

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Service Tax Appeal No.75620 of 2017

(Arising out of Order-in-Original No.98/COMMR/ST-II/KOL/2016-17 dated 13.01.2017 passed by Commissioner of Service Tax II, Kolkata)

M/s SPML Infra Limited

22, Camac Street, 3rd Floor, Kolkata-700016

Appellant

VERSUS

Commissioner of CGST & Excise, Kolkata South

180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

Appearance:

Shri Bhaskar Thakkar, Chartered Accountant for the Appellant

Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI SANJIV SRIVASTAVA, TECHNICAL MEMBER

HON'BLE SHRI P.DINESHA, JUDICIAL MEMBER

FINAL ORDER NO.75403/2022

DATE OF E-HEARING : 25.07.2022

DATE OF PRONOUNCEMENT : 28.07.2022

Per Sanjiv Srivastava :

This appeal is directed against order in original 98/COMMR/ST-II/KOL/2016-17 dated 13.01.2017. By the impugned order Commissioner has held as follows:

“4.0

ORDER

4.1 I confirm the demand of Service Tax (including Cess) amounting to Rs. 58,14,51,192/- (Rupees Fifty-eight Crore Fourteen Lakh Fifty-one Thousand One Hundred Ninety Two) only in terms of Section 73(2) of the Finance Act.1994, as amended as discussed in para- 3.9 above;

4.2 I order to pay interest on the amount confirmed in para-4.1 above, at the appropriate rate and for the appropriate period in terms of Sec 75 of the Finance Act, 1994, as amended;

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4.3 I impose penalty of Rs. 58,14,51,192/- (Rupees Fifty-eight Crore Fourteen Lakh Fifty-one Thousand One Hundred Ninety Two) only in terms of Section 78 of the Finance Act, 1994, as amended; if the demands confirmed above and the interest payable thereon are paid by the notice within thirty days of the date of communication of this order, the amount of penalty under Sec 78 shall be 25% of the Service Tax so determined. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred above;

4.4 I disallow the Cenvat Credit (including Cess) and confirm the demand amounting to Rs. 18,01,047/-(Rupees Eighteen Lakh One Thousand Forty-seven) only on availing of inadmissible Cenvat credit in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(2) of the Finance Act, 1994 as amended, as discussed in para-3.7.5. I drop the demand for recovery of Cenvat credit (including Cess) of Rs.10,25,76,067/-(Rupees Ten Crore Twenty-five Lakh Seventy-six Thousand Sixty Seven) only for the reasons discussed in para-3.7.5 above;

4.5 I order to pay interest on the amount of Cenvat credit disallowed in paragraph in 4.4 above at the appropriate rate and for the appropriate period in terms of Section 75 of the Finance Act, 1994 read with sec.14 of the Cenvat Credit Rules, 2004;

4.6 I impose penalty of Rs. 18,01,047/-(Rupees Eighteen Lakh One Thousand Forty-seven) only in terms of Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 as amended: if the demands confirmed above and the interest payable thereon are paid by the notice within thirty days of the date of communication of this order, the amount of penalty under Sec 78 shall be 25% of the penalty of Rs. 18,01,047/-(Rupees Eighteen Lakh One Thousand Forty seven) only. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been within the period of thirty days referred above;

4.7 I drop the demand of Interest of Rs.7800/- (Rupees seven Thousand Eight Hundred) only, for the reasons discussed in para-3.8.2 above; I appropriate the amount of Rs. 35,64,560/-(Rupees Thirty-

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Five Lakh Sixty-Four Thousand Five Hundred Sixty) only as payment towards interest liability, as discussed at paragraph-3.8.3 above;

4.8 I direct the noticee to apply to the concerned Divisional Asst. Commissioner/ Deputy Commissioner immediately from communication of this order, to regularize the issue of quoting of wrong Codes in the challans for payment of interest, as discussed in para- 3.8.3 above.”

2.1 Appellant is providing services under the taxable category of Maintenance and Repair Services, Erection, Commissioning or Installation Services, Construction of Residential Complex Services, Work Contract Services etc.

2.2 During course of audit of the records of the appellant it was observed that appellants had not paid the service tax due on the amounts as indicated in the table below during the period:

Issue	Description	Service tax including Cess
I	Comparison of SAP Project wise Trial Balance and ST-3 returns	125314751
II	Comparison of SAP Project wise Trial Balance of LABOUR Charges and Erection Charges and ST-3 returns	10324614
III	Mobilization Advance Received	129258456
IV	Unbilled Revenue Received	316553370
	Total	581451191
V	CENVAT Credit availed over and above as under respective head of trial balance	104377114
VI	Interest on delayed payment of service tax	3572360

2.3 A show cause notice dated 29.01.2015 was issued to the appellant asking them to show cause as to why:

- i. *Service tax including Education cess and SHE cess amounting to Rs 58,14,51,191/- (Rupees Fifty Eight Crore Fourteen Lakhs Fifty One thousand One Hundred and Ninety Two only) should not demanded and recovered from them under Section 73(1) of the Finance Act, 1994 read with 1st proviso to the said section.*

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- ii. *Interest on the above amount at an appropriate rate should not be charged and recovered from them under Section 75 of the said act;*
- iii. *Penalty under section 78 of the said act should not be imposed upon them for failure to pay Service Tax including Education Cess & SHE Cess by wilful suppression of material facts with intent to evade payment of service tax.*
- iv. *Total Cenvat credit of Service Tax, E Cess & SHE Cess of Rs 10,43,77,114/- (Rupees Ten Crore Forty Three Lakhs seventy seven thousand one hundred and fourteen only) availed an/ or utilized by the M/s SPML should not be disallowed and recovered from them under Rule 14 of The CENVAT Credit Rules 2004 read with Section 73 of the said act.*
- v. *Interest on the above amount of Rs.10,43,77,114/-(Rupees ten crore forty three lakh seventy seven thousand one hundred and fourteen only) should not be paid by M/s SPML under Rule 14 of the Cenvat Credit Rules 2004 read with Section 75 of the said act.*
- vi. *Penalty under Rule 15(3) of the Cenvat Credit Rules 2004 read with Section 78 of the said act should not be imposed upon M/s SPML for irregular availment and/or utilization of cenvat credit by way of willful suppression of material facts with intent to evade payment of service tax.*
- vii. *Interest of Rs. 35,72,360/- (Rupees thirty five lakh seventy two thousand three hundred and sixty only) should not be paid by M/s SPML on the amount of service tax paid belatedly.*

2.4 The show cause notice was adjudicated as per the impugned order referred in para 1, above. Aggrieved appellants have preferred this appeal.

3.1 We have heard Shri Bhaskar Thakkar, Chartered Accountant for the appellant and Shri J Chattopadhyay, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

Issue Involved	Argument	Evidence Reference
Service Tax liability on unbilled revenue amount	Wrong Interpretation of unbilled revenue by the department as much as unbilled revenue is considered as realised and not recognised in Para 3.6.2.	1) Accounting Standard (AS -7) 2) ISS Catering Services(South) Pvt. Ltd. [2016 (41) S.T.R. 567 (Tri. - Chennai)]

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		Unbilled Revenue is one which is recognised in the books of account as income on percentage completion method as per Accounting Standard AS7 and it doesn't relates to the amount realised from the customer. The amount has not been realised as mentioned earlier, therefore the same shall not be considered as advance nor there any applicability of tax on such transaction.	
Service liability mobilization advance	Tax on	No new projects were awarded in the concerned period. It is clear that amount booked in mobilization advance was in respect of running bill or merely adjustment and rectification entries which should not be considered as advance. The amount related to amount received from debtors. As per the accounting practice adopted by Appellant any collection received against running bill was initially transferred to the mobilization account and thereafter on receipt of complete details from customer adjustment entries were passed in the books of accounts. Thus the amount booked mobilization account was transferred to its respective debtors account. Demand of service tax was	

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	totally arbitrary and was required to be set aside. Moreover, the contention that no primary documents were submitted is not correct since the mobilization ledger was submitted at the time of investigation.	
Service tax demanded on credit balance of erection and labour charge as reflected in trial balance during the period 2012-2013	Entries booked in the ledger were inclusive of Service Tax. We have attached sample copy of the contract having project code C033 as per which it is evident that the contract was inclusive of service tax. Department failed to consider that debit balance appearing in the WC Receipt labour (M) and WC Receipt erection account were on account of reversal entry passed towards service tax and VAT already included in the credit figure. Credit entries were not in relation to billing however it included reversal entries of revenue which were booked in the debit side which were not considered by the department. As per the accounting policy the revenue was credited inclusive of service tax component and corresponding debit entries were passed resulting in actual booking of income.	Copy of the contract and details of debit entries were submitted in support.
Service Tax demanded on the debit balance	Debit balances were merely adjustment and transfer entries from one code to	1) CA certificate marked as Annexure D) certifying the fact that

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reflected in Service Tax ledger during the period 2010-2011 &2011-2012.	another. Entry wise and project wise breakup of code were submitted along with sample voucher at the time of initial verification. Balance of interim/accrual accounting code of business area "COO" to which the balance was transferred were not considered by department in spite the fact being disclosed by the Appellant at the time of departmental audit. The trial balance of BA Code 0047 represented in paper book in page no. 1130 shows that there is no closing balance. Page no. 90-93 of paper book reflects the reason for debit entry in these accounts	debit entries were transferred 2) Page No 15-155 of Paper Book depicted - SAP generated voucher of each and every transaction
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In view of the above submissions there is no merits in the demand confirmed in respect of the four major issues raised in the show cause notice and confirmed by the impugned order. Since there is no merits in the demand made there can be no issue for imposition of penalty and interest on the appellants.

In respect of the issue of CENVAT Credit which has been raised in the show cause notice impugned order itself demands the major portion of demand and confirms only an amount of Rs. 18,01,047/- which they do not contest. However as there is no malafides on their part though they do not contest the demand of CENVAT Credit penalty imposed in this respect is not justifiable.

3.3 Arguing for the revenue learned Authorized Representative for the revenue submits while reiterating the findings recorded in the order that the demands in the present case have been made on the basis of the documents maintained by the appellants and on noticing the discrepancies,

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in the accounting records and the ST – 3 returns filed by the appellant. Since appellants have failed to explain these discrepancies the demands are sustainable. As the appellants had not disclosed the information in their returns and not paid the tax accordingly extended period of limitation has been invoked against them for making these demands.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The appellant before us is a construction company engaged in providing various taxable services as referred in para 2. Construction contracts are the contracts which run over period of time and are not limited strictly by the Financial Year. For the purpose of accounting and monitoring of the projects undertaken in terms of such contractual agreement Accounting Standard AS-7 has been developed which provides as follows:

“Accounting Standard 7 (AS 7) relates with accounting of construction contracts. The very purpose of this accounting standard is to specify the accounting treatment of revenue and costs associated with construction contracts. Typically, the date at which a construction contract is entered into is different from the date at which such a contract is completed.

This means that the date of entry and the date of completion of a construction contract fall into different accounting periods. It is due to the nature of activity assumed under a construction contract.

Therefore, the fundamental concern in construction contract accounting is the distribution of contract revenue and costs to the accounting periods in which construction work is carried out.

Hence, Accounting Standard 7 provides guidelines to recognize contract revenue and costs in the statement of P & L.”

IV. What is Contract Revenue?

A contract revenue includes:

- amount of revenue agreed upon in the contract originally*
- variations in contract work, claims and incentive payments:*
- to the extent it is likely that they will generate revenue*

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- they have the potential of being reliably measured

Thus, contract revenue is measured when the consideration is received or it is receivable. Furthermore, such a measurement gets impacted by a number of uncertainties that depend upon the outcome of future events.

Therefore, you need to revise the estimates pertaining to contract revenue as and when future events occur and the uncertainties are settled. This means that the amount of contract revenue may vary from period to period.

b. Claim

A claim refers to the amount that a contractor demands from the customer as a compensation of costs not included in the original contract price. Such claims may result due to customer delays or errors in the design of the asset.

Thus, a contractor needs to include a claim in the contract revenue only when:

- negotiations have reached such a stage that it is expected that the customer will accept the claim
- such an amount accepted by the customer can be measured reliably

VI. Contract Revenue & Expense Recognition

The contract revenue and costs related to a construction contract must be recognized as revenue and expenses respectively. Provided it is possible to reliably estimate the result of the construction contract.

Such revenues and costs are recognized on the basis of the stage of completion of contract activity at the reporting date.

b. How to Recognize Revenue and Expense

(i) Percentage Completion Method

Percentage Completion Method refers to the one where revenues and expenses are recognized based on the stage of completion of a contract. Thus, the contract revenue is recognized as revenue in the statement of P&L in the accounting period in which the contract is performed.

Similarly the contract costs are recognized as an expense in the statement of P&L in the accounting periods in which the work is performed.

(ii) Work in Progress

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Work in progress refers to costs due from the customer on account of such costs relating to the future activity on a contract.

Thus, these contract costs are recognized as an asset, provided it is expected that such costs will be recovered.

VII. Determination of Stage of Completion

There are different methods to determine the stage of completion of the contract. These include:

- *proportion of the contract costs incurred with respect to the estimated total cost. Contract costs incurred relate with a work performed up to the reporting date.*
- *surveys of work performed*
- *completion of physical proportion of the contract work*

However, there are cases when the result of a construction contract cannot be measured reliably. In such cases, revenue should be recognized only to the extent of contract costs incurred whose recovery is probable.

Furthermore, the contract costs should be recognized as an expense in the period in which they are incurred.

VIII. Recognition of Expected Losses

There are scenarios when it is expected that the total contract costs will exceed the total contract revenue. In such cases, the expected loss must be recognized as an expense.

Furthermore, the amount of such a loss is determined irrespective of:

- *whether the work has commenced on the contract or not*
- *stage of completion of the contract activity*
- *profits arising from other contracts which are not treated as a single construction contract*

IX. Disclosure

An organization must disclose:

- *the amount of contract revenue recognized in an accounting period*

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- *methods used to determine the contract revenue recognized in the accounting period*
- *the methods used to estimate the stage of completion of contracts in progress*

An organization having contracts in progress should disclose:

- *aggregate amount of costs incurred and net profits (recognized profits less recognized losses up to the reporting date) recognized*
- *the amount of advances received (advances are the amounts received by the contractor before the related work is performed) and*
- *the amount of retention (retention is the amounts paid to the contractor only when the conditions specified in the contract for payments for such amounts are satisfied or until the defects have been rectified)*

Thus, an organization must present:

- *the gross amount due from customers for contract work as an asset and*
- *gross amount due to customers for contract work as a liability*

4.3 Thus as is seen from the above excerpts taken from the accounting standard, it is evident that this standard provides for method of recognition of costs, expenses and revenues during the particular period and the manner of disclosure of the same in the book of accounts. This standard uses the word expected and recognition and would not reflect the actual realization of the revenue by the contractor against a particular project.

4.4 In our view the entire demand has been made against the four issues referred in the show cause notice as Issue No 1 to 4 is based on the entries recorded in the book of accounts toward the expected revenue and expense recognition and not on the basis of the actual amounts realized against the contracts undertaken by the appellant.

4.5 The Service tax is paid on the basis of the revenue realized towards the provision of the taxable services and not on the basis of the revenue recognition. Impugned order do not point out a single case whereby the amounts realized by the appellant against any of the project undertaken by the appellant were not reflected in their ST-3 return. ST-3 return is based

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on the revenues realized by the appellant during the period of the return and not on the basis of revenue recognition. Accordingly, we do not find any merits in the impugned order. However in our view the revenue should have undertaken the exercise of reconciliation of the revenue realized against each of the project with the entries made in the ST-3 return and should arrive at any conclusion in respect of the demand of service tax. In case the revenue realized against the project is not reflected in the service tax returns filed over the period of time, then only revenue demand can be sustained otherwise the demand needs to be set aside. In our view the entire demand is for the period of the running contracts during the period 2008 to 2012 and would have been completed by now. Revenue should reconcile the revenue realized contract wise, with the service tax return, and if there all the revenues realized either as advance or on the completion of the contract can be reconciled with the ST-3 returns then demands need to be set aside or restricted to the unexplained amounts realized and not reflected in the ST-3 return. With the above observation we remand the matter to the original authority for reconciliation in respect of the Issues referred as Issues 1 to 4 in the show cause notice.

4.6 Appellants do not seriously object to the findings recorded in the impugned order in respect of the issues referred as Issue 5 and 6 in show cause notice taking note of the submissions made in respect of these issues we hold the order made in respect of these issues as per the impugned order, except for setting aside the penalties imposed by invoking Section 78. In our view when all facts were in knowledge of the department in respect of these issues invocation of Section 78 for imposing penalty in respect of these demands cannot be sustained.

5.1 In result impugned order is set aside in respect of issues at Issue No 1 to 4 in the Show Cause Notice as observed by us in para 4.5 above and matter remanded to original authority for reconsideration as observed in the said para.

5.2 In respect of the issues at Issue No 5 & 6 we uphold the impugned order to the extent of demand made but set aside the penalties imposed under Section 78.

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5.3 Accordingly the appeals are partially allowed as indicated in para 5.1 and 5.2 above and the matter remanded to original authority for reconsideration.

5.4 As issue is sufficiently old, original authority to finalize the issues in remand proceedings within three months of the receipt of this order.

(Pronounced in the open Court on **28.07.2022**)

Sd/

(Sanjiv Srivastava)
Member (Technical)

Sd/

(P. Dinesha)
Member (Judicial)

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