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

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 76079 of 2017

(Arising out of Order-in-Appeal No. 93/ST-I/KOL/2017 dated 14.03.2017 passed by the Commissioner of Central Excise (Appeal-I), Kolkata, 169, A.J.C. Bose Road, Bamboo Villa, 4th Floor, Kolkata – 700 014)

M/s. Ganges Valley Constructions Private Limited : Appellant
Block CB, Plot No. 8, Sector-I,
Bidhannagar, Salt Lake City,
Kolkata – 700 064 (West Bengal)

VERSUS

Commissioner of Service Tax : Respondent
Service Tax-I Commissionerate,
Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road,
Kolkata – 700 107 (West Bengal)

APPEARANCE:

Shri S.P. Siddhanta, Consultant, for the Appellant

Shri A. Mukherjee, Authorized Representative, for the Respondent

CORAM:

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

FINAL ORDER NO. 77624 / 2025

DATE OF HEARING: 16.10.2025

DATE OF DECISION: 31.10.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The facts of the case are that M/s. Ganges Valley Constructions Pvt. Ltd., Block CB, Plot No. 8, Sector-1, Bidhannagar, Salt Lake City, Kolkata - 700064. W.B. (hereinafter referred to as 'the appellant', in short), were issued a Show Cause Notice vide C. No. V(15)108/ST-Adjn./ADC/12/16356 dated 12.07.2012, demanding Service tax of Rs. 36,48,582/ including cesses, as detailed in Annexure-A to the notice. The demand has been raised on the gross amount received by the appellant for providing 'Work Contract Service' for the period from 2009-10 to 2011-12. The said Notice was adjudicated by the Ld. Additional Commissioner, vide Order-in-Original No. 01/ADC/ST/Kol/2013-14 dated 30.08.2013, wherein he has confirmed the demand of service tax of Rs. 36,48,582/ including cesses under Section 73(2) of the said Act and appropriated the amount already paid by the appellant. He also imposed a penalty of Rs. 36,48,582/ under Section 78 of the said Act.

1.1. The appellant preferred an appeal before the Ld. Commissioner of Central Excise (Appeal-I), Kolkata against the confirmation of service tax, as above, along with cesses, after payment of penalty of Rs. 9,12,146/ (25% of service tax) on 04.10.2013. The Ld. Commissioner (Appeals) vide Order-in-Appeal No. 93/ST-I/KOL/2017 dated 14.03.2017, upheld the demands confirmed in the Order-in-Original dated 30.08.2013.

1.2. Aggrieved by the confirmation of service tax, along with interest and penalty, the appellant has filed this appeal.

2. The appellant contested the demands confirmed in the impugned order on the ground of limitation. It is their submission that the differential service tax has been demanded and confirmed on the allegation that the appellant has not included the value of the free issue materials as provided under Notification No. 23/2009-ST dated 07.07.2009. In this regard, the appellant stated that they were filing ST-3 returns regularly and have not suppressed any information from the Department. It is further mentioned that they have filed the ST-3 return for the half year ending September, 2009 on 24.10.2009 (received by Sri P.

S. Das, Superintendent) and the same was scrutinized by Sri S. P. Guha, on 10.11.2009; after scrutiny, he had given the note as: ”Pl pay the differential short paid interest for delay payment of S. Tax & Cess and intimate."; the officer who has scrutinised the return has not made any mention about non-inclusion of the value of free issue material in the assessable value for the purpose of payment of service tax, as provided under the amendment to Notification No. 23/2009-ST dated 07.07.2009; this led the appellant to believe that they were arriving at the correct assessable value and discharging service tax. The appellant submits that they were informed about the short payment of service tax on account of non-inclusion of value of free issue materials, consequent to the amendment under Notification No. 23/2009-ST dated 07.07.2009, only by the Internal Audit Team; that surprisingly the date of audit has not been mentioned in the notice or order; the audit was conducted on 09/10.02.2011 and nonpayment/short payment of service tax was communicated to them only by means of the 'Audit query no. 1 dated 10.02.2011. The appellant points out that they have given their reply to the audit memo on 10.02.2011 itself; however, the Show Cause Notice demanding service tax for the period of 2009-10 to 2011-12, on the basis of the said audit memo, has been raised only on 12.07.2012, by invoking the extended period of limitation. The appellant further submits that after the audit, they paid service tax including the value of free supply materials and showed the same in the ST-3 returns filed by them. In support of this claim, the appellant furnished copy of the ST-3 returns filed by them for the period October 2011 to March 2012. Thus, the appellant submitted that they have no intention to evade the payment of service tax.

2.1. It is also the case of the appellant that a perusal of the Notice issued would reveal that the said notice was issued for the period 2009-10 to 2011-12 under the Section 73(1) of the said Act and not under the proviso to the Section 73(1) of the said Act which is required in case of demand for the extended period; accordingly, the appellant contends that the demand raised without invoking the proviso to Section 73(1) of the said Act, is barred by limitation. It is further contended demand is also barred by limitation since the notice was issued after one year and five month from the date of audit.

2.2. In support of the above contentions, the appellant has relied on the following decisions:-

(i) The decision of the CESTAT, SZB, Bangalore in the case of *Aditya College of Competitive Exam. Vs. C.C.E., Visakhapatnam reported in 2009(16)S.T.R. 154*, wherein it has been decided that larger period not invocable when show cause notice was issued based on audit objection;

(ii) The decision of the CESTAT, WZB, Ahmedabad in the case of *Vikrant Ispat Vs. C.C.E., Raigad reported in 2007(8)S.T.R. 559* wherein the Tribunal has observed that the Department cannot allege suppression of fact and invoke larger period of limitation on the basis of observation of Audit;

(iii) The decision of CESTAT, WZB, Ahmedabad in the case of *Cambay Organics Pvt. Ltd. Vs. C.C.E., Vadodara reported in 2007(217) EL..T. 586*, wherein it has been decided that larger period not invocable when show cause notice issued based on audit objection; and

(iv) The decision of the CESTAT, WZB, Mumbai in the case of *Ram Steel Rolling & Forgings Mills Vs. C.C.E., Mumbai-III reported in 2006(204) E.L.T. 87,* wherein it has been decided that larger period not invocable when show cause notice issued based on audit objection;

2.3. Regarding merits of the issue, the appellant submits that the amendment to Notification No. 23/2009-ST dated 07.07.2009 is applicable only prospectively for the period after 07.07.2009. Further, it is their contention that the amended provision is not applicable to the works contracts which were executed prior to 07.07.2009, and the works have commenced prior to that date. In this regard, the appellant argues that the lower authorities have not examined this aspect at all.

2.4. The appellant also mentions that during the course of hearing before the Ld. Commissioner (Appeals) on 25.10.2016, Shri S. P. Siddhanta, Authorized Representative of the appellant company, had submitted a copy of the decision of the CESTAT, Principal Bench, New Delhi in the case of *Bhayana Builders (P) Ltd. v. Commissioner of Service Tax, Delhi reported in 2013(32)S.T.R. 49(Tri.- LB),* wherein the Larger Bench has decided that value of free supply materials is not to be added to arrive at the gross value for determining their service tax liability; however, the Ld. Commissioner (Appeals) has not recorded any finding in the impugned order with respect to applicability of the case law of *Bhayana Builders (P) Ltd.(supra)*in the present case.

2.5. Accordingly, the appellant submitted that the amount of service tax along with interest and penalty (25% of the tax) paid by them is liable to be refunded to them.

2.6. In view of the above submissions, the appellant prayed for setting aside the demands of service tax, along with interest and penalty, as confirmed in the impugned order and allowing their appeal.

3. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings of the lower authorities.

4. Heard both sides and perused the appeal records.

5. We observe that the issue involved in the present appeal pertains to non-inclusion of the value of free issue material in the assessable value for the purpose of payment of service tax, as provided under the amendment to Notification No. 23/2009-ST dated 07.07.2009. The appellant has contested the issue on merits as well as on limitation.

6. Regarding the ground of limitation raised by the appellant, we find that that the appellants were filing ST-3 returns regularly. It has been submitted by the appellant before us that they have filed the ST-3 return for the half year ending September, 2009 on 24.10.2009 (received by Sri P. S. Das, Superintendent) and the same was scrutinized by Sri S. P. Guha, on 10.11.2009, who, after scrutiny, gave the note as: ”Pl pay the differential short paid interest for delay payment of S. Tax & Cess and intimate." We find that on 10.11.2009, the amendment to Notification No. 23/2009-ST dated 07.07.2009 had already come into effect. However, the officer who has

scrutinised the return has not made any mention about non-inclusion of the value of free issue material in the assessable value for the purpose of payment of service tax, as provided under the amendment to Notification No. 23/2009-ST dated 07.07.2009. We observe that this led the appellant to believe that they were arriving at the correct assessable value. Thus, we agree with the submission of the appellant on this score that they have not suppressed any information from the Department and there was no intention to evade the tax payment, if any, on their part.

6.1. In this connection, we also take note of the appellant's submission that they were informed about the short payment of service tax on account of non inclusion of value of free issue materials, consequent to the amendment under notification No. 23/2009-ST dated 07.07.2009, only by the Internal Audit Team. It is seen that the audit was conducted on 09/10.02.2011 and nonpayment/short payment of service tax was communicated to the appellant by means of the 'Audit query no. 1 on 10.02.2011. The appellant has given their reply to the audit memo on 10.02.2011 itself. However, we find that the Show Cause Notice demanding service tax for the period of 2009-10 to 2011-12, was issued on the basis of the said audit memo only on 12.07.2012, by invoking extended period of limitation. Further , we observe that after the audit, the appellant have paid service tax including the value of free supply materials and showed the same in the ST-3 returns filed by them. In support of this claim, the appellant furnished copy of the ST-3 returns filed by them for the period October 2011 to March 2012. Thus, we observe that the appellant have no intention to evade the payment of service tax and they have complied with the audit as soon as the issue was pointed out to them. Thus, we find merit in the submission of the appellant that they have no intention to evade the payment of service tax by excluding the value of free supply materials in the assessable value.

6.2. Further, on perusal of the Notice issued, as pointed out by the appellant, it is observed the said notice was issued for the period 2009-10 to 2011-12 under 'Section 73(1)' of the said Act and not under the 'proviso' to Section 73(1) of the said Act, which is required in case of demands raised for the extended period. It is also pertinent to note that the notice was issued after one year and five month from the date of audit. Therefore, the demand raised without invoking the proviso to Section 73(1) of the said Act, is barred by limitation. We also take note of the fact that during the relevant period when the notice was issued, the notice for normal period could be issued for a maximum period of 18 months from the relevant date. In view of the above findings, we hold that the demand confirmed by invoking extended period of limitation in the impugned order is not sustainable and hence we set aside the same.

7. Regarding merits of the issue, we find that the appellant has cited the decision of the CESTAT, Principal Bench, New Delhi in the case of *Bhayana Builders (P) Ltd. v. Commissioner of Service Tax, Delhi reported in 2013(32)S.T.R. 49(Tri.- LB),* wherein the Larger Bench has decided that value of free supply materials is not to be added to arrive at the gross value for determining the service tax liability. However, the Ld. Commissioner (Appeals) has not given any finding on the applicability of this

decision to the appellant's case. From the facts of the case, we observe that the decision of the Larger Bench of the Tribunal in the case of *Bhayana Builders (P) Ltd. (supra)* is squarely applicable in this case. Further, it is seen that the above decision of the Larger Bench has been affirmed by the Hon'ble Apex Court as reported in *2018 (10) G.S.T.L. 118 (S.C.),* wherein it has been laid down that the value of free supply materials is not includable in the assessable value. For ease of reference, the relevant observations of the Hon'ble Apex Court in the said judgement are reproduced below: -

> *"16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider."*

7.1. Thus, by relying on the decision cited supra, we hold that the value of free supply materials is not includable in the assessable value for determining the service tax liability of the appellant. Accordingly, we hold that the demand of Service Tax confirmed in the impugned order is not sustainable on merits, Consequently, we set aside the same.

8. As the demand of Service Tax against the appellant is not sustained, the question of demanding interest or imposing penalty does not arise.

9. In the result, 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 **31.10.2025**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd