IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 76106 of 2014

(Arising out of Order-in-Original No. 32/Comm/ST/KOL/2014-15 dated 17.06.2014 passed by the Commissioner of Service Tax, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Forum Projects Private Limited **: Appellant**
4/1, Red Cross Place, Kolkata – 700 001

VERSUS

Commissioner of Service Tax **: Respondent**
Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road, Kolkata – 700 107

APPEARANCE:

Shri Tarun Chatterjee, Advocate
Assisted by Ms. Sneha Das, Consultant
For the Appellant

Shri Prasenjit Das, Authorized Representative
For the Respondent

CORAM:

HON'BLE SHRIASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75153 / 2025

DATE OF HEARING: 22.01.2025

DATE OF DECISION: 27.01.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the impugned Order-in-Original No. 32/Comm/ST/KOL/2014-15 dated 17.06.2014 passed by the Commissioner of Service Tax, Kolkata, wherein the Ld. Commissioner has confirmed the demand of service tax of Rs.63,08,221/- along with interest and imposed equal amount of tax as penalty. The impugned order has also confirmed recovery of irregular CENVAT credit amounting to Rs.3,69,162/- along with interest and equal amount of irregular credit as penalty.

2. The issues involved in the demand of Service Tax and availment of irregular credit, are as under: -

Sl. No.	Description of Service	Service Tax (Rs.)	Cess (Rs.)	Total (Rs.)
1	"Support service of Business or Commerce" On the amount received against Cost sharing of the expenses incurred by the appellant on behalf of the group Companies	60,39,000	1,81,170	62,20,170
2	Rental income On the differential value between P&L and ST-3	48,678	1460	50,138
3	Car Hire Charges On the differential value between P&L and ST-3	21,600	432	22,032
4	Maintenance Charges On the differential value between P&L and ST-3	15,570	311	15,881
	Total	**6124848**	**183373**	**6308221**
5	CENVAT Credit – Ineligible credit input service is not used for providing output service **for the period 2009-10**	13,645	409	14,054
6	CENVAT Credit – Credit documents not produced **for the period 2007-08**	3,44,768	10,340	3,55,108
	Total	**3,58,413**	**10,749**	**3,69,162**

3. Regarding the demand of Service Tax amounting to Rs.62,20,170/- on cost sharing among the group Companies under the category of 'Business Support Service', the appellant submits that by an agreement dated 01.04.2008**,** they have incurred expenditure on behalf of the group companies and such expenditure/cost is shared among the group Companies at the agreed ratio; the appellant states to have collected such amount and recorded the same in its statutory records, including in the Profit & Loss Account under the heading "Establishment uses charge". The appellant states that such amount is not collected against provision of any service rendered, but the share of cost incurred by the appellant.

3.1. The appellant submits that the demand of Service Tax on cost sharing is settled and covered by the decision of the Hon'ble Supreme Court in *Gujarat State Fertilizers & Chemicals Ltd. v. Commissioner of C. Ex. [2016 (45) S.T.R. 489 (S.C.)],* wherein, it has been held that demand of Service Tax on cost sharing is not sustainable.

3.2. The appellant also submits that the issue is covered by the decision of the CESTAT, Ahmedabad in the case of *Hazira Lng Pvt. Ltd. v. Commissioner of Service Tax, Ahmedabad [Final Order No. A/11349/2022 dated 02.11.2022 in Service Tax Appeal No. 596 of 2011 – CESTAT, Ahmedabad].*

4. Regarding the demands of service tax of Rs.50,138/-, Rs.22,032/- and Rs.15,881/-, totalling to Rs.88,051/-, the appellant submits that these demands have been raised on the differential value of Profit & Loss Account and ST-3 returns. The appellant submits that they had categorically submitted before the ld. adjudicating Authority that such difference was due to different method of accounting; the Profit & Loss Account is prepared on accrual basis whereas Service Tax is payable on receipt basis. The appellant contends that in view of the catena of decisions of the Tribunals, it is a settled position of law that the demand of Service Tax on the differential value of Profit & Loss Account and ST-3 returns is *per se* bad in law and not sustainable. In this regard, the appellant submits that the issue is covered by the decision of the Tribunal, Kolkata in the case of *Balajee Machinery v. Commissioner of C.G.S.T. & Excise, Patna-II [2022 (66) G.S.T.L. 440 (Tri. – Kol.)]*. Accordingly, they prayed for setting aside these demands confirmed in the impugned order.

5. Regarding the demand of Rs. 3,69,162/- on account of ineligible CENVAT Credit on the ground that the appellant has failed to submit any documents, the appellant submits that the whole demand is made by invoking larger period under the proviso to Section 73(1) of the Finance Act,1994. It is their submission in this regard that the Show Cause Notice is dated 30.01.2012 and the impugned period is 2006-07 to 2009-10. The appellant submits that from paragraph 3 of the impugned Show Cause Notice it can be seen that there is no allegation of suppression, wilful misstatement, fraud, etc. Furthermore, the appellant submits that from paragraph 13.3 of the impugned order, it can be seen that no findings are recorded regarding suppression, wilful misstatement or fraud and therefore, invocation of the larger period is not warranted. In support of their claim, the appellant relied on the decision by Tribunal, Kolkata in the case of *Balajee Machinery v. Commissioner of C.G.S.T. & Excise, Patna-II [2022 (66) G.S.T.L. 440 (Tri. – Kol.)]*. As the entire demand is barred by limitation, the appellant contends that the demand confirmed on this count is not sustainable.

6. Thus, the appellant prayed for setting aside the demands and allowing their appeal.

7. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. Regarding the demand of Service Tax of Rs.62,20,170/- on cost sharing among the group Companies under the category of 'Business Support Service', we observe that the appellant incurred

expenditure on behalf of the group companies and such expenditure has been shared among the group Companies at the ratio agreed in the agreement dated 01-04-2008. We observe that there is no service element involved in this case. Thus, we find that in these circumstances, the demand of service tax under the category of 'Business Support Service' is not sustainable. We find that the issue is no more *res integra* as the demand of Service Tax on cost sharing is settled by the decision of the Hon'ble Supreme Court in *Gujarat State Fertilizers & Chemicals Ltd. v. Commissioner of C. Ex. [2016 (45) S.T.R. 489 (S.C.)],* wherein, it has been held that demand of Service Tax on cost sharing is not sustainable. The relevant part of the said decision is reproduced below:

> *"15. We have considered the aforesaid submissions in the light of the material placed on record. We shall advert to the second aspect namely, as to whether the arrangement between GSFC and GACL amounts to providing any services by GSFC to GACL and 50% incineration expenses incurred would constitute charges for providing such services. There is no dispute about the manner in which HCN is received through pipeline from M/s. Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60 : 40 respectively. GSFC and GACL are public sector undertakings, as already mentioned above. Since HCN is to be received through pipeline, it is abundantly clear that in order to save the expenditure, both the parties agreed that there should be a common pipeline. Once HCN is received through the said common pipeline, it comes first to GSFC's premises and from there it is diverted in the ratio of 60 : 40, meaning thereby that GSFC receives 60% of the HCN whereas GACL receives 40% of the supply in accordance with their respective requirement. To enable GACL to receive this HCN through common pipeline, arrangement/agreement was entered into between these two parties. For this purpose, handling facilities were installed in the premises of GSFC. However, fact remains, for which there is no dispute, that for installation of these facilities both the parties had contributed towards the investment. Since the said handling facilities are*

> *in the premises of GSFC, incineration also takes place at the said premises. Handling facilities expenditure thereof is shared equally by both the parties. That is clearly provided in the agreement/arrangement that was agreed to between the parties and is reflected in the Minutes dated 6-7-1980. Once these facts are accepted, we find that handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share the expenditure. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC. By no stretch of imagination, it can be treated as common 'service' provided by GSFC to GACL for which it is charging GACL."*

9.1. A similar issue was also dealt with by the Tribunal at Ahmedabad in the case of *Hazira Lng Pvt. Ltd. v. Commissioner of Service Tax, Ahmedabad [Final Order No. A/11349/2022 dated 02.11.2022 in Service Tax Appeal No. 596 of 2011 – CESTAT, Ahmedabad],* wherein it was observed as under: -

> *"4.5 However, since the activities under taken under the cost sharing agreement do not amount to provision of Service in terms of the decision of Hon'ble Apex Court in case of Gujarat State Fertilizers & Chemicals Ltd. (supra), the demand of Service Tax on the activities under taken under the cost sharing agreement cannot be sustained."*

9.2. Thus, by relying on the decisions cited above, we hold that the demand confirmed in the impugned order under the category of 'Business Support Service' is not sustainable and accordingly, we set aside the same.

10. Regarding the demand of service tax of Rs.88,051/-, we observe that these demands have been raised on the differential value of Profit & Loss Account and ST-3 returns. The appellant submitted

that the Profit & Loss Account is prepared on accrual basis whereas Service Tax is payable on receipt basis and thus, there is a difference between the values declared in the ST-3 and Profit and Loss Account. We observe that the ld. adjudicating authority has not given any finding regarding the liability of service tax on the differential value. It is the settled position of law that demand of Service Tax cannot be confirmed merely on the ground that there is a difference in the value of Profit & Loss Account and ST-3 returns. We observe that this issue is covered by the decision of Tribunal, Kolkata in the case of *Balajee Machinery v. Commissioner of C.G.S.T. & Excise, Patna-II [2022 (66) G.S.T.L. 440 (Tri. – Kol.)]*. The relevant part of the said decision is reproduced below: -

> *"8. We find that the very basis of the impugned demand is the figures appearing in the Income Tax Portal and the Profit and Loss account. We also find that the Ld. Commissioner has duly noted the fact that the Appellant was duly audited by the Service Tax Department for the compliance up to the financial year 2013-14. Since the records have been duly audited, the demand cannot be raised for the same period on account of change in the opinion. Further, we find that the Appellant had duly submitted the VAT Returns which have been recorded by the Ld. Commissioner in the impugned order.*
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> *9. In the VAT return for the financial year 2015-16, the Appellant has duly disclosed the sales turnover of Rs. 8,13,46,124/- on which VAT has been duly paid, whereas the impugned demand has been raised considering the value of taxable services to be Rs. 8,28,06,929/- by taking higher of the amount appearing in profit and loss account and the Income Tax Return. Similarly, for the financial year 2016-17, the value of taxable services have been considered to be Rs. 8,96,52,728/- whereas the appellant has duly disclosed the sales turnover of Rs. 8,79,88,828/- in its VAT return on which VAT has been paid at applicable rate. From the above, it appears that the major demand has been computed on the sales turnover."*

10.1. Thus, by relying on the decision cited supra, we hold that the demand of service tax of Rs.88,051/-, confirmed merely on the basis of the differential value between the Profit & Loss Account and ST-3 returns is not sustainable and accordingly. we set aside the same.

11. Regarding the demand of Rs.3,69,162/- confirmed in the impugned order on account of ineligible CENVAT Credit, we find that the issue was raised on scrutiny of ST-3 return for the year 2007-08. It is alleged that the appellant have taken CENVAT credit amounting to Rs.3,55,108.00, but failed to produce the copies of tax paying documents, as required under Rule 9(1)(e) of the said Credit Rules. We find that the Show Cause notice covering the period 2007-08 has been issued on 30.01.2012, by invoking the extended period of limitation. We observe that there is no allegation of suppression, wilful misstatement or fraud in the impugned notice. In the impugned order also, the ld. adjudicating authority has not given any finding regarding suppression of facts or wilful misstatement for invocation of the larger period of limitation. Thus, we find that the demand confirmed by invoking the extended period of limitation is not sustainable.

11.1. As the entire demand is barred by limitation, we hold that the demand confirmed on this count is not sustainable. In these circumstances, we hold that the demand of irregular credit confirmed in the impugned order is not sustainable and accordingly, we set aside the same.

12. Since the demands confirmed in the impugned are not sustainable, the question of demanding interest and imposing penalty does not arise.

13. In view of the above findings, we set aside the impugned order and allow the appeal filed by the appellant with consequential relief, if any, as per law.

(Order pronounced in the open court on **27.01.2025**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd