

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

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 75905 of 2017

(Arising out of Order-in-Original No. 21/COMMR/STA/KOL/16 dated 07.03.2017 passed by the Commissioner, Service Tax Audit Commissionerate, Kolkata, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Shantipally, Rajdanga Main Road, Kolkata, West Bengal, PIN – 700 107)

M/s. M.K. Enterprises

: Appellant

(Prop. Md. Kasim),
A-1, A-2, 2nd Floor, 371/1, Diamond Harbour Road,
Behala, Kolkata (W.B.), PIN – 700 034

VERSUS

Commissioner, Service Tax Audit Commissionerate, : Respondent

Kolkata, Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road,
Kolkata (W.B.), PIN – 700 107

APPEARANCE:

Shri Aditya Dutta, Advocate for the Appellant

Shri S. Dey, Authorized Representative for the Respondent

CORAM:

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

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

FINAL ORDER NO. 75380 / 2025

DATE OF HEARING: 06.02.2025

DATE OF DECISION: 18.02.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. M.K. Enterprises, A-1, A-2, 2nd Floor, 371/1, Diamond Harbour Road, Behala, Kolkata (W.B.), PIN – 700 034 (hereinafter referred to as the “appellant”) are engaged in the business of providing services of ‘erection, commissioning and installation service’. They are registered with the Service Tax Department and have been filing S.T.-3 Returns thereof.

2. A Service Tax audit was conducted by the Officers of the Service Tax Audit Commissionerate, Kolkata for the period from 2009-10 (October, 2009) to 2013-14, on 26.09.2014 and subsequently, on 11.03.2015. During the course of audit, records of the appellant such as Annual Financial Accounts, Ledgers, Invoices, Contracts and S.T.-3 Returns were scrutinized by the Audit Officers.

2.1. During the course of audit, the Audit Officers observed that the appellant has not paid appropriate service tax on various services rendered by them. Accordingly, a Show Cause Notice dated 20.04.2015 was issued to the appellant demanding Service Tax under various categories of services.

3. The said Notice was adjudicated by the Ld. Commissioner, Service Tax Audit Commissionerate, Kolkata vide the Order-in-Original No. 21/COMMR/STA/KOL/16 dated 07.03.2017 (hereinafter referred to as the "impugned order") wherein the Ld. Commissioner has confirmed the following demands against the appellant: -

"A. (i) I confirm the demand of Service Tax of Rs 3,65,07,819/- (including Cess) Rs 1,74,472/-(including Cess) and Rs 74,787/- (including Cess), grand totalling Rs. 3,67,57,078/- (Rupees Three Crore Sixty Seven Lakh Fifty Seven Thousand Seventy Eight) only, against the Noticee under Section 73(2) of the Finance Act, 1994.

(ii) I order for payment of interest at the rate as specified in Section 75 of Finance Act 1994 as amended from time to time on the tax amount indicated in clause (i) supra;

(iii) I impose penalty of Rs. 3,67,57,078/- (Rupees Three Crore Sixty Seven Lakh Fifty Seven Thousand Seventy Eight) only, under Section 78 of Finance Act, 1994, against the Noticee.

B. (i) I disallow the irregular & inadmissible CENVAT credit of Rs 9,87,523/-(Rupees Nine Lakh Eighty Seven Thousand Five Hundred Twenty Three) only, and confirm the demand of the said amount against the Noticee under Rule 14 of the CENVAT Credit Rules 2004 read with Section 73(2) of the Finance Act, 1994;

(ii) I order for payment of interest at the rate as specified in Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of Finance Act 1994 as amended from time to time on the irregular and inadmissible credit amount indicated in clause (1) supra;

(iii) I impose penalty of Rs 9,87,523/- (Rupees Nine Lakh Eighty Seven Thousand Five Hundred Twenty Three) only, against the Noticee under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 78 of Finance Act, 1994.

C. (i) I confirm the demand of Service Tax of Rs 42,611/-(including Cess), and the demand of Service Tax amounting to Rs. 4,695/-(including Cess), grand totalling Rs. 47,447/- (Rupees Forty Seven Thousand Four Hundred Forty Seven) only, against the Noticee under Section 73(2) of the Finance Act, 1994;

(ii) I order for payment of interest at the rate as specified in Section 75 of Finance Act 1994 as

amended from time to time on the tax amount indicated in clause (1) supra;

(iii) I impose penalty of Rs. 47,447/- (Rupees Forty Seven Thousand Four Hundred Forty Seven) only, against the Noticee under Section 78 of Finance Act, 1994.

D. (i) I order for payment of interest amounting to Rs. 31,66,003/- (Rupees Thirty One Lakh Sixty Six Thousand Three) only, against the Noticee under Section 75 of the Finance Act, 1994;

E. (i) I confirm the demand of Service Tax of Rs. 7,88,890/- (including Cess) (Rupees Seven Lakh Eighty Eight Thousand Eight Hundred Ninety) only, against the Noticee under Section 73(2) of the Finance Act, 1994;

(ii) I order for payment of interest at the rate as specified in Section 75 of Finance Act 1994 as amended from time to time on the tax amount indicated in clause (1) supra;

(iii) I impose penalty of Rs.7,88,890/- (Rupees Seven Lakh Eighty Eight Thousand Eight Hundred Ninety) only, against the Noticee under Section 78 of Finance Act, 1994.

F. (i) I confirm the demand of late fine amounting to Rs. 20,100/-(Rupees Twenty Thousand One Hundred) only, against the Noticee under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

G. (i) I Impose a penalty of Rs.10,000/- (Rupees Ten Thousand) only, against the Noticee under Section 77 of the Finance Act, 1994."

3.1. Aggrieved by the confirmation of the above demands, along with interest, and imposition of penalty, the appellant has filed this appeal. The appellant contested the demands on merit as well as on limitation.

Erection, Commissioning and Installation Service:

3.2. In respect of the demand of Service Tax confirmed under the category of 'erection, commissioning and installation service', it is the submission of the appellant that they have provided the said services as a sub-contractor of M/s. Alstom India Ltd., who were engaged by M/s. Vedanta Aluminium situated in an SEZ, Jharsuguda. The appellant submits that they have rendered the said services within the SEZ area, which are exempted from payment of service tax; however, the Id. adjudicating authority has chosen to deny the exemption on the ground that the exemption is available only to the main contractor who were engaged for providing service in the SEZ area; the said exemption is not available to sub-contractors who provide services to the main contractor. The appellant submits that they have rendered the service of 'erection, commissioning and installation' within the SEZ and hence they are eligible for the exemption and hence no service tax is payable by them for the services rendered within the SEZ area.

3.2.1.They have also supplied consumables purchased and utilized the same in the completion of projects executed by them in the SEZ. It is submitted that while calculating the Service Tax, they have deducted the cost of consumables for working out the Service Tax liability; the Revenue has alleged that since they were not working as pure agents, the value of consumables was liable to be included in the gross value of taxable services provided for the purpose of computation of Service Tax liability; hence, the demand was confirmed by including the value of consumables in the gross value of taxable services provided. In this regard, the appellant submits that these consumables were utilized in connection with the services rendered in the SEZ area and hence even if the value of consumables is included, no service tax is payable by them as the consumables were also used in respect of the services rendered in the SEZ area. Accordingly, they submitted that the demand confirmed in the impugned order on account of inclusion of the value of consumables in the assessable value is not sustainable.

3.2.2. Regarding the demand of Service Tax for the services rendered to M/s. Tata Projects Limited during the period 2012-13 and 2013-14, it is their submission that the services rendered by them are appropriately classifiable under the category of 'works contract service' and they have rightly paid Service Tax on 50% of the value of services thereof. However, in the impugned order, the department classified the said service as 'Erection, commissioning and installation service' and demanded service tax on 100% value of the said services. In this regard, the appellant pointed out that in the contract dated

23.06.2011, it is very clearly mentioned that they are liable to use the consumables viz. welding electrodes, hand gloves, oxy / acetylene gas, etc. Accordingly, the appellant contends that these services rendered by them, which include materials, are rightly covered under the category of 'works contract service' and they have rightly paid Service Tax on 50% of the value of services. Hence, the appellant submits that the demand raised on the 100% of the value from them is not sustainable in law.

Manpower Recruitment and Supply Agency Service; and Supply of Tangible Good Service:

3.3. Regarding the demands of Service Tax under the categories of 'manpower recruitment and supply agency service' and 'supply of tangible goods service', the appellant contends that during the impugned period, they had rendered these services to M/s. Alstom India Ltd. in the SEZ area.; demand of **Rs. 74,787/-** along with interest has been confirmed under the category of 'manpower recruitment and supply agency service'. In this regard, the appellant cited the contracts and contended that in the contracts, it is categorically mentioned that they are liable to supply manpower to the said project. Regarding the demand of service on supply of tangible goods service, the appellant submits that they have given Gensets on hire to M/s. Alstom India Ltd. for which service tax amounting to **Rs. 1,74,472/-** along with interest has been confirmed. In this regard, the appellant submits that the said services are exempted as these services have been rendered within the SEZ area.

Irregular CENVAT Credit:

3.4. In respect of the allegation of irregular CENVAT Credit availed to the tune of Rs.9,87,523/-, the appellant submits that CENVAT Credit of Rs. 6,91,364/- was availed during the period 2013-14 (Oct'13 to March'14), Rs. 2,43,747/- was availed during the period 2013-14 (April'13 to Sept'13) and CENVAT Credit of Rs. 52,412/- was availed on inputs during the period 2012-13 (Oct'12 to March'13). The said credit was disallowed on the following grounds:

- (i) Such credit of tax paid on reverse charge basis against 'Erection Commissioning and Installation Services' and 'Works Contract Services' but there is no reverse charge tax payment system in Erection Commissioning and Installation Services and being a proprietorship concern they are not liable to pay tax on reverse charge basis in WCS;
- (ii) they have not paid any tax under challans in Works Contract Services Accounting Code;
- (iii) they have not produced any documents regarding purchase of inputs for which they are eligible to take credit as shown in ST-3 (Oct'12 to March'13)

3.5. In this regard, the appellant submits that they had paid the Service Tax under the bona fide belief that they are liable to pay service tax on the Erection Commissioning and Installation Services' and 'Works Contract Services' under reverse charge; having accepted the payment, the department cannot deny the credit on procedural grounds. The appellant

further submitted that they have indicated the availment and utilization of credit in the S.T.-3 Returns filed by them. As they have not suppressed any information, the Department cannot invoke extended period of limitation to deny this credit, which is otherwise eligible to them. It is also submitted that the CENVAT Credit had been availed on input services like crane hire charges, manpower hire charges, etc., which are required for completion of the project and therefore the same are input services, which renders the appellant eligible to avail the credit. However, due to clerical error they have mentioned the CENVAT Credit availed in the inputs column. The appellant submits that the CENVAT Credit which is otherwise eligible to them cannot be denied on procedural infirmities and the appellant prayed for allowing the credit totally amounting to Rs.9,87,523/-.

Service Tax demand on Miscellaneous Receipts

3.6. The appellant submits that in the FY 2009-10, they have received Rs. 1,89,786/- as 'refund of earlier recoveries after close of jobs' and in the FY 2010-11 they have received Rs. 1,64,978/- as 'expenses towards additional labour charges related to primary work' and also received Rs. 58,938/- as 'refund of house-keeping expenses'. All these recoveries were received in connection with their primary work of Erection Commissioning & Installation Service. In the year 2012-13, there is another receipt of Rs. 39,125/- under 'refund of crane hiring charge' on which service tax of Rs. 4,836/- has been demanded. In total, service tax (along with cess) amounting to **Rs. 47,447/-** has been confirmed in the impugned order. The appellant submits, that these demands are not sustainable as they are related to the service of

'erection commissioning and installation service rendered to SEZ. Hence, separate demand raised as 'Miscellaneous receipts' is not sustainable.

Demand of Interest on Advance:

3.7. The appellant submitted that they have taken advance from time to time from different parties and adjusted the said advances later on at the time of billing to the parties. They have not paid service tax at the time of receipt of such advances but paid it at the time of receipt of bill; on this score, the Show Cause Notice has demanded interest amounting to **Rs.31,66,003/-** and confirmed in the impugned order. In this regard, the appellant does not contest the demand of interest on merits. It is their submission that the advances were received prior to 2013-14 and the Notice was issued on 20.04.2015, which is beyond the normal period of limitation for issue of the notice. As there is no suppression of fact with intention to evade the tax established in this case, the appellant submits that the demand is not sustainable on the ground of limitation.

Pending advance:

3.8. The appellant submits that in the Profit and Loss Account for the FY 2013-14, it is shown that there is a pendency of advance of Rs. 63,92,994/- which has not been adjusted by them and on the above, service tax of **Rs. 7,88,890/-** (along with cess) has been confirmed along with interest. The appellant has not disputed the demand on merits. It is their submission that the advances were received prior to 2013-14 and the Notice was issued on 20.04.2015, which is beyond the normal period of limitation for issue of the notice. As there is no suppression of fact with intention to

evade the tax established in this case, the appellant submits that the demand is not sustainable on the ground of limitation.

Late Fine

3.9. The appellant submits that late fine of **Rs. 20,100/-** has been charged for delayed filing of return and penalty has been imposed under Section 77 of the Finance Act, 1994. The appellant has disputed this demand only on the ground of limitation.

The Show Cause Notice was not adjudicated within the statutory time-limit:

3.10. The appellant submitted that the Show Cause Notice in this case was issued on 20.04.2015 whereas the Order-in-Original was passed only on 07.03.2017, which is beyond the statutory time-limit prescribed under Section 73(4B) of the Finance Act, 1994. The appellant has cited the decision of the Tribunal, New Delhi in the case of *M/s. Kopertek Metals Pvt. Ltd. &ors. v. Commissioner of CGST (West), New Delhi [Final Order No. 59511-59720 of 2024 dated 25.11.2024 in Excise Appeal No. 52178 of 2022 &ors. – CESTAT, New Delhi]* and contended that the impugned order passed is without the authority of law. The appellant also cited the decision of the Hon'ble Delhi High Court in the case of *M/s.VOS Technologies India Pvt. Ltd. Vs The Principal Additional Director General & ors. in W.P.(C) No. 4831 of 2021 dated 10th December, 2024 [Del.-HC]* wherein the Hon'ble High Court has set aside the order on the ground of inordinate delay in completion of the adjudication proceedings. Hence, the appellant submits that on this count also the demand confirmed in the impugned order is not sustainable.

4. The Ld. Authorized Representative of the Revenue reiterated the findings of the adjudicating authority in the impugned order. Regarding the contention of the appellant that the adjudication order was not passed within the statutory time-limit prescribed, the Ld. Departmental Representative submits that the same Tribunal has been taking contrary views on the very same subject. He has cited the decision of the Tribunal, Delhi in the case of *M/s. Citicorp Finance India Ltd. v. Commissioner of Service Tax, Delhi-II* [2023 (11) TMI 891 – CESTAT, New Delhi] and *M/s. Picasso Digital Media Pvt. Ltd. v. Commissioner, CGST, East Delhi & vice versa* [2024 (2) TMI 1160 – CESTAT, New Delhi] wherein the appellants had not raised the issue of delay in adjudication before the adjudicating authority and thus, it was held that the appellant is refrained from taking up that issue at the appellate stage. He contends that in the present case also, the appellant had not raised the said issue before the Id. adjudicating authority and therefore, he cannot take up this issue at the appellate stage. Accordingly, the Ld. Authorized Representative of the Revenue contended that this claim of the appellant deserves no merit.

4.1. Regarding the other issues on merits raised by the appellant, the Ld. Departmental Representative has reiterated the findings in the impugned order.

4.2. He therefore contended that the demands have been rightly confirmed against the appellant in the impugned order.

5. Heard both sides and perused the appeal records.

6. We find that a total demand of Rs.3,85,80,940/- [Rs.3,67,57,078/- + Rs.9,87,523/- + Rs.47,447/- + Rs.7,88,890/-] (ref. paragraph 13(i) of the Form of Appeal) has been confirmed in the impugned order under various categories, which are being contested by the appellant. The same are being examined hereunder.

Erection, Commissioning and Installation Service:

6.1. Regarding the demand of Service Tax of Rs.3,65,07,819/- confirmed under the category of 'erection, commissioning and installation service', we observe that the appellant has rendered the service as a sub-contractor to M/s. Alstom India Ltd., who were the main contractors engaged by M/s. Vedanta Aluminium located in the SEZ, Jharsuguda. We find that the said services rendered by the appellant are within the SEZ area and hence the said services are exempted from the levy of Service Tax. There is no dispute in this case that the sub-contractor has rendered the services within the SEZ area. The Ld. adjudicating authority denied the benefit of exemption to the appellant on the ground that the exemption is available only to the main contractor and not to the sub-contractor. We observe that this view held by the Ld. adjudicating authority is not supported by any decision of higher appellate forums. On the other hand there is a catena of decisions holding that the exemption available to the main contractor is equally applicable to the sub-contractor also when the services are rendered by the sub-contractor within the SEZ.

6.2. In this regard, we observe that the appellant has cited the decisions in the cases of *M/s. Randhawa Construction v. Commissioner of Central Excise and Service Tax, Vadodara-I* [(2024) 18 Centax 276 (Tri. – Ahmd.)] and *M/s. Anjani Excavation Operation v. Commissioner of Central Excise and Service Tax, Bharuch* [(2024) 21 Centax 344 (tri. – Ahmd.)]. We find that the decisions cited above are squarely applicable to the present case. In the case of *M/s. Randhawa Construction (supra)*, the Tribunal at Ahmedabad has observed as under: -

"4. Having heard both the sides, we find that only question which needs to be answered by us is whether the appellant being a subcontractor to the main contractor M/s. Samsung Engineering Company Limited which was appointed for rendering certain services to M/s. ONGC, located at SEZ Dahej, is entitled for the benefit of Notification No. 9/2009-ST dated 03.03.2009 as amended by various notifications being a subcontractor. Before proceeding further in the matter it will be relevant to reproduce here the arguments on which the demand has been confirmed by the learned Adjudicating Authority in order-in-original :-

"22.6. I therefore find that from the overall facts of the case seen in the light of the existing provisions, in-admissibility of the exemption on the taxable services provided by a sub contractor to the Contractor of a SEZ Unit is expressly clear. Nowhere in the SEZ Act, 2005 and the Rules framed there-under or under any Notification issued in relation thereto as well as under any statutory provisions of the Finance Act, 1994 (as amended) there is any such provisions of exemption from levy of Service Tax on the taxable services when provided by a sub-contractor to the Contractor of a SEZ Unit. Further, levy of service tax is by virtue of the Finance Act, 1994 and no levy can be imposed by way of instructions/circular by the Board. In this regard, the recent decision of Hon. Tribunal in the case of M/s. Sew Construction

Ltd. Vs. CCE, Raipur- 2011 (22) STR 666 (Tri.-Del) is most relevant. It was held by the CESTAT that -

"5. We do not find any provision in the Finance Act, 1994 to grant immunity to the sub contractor from levy of service tax when undisputedly taxable services were provided by them. No evidence was before us to notice whether the service provided by the sub-contractor to the contractor was ever been taxed. We noticed that para 9 of the Larger Bench decision in the case of M/s. Vijay Sharma & Co. cited by the learned AR clearly speaks that a sub-contractor shall not be immune from service tax under Finance Act, 1994. The said para 9 is reproduced below for appreciation.

In view of the foregoing discussion, it is clear that even when service is provided in the category of sub-contractor, he is liable to pay service tax. This view is also supported by Board's circular No. 96/7/2007-ST dated 23.08.2007 and 138/7/2011-ST dated 06.05.2011 as elucidated above. Under the circumstances I find M/s Randhawa not eligible for the exemption on the taxable services provided by them as sub-contractor to M/s Samsung."

It can be seen that there is no denying of the fact that services were provided by the appellant in the capacity of a subcontractor to a unit located in SEZ area and only argument on the basis of which the learned Adjudicating Authority has confirmed the demand of service tax only on the ground that when the service has been provided by a subcontractor to the contractor of the SEZ Unit, the subcontractor will not be entitled to benefit of notification even though services have been provided to a SEZ unit.

5. We are of the view that since the services rendered to a SEZ unit on behalf of a Contractor who has formally been authorised by SEZ Unit for providing certain goods and services to them, irrespective whether the services directly provided by the main contractor or the main contractor has appointed a subcontractor makes no difference since the service has been rendered to SEZ Unit, the

benefit of exemption notification is available to the appellant. While holding the above view, we take note of this Tribunal's decision in the case of M/s. Shyam Engineers Final Order No.12201/2023 dated 07.08.2023. The relevant extract of the same is reproduced below:-

"5. We have carefully considered the submissions made by both the sides and perused the record. We find that Revenue has denied the exemption on payment of service tax under Notification No. 09/2009-ST only for the reason that the appellant being a sub-contractor, have not provided service directly to the SEZ unit or developer of SEZ. On perusal of notification, we find that notification prescribes that the service which are provided in relation to authorised operation in SEZ and received by a developer or unit of SEZ are exempted from whole of service tax. As per this plain reading of the notification, the only criteria is that the service which is provided, should be in relation to the authorised operations in SEZ and received by a developer or unit of SEZ. In the facts of the present case, there is no dispute that appellant have provided service which are approved by the concerned authority in relation to the authorised operations in SEZ therefore, in our considered view, even the appellant is sub-contractor but the condition of providing service to authorised operation has been satisfied. Therefore, exemption cannot be denied to the appellant. This issue has been considered by this Tribunal in the following decisions;

(a) Sudhir Chand Jain vs. CCE – 2018 (8) GSTL 302 (Tri. All)

(b) CST vs. Fedco Paints and Contracts – 2017(3) GSTL 364 (Tri.-Mumbai)

From the above judgments and the discussion and findings given hereinabove, there is no doubt in our mind that service provided by the appellant in the capacity of sub-contractor but in relation to the authorised operations in SEZ are clearly eligible for exemption Notification No. 9/2009-ST dated 03.03.2009 as

amended. Accordingly, the impugned order is set-aside, appeal is allowed."

A similar view has also been taken by this Tribunal in the case of Rishabh Construction Company – 2023 (10) TMI 596-CESTAT Ahmd, the same is reproduced below:-

"4. We have carefully considered the submission made by both sides and perused the records. We find that the Revenue has denied the exemption to the appellant on the ground that the appellant being sub-contractor provided the service not to the SEZ but to the main contractor i.e. M/s. Khurana Construction, therefore, they are liable to pay the service tax. We find that even though the service was provided by the appellant on the behest of the main contractor M/s. Khurana Construction but there is no dispute that the service was provided in relation to various operations of the SEZ and the services was undisputedly consumed in the SEZ therefore, the appellant has provided the service in SEZ. Accordingly, they are eligible for exemption Notification No. 04/2004-ST dated 31.03.2004. This issue is no longer res-integra as the same has been decided in various decision of the Tribunal cited by the learned counsel. Some of the judgments are reproduced below:-

Commissioner of Service Tax, Mumbai –I Vs. M/s. FEDCO Paints and Contracts – 2017 (3) GSTL 364 (Tri. Mumbai)

"5. After hearing both the sides, we find that the main ground of the appeal of the Revenue is that the respondent had never provided services directly to the SEZ unit but was contracted as a sub-contractor to provide services to a unit in SEZ. Hence, the benefit of Notification No. 4/2004-S.T. is not applicable. It is undisputed that during the period 1-4-2005 to 31-3-2009 the respondent had rendered various services to the unit situated in SEZ and being developed by the SEZ developer. It is also undisputed that appellant was a sub-contractor. On this factual matrix, we have to now consider the

Notification No. 4/2004-S.T. which reads as under :

"Service tax exemption to services provided to a Developer or units of Special Economic Zone — Notification No. 17/2002-S.T. superseded

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance and Company Affairs (Department of Revenue), No. 17/2002-Service Tax, dated 21-11-2002, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 21-11-2002, vide, G.S.R 777(E), dated 21-11-2002, except as respects things done or omitted to be done before such supersession, the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service of any description as defined in clause (90) of sub-section (1) of section 65 of the said Act provided to a developer of Special Economic Zone or a unit (including a unit under construction) of Special Economic Zone by any service provider for consumption of the services within such Special Economic Zone, from the whole of service tax leviable thereon under section 66 of the said Act, subject to the following conditions, namely:-

(i) the developer has been approved by the Board of Approvals to develop, operate and maintain the Special Economic Zone;

(ii) the unit of the Special Economic Zone has been approved by the Development Commissioner or Board of Approvals, as the case may be, to establish the unit in the Special Economic Zone;

(iii) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilisation of the said taxable services.

Explanation. - For the purposes of this notification, -

(1) "Board of Approvals" means the combined Board of Approvals for export oriented unit and Special Economic Zone units, as notified in the Official Gazette, from time to time by the Government of India in the Ministry of Commerce and Industry;

(2) "developer" means a person engaged in development or operation or maintenance of Special Economic Zone, and also includes any person authorised for such purpose by any such developer;

(3) "Special Economic Zone" means a zone specified as Special Economic Zone by the Central Government in the notification issued under clause (iii) of Explanation 2 to the proviso to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944)."

6. It can be seen from the above reproduced notification that the said notification exempts any taxable service provided by any service provider for consumption of the service within a Special Economic Zone, subject to following/adhering to the conditions. It is also undisputed that all the conditions mentioned in the notifications are satisfied by the SEZ developer i.e. M/s. Reliance Industries Ltd. On the face of such factual matrix, we find that the adjudicating authority was correct in coming to the conclusion that the proceedings initiated by show cause notice issued needs to be dropped. We also find as regards taxability of the service rendered to the SEZ developer was in dispute before this Tribunal in the case of *Sujana Metal Products Ltd. v. Commissioner of Central Excise – 2011 (273) E.L.T. 112 (Tri.-Bang.)* and this Tribunal came to a conclusion that where the services are rendered to SEZ or a unit in SEZ, as long as it is rendered for consumption in a Special Economic Zone, the services are exempt. We also note that the provisions of Section 26 of the Special Economic Zone overrides provisions of other law and exempts any services or taxes if the same are consumed in Special Economic Zone.

7. In view of the foregoing and the authoritative judicial pronouncement, we find no merits in the appeal filed by the Revenue and the same stands rejected and hold impugned order is correct and legal and does not require any interference. cross-objection is also disposed of."

Sudhir Chand Jain vs. Commissioner of Central Excise, Ghaziabad – 2018 (8) GSTL 302 (Tri.All)

"6. Having considered the rival contentions I hold that the appellant as sub-contractor have provided service through their contractor M/s. Anurag Enterprises for construction of SDF, Block L at NSEZ for to the Deputy Commissioner of the SEZ. This proposition has been affirmed by the Hon'ble Supreme Court in the case of Imagic Creative and also by Hon'ble Patna High Court in the case of Hindustan Dorr Oliver Ltd. v. State of Bihar. Further, I find that the approval should be either by the Deputy Commissioner and/or Board of Approvals as the case case may be. Here, admittedly the work order has been issued by Deputy Commissioner, SEZ. Hence it amounts to providing and consuming service to SEZ and/or allotted through NBCC, as the operating agency to the appellant with regard to other demand of Service Tax which already stands paid along with interest before SCN and not being contested by the appellant as regard taxability. Thus, there is ipso facto approval of the Deputy Commissioner of the SEZ. Thus, I hold that no further approval of the Approval Committee is required under the facts and circumstances. Accordingly, the appeal is allowed and the demand of Rs. 17,51,124/- is set aside. I also find that there is no suppression of facts or contumacious conduct on the part of the appellant. Accordingly, the penalty under Section 78 & Section 77 of the Finance Act, 1994 is also set aside. The appellant will be entitled to consequential benefits, if any, in accordance with law."

4.1 In view of the above judgments, it is settled that the service of sub- contractor

provided in SEZ shall be eligible for exemption under Notification No. 04/2004-ST and other identical notifications.

5. Accordingly, the impugned order is not sustainable, hence, the same is set aside. Appeal is allowed."

6. Following the above decisions, we are of the view that substantial benefits of exemption notification cannot be denied merely on small infringement of procedural requirement. We therefore, hold that impugned order-in-original is without any merits and therefore we set-aside the same. The appeal is allowed."

6.3. We find that the appellant has utilized various consumables while executing the services of erection, commissioning and installation. The value of such consumables used in providing the service has been included in the gross value of services rendered by the appellant and the demand confirmed in the impugned order. However, we observe that these consumables were also used in connection with the services provided in the SEZ area. Accordingly, we hold that no Service Tax is leviable on account of inclusion of the value of consumables, used in providing the service within the SEZ area.

6.4. Regarding the demand of Service Tax for the services provided by the appellant to M/s. Tata Projects Ltd., it is seen that the appellant have already paid Service Tax on 50% of the value, by treating the service rendered as a 'works contract service'. However, the Department has considered this service as 'erection, commissioning and installation service' and contends that the appellant is liable to pay Service Tax on 100% of the value of services rendered. In this regard, we find that the appellant has placed a copy

of the Work Order dated 09.12.2010 issued by M/s. Tata Projects Limited wherein it is categorically mentioned that the services rendered by them includes "consumables like welding electrodes, Oxy / Acetylene / industrial gas". Copy of the said work order is reproduced below: -

TATA

Work Order No.		WO Date	Amendment No.	Amendment Date		
SIBU - M & M / Instl 1x4050 Blast Furnace RSP / 116		09-DEC-10	0			
Name of the Contractor/Vendor:						
M. K. ENTERPRISES 17/2, Bhupen Roy Road, Mantlon, Behala, KOLKATA, WEST BENGAL-700034		MSMED No.	NA			
		Contractor's PAN No.	AHHPK5641B			
		Contractor's Service Tax No.	AHHPK5641BST001			
Contact Person	MR.MD KASIM	Details of Annexure attached to this WO				
Phone	(33)24570939, 24570939	1) Annexure - I (BOQ with Item rate)				
Email		2) Annexure - II (Technical Spec)				
Fax	(324570939	3) Annexure - III (GCC)				
		4) GCC for safety				
Name of TPL's Contact Person:	Dept: Project	Telephone No.:				
A. Saket Mathur	Email Id:					
Dear Sirs,						
Sub: Erection of Two numbers of ESP for Cast House at SAIL RSP Project Ref: 1) Our enquiry dated 28.10.2010 2) Your offer dated 30.10.2010 3) MOM dated 10.11.2010 4) Final Offer dated 12.11.2010 5) Email dated 12.11.2010 6) LOI No- TPL/KOL/RSP/MKP/143/LOI-143 dated 7.12.2010						
With reference to the above, we are pleased to issue this Work Order for the subject work as per the documents enclosed herewith as Annexures and the Terms & Conditions as detailed below. The technical specification sent to you as part of the enquiry documents, subsequent MOM (technical & commercial), and all other terms & conditions (except otherwise specifically agreed to in writing) as specified hereunder and to be read along with attached annexures, form an integral part of this Work Order.						
Sl. No.	Item	Description	UOM	Quantity	Unit Rate	Amount INR
Details As Per Annexure-1						
Total Contract Price					1,30,95,927/-	
Total Contract Price is INR One Crore Thirty Lakh Ninety Five Thousand Nine Hundred Twenty Seven Only						
1.0	Scope of Work: The scope covers handling at site / storage yard, transportation to site of work, erection, testing and commissioning of ESP with its associated auxiliaries for SAIL- RSP Project. Total weight of structural has been mentioned as 1053MT. Other than structural there is other associated auxiliaries which have been mentioned in the BOQ (in numbers) like Rotary air lock valves, Foundation bolts, Expansion joints, Explosion vent, hopper heater, electrical and instruments, insulation for ESP etc. The offer is also inclusive of all consumables like welding electrodes, Oxy / Acetylene / Industrial gas, materials, welding machines, major tools, bed materials, scaffolding and civil job. The Scope excludes the supply of all materials, cranes with consumables, hydra with consumables, and trallor for shifting of materials, welding machines, major tools, bed materials, scaffolding and civil job. During peak hours of erection contractor will deploy approximately 80 workmen per day. Site will be mobilized with tools and tackles like welding cables, Gas cutting sets, Grinding machines, Filter tools, welder tools etc Supervision of Erection and Commissioning: Under scope of Contractor. During peak hours of erection contractor will deploy approximately 80 workmen per day. Site will be mobilized with tools and tackles like welding cables, Gas cutting sets, Grinding machines, Filter tools, welder tools etc Accommodation / Transportation of workmen is under scope of contractor Contractor shall deploy requisite manpower to equipment supplier during commissioning of equipment					

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TATA PROJECTS LIMITED

Amajyoti 10 Belvedere Road Kolkata 700 027 India
Tel 91 33 66011200 24565131 24565132 Fax 91 33 24565133 e-mail tpler@tataprojects.com
Registered Office : Mithona Towers-1 1-7-80 to 87 Opp.Wesley Co-ed Jr. College
Prenderghast Road Secunderabad 500 003 India Tel 91 40 6623 8801 Fax 91 40 6617 2535
e-mail tpi@tataprojects.com www.tataprojects.com

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6.4.1. From the work order extracted above, we find that the value offered in the agreement/work order is inclusive of consumables like welding electrodes, oxy / acetylene and industrial gases, which are to be supplied by the appellant while rendering the service. Since it is clear that the appellant has rendered this service along with materials, we hold that the appellant has rightly paid Service Tax at the rate of 50% of the value by classifying the same as 'works contract service'. Thus, we hold that the demand of Service Tax on 100% of the value by classifying the service rendered as 'erection, commissioning and installation service' in the impugned order is not sustainable.

Manpower Recruitment and Supply Agency Service; and Supply of Tangible Good Service:

7. In respect of the demands of Service Tax under the categories of 'manpower recruitment and supply agency service' and 'supply of tangible goods service', we observe that the said services were also rendered within the SEZ. The appellant has furnished the following Purchase Order issued by M/s. Alstom India Ltd. in support of their contention that the said services were rendered in the SEZ area:

ALSTOM

ALSTOM

M.K.ENTERPRISES
17/2,BHUPEN ROY ROAD, MANTON.BEHALA
CALCUTTA. 700034

Your vendor number with us
17680

Purchase order	
PO number/date	520011447 / 20.05.2009
Contact person/Telephone	Mithun Sharma/CLEPWMSA
E-Mail	mithun.sharma@power.alstom.com

Deliv. terms: EXW .

Amerdment - 1 dated 30.04.2010 is being released for changing the FTP no to 31 & 32 instead of FTP 31 & 51, changing in Tax Clause due to SEZ and inclusion of line no 20 & 30

Purchase Order issued on 20.05.2009 for the Mechanical Erection Contract for two(2) FTP Units (31 & 32) at Vedanta Jharsuguda Site.

JOB NO. : APAWM8003
A/C VEDANTA - JHARSUGUDA

SCOPE OF WORKS CONTRACT :

The Detailed Scope of the Contract is as agreed in the reference MOM, LOI and the Fax message regarding additional scope.

Broadly, the Major scope of work shall include the following:

1. Site Mobilisation
2. Manpower Resources & Mobilisation
3. Tools & Plants required for Erection
4. Unloading & Storage

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7.1. From the scanned copy of the work order reproduced above, it is evident that the appellant was required to supply manpower resources and mobilization. Accordingly, we hold that the manpower services rendered by the appellant within the SEZ area are not leviable to Service Tax. Consequently, the demands of Service Tax under the categories of 'manpower recruitment and supply agency service' is found to be unsustainable.

7.2. Regarding the demand of service tax on supply of tangible goods service, we observe that the appellant has given Gensets on hire to M/s. Alstom India Ltd. for which service tax amounting to Rs. 1,74,472/-along with interest has been confirmed. As the service has been rendered within the SEZ area, we hold that no service tax payable by the appellant under the category of 'supply of tangible goods service'.

Interest on Advance and Pending Advance:

8. Regarding the demands pertaining to interest on advances, we find that the advances were received during the period 2009-10 (October to March) to 2012-13. The last advance payment was received on 31.03.2013. They have adjusted this advance and subsequently paid Service Tax. Therefore, there is no loss of revenue to the Government exchequer. We do not agree with the submission of the appellant. The appellant is liable to pay service tax on the advances immediately subsequent to the month in which the advance was received. Thus, the appellant is liable to pay interest for the delay in payment of service tax on the advances received. However, we observe that the appellant has not contested this issue on merits. They contested this issue only on limitation. We find that the demand under this category pertains to the period prior to 31.03.2013 and the Show Cause Notice was issued on 20.04.2015 which is beyond the normal period of limitation. As the appellant has not suppressed any information from the Department, we hold that the demand under this category is not sustainable on the ground of limitation.

8.1. Regarding the demand of Service Tax on advances received (pending advance) of Rs.7,88,890/-, the appellant has pleaded that the Service Tax amount of Rs.5,41,690/- [Rs.7,88,890/- - Rs.2,47,200/-] raised in the Show Cause Notice is barred by limitation in view of the fact that the advances against the same were received on 10.02.2013, 01.10.2009 and 30.01.2012, which are prior to 31.03.2013. As there is no suppression of fact with intention to evade the tax has been established in this case, we hold that extended period cannot be invoked to demand the service tax. Accordingly, we find that the demands raised for the period prior to 31.03.2013 are barred by limitation.

Irregular CENVAT Credit:

9. In respect of the allegation of irregular credit availed to the tune of Rs.9,87,523/-, we observe that CENVAT Credits of Rs. 6,91,364/- was availed during the period 2013-14 (Oct'13 to March'14), Rs. 2,43,747/- was availed during the period 2013-14 (April'13 to Sept'13) and CENVAT Credit of Rs. 52,412/- was availed on inputs during the period 2012-13 (Oct'12 to March'13). The said credit was disallowed on the following grounds:

- (i) Such credit of tax paid on reverse charge basis against 'Erection Commissioning and Installation Services' and 'Works Contract Services' but there is no reverse charge tax payment system in Erection Commissioning and Installation Services and being a proprietorship concern they are not liable to pay tax on reverse charge basis in WCS;

- (ii) they have not paid any tax under challans in Works Contract Services Accounting Code;
- (iii) they have not produced any documents regarding purchase of inputs for which they are eligible to take credit as shown in ST-3 (Oct'12 to March'13)

9.1. In this regard, we observe that the appellant had paid the Service Tax under the bona fide belief that they are liable to pay service tax on the 'Erection Commissioning and Installation Services' and 'Works Contract Services' under reverse charge. Having accepted the payment, the Department cannot deny the credit on procedural grounds. We observe that the appellant has indicated the availment and utilization of credit in the S.T.-3 Returns filed by them. As they have not suppressed any information, we are of the view that the Department cannot invoke extended period of limitation to deny this credit, which is otherwise eligible to them. We also observe that the CENVAT Credit had been availed on input services like crane hire charges, manpower hire charges, etc., which are required for completion of the project and therefore the same are input services, which renders the appellant eligible to avail the credit. However, due to clerical error they have mentioned the CENVAT Credit availed in the 'inputs' column. We observe that the CENVAT Credit which is otherwise eligible to the appellant cannot be denied on procedural infirmities and accordingly, we hold that the appellant cannot be denied the credit totally amounting to Rs.9,87,523/-. Since there is no dispute regarding receipt and utilization of the services and payment of service tax

on the input service, we hold that this credit availed cannot be denied to the appellant.

9.2. Since the demands confirmed in the impugned order are not sustained, we hold that the demands of interest and penalties confirmed in the impugned order are not sustainable and accordingly, we set aside the same.

9.3. Regarding the late fine of **Rs. 20,100/-** charged for delayed filing of return and penalty has been imposed under Section 77 of the Finance Act, 1994, we observe that the appellant has disputed this demand only on the ground of limitation and inordinate delay in adjudication.

Show Cause Notice not adjudicated within the time-limit prescribed under the statute:

10. In respect of the demands confirmed in the impugned order, the appellant have also taken the ground that the entire demand is barred by limitation as the Show Cause Notice was issued on 20.04.2015 whereas the same was adjudicated vide the impugned order passed on 17.03.2017, which falls beyond the statutory time-limit prescribed under Section 73(4B) of the Finance Act, 1994. We find that the Tribunal, New Delhi in the case of *M/s. Kopertek Metals Pvt. Ltd. & ors. v. Commissioner of CGST (West), New Delhi [Final Order No. 59511-59720 of 2024 dated 25.11.2024 in Excise Appeal No. 52178 of 2022 &ors. – CESTAT, New Delhi]* has held that adjudication must be completed within the time-limit prescribed under the statute. We also observe that the Department has cited the decisions in the case of *M/s. Citicorp Finance India Ltd. v. Commissioner of Service Tax, Delhi-II [2023 (11) TMI 891 – CESTAT, New Delhi]* and *M/s.*

Picasso Digital Media Pvt. Ltd. v. Commissioner, CGST, East Delhi & vice versa [2024 (2) TMI 1160 – CESTAT, New Delhi] to contend that as the appellant has not raised this issue at the adjudication level before the Id. adjudicating authority, they cannot raise this issue at the appellate level. However, we are of the view that legal issues can be raised at any stage in appellate proceedings. The issue of delay in adjudication being a legal issue, they have raised the same before the Tribunal.

10.1. In this regard, we observe that the decisions cited by the Department are not relevant to the facts of this issue. We find that the appellant has also cited the decision rendered in the case of *M/s. VOS Technologies India Pvt. Ltd. Vs The Principal Additional Director General &ors. in W.P.(C) No. 4831 of 2021 dated 10th December, 2024 [Del.-HC]* wherein the Hon'ble High Court has set aside the order on the ground of inordinate delay in completion of the adjudication proceedings. We find that the same view has been taken by the Tribunal, Delhi in the case of *M/s. Kopertek Metals Pvt. Ltd. & ors. v. Commissioner of CGST (West), New Delhi [Final Order No. 59511-59720 of 2024 dated 25.11.2024 in Excise Appeal No. 52178 of 2022 &ors. – CESTAT, New Delhi]*. The relevant portion of the said decision is reproduced below:

"42. The aforesaid discussion would lead to the inevitable conclusion that the impugned order would have to be set aside only for the reason that the adjudication was not completed within the time limit prescribed under sub-section (11) of section 11A of the Central Excise Act."

10.2. Thus, by relying on the decisions cited supra, we hold that the demands confirmed in the impugned order are liable to be set aside as the Show Cause Notice has been adjudicated in a delayed manner and the impugned order has not been passed within the time frame prescribed under the statutory provisions.

11. In the result, we hold that the demand is not sustainable on merits as well as on account of the inordinate delay in completion of the adjudication proceedings in terms of the decision in the case of *M/s. Kopertek Metals Pvt. Ltd. (supra)*.

12. In view of the above discussions, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on **18.02.2025**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd