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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75141 of 2016

(Arising out of Order-in-Original No. 17/Commr/ST-II/Kol/2015-16 dated 30.10.2015 passed by the Commissioner of Service Tax, Service Tax-II Commissionerate, Kolkata, KendriyaUtpad Shulk Bhawan, 180, Shantipally, Rajdanga Main Road, Shantipally, Kolkata – 700 107)

M/s. Alfa Aluminium Private Limited : Appellant
1/1, Camac Street, 5th Floor,
Kolkata – 700 016

VERSUS

Commissioner of Service Tax-II : Respondent
KendriyaUtpad Shulk Bhawan,
180, Shantipally, Rajdanga Main Road, Shantipally,
Kolkata – 700 107

APPEARANCE:

Shri Tarun Chatterjee, Advocate,
Shri Raju Mondal, Advocate,
For the Appellant

Shri R.K. Agarwal, Authorized Representative,
For the Respondent

CORAM:

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

FINAL ORDER NO. 77916 / 2025

DATE OF HEARING / DECISION: 11.12.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Alfa Aluminium Pvt. Ltd. (hereinafter referred to as 'the appellant'), is a private limited company having their registered premises at 1/1, Camac Street, 5th floor, Kolkata 700 016. The appellant has been holding Service Tax Registration No. AACCA6164CST001 for 'Industrial & Commercial Construction', 'Construction of Complex Service', 'Transportation of Goods by Road Service' & 'Works Contract Service'. The appellant is primarily engaged in providing services in relation to fabrication & installation of aluminium architectural systems (namely, aluminium doors, windows etc.).

1.1. Based on specific information indicating evasion of Service Tax, an investigation was initiated against the appellant by conducting a search, by the officers of the Directorate General of Central Excise Intelligence, Kolkata Zonal Unit. During the course of search, various incriminating records / documents were recovered from the appellant.

1.2. On completion of the investigation, a Show Cause Notice bearing F. No. 135/KZU/KOL/ST/2013/6868 dated 21-10-2013, was issued to the appellant demanding service tax, for the period from 2008-09 to 2012-13.

1.3. After due process, the said notice was adjudicated by the Commissioner vide impugned Order-in-Original No. 17/Commr/ST-II/Kol/2015-16 dated 30.10.2015, wherein the Ld. Commissioner of Service Tax, Kolkata-II Commissionerate, has confirmed the demand of Service Tax, along with interest, against the appellant. He also imposed an equal amount of tax as penalty.

1.4. Aggrieved by the confirmation of the demand of Service Tax , along with interest and penalty thereon, as confirmed in the impugned order, the appellant has filed this appeal.

2. During the course of hearing, the appellant submitted that they have paid Service Tax under the category 'Commercial or Industrial Construction Service', on 33% of the total amount charged, after availing abatement, in terms of Notification No. 1/2006-ST, dated 01-03-2006; they have also paid service tax under Works Contract (Composition Scheme for Payment of Service Tax) @4%, as per Notification No. 32/2007 -ST, dated 22-05-2007. It is also stated that as per the conditions of the said

Notification No. 1/2006-ST, dated 01-03-2006 , the appellant was not entitled to avail CENVAT Credit; however, they had taken CENVAT Credit of Rs. 64,00,247/- on 'inputs' and Rs.43,41,911/- on 'input service', totally amounting to Rs.1,07,42,158/-; as the appellant had availed such CENVAT Credit, the Department alleged that the appellant was not eligible for the benefit of the Notification No. 1/2006-ST, dated 01-03-2006. It is also stated that similarly, the concessional rate of duty as provided under the Works Contract (Composition Scheme for Payment of Service Tax), @4% as provided under Notification No. 32/2007 -ST, dated 22-05-2007, was not extended as the appellant on the ground that the appellant has not exercised the option to avail the benefit of the scheme.

2.1. In this regard, the appellant's submission is that if the concessional rate of 4% as provided under Notification No. 32/2007 -ST, dated 22-05-2007 is not extended, then the value of services needs to be determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006, by excluding the value of the goods and VAT/WCT from the gross amount charged; however, the Department has demanded Service Tax by including the value of the goods used in execution of the 'works contract', which is bad in law and against the mandate of the Act. The appellant points out that during the impugned period, the total value of material and stores consumed is Rs.36,47,43,620/- which needs to be excluded in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006.

2.2. The appellant has also submitted the details of value of goods used in execution of the works contract as per audited financial statements, as under:

Period	Amount (Rs.)
2008-09	10,27,26,156
2009-10	9,40,37,908
2010-11	9,26,86,745
2011-12	3,33,45,992
2012-13	4,19,46,819
Total	**36,47,43,620**

2.3. The appellant has further submitted that they have also paid VAT/WCT to the extent of Rs. 3,11,88,476/-, which needs to be excluded from the gross amount charged, in terms of Explanation (a) of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006. To this extent, they have submitted the details of VAT/WCT paid, as under:

Year	VAT/WCT Paid (Rs.)
2008-09	36,04,190.00
2009-10	86,25,490.00
2010-11	1,25,84,305.00
2011-12	32,43,367.00
2012-13	31,31,124.00
TOTAL	**3,11,88,476.00**

2.4. The appellant submitted a Chartered Accountant's Certificate certifying the value under Rule 2A (i) of the Service Tax (Determination of Value) Rules 2006, Service Tax paid and payable; it is their stand that if the aforesaid amount are excluded from the gross amount charged and the taxable value is determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006, then there is no non-payment/short payment of service tax during the impugned period. According to the appellant, they have paid excess Service Tax amounting to Rs. 61,538/-, for the said period, as per the above calculation.

2.5. The appellant mentions that the Ld. adjudicating authority has held that the appellant are not entitled to the benefit of Notification No. 32/2007-ST, dated 22-05-2007 merely because they have not exercised the option; that similarly, the benefits of Notification No. 1/2006-ST, dated 01-03-2006 and Notification No.12/2003-ST , dated 20-06-2003, were denied on the ground that the appellant has taken credit on 'inputs'. The appellant submits that the ld. Adjudicating Authority has deprived all the benefits and demanded of Service tax by adding the value of goods in the 'gross amount charged', which is impermissible in law.

2.6. In support of their contention that the value of service needs to be determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006 by excluding the value of the goods and VAT/WCT from the gross amount charged, the appellant relied on the decision of the Hon'ble Supreme Court in the case of *Commissioner of Cus. & C. Ex. &S.T., Noida Versus Interarch Building Products Pvt. Ltd. reported in 2023 (73) G.S.T.L. 433*

(S.C.) / (2023) 6 Centax 40 (S.C.) wherein on similar facts and circumstances, the Hon'ble Apex Court has held that the value of services has to be determined as per Rule 2A Service Tax (Determination of Value) Rules, 2006.

2.7. Furthermore, the appellant has submitted that they are a registered assessee and were regular in furnishing the ST-3 returns and also with respect to payments of service tax; that there is no allegation in the Notice that the appellant has not furnished the ST-3 returns or suppressed any information in the return. It is also stated that payment of service tax on 33% of the value / @4% was duly disclosed in the returns; the same has also been recorded in the impugned order. Thus, it is contended by the appellant that non-exercise of the option cannot be and shall not be a valid ground for invocation of the larger period. They also submit that further, no findings whatsoever is recorded regarding suppression, fraud etc in the impugned order. In this regard, the appellant points out that the Show Cause Notice was issued by invoking the larger period of limitation; the demand in this case has been issued for the period 2008-09 to 2012-13 and the Show Cause Notice was issued on 21-10-2013; the normal period is eighteen months (18) from the relevant date i.e. from 01-10-2011 to 31-03-2013 25-04-2013 and thus, it is contended that the demand beyond 18 months i.e. demands for the period 2008-09 to 30-09-2011 is barred by limitation.

2.8. In view of the above submissions, the appellant prayed for reworking the duty liability, if any, for the normal period of limitation, by excluding the value of the goods and VAT/WCT from the gross amount charged.

3. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order. It is the submission of the Ld. Departmental Representative that the appellant has availed CENVAT Credit on the 'inputs' and hence, are not eligible for the benefit of the Notification No. 01/2006-ST dated 01.03.2006; that they have not exercised the option to avail the composition Scheme. Hence, it is his contention that the ld. adjudicating authority has rightly demanded Service Tax on the gross value charged by the appellant.

4. Heard both sides and perused the appeal records.

5. We observe that, in the instant case, the appellant has paid Service Tax under the category 'Commercial or Industrial Construction Service', on 33% of the total amount charged, after availing abatement, in terms of Notification No. 1/2006-ST, dated 01-03-2006 . They have also paid Service Tax under the Works Contract (Composition Scheme for Payment of Service Tax) @4%, as per Notification No. 32/2007 -ST, dated 22-05-2007. It is seen that as per the conditions of the said Notification No. 1/2006-ST, dated 01-03-2006 , the appellant was not entitled to avail CENVAT Credit on the 'inputs'. However, they availed CENVAT Credit of Rs.64,00,247/- on 'inputs' and Rs.43,41,911/- on 'input service', totally amounting to Rs.1,07,42,158/-. Thus, we find that the appellant is not eligible for the benefit of Notification No. 1/2006-ST, dated 01-03-2006. Accordingly, we hold that the benefit of the said notification has been rightly denied by the ld. adjudicating authority.

5.1. We also find that the Ld. adjudicating authority has held that the appellant is not entitled to the benefit of Notification No. 32/2007-ST, dated 22-05-2007 as they have not exercised the option. We are of the view that availing the option is a procedural requirement to avail the exemption benefit. The substantial benefit of the exemption as provided under the Notification No. 32/2007-ST, dated 22-05-2007 cannot be denied on the ground of procedural infirmities. We are of the view that the payment of service tax @4% by the appellant is enough to conclude the appellant's willingness to avail the benefit. Accordingly, we hold that said benefit of concessional rate of service tax as provided under the Notification No. 32/2007-ST, dated 22-05-2007 cannot be denied on the ground of procedural infirmities.

5.2. However, we find that the appellant in their submissions has submitted that they are not claiming the exemptions as provided under either Notification No. 01/2006-ST dated 01-03-2006 or Notification No. 32/2007-ST dated 22-05-2007, and have given their willingness to pay the Service Tax without availing the abatement as provided under Notification No. 01/2006-ST and the concessional rate of duty @4%. The submission of the appellant is that in such case, the Service Tax cannot be demanded on the gross value charged.

5.3. It is observed from the records that after denying the benefits of the Notification Nos. 1/2006-ST, dated 01-03-2006 and 32/2007-ST, dated 22-05-2007, Service Tax has been demanded by adding the value of goods in the 'gross amount charged'. In this context, it is pertinent to note that if the concessional rate of 4% as provided under Notification No.

32/2007-ST, dated 22-05-2007 is not extended, then the value of service needs to be determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules ,2006 by excluding the value of the goods and VAT/WCT from the gross amount charged. However, the Department, in the present case, has demanded Service Tax by including the value of the goods used in execution of the 'works contract', which is legally not sustainable. In support of our view, we rely upon the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Cus. & C. Ex. &S.T., Noida Versus Interarch Building Products Pvt. Ltd., reported in 2023 (73) G.S.T.L. 433 (S.C.) / (2023) 6 Centax 40 (S.C.)*** wherein, under similar facts and circumstances, the Hon'ble Apex Court has held that the value of service has to be determined as per Rule 2A Service Tax (Determination of Value) Rules 2006. For ready reference, the relevant part of the said judgment is reproduced below:

> ***"8.4*** *It is required to be noted that thereafter the above service elements have found a statutory recognition as part of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 w.e.f. 1-6-2007 which has been referred to hereinabove. The applicability of Rule 2A has been dealt with and considered by this Court in extenso in the case of Larsen and Toubro (supra). Therefore, as per the law laid down by this Court in the case of 'works contract service' an assessee is liable to pay the service tax on the service element/value of the service rendered and the sales tax/tax on the element of goods transferred pursuant to the contract.*
>
> ***8.5*** *In light of the above now the next main question posed for consideration before this Court is required to be considered namely whether despite Rule 2A of the Service Tax (Determination of Value) Rules, 2006 and the Composite Scheme still the assessee is entitled to take the total contract value which includes both goods and services in terms of Section 67 of the Act, 1994 and remit service tax on the entire value as works contract service and the assessee is also entitled to avail Cenvat credit?*

8.6 *Rule 2A applicable prior to 1-7-2012 is reproduced hereinabove. It is to be noted that Rule 2A is the specific provision for determination of value of taxable service in relation to services involved in the execution of a works contact shall be determined by the service provider in the manner provided under Rule 2A(1)(i) i.e. value of works contract service determined shall be equivalent to the gross amount charged for the works contract. As per explanation to Rule 2A gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the works contract. The position is made more clear post 1-7-2012. Post 1-7-2012 as per Rule 2A value of service portion in the execution of a works contract shall be determined taking into consideration the value of service portion in the execution of a works contract equivalent to the gross amount charged for the works contract less the value of property of goods transferred in the execution of the said works contract. Therefore, as such the things which were already there as per the decision of this Court in the case of Gannon Dunkerly and Co. (supra) and Rule 2A earlier has been made explicitly clear.*

8.7 *However, as per the Composition Scheme vide Notification No. 32/2007-S.T., dated 22-4-2007 by which works contract (Composition Scheme for payment of Service Tax) Rules, 2007 came to be introduced, as per Rule 3(1) and notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge the service tax at the rate specified in Section 67 of the Act, by paying an amount equivalent to 2% of the gross amount charged for the works contract. Explanation specifically provides that gross amount charged for the works contract shall not include the VAT or sales tax, as the case may be paid on transfer of property in goods involved in the execution of the said works contract. At this stage, it is required to be noted that post 1-7-2012 Rule 2A specifically provides that the taxable service shall not take Cenvat credit of duty or cess paid on inputs used in or in relation to said works contract, under the provisions of Cenvat Credit Rules, 2004.*

8.8 *It is the case on behalf of the respondent-assessee that as in Rule 2A and even in the Composition Scheme the word used are subject to the provisions of Section 67 the assessee had an option to pay the service tax on the entire contract value i.e. on gross amount charged by the service provider and that Rule 2A is not compulsory and the Composition Scheme is optional. However, the aforesaid has no substance. If the submission on*

behalf of the assessee is accepted in that case Rule 2A and the Composition Scheme shall become otiose.

8.9 *With respect to the 'works contract service' and/or the Composition Works Contract the valuation has to be made as per Rule 2A of the Valuation Rules, 2006. Even as per the Composition Scheme vide Notification No. 32/2007, dated 22-4-2007 an assessee has an option to discharge the service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act by paying equivalent to 2% of the gross amount charged for the works contract. It is to be noted that Rule 3(1) provides notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006. Therefore, as per the Scheme of the Act the determination of value of service portion in the execution of the works contract is to be made as per Rule 2A, however with an option to the assessee to avail the benefit of Composition Scheme. Therefore, either the assessee has to go for Composition Scheme or go for Determination of Value as per Rule 2A and the assessee has to pay service tax on the service element and can claim Cenvat credit on the said amount only.*

9. *In view of the above the impugned judgment and order passed by the CESTAT taking the contrary view is unsustainable by which it is held that the assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as 'works contract' and the assessee is also entitled to avail the Cenvat credit on the same.*

9.1 *However, at the same time the service tax needs to be paid in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2006 and since the assessee has not opted for composition scheme, the matter is to be remitted back for re-computation of the demands in terms of Rule 2A. As the issue with respect to the extended period of limitation has also not been decided by CESTAT the matter is to be remanded to the CESTAT to decide the issue of limitation.*

10. *In view of the above and for the reason stated above, the present appeal succeeds. The impugned judgment and order passed by the CESTAT is hereby quashed and set aside and it is held that the assessee is not entitled to take the total contract value which includes both goods and services and remit service tax on the value as works contract service and, in the process, also entitled to avail the Cenvat credit on the entire amount. It is observed and held that the assessee has to pay the service*

tax on the value of services as per Rule 2A of the (Determination of Value) Rules, 2006 and thereafter to avail the Cenvat credit accordingly. However, it is also observed and held that demand for the period January, 2007 to May, 2007 is unsustainable.

10.1 *In that view of the matter now the service tax needs to be computed in terms of Rule 2A of the (Determination of Value) Rules, 2006 and as the assessee has not opted for the composition scheme, the matter is remitted back to the CESTAT for re-computation of the demands in terms of Rule 2A.*

11. *As observed hereinabove the Tribunal has also not decided the issue of extended period of limitation. Therefore, while quashing and setting aside the impugned judgment and order passed by the CESTAT, the matter is remitted back to the CESTAT limited only to decide the issue of limitation and re-computation of the demands in terms of Rule 2A. The aforesaid exercise be completed by the CESTAT on remand within a period of three months from the date of the present order."*

5.4. Thus, by following the decision of the Hon'ble Apex Court cited supra, we hold that the value of service needs to be determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006 by excluding the value of the goods and VAT/WCT from the gross amount charged. For this purpose, we find that the appellant has already submitted a certificate from a Chartered Accountant. However, to check the correctness of the claims made by the appellant on the value of goods used and the VAT/WCT paid, for working out the service tax liability as per our observations supra, we are of the opinion that the matter needs to be remanded back to the adjudicating authority.

6. Regarding invocation of extended period of limitation to demand Service Tax in this case, we take note of the fact that the appellant is a registered assessee with the Service Tax department and they were regular in filing their ST-3 returns as well as in their payments of tax. We find that there is no

allegation in the Notice that the appellant has not furnished the ST-3 return or suppressed any information in their returns. We also find that the appellant has disclosed the payment of Service Tax on 33% of the value / payment of service tax @4% in the returns filed by them and the same is also recorded in the impugned order. Further, no findings whatsoever have been recorded regarding suppression, fraud, etc., in the impugned order. Under such facts and circumstances, we hold that extended period of limitation cannot be invoked in this case to demand Service Tax. Accordingly, we set aside the demand of Service Tax confirmed in the impugned order, by invoking the extended period of limitation.

6.1. In this regard, we find that the Show Cause Notice in this case was issued covering the period from 2008-09 to 2012-13, on 21.10.2013. The normal period of limitation during the relevant period was eighteen months from the relevant date. Accordingly, we hold that the demand confirmed in the impugned order beyond 18 months is barred by limitation. For quantifying the service tax liability, if any, for the normal period of limitation, as per our observations supra, the matter needs to be remanded back to the adjudicating authority.

6.2. We also find that as suppression of facts with an intention to evade tax is not established in this case, no penalty is imposable on the demand of Service Tax, if any, confirmed for the normal period of limitation.

7. In view of the above discussions, we pass the following order:

(i) The value of services needs to be determined in terms of Rule 2A(i) of the Service Tax (Determination of Value) Rules 2006 by excluding the value of the goods and VAT/WCT from the gross amount charged.

(ii) The demand of Service Tax confirmed in the impugned order beyond the normal period of limitation, i.e., 18 months, is barred by limitation.

(iii) For quantifying the Service Tax liability, if any, for the normal period of limitation, as per our observations supra, the matter is remanded back to the adjudicating authority.

(iv) As the issue pertains to the period from 2008-09 to 2012-13, the adjudicating authority is directed to decide the issue within four months from the date of receipt of this order, after observing the principles of natural justice. The appellant is also directed to co-operate with the adjudicating authority and furnish all the relevant information to finalise the Service Tax liability, if any.

(v) As suppression of fact with the intention to evade tax is not established, no penalty is imposable on the demand of Service Tax, if any, confirmed for the normal period of limitation.

8. The appeal filed by the appellant is disposed of by way of remand, as per the above terms.

(Operative part of the order was pronounced in open court)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd