

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 16 of 2010

(Arising out of Order-in-Original No.27/Commr/ST/Kol/2009-10 Date 30.10.2009
passed by Commissioner of Service Tax, Kolkata)

M/s. C. E. Testing Company Pvt. Ltd.
(124A, N.S.C. Bose Road, Kolkata-700092)

Appellant

VERSUS

Commr. of Service Tax, Kolkata
(180, Santipally, Rajdanga Main Road, 3rd Floor, Kolkata-700107)

Respondent

**With
Service Tax Appeal No. 31 of 2010**

(Arising out of Order-in-Original No.27/Commr/ST/Kol/2009-10 Date 30.10.2009
passed by Commissioner of Service Tax, Kolkata)

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(180, Santipally, Rajdanga Main Road, 3rd Floor, Kolkata-700107)

Appellant

VERSUS

M/s. C. E. Testing Company Pvt. Ltd.
(124A, N.S.C. Bose Road, Kolkata-700092)

Respondent

APPEARANCE :

Mr. K. Kurmy & D. Dutta, Advocate for the Appellant/ Respondent
Mr. Joydip Chattopadhyay, Authorized Representative for the
Respondent/Appellant

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77575-77576/2023

Date of Hearing : 17 October 2023
Date of Pronouncement: 30/11/2023

PER R. MURALIDHAR:

The Appellant is registered with Service Tax Registration No. AABCC0609BST001 since October 2003. They were providing various services under the category of 'Technical Testing and Analysis Service', 'Survey and Map Making Service' etc. On the ground that the turnover shown by them in the ST-3 Returns was lower than the turnover shown by them in their Income Tax and Balance Sheet, Show Cause Notice was issued on 31/3/2009 for the period July 2003 to March 2008 demanding Service Tax of Rs.98,77,781/-. The Appellants argued both on merits and on account of limitation by providing various documentary evidence before the Adjudicating Authority. After due process, the Adjudicating Authority vide the impugned OIO, dropped the demand to the extent of Rs.73,07,023/-. He confirmed the demand of Rs.25,70,758. Being aggrieved by the confirmed demand, the Appellant is before the Tribunal. Being aggrieved by the dropped demand of Rs.73,07,023/-, the Revenue is before the Tribunal with their Appeal. We have taken up both the Appeals together for disposal.

2. The Learned Advocate appearing on behalf of the Appellant Assessee, submits that they had provided all the documentary evidence in the form of their P & L Account, Balance Sheet, ST Returns, CA Certificate etc., along with complete Reconciliation Statement to the Adjudicating Authority. He draws our attention to page No. 22 & 23 of the OIO, wherein the Adjudicating Authority has reproduced these details by way of Table towards reconciliation shown by them with proper Chartered Accountant's Certificate. The Learned Advocate submits that after going through the documentary evidence placed in each and every case, the Adjudicating Authority has dropped the demand of Rs.73,07,023/-. He reiterates the detailed findings given by the Adjudicating Authority for dropping this demand and submits that the Adjudicating Authority has correctly dropped the demand and prays that the Revenue's Appeal may be dismissed.

3. In respect of Rs.25,70,758/- confirmed by the Adjudicating Authority, he submits that they have undertaken Survey and Map Making Service provided to HSCL and others. They have undertaken this service as a sub-contractor to the main contractor i.e. HSCL. Therefore, in terms of Board's Circular No.F.No. B 43/1/97-TRU dated 06/06/1997 and Circular No. B 43/5/97-TRU dated 2/7/1997, the services provided by them cannot be treated as taxable service since the Appellant assessee was acting as a sub-contractor to the main contractor. He further submits that the Adjudicating Authority is in error in relying on the Circular No. 96/6/2007-ST dated 23/8/2007 to hold that the service provided by the Appellant assessee cannot be treated as any service provided by the sub-contractor to the main contractor. The Learned Advocate submits that this Circular cannot be applied for the period prior to 23/08/2007. He further submits that they held bonafide belief that no Service Tax is required to be paid since they were providing the service as sub-contractor. He also draws our attention to the Sub-contract Agreement entered into with various contractors. Therefore, he submits that in the present case, the Department was in error in invoking the extended period provisions and confirming the demand for the extended period from 10/09/2004 to 31/3/2008. He submits that the demand for the extended period is required to be set aside on account of time bar.

4. The Learned AR reiterates the grounds taken by the Revenue in their Appeal. He submits that the Adjudicating Authority was in error in dropping the demand to the extent of Rs.73,07,023/-. Therefore, he submits that the Revenue's Appeal is required to be allowed. He further submits that the Adjudicating Authority has given a very detailed and clear findings that the Services rendered by the Appellant is in respect of 'Survey and Map Making Services' and the provisions of sub-contractor providing service to the main contractor would not arise and justifies the demand confirmed by the

Adjudicating Authority. Therefore, he prays that the Appeal filed by the Assessee is required to be dismissed.

5. Heard both sides and perused the documents placed on record.

6. Coming to the Appeal filed by the Revenue, a cursory glance of the Show Cause Notice would clarify that the same was issued for the period which is even beyond the extended period of five years. This shows that the proper care was not taken by the Department while issuing the Show Cause Notice. The Show Cause Notice has been issued merely on the ground that the income shown by the Appellant in their P & L Account is higher than the turnover declared in the ST 3 Return. The Appellant has submitted a detailed Reconciliation Statement duly certified by the Chartered Accountant which has been taken on record by the Adjudicating Authority at Page 22 & 23 of the OIO. It is also seen from the discussion and findings given by the Adjudicating Authority that he has properly verified the documentary evidence while coming to his conclusion. Some of his important findings are given as under:-

It is noted that Technical Tasting and Analysis Service became taxable with effect from 01.07.2003, Survey and Map Making Service came under the purview of Service Tax on 16.06.2005, Site Formation and Clearance, Excavation and Earth Moving and Demolition Service and Consulting Engineer's Service became taxable from 16.06.2005. As per the second proviso to rule 6(1) of the said Rules, no Service tax is payable on the receipts against the services provided before the dates they became taxable.

As per Section 67 of the said Act value of taxable service is the gross amount charged for the service provided/to be provided. In terms of rule 6 of the said Rules, Service Tax is payable on the payment received towards value of taxable services. Thus Service Tax is payable on the payment received towards value of taxable services. Thus Service Tax is payable on actual receipts. Accordingly, opening and closing debtors were adjusted with the Gross Income to arrive at actual receipts. From the actual receipts gross receipts as per ST 3 returns were deducted and amount of tax payable was determined on

the basis of such differential receipt amounts. It is found that the method adopted in the SCN for calculation of tax liability is in congruence with the provisions of law. In view of the above, the said assessee's contentions that Service Tax was not demanded on the basis of receipt of value of services is not tenable.

The said assessee has claimed that demand of Service Tax on receipts of taxable value during July' 03 to September '03 is barred by limitation. They have submitted an Annexure signed by CA containing job Nos. and amounts received, copies of some bills and summary of payment details. It's a fact that as per Section 73 of the said Act, SCN can be issued for the maximum period of five years. In this case the SCN was issued on 31.03.2009. Considering the last date for filing the return for the period July '03 to Sept '03 i.e. 25.10.2003 as the relevant date, the demand for the period July' 03 to September '03 is beyond the limit of five years. Accordingly, demand of tax on the amount of Rs.98,18,484/- shown as receipt during the period July '03 to September '03 in the Annexure certified by C.A. is held as barred by limitation.

It has been discussed above that Technical Testing and Analysis Service came under the Service Tax net with effect from 01.07.2003. Naturally receipts against the said service provided prior to 01.07.2003 cannot be taxable. It is seen from the aforesaid Reconciliation Statement that receipts against such service (provided prior to 01.07.2003) during the years 2003-04, 2004-05, 2005-06 and 2006-07 amounted to Rs.56,64,908/-. The said assessee has submitted copies of some bills, measurement sheets and payment details. There is nothing on record to controvert the claim of the said assessee regarding deduction of the said amount from the differential amounts. On the basis of the said Statement (certified by CA) and the documents submitted by the said assessee deduction of Rs.56,64,908/- spread over the material period is allowable from the actual receipts, survey and Map Making Service and Site formation and Clearance, Excavation and Earthmoving and Demolition Service came under the purview of Service Tax from 16.06.2005. Receipts against the said services rendered prior to 16.06.2005 were not

taxable. The said assessee has adduced Annexure signed by CA containing Job Nos. amounts received (year wise), copies of some bills and payment details. Considering the above position of law, documents and Annexure, receipts against the said services amounting to Rs.1,61,30,030/- and Rs.41,55,866/- are to be deducted from the differential amounts to arrive at the differential value of taxable services.

Provisions in relation to Service Tax apply to the whole of India except the state of Jammu & Kashmir. It is observed that Section 64(1) of the said Act stipulates that Chapter V of the Finance Act, 1994 extended to the whole of India except the state of jammu & Kashmir. As the territorial jurisdiction of the Service Tax legislation does not extend to the state of Jammu & Kashmir, Service Tax is not leviable on the service rendered in the state of Jammu & Kashmir, even if the service is provided by a person having place of business in any other state of India. The said assessee has submitted Annexure containing amount received against job nos. (year wise), copies of some work orders, running bills, amount received against running bills, cheque nos. etc.

The above work orders and relevant bills establish that the said assessee provided services in the State of Jammu & Kashmir during the material period and realized their charges through running bills. Considering the above position of law, facts and the statement certified by the CA, one has to allow deduction of total amount of Rs.2,90,57,511/- from the differential amount.

From the aforesaid certificate it is clear that Adani Power Ltd is an approved Developer of SEZ. The letter dated 21.12.2007 indicates that Adani Power Ltd. issued work order No.APL/140900/VJ/1042/07 dated 12.12.2007 in favour of the said assessee. The running bills dated 15.12.2007 and 31.12.2007 bearing the reference of the above work order and cheque Nos. and dates given in the summary details establish that the said assessee received payment from Adani Power Ltd. It is noted that the Annexure containing the said amount is signed by CA. The above facts and evidence testify that the said assessee provided service to a developper of SEZ and in terms of

Notification No.4/2004-ST dated 31.03.2004, value of service Rs.55,16,811/- received from the said developer was exempted from Service Tax.

The said assessee has submitted that they rendered services to their clients which were in the nature of sub-contracting assignments. Their clients paid Service Tax. They have stated that an amount of Rs.2,16,23,888/- relates to value of services provided as sub-consultant to principal consultant and in such cases liability to pay Service Tax falls on the principal consultant. They have claimed that out of total amount of Rs.2,16,23,888/- received by them as sub-consultant, they have collected certificates for the gross value of Rs.1,15,21,446/- from their principal consultant to the effect that they already paid Service Tax on their output services. An amount of Rs.60,45,279/- received from HSCL for providing service in respect of construction of roads and bridges. They have argued that the amount of Rs.60,45,279/- cannot be taxed for the reason that the contract was executed by them as sub-consultant and secondly the services were related to construction of roads and bridges which cannot be taxed under the Act. It is found that in the Circular No.96/6/2007-ST dated 23.08.2007, it is clarified that a sub-contractor is essentially a service provider, therefore the sub-contractor is required to charge Service Tax to the main contractor.

In view of the above, it cannot be said that Survey and Map Making Service provided to HSCL in respect of construction of roads and bridges is excluded from the purview of Service Tax. The above deliberation leads to the conclusion that Rs.2,16,23,888/- received by the said assessee by way of providing service as sub-contractor/sub-consultant during the material period is taxable.

It is found that uniform tax rate was not applicable during the material period. Rate of tax varied in subsequent years under consideration. But differential cum-tax values corresponding to different tax rates are not available. Under the circumstances, differential cum-tax values are apportioned on pro-rata basis for working out the tax amount in the following table.

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Period	Differential cum tax value	Rate of tax	Tax payable		
			Service Tax	E. Cess	S & HE Cess
July, 03 to March, 04	43,13,068	8%	3,19,486	-	-
01.04.04 to 09.09.04	40,22,630	8%	2,97,973	-	-
10.09.04 to 31.03.05	50,40,703	10% +2%	4,57,414	9,148	-
2005-06	59,09,850	10% +2%	5,36,284	10,726	-
01.04.06 to 17.04.06	3,86,940	10% +2%	35,113	702	-
18.04.06 to 31.03.07	79,20,880	12% +2%	8,46,851	16,937	-
01.04.07 to 10.05.07	40,010	12% +2%	4,278	86	-
11.05.07 to 31.03.08	3,25,085	12% +2% +1%	34,719	694	347
TOTAL			25,32,118	38,293	347

Thus the said assessee is liable to pay Service Tax Rs.25,32,118/- and Education and S & HE Cess Rs.38,640/- totaling to Rs.25,70,758/-. Rest demand for Service Tax Rs.71,97,259/- and Education and S & HE Cess Rs.1,09,764/- is required to be dropped.

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7. From these detailed discussions, we conclude that the Adjudicating Authority carried out thorough verification and has given reasoned Order for dropping the demand as well as confirming the demand. Therefore, we do not find any reason to interfere with his Order in respect of the dropped demand of Rs.73,07,023/-. Accordingly, we dismiss the Appeal filed by the Revenue.

8. In respect of the Appeal filed by the assessee for the confirmed demand of Rs.25,70,758/-, as seen from the reproduced extract of discussions and findings, the Adjudicating Authority has held that the services provided by the assessee can not be termed as the 'Services provided by the sub-contractor to the main contractor. For this, he has relied on the Board's Circular dated 23/08/2007. The Appellants have relied on the two Circulars issued in June 1997 and July 1997 about the sub-contracting work and non-taxability on the same.

9. We agree with the submission of the assessee that till the new clarification was given on 23/08/2007, the Revenue was bound by the earlier clarification issued by the CBIC. Therefore, the demand prior to 22/08/2007 is legally not sustainable.

10. We also note that the Appellant has obtained Service Tax Registration in October 2003 and has been filing their Returns regularly. The Department in its over-enthusiasm has issued the Show Cause Notice even for the period prior to five years. The Show Cause Notice has been issued for Rs.98.77 Lakhs whereas after thorough verification and reconciliation, the Adjudicating Authority has dropped the demand of Rs.73.07 Lakhs. Even in respect of balance 25.7 Lakhs confirmed demand, we find that the clarification given on 23/08/2007 has been applied for the transaction carried out between April 2006 to 31/03/2008. Therefore, we hold that the demand for the extended period is legally not sustainable and confirmed demand for the extended period is set aside on account of limitation also.

11. As a result, we hold that the Appellant is required to pay the Service Tax on sub-contract work (map making) undertaken by them for the main contractor between the period October 2007 to March 2008 only. It is noted from the OIO that the amounts paid by the assessee during the proceedings have been appropriated. The amount payable, if any, for the period October 2007 to March 2008 is required to be adjusted against such appropriation. The balance, if any, payable by the Appellant is required to be paid by them along with interest. On the other hand, if the appropriated amount is more than the net amount payable by the assessee, the balance amount should be refunded to the Appellant.

12. The Appeal filed by the Assessee is disposed of thus.

(Order was pronounced in the open court on 30/11/2023.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Pooja