IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 76359 of 2014

(Arising out of Order-in-Original No. 10/S.Tax/Commr/2014 dated 25.07.2014 (issued on 06.08.2014) passed by the Commissioner, Central Excise & Service Tax, 143, New Baradwari, Sakchi, Jamshedpur – 831 001)

M/s. Munna Construction **: Appellant**
277, Shree Balajee Bhawan, Hill View Colony,
P.O.: MGM, Mango, Jamshedpur

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
Jamshedpur Commissionerate,
143, New Baradwari, Sakchi, Jamshedpur – 831 001

APPEARANCE:

Shri Aditya Dutta, Advocate for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO. 77625 / 2024

DATE OF HEARING: 19.11.2024

DATE OF DECISION: 22.11.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Munna Construction, 277, Shree Balajee Bhawan, Hill View Colony, P.O.: MGM, Mango, Jamshedpur(hereinafter referred to as " the Appellant") have filed this appeal against the Order-in-Original No. 10/S.Tax/Commr/2014 dated 25.07.2014 (issued on 06.08.2014) passed by the Commissioner, Central Excise & Service Tax,143, New Baradwari, Sakchi, Jamshedpur – 831 001 wherein the demand of Service Tax of Rs.2,60,03,775/- has been confirmed, along with interest, and equal amount of tax has been imposed as penalty.

2. The facts of the case are that the Appellant are engaged in providing taxable services under the category of 'commercial or industrial construction service' as defined under Section 65(25b) of the Finance Act, 1994.

2.1. An audit was conducted of the records of the Appellant for the period from 2006-07 to 2010-11. During the course of audit, certain discrepancies were noticed. On account of the discrepancies noticed, an investigation was initiated against the Appellant. The Appellant thereafter submitted their balance sheet, Profit & Loss Account, sample copy of bills raised by them, sample copy of work orders and TDS details (Form 16A/Form 26AS) to the audit team. On verification of the documents furnished by the Appellant, it was found that the Appellant had not paid Service Tax appropriately for the period from 2006-07 to 2011-12.

2.2. A Statement showing the taxable values declared by the Appellant in the ST-3 Returns filed by them and the income received as per the Form 26AS, Profit & Loss Account has been prepared, which is reproduced below: -

STATEMENT OF INCOME/RECEIPT			
YEAR	**As per Form 26AS (Rs)**	**As per Profit & Loss A/c. (Rs.)**	**As per ST-3 (Rs.)**
2006-07	87562614.00	87562614.00	-
2007-08	45472050.67	44559932.00	7735301.00
2008-09	59856432.47	67879970.00	27093882.00
2009-10	61555749.00	78973117.76	50917535.60
2010-11	81001496.42	55928035.00	58461992.00
2011-12	36945961.43	48603257.60	33072555.00
TOTAL	**372394303.99**	**383506926.36**	**177281266.60**

2.3. From the above, it appeared to the Revenue that during the period from 2006-07 to 2011-12, the total amount received as per Form 26AS was Rs.37,23,94,303.99/- whereas as per the Profit & Loss Account the same was Rs.38,35,06,926.36/-. However, as per the ST-3 returns filed by the appellant, the gross taxable value declared by them was only Rs. 17,72,81,266.60/- which is far less than the income receipt mentioned in 26AS as well as Profit& Loss Account. It therefore appeared that the appellant had suppressed the taxable value in their ST-3 returns filed by them and accordingly, they had short paid the Service Tax.

3. Accordingly, a Show Cause Notice was issued to the appellant on 04.07.2013 *inter alia* demanding Service Tax of Rs.2,60,03,775/- along with interest and penalty. Separate penalty has been imposed on the Directors as well.

4. The said Notice was adjudicated by the Ld. Commissioner, who vide the impugned order has confirmed the Service Tax demand of Rs.2,60,03,775/-, along with interest. He has also imposed an equal amount of tax as penalty under Section 78 of the Finance Act, 1994, along with various other penalties.

5. Aggrieved against the confirmation of the said demands, the Appellant has filed this appeal.

6. It is the submission of the Appellant that they have rendered construction services to various service recipients, such as Tata Projects, Bhusan Steel Ltd., Jindal Steel &Power Ltd., etc., along with materials.

6.1. The appellant submitted that the Show Cause Notice in this case was issued on 04.07.2013 for the period from 2006-07 to 2011-12. Thus, the demand pertained to the period 2006-07 to 2007-08 is beyond the extended period of limitation of five years and accordingly, they contend that the demand of Service Tax confirmed in the impugned order for this period 2006-07 and 2007-08, is not sustainable. The Appellant submitted that if this value is excluded, then the taxable value for the Financial Years 2008-09 to 2011-12 as per the Profit and Loss Account would be Rs.25,13,84,380/-.

6.2. The Appellant submits that they have rendered the services of construction and fabrication work to their clients, including supply of materials. As per Notification No. 01/2006-S.T. dated 01.03.2006, they are eligible for abatement of 33% from the taxable value and service tax is liable to be paid only on 67% of the taxable value received by them. If the abatement of 33% is allowed, then the Service Tax liability on the taxable value would be less than the service tax already paid by them.

6.3. The Appellant submitted that they have already paid Service Tax on the taxable value of Rs.17,72,81,266/-, which is more than the taxable value on which they are liable to pay service tax after the abatement. Thus, the appellant contended that the demand of service tax confirmed in the impugned order is not sustainable.

6.4. The Appellant further submits that the entire demand has been raised on the basis of the data available in their balance sheet, Profit & Loss Account and the data received from the Income Tax Department in Form 26AS. The appellant submits that they had taken registration with the Service Tax Department on 12.10.2006 and have been paying Service Tax and filing their S.T.-3 Returns regularly; they have not suppressed any information from the Department. Accordingly, it is the contention of the Appellant that the demand confirmed by invoking the extended period of limitation is not sustainable. For the normal period of limitation, if the service tax liability is calculated after allowing the abatement, they have paid more service tax than the service tax liability. Thus, the appellant submits that the demands confirmed in the impugned order for the normal period of limitation is also not sustainable.

6.5. In support of the above contention, the Appellant has cited the following decisions:

> (i) *Arya Logistics v CCE & ST Rajkot [Service Tax Appeal No. 12389 of 2014; Date of Decision – 17/08/2023].*
>
> *(ii) Balajee Machinery v Commissioner of CGST & Excise, Patna-II [2022 (66) G.S.T.L. 440 (Tri-Kolkata)]*
>
> *(iii) Quest Engineers & Consultant Pvt. Ltd. v Commissioner, CGST & C. Ex., All [2022 (58) G.S.T.L. 345 (Tri.-All)]*

6.6. In view of the above, the Appellant contends that the demand confirmed in the impugned order is not sustainable and accordingly, prayed for setting aside the demands confirmed in the impugned order.

7. The Ld. Authorized Representative of the Revenue submits that even though the Appellant had taken registration in the year 2006, they filed their filed their first ST-3 Return for the period October, 2006 to March, 2007 on 12.10.2009; the Return for both half of the year 2007-08, 2008-09 and the return for the first half of the year 2009-10 were filed on the

same date i.e., 12.10.2009. Further, he contends that the Appellant has not disclosed their actual taxable value in the S.T.-3 Returns filed; only after the investigation by the Department the actual taxable value has been unearthed. Therefore, he submitted that the extended period of limitation has been rightly invoked in the instant case to demand Service Tax from the Appellant.

7.1. Regarding the claim of the Appellant on the eligibility to claim 33% abatement, the Ld. Departmental Representative submits that the Appellant had not submitted any evidence regarding supply of materials while rendering the said service. Accordingly, it is his submission that the Appellant is not eligible to claim the benefit of abatement without submission of evidence of supply of materials.

7.2. In view of the above, the Ld. Authorized Representative of the Revenue supported the impugned order confirming the demands.

8. Heard both sides and perused the appeal records.

9. We observe that the demand of service tax of Rs.2,60,03,775/- has been confirmed against the Appellant vide the impugned order based on the difference in the taxable value declared by the Appellant in their S.T.-3 Returns and the gross income receipt available in their balance sheet/Profit & Loss Account details.

10. During the course of the hearing, the Appellant contended that the Show Cause Notice issued on 04.07.2013 for the period from 2006-07 to 2011-12 is beyond the period of limitation of five years and accordingly, they submitted that the demand for the

period from 2006-07 to 2007-08, covering the period beyond five years, is not sustainable.

10.1. In this regard, we observe that even though the Appellant had registered with the Service Tax Department in the year 2006, they filed their first Service Tax Return for the period from October 2006 to March 2007 only on 12.10.2009. The relevant date for computing the five-year period as per proviso to Section 73 of the Finance Act, 1994 is the date of filing of the first Return. Since the return for the period 2006-06 and 2007-08 were filed only on 12.10.2009, we hold that the demand raised in the notice for the period from 2006-07 to 2011-12 is well within the extended period of limitation. Accordingly, we hold that the objection raised by the Appellant on this ground is not sustainable.

11. We find that the Appellant has also submitted that they have rendered the services of construction and fabrication to their clients along with supply of materials. Accordingly, the appellant submitted that they are eligible for the abatement of 33% from the taxable value, as provided under Notification 01/2006 dated 01.03.2006. In support of their claim that the construction/fabrication service was rendered along with material, the appellant submitted copies of some of the work orders issued by various clients. We have perused the work orders submitted by the Appellant and observe that the appellant have rendered the service along with materials, The extracts from some of the Work Orders submitted by the appellant are reproduced below: -

<u>1. Work Order dated 10.11.2010 issued by Bhushan Steel Limited</u>:

" For consumables and plant and tools: An additional charges @40% of the billed amount will be paid according to the revised Man-day rates instead of 30%mentioned in the Work Order- Clause No.2"

2. TATA Projects Limited Work Order dated 22.04.2008

"Scope of Work

(f) All consumables including Gas, electrodes and grinding wheels for edge-preparation shall be in your scope of supply. Electrodes and Gas, if supplied by us, shall be on chargeable basis"

3. Jindal Steel& Power Ltd, Raigarh (C.G)

" Terms and conditions: Contractor - Consumables, Tools and Tackles"

11.1. From the above, we observe that the Appellant has supplied consumables, gas, etc., for the purpose of fabrication and construction service rendered by them. As per Notification No. 01/2006 dated 01.03.2006, if the construction service is undertaken along with supply of materials, the Appellant would be eligible for the benefit of 33% abatement in the taxable value. We observe that this exemption is available in the notification itself. We also observe that this view has been held by the Tribunal, Ahmedabad in the case of *P&H Associates Vs. Commissioner of Central Excise and Service Tax, Vadodara [2024 (15) CENTAX 411 (Tri.- Ahmd.)].* The relevant portion of the said decision is reproduced below:

"5.2 From the above samples it is very much clear that the appellant has used goods and materials for execution of the work orders. So also it cannot be said that all these are entirely in the nature of 'Completion or Finishing service'. The department has alleged that the appellant has not furnished sufficient evidences to prove that goods and materials were used in the execution of Construction works. In the impugned order, the Adjudicating Authority has observed that the appellant has purchased a huge amount of raw materials however has not produced evidence to link the sale of materials to each client and therefore the abatement cannot be granted. Observation in the impugned order reads as under:-

"19. It is not denied that they have purchased huge amount of raw materials. However, in order to get the benefit of Notification No. 12/2003-S.T., which must be strictly construed, value of only that material could be deducted from the gross value of service received, where there is a clear cut of sale to that customer to whom such services has been provided. Assessee has failed to link the sale of materials to each of such client and the gross value received from them. The notification does not provide benefit for gross deduction of all purchases and thereafter either used/sold/supplied in relation to all the services provided to service recipients." Further in Para 18, it is observed by the Adjudicating Authority that even "assuming that the some might be in the nature of 'Works contract service' they have failed to bifurcate and substantiate that portion of gross value for treating it on different footing. In Para 16, it is observed that 'Just because they purchased cement and steel on behalf of their customers, it does not mean that their service is also getting covered under section 65(25b)[b] and [d]'.

5.3 From the above observations in the impugned order, it is clear that there is ample evidence to show that the appellant has used goods and materials in construction service which are composite in nature. So also, from the different work orders we have no confusion to conclude that these are not completion and finishing service so as to get excluded from the ambit of Notification No. 1/2006-ST. It also requires to be mentioned that the Tribunal in its earlier Final Order dated 2-7-2014, had remanded the matter with specific direction to the Adjudicating Authority to verify and scrutinize documents furnished by the *appellant with regard to their claim of abatement in spite of such directions, the Adjudicating Authority has denied the benefit of abatement with observing that appellant has not produced details of site-wise/bill-wise for the purchase of materials. We find that this observation is highly erroneous and not acceptable.*

--

5.6 After appreciating the evidences placed on record, we are of the view that appellant has used goods and material for execution of construction work. The allegation of the department that the works are entirely 'Completion and Finishing service' is factually and legally incorrect. We, therefore, hold that the appellant is eligible for abatement. Following the ratio of decisions cited above, we are of the opinion that the demand raised cannot sustain. Accordingly the impugned order is set-aside. The appeal is allowed with consequential relief, if any."

11.2. Since the evidence submitted by the appellant clearly indicate rendering of the construction service along with consumables and materials such as Gas, grinding wheels, Welding Electrodes etc., we hold that the Appellant is eligible for abatement of 33% as provided under Notification No. 01/2006-S.T. dated 01.03.2006.

12. Regarding confirmation of the demand of service tax by invoking the extended period of limitation, we observe that the Show Cause Notice has been issued on the basis of the data submitted by the Appellant, i.e., from their balance sheet, Profit & Loss Account and Form 26AS.The Appellant submitted that they had obtained registration with the service tax department in the year 2006 and have been filing their Returns. Accordingly, it is their submission that they have not suppressed any information from the Department and thus the extended period of limitation is not invokable.

12.1. In this regard, we observe that the Appellant had been filing their Returns and paying Service Tax regularly. They have registered with Service Tax Department since 2006, but till the date of audit conducted in 2011, the Department had not raised any objection regarding any short payment of Service Tax by the Appellant. We observe that the if the demand has been confirmed on the basis of the data submitted by the appellant, i.e., from their balance sheet, Profit & Loss Account and Form 26AS, then extended period of limitation is not invokable. We observe that this view has been held in various judicial pronouncements.

12.2. In the case of *Arya Logistics v CCE & ST Rajkot [Service Tax Appeal No. 12389 of 2014],* it has been held as under:

> *"4. We have carefully considered the submissions made from both the sides and perused the records. On going through the entire facts of the case we are of the view that the case can be disposed of on the ground of limitation itself.*
>
> *4.1 We find that the issue involved in this case is regarding the demand of service tax for the period April 2008 to March 2011 on the ground that the appellant has availed in-eligible benefit of notification No. 1/2006-ST dated 1-3-2006 by discharging the service tax liability by availing Cenvat Credit and paid service tax after availing abatement of 70% of the gross amount. We find from the records and copy of ST-3 produced before us that appellant had been filing the ST-3 returns regularly to the Jurisdictional Range officers. It is on record that the appellant shown all the details in ST-3 returns. We find that Appellant has shown the category of Transport of Goods by Rail services in all the ST-3 returns and has also shown the fact that they were availing Cenvat Credit. In the said ST-3 return, admittedly against the "Column A1 -Name of Taxable Service" Appellant have shown name of service as Goods Transport Agency and Transport of Goods in Container by Rail Service. Further in*

column 5B appellant have shown the details of Cenvat Credit Taken and utilized.

4.2 It becomes clear from the ST-3 return that the fact that appellant were discharging Service tax on Transport of Goods in container by Rail service and availing Cenvat credit and utilized the Cenvat credit was in the knowledge of the Revenue. However show cause notice to the Appellant was issued on 26-2-2013. Inasmuch as the entire information was in the knowledge of the Revenue, the longer period of limitation is not available. In view of these facts the show cause notice should have been issued within the normal period of one year as prescribed under section 73(1), whereas the show cause notice for the period April 2008 to March 2009 was issued on 26-2-2013 i.e. after prescribed limit of one year. As per the above fact, there is no suppression of fact on the part of the appellant. We also find that it is admitted fact that the appellant have taken service tax registration and are filing the periodical returns regularly. The appellant have maintained proper books of accounts in the normal course of business. It is pertinent to note that the entire case of the department on merit is that since appellant have availed Cenvat Credit, they violated the condition of abatement notification No. 01/2006-ST. As discussed above the facts that availment of Cenvat Credit and payment of Service Tax on the abated value were declared in the ST-3 return. Hence, having all the facts were disclosed to the department, nothing prevented department from issue of show cause notice within normal period of one year. Therefore, the demand raised in the show cause notice is clearly time-barred.

4.3 Since the demand is not sustainable on limitation alone, we refrain from giving finding on merit of the case and the same is left open."

12.3. In the case of *Balajee Machinery v Commissioner of CGST & Excise, Patna-II [2022 (66) G.S.T.L. 440 (Tri-Kolkata)],* it has been held as under:

***"10.** In so far as the issue of limitation is concerned, we do not find any ingredient of fraud or suppression with an intent to evade payment of tax. In the case of Pappu Crane Services v. CCE, Lucknow (Final*

Order No. 71246 of 2019 in ST Appeal No. 70707 of 2018), the Co-ordinate Bench of Tribunal at Allahabad has held that where the demand is merely based on the data appearing in the Income Tax Portal, there cannot be said to any fraud or suppression so as to justify invocation of extended period of limitation. Therefore in the present case, in our view, the demand raised for the period up to March, 2015 is completely barred by limitation and accordingly the demand is set aside. Further, since there is no element of fraud or suppression, we are of the view that the entire penalty amount is liable to be set aside."

12.4. It is also observed that in the case of *Quest Engineers & Consultant Pvt. Ltd. v Commissioner, CGST & C Ex, All [2022(58) G.S.T.L. 345 (T-All)],* it has been held that: -

"12. *Appreciating the facts and circumstances, we find that the allegations of Revenue are frivolous, that it was only on enquiry it came to know about the affairs of the appellant, i.e. providing of taxable service in view of the admitted facts that appellant is a registered assessee under the Service Tax provision, and have been filing their returns and paying tax. It is not alleged by the Revenue that the appellant was not maintaining proper financial records, register and vouchers for their transaction. We further find that Form No. 26AS is not a statutory document for determining the taxable turnover under the Service Tax provisions. We find that Form No. 26AS is maintained on cash/ receipt basis by the Income Tax Department for the purpose of tax deducted at source, etc. being the relevant data for Income Tax. Whereas under the Service Tax provisions, the service tax is chargeable on mercantile basis (accrual basis) on the service provided whether the value of such service is received or not. Thus, we find that the whole basis of show cause notice is incorrect and/or misconceived.*

13.*We further hold that the extended period of limitation is not available to Revenue under the facts and circumstances. We further hold that the appellant is entitled to exemption under the*

> *Notification No. 25/2012-S.T. under Sl. No. 13(a) of the said notification for providing consulting engineer services in the matter of road construction. When road construction is exempt, every activity is exempt relating to the road construction including consulting engineer services. The appellant also relied on the ruling in Lord Krishna Real Infra Pvt. Limited v. Commissioner of Customs, CE & ST, Noida, Final Order No. 70126/2019, dated 27-12-2018. This Tribunal has held in other disputed cases, that even the barricade provided on the side of highway, maintaining greenery on the side or middle of highway, construction of any facility, refreshment centre for road users, is also part of the road construction and such activity is also exempt. Even the administrative building constructed by the concessionaire, for construction of the road or highway for administration and collection of toll etc. is part of road.*
>
> ***14.---***
>
> ***15.*** *Accordingly, in view of our findings, we allow the appeal and set aside the impugned order. We also hold that extended period of limitation is not available to Revenue. We also hold that appellant is also entitled to consequential benefits, in accordance with law."*

12.5. Accordingly, by relying on the decisions cited above, we hold that the demand cannot be raised in this case by invoking the extended period of limitation. Thus, we hold that the demand confirmed in the impugned order by invoking the extended period of limitation is not sustainable.

12.6. In this case, we observe that the Show Cause Notice was issued on 04.07.2013, for the period 2006-07 to 2011-12. When extended period of limitation is not invokable, the appellant is liable to pay service tax on the normal period of limitation, which was 18 months during the relevant period. If we take into account the return filed by the appellant in April 2012, then the appellant is liable to pay service tax for the normal period of limitation, i.e., for the second half-yearly period for the Financial Year 2011-12, i.e., for the period **October, 2011 to March, 2012.** In their additional submissions, the appellant furnished the details of taxable value declared by them in the last two Quarters (October 2011 to March 2012) of the Financial Year 2011-12. From the details furnished by the appellant, we observe that the taxable value furnished by the appellant in the ST-3 returns for the period October 2011 to March 2012 tallies with the figures available in the Profit &Loss Account. On the basis these details, a comparative chart showing the details of tax payable and paid by the appellant is prepared, which is furnished below:

Period	**Taxable Value As per Profit/Loss And ST 3 (in Rs.)**	**Abatement as per notification 01/2006 (in Rs.)**	**Taxable Value @67% (in Rs.)**	**Total Tax payable, including Edu. Cess and SHE Cess (in Rs.)**
		33%		
Oct to Dec	1,55,94,820	51,46,290.60	1,04,48,529.40	10,76,198
Jan to March	1,74,77,735	57,67,652.55	1,17,10,082.45	12,06,138
Total	**3,30,72,555**	**1,09,13,943.15**	**2,21,58,611.85**	**22,82,336**

12.7. From the above table, we observe that the total tax payable for the normal period (excluding the extended period of limitation), after allowing the 33% abatement as provided under notification 01/2006 dated 01.03.2016, comes to **Rs. 22,82,336/-**. From the ST-3 returns filed for the half yearly period October 2011 to March 2012, we observe that the Appellant has paid service tax amounting to **Rs. 33,92,433/-** , for this period. As the appellant has paid more service tax than the service tax payable by them for normal period of limitation, i.e., the half yearly period October 2011 to March 2012, after allowing the abatement, we hold that no additional service tax is payable by the appellant for the normal period of limitation, i.e., for the period October 2011 to March 2012. Accordingly, we hold that the demand confirmed in the impugned order for the normal period of limitation is also not sustainable and hence we set aside the same.

13. Since the demand itself is not sustainable, the question of demanding interest and imposing penalties on the Appellant as well the Directors does not arise.

14. In the result, we set aside the impugned order and allow the appeal filed by the Appellant. They would be eligible for consequential relief, if any, as per law.

(Order pronounced in the open court on **22.11.2024**)

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd