CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. ST/86642/2013
ST/CO/91099/2013

(Arising out of Order-in-Original No. 20/ST/HB/12-13 dated 14.12.2012 passed by Commissioner of Service Tax, Mumbai-I)

Commissioner of Service Tax **Appellant**
Mumbai-I
5th floor, New Central Excise Bldg.,
Maharshi Karve Road,
Churchgate, Mumbai 400 020

Vs.

Navdeep Constructions Co. **Respondent**
2, Vireshwar Kunj,
Tejpal Road,
Vile Parle (E), Mumbai 400 057

Appearance:

Shri M.K. Sarangi, Authorised Representative for the Appellant
Shri Prakash Shah, Advocate for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85732/2019**

Date of Hearing: 18.01.2019
Date of Decision: 18.01.2019

PER: SANJIV SRIVASTAVA

This appeal filed by revenue is directed against order in original No. 20/ ST/HB/2012 dated 14.12.2012 of the Commissioner Service Tax Mumbai 1. By the said Commissioner has held as follows:

"The Show Cause Notice is dropped as being not maintainable, being not correct, proper and tenable, both in fact and law."

1.2 Respondents have filed cross objections in the matter.

2.1 Pursuant to intelligence that Respondents namely M/s Navdeep Construction Company were providing services of management, maintenance or repairs of roads, without obtaining registration as service provider and were not paying service tax, enquiries were initiated.

2.2 Respondents responded stating that though they were contractors of Municipal Corporation of Greater Mumbai (referred as MCGM), they were not reconditioning any goods equipments, maintenance or management of any immovable property etc., hence they did not qualify as provider of taxable service. On verification of various documents and work order submitted by the respondent during the course of investigation Service tax authorities were of the view that services provided against work order as detailed below will fall within category of taxable service defined as "Management, Maintenance and Repair Services."

S No	Work Order No	Scope of Work	Work order Cost
1	Dy. Ch Eng./10141Rds & Tr dtd 23.01.2008	Widening and improvement of various roads to eastern suburbs in S Ward (s-1)	98525578
2	Dy. Ch Eng./10141Rds & Tr dtd 23.01.2008	Widening and improvement of various roads to eastern suburbs in S Ward (s-2)	68965810
3	Dy. Ch Eng./170/swd/es dtd 09.04.2008	ES-22 Training and widening of boundary nalla	101696495
4	CE/PD/7166/II dtd 06.11.2006	Repair to Dr Babasaheb Ambedkar Municipal Maternity Home.	13111761
5	CE/PD/425/II dtd 28.07.2006	Beautification of Shyam Nagar Talao	
6	Dy. Ch Eng./1623/swd/es	Improving, Widening	110247253

	dtd 16.05.2006	deepening remodeling of saphed pool nalla	
7	Dy. Ch Eng./55/swd/es dtd 03.04.2006	Traiming of Vashi Nall as per BRIMSTOWAD	45663494
8	Dy. Ch Eng./006/swd/es dtd 03.04.2006	Repairing of Collapse Wall on nalla	9101383
9	Dy. Ch Eng./59/swd/es dtd 03.04.2006	Improving construction of SWD and renovation of drain culverts, nalla etc.	11195798
10	Dy. Ch Eng./0062/swd/es dtd 03.04.2006	Converting the pipe culvert into box culvert and remodeling	7090518
11	Dy. Ch Eng./2409/Bridges & MUTP dtd 31.08.2009	Widening & Reconstruction of Bridge	27256058
12	Dy. Ch Eng./11278/swd/es dtd 18.02.2009	Reconstruction off Nalla	336587286

2.3 After completion of investigations, a show cause notice dated 14th October 2010 was issued to the respondents asking them to show cause as to why-

(i) The service tax amounting to Rs. 17,77,90,559/- (Rupees Seventeen Crore Seventy Lakhs Ninety Thousand and Five Hundred Fifty Nine Only), Education Cess Rs 35,45,812/- (Rupees Thirty Five Lakhs Forty Five Thousand Eight Hundred Twelve only} and Higher Education Cess Rs 14,99,826/- (Rupees Fourteen Lakhs Ninety Nine Thousand Eight Hundred and Twenty Six Only), totally amounting to Rs 18,23,36,197/- (Eighteen Crore Twenty Three Lakhs Thirty Six Thousand One Hundred and Ninety Seven Only). On the service tax i.r.o services provide to various clients under category Management, Maintenance or Repairs for which they have collected Service Tax from them and did not remit the said mandatory liability during the period 01.04.2005 to 31.03.2010 should not be demanded and recovered from

them under proviso to the Section 73 (1) of the said act read with provision of section 68 (ibid).

ii. Interest under Section 75 of the Finance Act, 1994 as amended should not be demanded on total Service Tax demanded of Rs 18,23,36,197/-.

iii. Penalty under Section 76 of the Chapter V of the Finance Act, 1994 should not be levied on M/s Navdeep Construction Company for failing to pay the Service Tax.

iv. Penalty under Section 77 should not be imposed on M/s Navdeep Construction Company for not furnishing the desired information during the course of investigation not producing the required documents and for not submitting the information in response to summons and intentionally suppressing the information.

v. Penalty under Section 78 of the Act, 1994 should not be imposed on M/s Navdeep Construction Company for failing suppressing the value of taxable service with intention to evade the Service Tax.

2.4 The show cause notice has been adjudicated by the Commissioner, as per his order referred in para 1, supra.

2.5 Aggrieved by the order, revenue has preferred this appeal. In response to the appeal, respondent have filed the cross objection.

3.1 In their appeal, revenue has assailed the impugned order and stated as follows:

i. The adjudicating authority has in his order merely harped on the fact that the charges in the notice were scantily drafted while proposing that services provided by the respondent were taxable as Management, Maintenance or Repair Services. The fact that the said notice was not elaborate cannot be a reason to drop the same.

ii. Te adjudicating authority erred in merely examining the nature of activities mentioned in contracts listed from 1 to 12 of the table appearing at page of the impugned order. Adjudicating Authority has after examination concluded that the activities undertaken would not fall within the scope of Management, Maintenance or Repair Services. However he failed to appreciate that there were 94 contracts involving sum of Rs 178,29,20,112/- against 12 contracts involving sum of Rs 82,94,41,434/-. The adjudicating authority should have examined each of the contracts and given a finding in respect of each contract separately. By merely examining few contracts and that too only on the basis of submissions made by the noticee, adjudicating authority erred in applying those findings to all the contracts.

iii. Further he erred in holding that the notice was based on the figures appearing in balance sheet and not on the basis of the actual receipts against the taxable services provided by him. The respondents have never contested the figure, in their reply dated 21.02.2011 they have only stated that activities were not in the nature of repair and maintenance service or that the amounts received pertained to services provided prior to date of levy i.e. 16.06.2005.

iv. Adjudicating authority erred by not examining the veracity of submissions made by noticee against all the facts and evidences himself, but has merely accepted the same by putting the onus on the department.

v. He has erred in holding that there were no grounds for invoking extended period of limitation. All the facts came to light only after investigation s were made by the Anti Evasion Section of Service Tax -1 Commissionerate, Mumbai.

3.2 In the cross objection filed respondents have supported the impugned order. In the cross objections respondents have not challenged any part of the impugned order. Hence the cross objections which are only in nature of para wise comments on the appeal filed by the revenue are not being reproduced here.

4.1 We have heard Shri M K Sarangi, Joint Commissioner, Authorized Representative or Appellant (Revenue) and Shri Prakash Shah, Advocate for the Respondents.

4.2 Arguing for the Appellant Revenue, Learned Authorized Representative reiterated the grounds taken in the appeal filed by the revenue and stated-

i. From the plain reading of O-I-O it is quite evident that adjudicating authority has failed to examine the facts and evidence in right ernst. He has only commented on the show cause notice adversely rather than examining the issue vis a vis the evidences gathered during the investigation and the reply submitted by the noticee.

ii. Adjudicating authority failed to consider all the evidences that were produced before him during the course of adjudication proceedings.

iii. He has failed to appreciate that apart from the contracts mention in the table in show cause notice there were large number of other contracts. No findings have been recorded contract wise for all the contracts.

iv. Adjudicating authority has held that extended period of limitation would not be applicable in the present case. The said finding is contrary to the facts available on record. The case came to light only as result of investigations undertaken by the anti evasion. All the documents were either called for from the respondents on summon or recovered or resumed from them. Since the information with regards to provisioning of the taxable service was never disclosed to the department respondents were definitely guilty of suppressing the relevant facts hence the extended period of limitation was definitely applicable in the facts of the present case.

v. The services provided by the respondents would merit classification under category of Management, Maintenance or Repair Services, and hence they are liable for payment of service tax. Sufficient evidence to that effect has been reproduced in the Show Cause Notice, Commissioner should have given a finding after discussing the evidences rather than criticizing the show cause notice or the investigation in the matter.

4.3 Arguing for the respondents learned Advocate submitted that-

i. The order of adjudicating authority is well balanced and reasoned. He has examined all the facts and evidences and concluded accordingly.

ii. It is not correct for the revenue to contend that there were 94 Contracts under consideration for making the demand. In fact Show Cause Notices refers to only 12 contracts. Certain contracts were referred by them while filing the reply to show cause notice to show that payments which they received during the period of demand as per show cause notice pertained to services provided by them prior to introduction of taxable services under category of Management, Maintenance or Repair Services.

iii. Adjudicating authority has in fact examined all the twelve contracts, vis a vis the definition of taxable services under the category of Management, Maintenance or Repair Service along with the instruction, circulars issued by CBEC from time to time and also the relevant case laws. After consideration of all the facts and law he has concluded that the services provided under these contract were not falling under the category of management maintenance or repair services. In para 56.1 to 77 of the order in original Commissioner has considered the classification of services vis a vis the contracts referred in show cause notice.

iv. He has also examined vis a vis the quantification of demand in para 78 to 81. His observation that the demand is based upon the balance sheet figures and not the on the basis of actual receipt for the services provided during the period demand cannot faulted with.

v. On the issue of limitation also Commissioner has examined the issue in detail in para 82 to 86 of the order. He has after examination of the facts of case vis a vis the law on subject concluded against invoking extended period of limitation.

5.1 We have considered the submissions made in appeal, cross objections and during the argument of appeal by both the sides and the impugned order.

5.2 Since the appeal filed by revenue refers to 94 contracts that were subject matter of show cause notice, whereas we found that only twelve were referred to in show cause notice, Authorized Representative appearing for revenue was directed by us to produce the complete adjudication file and the review file for examination. However even after adjournment of the matter twice the same could not be produced. Learned Authorized Representative produced a letter dated 12.12.2018 of the Additional Commissioner 9Review) CGST Mumbai West stating that the said files cannot be traced. Said letter of the Additional Commissioner is reproduced below:

OFFICE OF THE COMMISSIONER OF CGST, MUMBAI WEST
1st Floor, Mahavir Jain Vidyalaya, C.D.Barfiwala Marg,
Andheri (West), Mumbai-58.

F.No.CGST/MW/HQ/Review/Misc/02/2018-19
Mumbai, the December, 2018

MOST URGENT

To,
The Additional Commissioner(AR),
CESTAT, Mumbai

Sub:- Appeal No. ST/86642/13-Mum filed by the Department in he matter of M/s Navdeep Construction Company – reg.

Please refer to your letter Appeal No.ST/86642/13 dated 10.12.2018 on the above subject calling for the Adjudication record and the Review record in the matter.

In this connection, it is to inform that the D. C., Investigation, CGST, Mumbai West has reported that the case file pertaining to the aforesaid appeal filed by the department in the matter of Navdeep Construction Company could not be traced and hence the desired documents could not be submitted. However efforts are being made to trace the file from the files handed over by the Legacy Cell, since the SCN has been issued by the erstwhile Service Tax-V Commissionerate.

If possible the matter listed for hearing on 13.12.2018 may please be adjourned and the same may be intimated to this office so that this office will try to submit the desired documents.

Manish 12/12/18
(Manish Mohan)
Additional Commr.(Review)
CGST, Mumbai West

5.3 Since the revenue has failed to produce the files which are not traceable, we are not in position to accept the contention of the revenue that there were 94 contracts under consideration in show cause notice. Hence the matter needs to be limited to the contracts referred to in show cause notice.

5.4 Respondents had in their response to show cause as recorded by Commissioner in para 38.1 to 38.6 of his order, submitted the detail service rendered by respondent to MCGM year wise and service wise. The detailed chart produced by the respondents is reproduced below:

ANNEXURE 'C'

NAVDEEP CONSTRUCTION CO

YEARWISE INCOME UNDER DIFFERENT CONTRACTS

SR.NO	WORK ORDER No. & Date	NAME OF WORK	2005-06	2006-07	2007-08	2008-09	2009-10	TOTAL
1	DyChE/1606/30-03-2000	POSTAL COLONY SWD				246507		246507
2	DyChE/6621/06-11-2000	N.A.D.NALLA WORK	683003	0	0			683003
3	DyChE/7199/07-11-01	BAJI PRABHU DESHPANDE WORK	714944	0	0			714944
4	DyChE/0410/17-01-02	MANKHURD NALLA WORK	0	357008	0			357008
5	DyChE/1172/28-02-02	VINAY MANDIR NALLA	0	308109	507133			815242
6	DyChE/5901/29-08-02	BILWAKUNJ SWD WORK	122530	167494	0			290024
7	DyChE/6684/07-10-02	DEONAR DUMPING WORK/G.M.LINK RD.	588499	272990	0			861489
8	DyChE/6685/07-10-02	KESHAR BAUG NALLA WORK	1136598	0	0	797363		1933961
9	DyChE/5622/02-12-02	COLLECTOR COLONY NALLA	263059	0	0	183381		446440
10	DyChE/8332/06-02-03	C/220 C.C.ROAD WORK	0	361592	0			361592
11	DyChE/8634/20-01-04	MAHAKALI NALLA WORK	0	150818	154448			305266
12	DyChE/8631/20-01-04	NARAYAN NAGAR SWD WORK	1059894	1142	157787			1218823
13	CE/PD/1645/01-05-04	L'WARD WORK	42371803	11683104	3658260			57713167
14	DyChE/3481/10-08-04	BAINGANWADI NALLA WORK	20973601	1387004	0	166950		22527555
15	DyChE/3851/27-08-04	N'WARD CULVERTS WORK	5318159	364251	464312			6146722
16	DyChE/4506/23-09-04	L'WARD CULVERTS WORK	2942515	0	0		646752	3589267
17	DyChE/5483/23-09-04	R'WARD CULVERTS WORK	872058	0	0			872058
18	DyChE/6042/13-12-04	COVERING DRAIN WORK	10781120	0	0	566965		11348085
19	DyChE/6041/13-12-04	GAIKWAD NAGAR NALLA WORK	5714999	2247088	1179459			9141546
20	DyChE/12-12-04	N'WARD MISC.DRAIN WORK	3772907	0	0	425597		4198504
21	DyChE//29-10-04	T'WARD WORK	11010493	0	0			11010493
22	DyChE/8616/27-01-06	VALANI NALLA ,MALAD WORK	0	9913584	1202123.31			11115707.31
23	DyChE/8527/22-03-06 *	M/WEST ROAD & DRAIN WORK	0	12027292	30664839			42692131
24	DyChE/8527/22-03-06 $	T'WARD ROAD & DRAIN WORK	0	30548334	128903951.8	31632362.63	9496131.17	200580779.6
25	DyChE/0058/03-04-06	SOMAIYA NALLA WORK	0	6370653	516368			6887021
26	DyChE/0062/03-04-06	M/EAST CULVERTS-2006 WORK	0	5720513				5720513
27	DyChE/0061/03-04-06	COLLAPSED WALL M/WEST WORK	0	6190456	750303			6940759
28	CE/PD/14883/II/12-04-06	M/WEST WORK	0	10408621	0			10408621
29	DyChE/1440/11-05-06 DyChE/7407/07-12-09	BOUNDRY NALLA T'WARD	0	2214284	2478427.59			4692711.59
30	DyChE/8488/12-02-08	KANJUR CROMPTON NALLA WORK				3234330.75	101424718.7	104659049.4
31	CE/PD/0346/II/10-04-08	CWC M/E WARD				74018101	90836503	164854603

32	CE/PD/0346/II/10-04-08	CWC N' WARD				72700032	81667363	154367395
33	CE/PD/0346/II/10-04-08	CWC T' WARD WORK.				57343435	67039145	124382580
34	DyChE/1143/30-04-08	E/202 C.C.RDS WORK					102755802	102755802
35	DyChE/1238/15-05-08	MITHI RIVER WORK	0	0	44670068	25000000	10250000	79920068
36	EEWW(Civil)Maint/6443/16-7-09	GHATKOPAR YARD H.E.WORK				13244492	12917748	26162241
			108326182	100694337	215307480	279559516	477034162	1180921677
1	DyChE/0055/03-04-06	VASHINAKA NALLA WORK	0	24290962	10216510			34507472
2	DyChE/0059/03-04-06	T'WARD MISC.DRAIN WORK	0	7861965	344551			8206516
3	DyChE/0060/03-04-06	COLLAPSED WALL M/EAST WORK	0	4364750	2735281			7100031
4	DyChE/1623/06-05-06	SAPHED POOL NALLA WORK	0	20000000	30776620	52107607		102884227
5	CE/PD/4275/28-07-06	SHYAMNAGAR TALAO WORK	0	4500000	9827127	38189174		52516301
6	CE/PD/7166/06-11-06	TAGOR NAGAR MATERNITY HOME	0	1765938	8214675	3606587	3583753	17170953
7	DyChE/0170/09-04-08	BOUNDRY & KESHAR BAUG NALLA				44623591	80068012	124691603
8	DyChE/11278/18-02-09	ES 43-47 T'WARD NALLA					97898161	97898161
9	DyChE/2409/31-08-09	KANDIVALI BRIDGE WORK (GOANTHAN RD.)					1722901	1722901
10	DyChE/5805/31-8-09	S'WARD RDS AE-19				70040165	22472464	92512630
11	DyChe/5804/31-8-09	S'WARD RDS AE-20				38901540	19318820	58220360
12	TMC/C.E/WO/67/09-02-09	THANE MUN.SCHOOL WORK					4567281	4567281
			0	62783615	62114763	247468665	229631393	601998436
			108326182	163477952	277422243	527028181	706665555	1782920113

NB : * Sub-Contract . Appolo Associates

$ Sub-Contract fm Yash Enterprises

For NAVDEEP CONSTRUCTION CO.

Partner

On the basis of the above charts respondents had contended before the Commissioner that they had during the period of demand received payments against the services which were provided during period prior to the period of demand. Hence this has formed the basis of the finding for the Commissioner to the effect that the demand has been based on the Balance Sheet figures and not the figures of actual receipts against the taxable services provided during this period.

5.5 In the appeal revenue has not disputed the findings rendered by the Commissioner in respect of the twelve contracts referred in the show cause notice, the only reason by which the revenue is aggrieved is that the findings in respect of twelve contracts have been applied to the contracts under consideration and commissioner should have examined all the contracts and rendered the findings individually. We do not know from where revenue authorities got the magical figure of “94 contracts” it is not in the show cause notice or in impugned order. When we tried to decipher the mystery revenue expressed its inability to produce the files of adjudication and review. In absence of any tangible evidence to the effect that there were 94 contracts under consideration while making the demand we reject the said contentions raised by the revenue in their appeal.

5.6 Commissioner has in para 55 of his order framed following issues for his consideration:-

(i) the SCN is correct and proper in not considering and discussing on the record proper, adequate and reasonable material and evidence in order to support and sustain the allegations made resulting in the liability of the Noticee to Service Tax under Management Maintenance Repair Services.

(ii) The SCN is correct and proper in basing the figures of demand made therein entirely on the basis of the figure(s) appearing in the Noticee’s Balance Sheet(s).

(iii) The extended period of limitation is applicable.

Thereafter he examines each of the issue vis a vis facts and evidences available on record.

5.7 Issue (i) is discussed in para 56.1 to 77 and in para 77 it is recorded:

"77. Since the Noticee do not fall under MMRS category, as held above, the applicability of Section 65A of the FA-94 per the SCN does not stand scrutiny and has been wrongly invoked for doing so. Also, ST (Determination of Value) Rules, 2006 are not applicable here and are wrongly invoked. Further, the 3CD statement submitted by NCC only supports their stand in the given circumstances. In view of the detailed discussion foregoing, it is evident that the SCN is egregious and improper in not considering and discussing on the record proper, adequate and reasonable material and evidence in order to support and sustain the allegation made resulting in the liability of the Noticee to ST under MMRS. The issue required for determination at '(1)' above, is thus decided accordingly."

5.8 Issue (ii) is discussed in para 78 to 81 and in para 81 following is recorded:

"Hence, for non-observation of the accounting principles and the resultant violation of the provisions of ST law, in this regard, the SCN would be liable to be set aside. In this background and situation, in fact, I agree with the Noticee's submission that as held by the various Hon. Courts and Tribunals that when allegation is based only on financial accounts and figures mentioned in Balance Sheet are taken for the purpose of charging ST, such demand is bad and cannot sustain in the eye of law. The issue required for determination at '(2)' above, is thus decided accordingly."

5.9 Issue (iii) is discussed in para 82 to 86 and Commissioner in para 82 against invocation of extended period.

5.10 Revenue has not challenged the findings recorded by the commissioner on merits but have questioned the manner in which he have gone about dealing with the show cause notice. The major challenge which has been made is with regards to examination of 94 contracts which we are unable to find. With regards to all submissions made in appeal we do not find merit as all the issues raised in the show cause notice have been well considered by the Commissioner in the paras of impugned order referred above.

6.0 In result the appeal filed by revenue is dismissed and cross objections disposed off.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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