classifiable under the respective sub-clauses of section 65(105) of the Finance Act, as per their description and that their taxability shall be decided accordingly. It is thus apparent that just because the main contractor is providing the WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as WCS. Rather, the classification would have to be independently done as per the rules and the taxability would get decided accordingly."

3.2. Further, the adjudicating authority, in para 36(v) of the OIO has held that the noticee, for the period 2011-12 to 2014-15, is liable for penalty under Section 78 of the Finance Act, 1994 to the extent of 50% of tax liability being the transactions already recorded in their books of accounts. However, in terms of Section 78(1) of the Finance Act, 1994, the penalty imposable is equal to 100% of total Service Tax evaded. It is by virtue of proviso thereto, a benefit of reduced penalty at 50% has been made available subject to certain conditions but that is only w.e.f. 08.04.2011. In other words, since the present order covers demand for the period from 2010-11(from October 2010) onwards and the Commissioner although for the year 2010-11 has imposed penalty @100%, has erred in imposing penalty @50% under Section 78 of the Act, for the period prior to 08.04.2011 as for this period, the penalty imposable is @ 100% of Service Tax evaded.

3.3 The Learned Authorized Representative further submitted that the respondent was not entitled to the benefit of exemption being the services provided by them as a sub-contractor to the main contractor and do not independently fall within the ambit of the exemption.

4. Learned Counsel for the Respondent submitted that the appellants paid service tax amounting to Rs.53,31,429/- on the services of value of Rs.4,31,34,535/- provided to M/s Gammon India Ltd. though the services were exempted. Hence, the total amount in dispute was not Rs.87,14,512/- but Rs.33,83,083/- which has been acknowledged in Para 30.1.6 of the impugned order.

4.1. The Learned Counsel submitted that the department was referring to the clarification in Para 7.11.11 of the Education Guide and Board Circular No.147/16/2011 ST dt.21.10.2011. She contended that the content of clarification is not applicable in the present case as the services provided by the appellant for Construction of Road, Bridge and Tunnel which is specifically exempted whereas the clarification/circular referring Architect Service, Consultant Engineering Services etc. which are specifically taxable. She submitted that the appellant is covered under Para 3 of the circular. She further submitted that since 01.07.2012 the services for construction of Road, Bridge and Tunnel have been specifically exempted under S.No.13(a) of Notification No. 25/2012 -ST dt.20.06.2012. Prior to 01.07.2012 these services were specifically excluded from levy of service tax in clause (zzzza) of Section 65(105) readwith Section 65(25b). She prayed that the appeal filed by the department may be dismissed and findings given by the Commissioner be held correct and sustainable.

5. We have heard the ld counsel and the ld AR. At the outset it is important to note that the demand pertains to for the period 2010-2016 (Pre & Post negative list regime in service tax). This is an appeal filed by the Department by referring the impugned order wherein the adjudicating authority set aside the service tax demand of Rs 87,14,512/- on the ground that the same was related to site preparation provided in relation to exempted services, viz., construction of road, tunnel and bridge. It has been urged before us that the appellant had provided the services as a subcontractor to the main contractor for further use of the services in providing exempted service. Consequently, the benefit of exemption is not available to the appellant.

The issues for consideration before are

(i) whether the adjudicating authority was correct in dropping the demand of Rs 87,14,512/-?

(ii) Whether the imposition of 50% penalty undersction 78 of the Finance Atct, 1994 is correct?

6. We now move to consider each issue independently:

For the period prior to introduction of the negative list regime, we observe that the adjudicating authority after an examination of work orders and certificates which was submitted before him, came to the conclusion that the respondent had provided "site formation and clearance, excavation, earth moving, demolition" services to the main contractors. We find that the adjudicating authority has gone through each of the contract and has come to finding regarding their exigiblity to service tax. He has concluded his findings in para 30.1.5, which is as follows:

> "30.1.5. In addition to the above, the services regarding Site Formation and Clearance, Excavation and Earthmoving and Demolition are taxable since 16. 06. 2005 under sub- – clause (zzza) of clause (105) of section 65 of the Finance Act 1994 and with effect from 01. 07. 2012, under the definition of service as defined under Sec 65B (44) of the Finance Act, 1994. However, if the site formation and clearance, excavation and demolition and such other similar activities et cetera when provided in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams and ports to any person by any person are exempt from the of service tax leviable thereon under section 66 of the said Finance Act. With effect from 01.07.2012, the services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of road, bridge, tunnel, or terminal for road transportation for use by general

> public are exempt in terms of S. No. 13(a) of notification no. 25/2012. Therefore, during the relevant period, i.e., 2010-11 to 2015-16, the services of excavation and site preparation as provided by the assessee are exempt from levy of service tax."

7. We note that the observations and the findings of the adjudicating authority insofar as the period post 01.07.2012 is concerned, is correct. It has been correctly held that services provided by the respondent are exempt in terms of S. No. 13(a) of notification no. 25/2012. However, for the period prior to 01.07.2012, there was no express exemption provided for the activities carried out by the respondent. In this regard, we note that the notification 17/2005 -ST dated 07.06.2005 provided exemption to site formation and clearance, excavation and earthmoving and demolition and such other similar activities in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports and other ports with effect from 16.06.2005. The aforesaid notification is reproduced hereinafter:-

> "GSR (E).- In exercise of the powers conferred by subsection (1) of section 93 of the Finance Act, 1994 (32 of 1994)(hereinafter referred to as per Finance Act), the Central Government on being satisfied that it is necessary in public interest so to do, hereby exempts site formation and clearance, excavation and earthmoving and demolition and such other similar activities, referred to in sub- – clause(zzza) of clause (105) of section65 of the Finance act, provided to any person by any person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, from of service tax leviable thereon under section 66 Finance Act.
>
> 2. This notification shall come into force on the 16th day of June, 2005."

8. The aforesaid notification exempts all the activities related to construction of public utilities as described above. In the instant case, we note that only the respondent's contracts are merely for excavation and not construction. The Notification is very clear that such services are exempt only if it is in the course of construction, which is not the case here. There are catena of judgements which hold that the wordings of a Notification have to be interpreted strictly and cannot be expanded to conclude any extraneous interpretation. We also note that the Tribunal has held similar view in the case of R. Balarami Reddy vs Commissioner of Service Tax, Hyderabad reported at [2018(8) TMI 627 CESTAT, HYD] which held as follows:

> "7. As regards the other demand raised in the impugned orders as to the tax ability of the services rendered by the appellant, site formation activity of Nagarjuna Thermal Power Project at Padubidri, Udupi Dist, Karnataka, the reading of the said contract indicates clearly that the entire contract is only for site formation and clearance, excavation and earthmoving and demolition services. The bill of quantities enclosed in the said contract talks about cutting, site clearing and grabbing, earth work in excavation, earth work and filling, mechanical carriage and earth work for roads. This tax liability which has been sought and confirmed from the appellant is in respect of earth work for roads executed by the appellant for the thermal power plant. We find that the arguments putforth by the learned counsel that these activities amounts to construction of roads and discovered by notification number 17/2005-ST is not on a firm footing. The detailed activity which is indicated in the said works order clearly states that the appellant is required to undertake only the activity of earth work for roads, letterpress of sub-grade by excavation/filling required level, consolidation with power roadroller of 8-12 ton capacity, compact to 95%

procter's density at OMC by mechanical device, dressing to camber, making good the undulation, etc., including all leads and lifts. The clarity of the work in the contract executed by the appellant would indicate that they had not constructed any road for Nagarjuna thermal power plant but had done all the earth work on the site formation. In our view, this activity of the appellant will not get covered under the category of construction of road as has been considered in notification 17/2005 dt 07.06.2005 ………"

9. Similar stand was taken by the Tribunal in the case of Alok Guha vs Commissioner of C.Ex& ST, Raipur reported in [2018(18) GSTL 434 (Tri. Del)]

10. We also observe that that the issue of the liability of service tax on subcontractors stands settled by the decision of the Larger Bench in the case of Commissioner of Service Tax, Delhi vs M/s Melange Developers (P) Ltd., reported in [2019-TIOL-1684-CESTAT-DEL-LB]. The relevant paras are reproduced herein below:-

"7. We have considered the submissions advanced by the learned Authorised Representative of the Department and the learned CharteredAccountant and learned Counsel for the Respondent.

8. It is w.e.f. 01 June, 2007 that sub-section (zzzza) was inserted in Section 65(105) of the Act in relation to execution of 'Works Contract'.

Taxable Service under Section 65(105)(zzzza) is defined as :

"65(105)(zzzza) - to any person, by any other person in relation to the execution of a works contract, excluding workscontract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation —For the purposes of this sub-clause, "works contract" means a contract wherein, —

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, —

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other

installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work,

duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift

and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit,

primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services,

in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC)

projects;"

9. It is not in dispute that the activity undertaken by the sub-contractor falls under the category of 'Works Contract' service. What is sought to be contended is that the main contractors, who had given sub-contracts to the sub-contractor through various work orders, had already discharged the Service Tax liability on the entire contract amount and, therefore, the sub-contractor was not required to pay any Service Tax.

10. Section 66, as substituted by the Finance Act, 2007, provides that there shall be levied a tax (hereinafter referred to as the 'Service Tax') @ 12% of the value of taxable services of various sub-clauses of clause (105) of section 65 and collected in such a manner as may be prescribed. Section 68 of the Act provides that every person providing

taxable service to any person shall pay Service Tax at the rate specified in section 66 in such a manner and within such a period as may be prescribed. Section 94 of the Act deals with power to make Rules. Subsection(1) provides that the Central Government may, by Notification in the official gazette, make Rules for carrying out the provisions of Chapter V of the Act. Sub-section (2)(a) provides that such Rules may provide for collection and recovery of Service Tax under sections 66and 68 of the Act. In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 and section 94 of the Act and in supersession of the CENVAT Credit Rules, 2002 and Service Tax Credit Rules, 2002, the Central Government framed the CENVAT Credit Rules, 2004. It is, therefore, clear that every person (which would include a sub-contractor) providing taxable service to any person (which will include a main contractor) shall pay Service Tax at the rate specified in section 66 in the manner provided for. The manner has been provided for in the CENVAT Credit Rules of 2004. 'Input Service' has been defined to mean, any service used by a provider of output service for providing an output service. 'Output Service' has been defined to mean any service provided by a provider of service located in the taxable territory. Rule 3 stipulates that a provider of output service shall be allowed CENVAT Credit of the Service Tax leviable under Section 66, 66A and 67B of the Act. Thus, in the scheme of Service Tax, the concept of CENVAT Credit enables every service provider in a supply chain to take input credit of the tax paid by him which can be utilized for the purpose of discharge of taxes on his output service. The conditions forallowing CENVAT Credit have been provided for in Rule 4. The mechanism under the CENVAT Credit Rules also ensures that there is noscope for double taxation.

11. In the face of these provisions, it may not be open to a sub-contractor to contend that he should not be subjected to discharge the Service Tax liability in respect of a taxable

service when the main contractor has paid Service Tax on the gross amount, more particularly when thereis no provision granting exemption to him from payment of Service Tax.

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29. The submission of the learned Counsel for the Respondent regarding 'revenue neutrality' cannot also be accepted in view of the specific
provisions of Section 66 and 68 of the Act. A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The
contractor can, as noticed above, take credit in the manner provided for in the CENVAT Credit Rules of 2004.

30. Thus, for all the reasons stated above, it is not possible to accept the contention of the learned Counsel for the Respondent that a sub contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the subcontractor.All decisions, including those referred to in this order, taking a contrary view stand overruled.

31. The reference is, accordingly, answered in the following terms:

"A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract." ”

11. In view of the above, we are of the opinion that the respondent was liable to pay service tax on the taxable services provided by him for the period prior to 01.07.2012. However, we observe that

adjudicating authority has ordered appropriation of an amount of ₹ 53,31,429/- which was collected as service tax from the service receiver on exempted services and deposited to the Government account in terms of provisions of section 73A (2) of the Finance Act. It would be appropriate to remand the matter to the adjudicating authority for recalculation of the demand, if any, taking into account the amount already so paid.

12. We now address the second issue as to whether the Commissioner had erred in imposing penalty @50% under section 78 of the Act.

13. We note that in terms of section 78(1) of the Finance act 1994, the penalty leviable is to the extent of 100% of total service tax evaded. The relevant section is reproduced herein below for ease of reference:

> "78. Penalty for suppressing, etc., of value of taxable services
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> (1) where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, by reason of –
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> (a) fraud; or
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> (b) collusion; or
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> (c) wilful misstatement; or
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> (d) suppression of facts; or
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> (e) contravention of any of the provisions of this chapter or of the rules made thereunder with the intent to evade payment of service tax,
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> the person, liable to pay such service tax or erroneous refund, as determined under subsection (2) of section 73, shall also be liable to pay penalty, in addition to such service tax and interest thereon, if any, table by him, which shall be equal to the amount of service tax so not

levied or paid or short levied or short paid or erroneously refunded:
Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short levied or short paid or erroneously refunded:………………………….”

14. We observe that it is by virtue of a proviso that the benefit of reduced penalty at 50% has been made available only with effect from 08.04.2011. Consequently, the benefit of this proviso could only have been exercised by the Commissioner for the period post 08.04.2011. In view of the above, we agree that the Commissioner has erred in imposing penalty at 50% for the period prior to 08.04.2011.

15. In view of the above discussions, we allow the appeal by way of remand to calculate service tax liability of the respondent for the period prior to 01.07.2012 as observed in the paragraph 11 above, as well as for recalculation of the penalty under section 78 leviable thereon.

(Order pronounced in the open Court on 10.04.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.