

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

PRINCIPAL BENCH –COURT NO. 4

Service Tax Appeal No. 54057 of 2018

(Arising out of Order-in-Original No. DLI-SVTAX-003-COM-96-16-17 dated 21.06.2017 passed by the Commissioner of Service Tax, Delhi-III)

Commissioner of Service Tax, Delhi East

Appellant

Office of Commissioner of CGST,
Customs And Central Excise,
Room No. 134, Central Revenue Building,
I.P. Estate, East Delhi, New Delhi-110002.

Versus

M/s Navnirman Construction Company

Respondent

BU-19, SFS Flats, Outer Ring Road,
Pitampura, New Delhi-110088.

Appearance :

Present for the Appellant: Shri Anand Narayan, Authorized Representative

Present for the Respondent: Shri Kamal Gupta, Chartered Accountant

CORAM:

Hon'ble Dr. Rachna Gupta, Member (Judicial)

Hon'ble Ms. Hemambika R. Priya, Member (Technical)

Date of Hearing : 23/09/2024

Date of Decision : 15/01/2025

Final Order No. 50053/2025

Rachna Gupta:

The present appeal has been filed by the department pursuant to review order No. 11/ST/2017-18 dated 05.12.2017. The facts relevant for the present adjudication, succinctly are as follows that:

2. The respondent was registered for providing the construction services for constructing commercial/industrial buildings or civil structures, for providing works contract services, supply of tangible

goods services etc. CERA conducted the audit of M/s VSK Infrastructure Private Limited for the period 2010-2011 to 2013-2014 and it got revealed that M/s VSK Infrastructure had received various services through contractors/sub-contractors service providers. Later, did not charged service tax on the bills/invoices against those services provided. M/s Navnirman Constructions Company, being one of the such contractor was observed to have charged Rs. 68 lakhs during the disputed period from M/s VSK Infrastructure, without charging any service tax.

3. The records of the appellant were also called. On the scrutiny thereof, it was observed that the appellant has neither paid the service tax nor had filed ST-3 returns. However, appellant had prepared a reconciliation chart for the period 2010-2011 to 2013-2014 showing the exempted amount but without any documentary evidence. Following discrepancies were also noticed from comparison of taxable amount in ST-3 returns with that of balance sheet:

- (i) Short payment of service tax of an amount of Rs. 5,82,06,760/-.
- (ii) For the period 2012-2013, the appellant had availed 60% abatement on works contract services. Hence, was not entitled to avail and utilized Cenvat credit of Rs. 6,180/-.
- (iii) On scrutiny of details of project this were not found in relation with the balance sheet and profit and loss account;

- (iv) The registration for service tax was taken on 09.02.2012 however the construction services were being provided much prior the said date.

4. The said discrepancies are alleged to be an act of suppression of facts and of mis-representation on part of the appellant. Thus while invoking the extended period of limitation, a show case notice bearing No. 23/2015-16 dated 15.10.2015 was served upon the appellant proposing the recovery of service tax amounting to Rs.5,82,06,760/- along with the proportionate interest. Wrongly availed and utilized Cenvat credit amounting to Rs. 6,180/- was proposed to be disallowed and to be recovered from the appellant. Imposition of penalty under Section 76, 77 and 78 of the Finance Act, 12994 was also proposed. Another show cause notice on the similar allegations bearing No. 2/2015-2016 dated 10.05.2016 for the period 2014-2015, as a subsequent follow up show cause notice was also served upon the appellant proposing the recovery of service tax amounting to Rs. 53,08,119/- along with proportionate interest and the appropriate penalties under Section 76 and 77 of the Finance Act.

5. Both these show cause notices have been adjudicated vide the impugned order in original No. 96/2016-2017 dated 21.06.2017 confirming the demand of Rs. 1,99,080/- out of the total amount of Rs. 5,82,06,760/- as was proposed under Show Cause Notice No. 23/2015-2016 along with the interest and the penalties as mentioned in the said order. The demand of Rs. 9,94,450/- out of total demand of Rs. 53,08,119/- has also been confirmed with

respect to show cause notice No. 23/2015-16 dated 10.05.2016 along with the interest and the penalties as mentioned therein. The said order was got reviewed by the Committee of Commissioners vide the aforementioned review order dated 05.12.2017. The present appeal has been filed pursuant to the directions of the said review order.

6. We have heard Shri Anand Narayan, learned Authorised Representative for appellant/department and Shri Kamal Gupta, learned Chartered Account for the respondent.

7. Learned departmental Representative for the appellant – department has submitted that the adjudicating authority erred in dropping the demand in respect of service provided by the noticee to M/s PGCIL and M/s VSK Infrastructure Private Limited, before 01.07.2012 i.e. before introduction of negative list under Works Contract service which otherwise were related to site preparation activities at various sites for the period from 2010-11 to 2011-12 as was raised in show cause notice dated 15.10.2015. Also erred in consequently not imposing commensurate penalty under Section 78 of the Act. The adjudicating authority erred in dropping the demand in respect of Hire charges income shown in balance sheet amounting to Rs. 1,00,55,536/- for the period 2010-11 to 2011-12 as was raised vide show cause notice dated 15.10.2015 and consequently not imposing commensurate penalty under Section 78 of the Act.

8. The original adjudicating authority also observed that M/s Power Grid Corporation of India Ltd. (M/s PGCIL), is the

Government of India Enterprises and the activities carried out by them are not covered under commercial or industrial activities. It is submitted that on the contrary, M/s PGCIL though is established by Government but it is a profit making body and indulges in commercial activities too. Hence those findings are also been wrongly arrived at by the adjudicating authority. Similarly the services provided by the appellant to Municipal Corporation, Delhi are also wrongly concluded to be such activities of MCD which are not covered under commercial or industrial activities. The dropping of demand on those activities for the period prior coming into effect of negative list on 1st July 2012 merely on the basis of service receiver being the Government body without looking into the nature of the service provider, the adjudicating authority is alleged to have committed an error. The only demand confirmed with respect to both the show cause notices is in respect of road work on L&NT, Raipura project. However, said confirmation of the order along with the order of appropriating the demand of Rs. 5,00,592/- in respect of road work is also alleged to be a wrong finding. Finally, alleging that the order in original is a non-speaking order which is passed in the absence of the documents as that of agreement/work orders etc., the same is prayed to be set aside and the appeal filed by the department is prayed to be allowed.

9. While rebutting these submissions, learned counsel for the respondent submitted that the department in the present appeal has raised an additional ground of appeal while alleging that the activity of the respondent is taxable under the category of 'Site Preparation Services' despite that it was never the case made out

even in the show cause notice nor has been discussed anywhere by the original adjudicating authority. The department-appellant is not allowed to make a new case against the respondent at this stage of appeal. Learned counsel has relied upon the decision of Hon'ble Gujarat High Court in the case of **Commissioner Vs. Reliance Ports and Terminal Ltd.** reported as **2016 (334) ELT 630 (Guj)**. It is further submitted that the respondent is not denied to have rendered works contract services to M/s PGCIL which is a government authority still the show cause notice alleged it to be taxable being in the category of commercial or industrial construction services. The adjudicating authority below has rightly considered the admitted fact and thus there is no infirmity in dropping of the demand *qua* services provided to M/s PGCIL.

10. Learned counsel has relied upon para 13.2 of Circular No. 80/10/2004-ST dated 17.09.2004 which clarified that leviability of service tax would depend primarily upon whether the building is used or to be used for commerce or industry. The appellant – department has otherwise failed to produce any evidence to prove that the services provided by the respondent are primarily for commerce or industry. M/s PGCIL is otherwise engaged in setting transmission for electricity and the respondent has provided services of site preparation for setting up of transmission tower/sub-station i.e. for setting up of the transmission infrastructure for transmission of electricity. Notification No. 11/2010-ST dated 27.02.2010 exempts the taxable service provided to any person by any other person for transmission of electricity from whole of service tax leviable thereupon in terms of

Section 66 of Finance Act. Similarly, the services rendered to MCD was in the nature of constructing parkings which was also not in the nature of the commercial or industrial activity. No infirmity is found in the order. Finally relying upon the decision of this Tribunal in the case of **Madhya Pradesh Power Transmission Company Ltd. Vs. Principal Commissioner of CGST & Central Excise, Bhopal** reported as **2023 (385) ELT 152 (Tri.-Del.)** and in the matter of **Kedar Constructions Vs. CCE, Kohlapur** reported as **2015 (37) STR 631 (Tri.-Mumbai)**, the respondent has prayed for dismissal of the present appeal.

11. Having heard both the sides at length perusing the entire record we observe and hold as follows:

“The impugned order in original has adjudicated two show cause notices for two consecutive period but on the same allegations. The demand was proposed on several counts vide the impugned order, the authority has confirmed the following demands:

- (a) Demand of Rs. 1,87,106/- for providing excavation services;
- (b) Demand of Rs. 5,00,592/- towards providing construction of road services/L&T;
- (c) An amount of Rs. 9,94,450/- vis-à-vis providing construction of a education building;
- (d) Demand of Rs.1,19,737/- on another government project meant for commerce holding it to be a tax

liability of the respondent for works contract executed for M/s PGCIL after introduction of negative list. However, the authority has dropped the following demands vis-à-vis both the show cause notices:

- (1) The service tax demanded with respect to projects executed for Power Grid Corporation of India Ltd.
- (2) Tax demand on the amount received as the income from higher charges;
- (3) The service tax liability vis-à-vis construction of parking for MCD.

12. The respondent assessee is not in appeal against the confirmation of demand. However, the department has challenged the dropping of demand on the ground that the construction services provided to M/s PGCIL and to MCD both are the constructions meant for the commercial activity having commerce/profit element. Hence this activity is not liable for the exemption. The demand is alleged to have wrongly been dropped with respect to M/s PGCIL. The activity is not for construction of infrastructure for electricity transmission lines but is actually a site preparation services. We observe that in none of the show cause notices the respondent assessee is alleged to have rendered site preparation services to either to M/s PGCIL or to MCD or any other of its clients including M/s VSK Infrastructure. Thus we hold that this ground of appeal raised by the department is beyond show cause notice hence cannot be dealt with at this stage of appeal.

We are drawing our support from the decision relied upon by the assessee – respondent of Hon'ble Gujarat High Court in the case of **Reliance Ports and Terminal Ltd.** (supra).

13. Further, from the departmental Circular No. 80/10/2004 dated 17.09.2004 as brought to notice by the respondent, it is clear that the leviability of the service tax would depend primarily upon whether the building is used or to used for commerce or industry. In the present case, respondent has provided services to M/s PGCIL a public sector undertaking which admittedly is engaged in setting up of transmission lines for transmission of electricity and the respondent has provided the infrastructure for the same. Any service provided in relation to transmission of electricity stands exempted from whole of the service tax liability in terms of Notification No. 11/2010-ST dated 27.02.2010. This notification has been relied upon by the original adjudicating authority while dropping the demand vis-à-vis the demand of service tax vis-à-vis projects executed for M/s PGCIL. There is no evidence produced by the department to prove that the service provided by appellant is not for electricity transmission infrastructure. Hence, we do not find any infirmity in the order to that extent.

14. The demand of hire charges on account of giving DG sets, motor graders, hydraulic, excavator etc. has been dropped holding that the amount on account of sale of goods is not taxable under service tax and, therefore, the respondent is not liable to pay service tax on account of amount booked for sale of goods. The amount was proposed to be recovered holding that the

sale/purchase of goods and trading is included in the exempted service as defined under Rule 2(a) of Cenvat Credit Rules, 2004 which is applicable for the period in dispute.

15. The original adjudicating authority has observed that one condition in each of the contract for giving various equipment on Hire, is common wherein it has been stated that both possession and effective control of equipment will be lying with the client and client may use the equipment in any manner, he likes. The moment the goods are transferred with the right of possession and effective control the activity goes out of the ambit of taxable service classifiable as 'Supply of Tangible Goods'. It rather stands classified as 'Deemed Sale' in terms of sub-clause 29(A) of Article 366 of Constitution of India as was introduced with 42nd amendment of the Constitution. The Government of India proposed to amend the Constitution to include in Article 366, a definition of 'tax on the sale or purchase of goods' by inserting a new clause (29A) which reads as :

"29(A) "tax on the sale or purchase of goods" includes—

[\(a\)](#) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

[\(b\)](#) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

[\(c\)](#) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

[\(d\)](#) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

[\(e\)](#) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

[\(f\)](#) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food

or any other article for human consumption or any drink whether or not intoxicating, where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made"

16. Giving goods on Hire with effective control and possession thereof thus stands ousted from the scope of service tax leviability. Since there is no evidence produced by the department on record showing that right to possession and effective control of the equipments given on hire was retained by the respondent – assessee, we do not find any infirmity in the order under challenge where the demand on hire charges has been dropped.

17. Finally coming to the demand dropped with respect to the charges received for constructing parking for MCD, the adjudicating authority has held that the main contractor of MCD was M/s VSK Infrastructure and the respondent – assessee was the sub-contractor. Since the main contractor was exempted from paying any service tax, the sub-contractor cannot be held liable to tax for the same project of renting works contract services. However, we are not in agreement with those findings, the Larger Bench of this Tribunal in the case of **Commissioner of Service Tax, New Delhi Vs. M/s. Melange Developers Pvt. Ltd** reported as **2020 (33) GSTL 116 (Tri. LB)**, has while referring the earlier decision in **Max Tech. Oil & Gas Services Pvt. Ltd. Vs. Commissioner of 92, Delhi** reported in **2017 (52) STR 508 (Tri.-Del.)**, the Division Bench has held:

"6. Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main

contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. If at all, the service tax paid by a sub-contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the Cenvat Credit Rules, 2004 will come into play subject to fulfillment of conditions therein. It is nobody's case that the sub-contractors per se are not liable to service tax even if they rendered taxable service....."

18. In the light of the said decision, the services provided by the respondent are not the services provided to the governmental authority (MCD) but it was provided to a private company viz. M/s VSK Infrastructure Ltd. Otherwise, also the parking for MCD being a paid parking and as such the construction thereof was meant for making profit/revenue generation for the MCD. These facts are sufficient for us to hold that the mega exemption No. 25/2012-ST dated 20th Jun 2012 Entry No. 12(a) which exempts the activity in relation to construction provided to the Government or governmental authorities from service tax levy is not applicable to the respondent – assessee. Said entry 12(a) reads as follows:

"the civil structure or any other original work meant predominantly for use other than for commercial industry or any other business or provision shall remain exempted".

19. As already discussed above, the MCD parkings are for generating Revenue hence construction thereof is the construction for a building meant for commerce. Resultantly, irrespective the MCD is a governmental authority meant to carry out the functions entrusted in Article 243(w) of Constitution of India but the parking being meant as a commercial project of MCD. Above all the respondent has not provided the said service to MCD but to the

main contractor. M/s VSK Infrastructure which is not Governmental authority hence we hold that the original adjudicating authority has wrongly relied upon the said notification while dropping the demand for the construction services being provided by the respondent to M/s VSK Infrastructure Ltd,/MCD. The impugned order in original is, therefore, set aside to this extent.

20. In light of the entire discussion above the order under challenge has been confirmed/upheld dropping of demand with respect to the services provided to M/s PGCIL and with respect to the Hire Income is concerned. However the order is set aside with respect to dropping the service tax demand with respect to construction of MCD parking. The order is, therefore, partly set aside. Consequent thereto, the departmental appeal is partly allowed.

(Pronounced in open Court on 15/01/2025)

(Dr. Rachna Gupta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

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