

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 86145 of 2013

(Arising out of Order-in-Original No. 51/AT(51)COMMR/RGD/12-13 dated 16.11.2012 passed by the Commissioner of Central Excise, Raigad)

M/s. Om Sai Fabricators

Appellant

F-659, Vasudev Niwas,
Omkar Colony,
Kumbharwad Road,
Uran, Navi Mumbai 400 707.

Vs.

Commissioner of CE & ST, Raigad

Respondent

Utpad Shulk Bhavan, Pot No.1,
Sector 17, Khandeshwar,
Navi Mumbai 410 206.

Appearance:

Shri Neerav R. Mainkar, Advocate, for the Appellant

Shri Anand Kumar, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 21.09.2022

Date of Decision: 29.09.2022

FINAL ORDER NO. A/85923/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 51/AT(S-1)/COMMR/RGD/12-13 dated 16.11.2012 of the Commissioner Central Excise Raigad By the impugned order Commissioner held as follows:

"a) I determine service tax of Rs.1,25,36,776.00 (Rupees one crore twenty five lakh thirty six thousand seven hundred seventy six only) as payable by Shri Sukhdeo Vasudeo Yadav, the Proprietor of M/s Om Sai Fabricators during the period 2006-07 to 2008-09 as discussed supra under section 73(2) of the Finance Act, 1994;

b) I order appropriation of. Rs. 9,45,516.00 paid by Shri Sukhdeo Vasudeo Yadav, the Proprietor of M/s Om Sai

Fabricators towards the said services against the amount confirmed as at (a) above and the balance amount shall be paid forthwith by them;

c) I order payment of interest by Shri Sukhdeo Vasudeo Yadav, the Proprietor of M/s Om Sai Fabricators on the delayed payment of service tax at the appropriate rates and as applicable in force under section 75 of the Finance Act, 1994;

d) I impose penalty of Rs.1,25,36,776.00 (Rupees one crore twenty five lakh thirty six thousand seven hundred seventy six only) on Shri Sukhdeo Vasudeo Yadav, the Proprietor of M/s Om Sai Fabricators under the provisions of section 78 of the Finance Act, 1994.

e) I do not impose penalty under section 76 of the Finance Act, 1994, as discussed supra;

f) I impose a penalty of Rs 5,000/- (Rupees Five thousand only) on Shri Sukhdeo Vasudeo Yadav, the Proprietor of M/s Om Sai Fabricators under the provisions of section 77 the Finance Act, 1994."

2.1 Based on intelligence that the noticee is charging and collecting service tax from their clients on the taxable service provided but not depositing the same with the Government exchequer investigations were initiated against the appellant. It was noticed that the noticee charged service tax separately in few of the invoices whereas in other cases no service tax was shown separately; that they have obtained service tax registration but not followed the proper procedure; that being a sub-contractor, the noticee did not discharge service tax liability under advice from Gammon India Ltd.

2.2 Appellant thus contravened the provisions of section 66, section 68, and section 70 of the Finance Act, 1994 read with rule 5, 6 & 7 of the Service Tax Rules, 1994 in as much as –

- i. they have failed to determine and pay the service tax due on the service rendered to their customers as per the provisions of section 66 and section 68 *ibid* read with rule 6 *ibid*;

- ii. they have failed to submit returns in the form ST 3 to the service tax department on due date as per the section 70 ibid read with rule 7 ibid;
- iii. they have failed to maintain proper records under rule 5 ibid.

2.3 Accordingly a notice dated 21.10.2011 was issued to appellant, requiring them showing cause as to why:

- i. service tax totally amounting to Rs. 1,25,36,776.00 not paid during the period from 2006-07 to 2008-09, should not be demanded and recovered from them, under the proviso to sub-section (1) of section 73 of chapter V of the Finance Act, 1994 read with the provisions of section 68 ibid;
- ii. the sum of Rs. 9,45,516.00 already paid by them should not be appropriated against the said demand;
- iii. interest on the delayed/non-payment of service tax, at the appropriate rates and as applicable in force should not be recovered from them under section 75 of the Finance Act, 1994;
- iv. penalty should not be imposed on them under the provisions of section 76, section 77 and section

78 of the Finance Act, 1994;

2.4 The show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Neerav Mainkar, Advocate for the appellant and Shri Anand Kumar, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits-

- The Appellant was sub-contractor to Gammon India Ltd (Main Contractor) for the "Dahej Uran Pipeline Project". The Appellant was not charging ST to the Main Contractor as the Main Contractor had informed that they were paying ST on the entire contract value, as such, the Appellant was not required to pay ST. Statement of the Appellant were recorded on , 10-11-2008 and 21-11-2008 wherein has

admitted of non-payment of ST on sub contract value raised to the Main Contractor.

- Denial of Abatement of 67% (Notification No. 15/2004-ST: The Gross Amount does not include "Free Supply" and the Abatement under Notification No 15/2004-ST dated 10-09-2014 should be granted. This issue is no more res-integra in terms of decision in case of Bhayana Builders (P) Ltd 2013(32) S. T. R. 49 (Tri-LB) affirmed by Supreme Court 2018 (10) GSTL 118 (S. C.)
- BONAFIDE BELIEF: The Main Contractor who is Multinational Company had issued Certificate dated 18-07-2007 to the Appellant certifying that the Appellant need not pay or charge ST as the Main Contractor is paying the ST on entire Contract. The Appellant had no reason to doubt of the same. The Main Contractor vide letter 30-11-2009 provided all the Challans evidencing payment of Service Tax on the entire contract value which includes values of sub-contract of the Appellant. The copies of Challans of the Main Contractor are enclosed. These facts were never verified by the Investigation Agency. Thus, the Appellant had Bonafide belief which was backed by evidentiary documents.
- Conflicting decisions & instruction during disputed period:
 - Trade Notice 5/98-ST dated 14-10-1998 of Indore Commissionerate in respect of certain services clarifying that if Main Contractor pays ST, then sub-contractor need not pay ST.
 - However, in 2007 and 2011, the Board held that sub-contractor is liable to pay ST.
- The Appellant wishes to quote following case laws:
 - Vinoth Shipping Services 2021 (55) GST L 313 (Tri-Chennai)
 - Murari Lal Singhal 2019 (25) G STL 45 (Tri-Del)
 - Veejay Marketing 2019 (22) G S T L 211 (Tri-Chennai)
- The extended period is upheld on the grounds of suppression as the Appellant failed to give evidence of payment of Service Tax by Gammon India. This conclusion is completely incorrect & misleading as in the course of

investigation, statement of Shri Yatin Rawal, Deputy General Manager (Internal Audit) of Gammon India Ltd was recorded on 12-01-2009 wherein he admitted that Gammon India asked the Appellant not to levy Service Tax. The said Authorised Person also stated in his statement that Gammon India Ltd had issued letter dated 18-07-2007 to the Appellant that the Appellant was not required to levy and pay Service Tax. The Appellant also had provided copies of challans of payment of service Tax by Gammon India. Thus, extended period was not invocable and the demand is hit by limitation. The Appellant wishes to quote and rely on the following case laws:

- Coaltar Chemicals Manufacturing Co. 2003 (158) ELT 402 (S.C.)
 - Chemphar Drugs & Liniments 1989 (40) ELT 276 (S.C.)
 - Continental Foundation Jt. Venture 2007 (216) ELT 177 (S.C.)
- The Appellant submits that the main Contractor (Gammon India Limited) has to be treated as "agent" of the Appellant for the purpose of ST payment as definition of "Assessee" under Section 65(7) of the Finance Act, 1994. The Appellant wishes to quote and rely on the following case laws:
- Katrina R. Turcotte 2013 (31) STR 670 (Tri-Mum)
 - Zaheerkhan B. Khan 2014 (33) S T R 75 (Tri-Mum)

3.3 Arguing for the revenue learned authorized representative submits that__

- He re-iterates the findings of Learned Original Adjudicating authority and relies upon the ratio of the case law of Melange Developers Private Limited [2020 (33) G.S.T.L. 116 (Tri. – LB)] which is squarely applicable in this matter.
- As regard the issue of extended limitation period, the whole facts clearly points out the element of suppression of the facts and gross contravention of provision of law with sole intent to evade duty. Investigation was initiated

against the appellant on the intelligence input that the appellant is charging and collecting service tax from their clients on the taxable services provided but not depositing the same with govt. exchequer.

- During investigation, statement of Shri Sukhdev Vasudev Yadav (Prop. M/s Om Sai Fabricator) was recorded who deposed the following relevant facts:
- They were engaged in provision of taxable services since 2006 and were duly registered under service tax.
 - They were providing taxable services mainly to M/s Gamon India Ltd., Mumbai, M/s Japsin Jacob Wire Drawing Pvt. Ltd., New Delhi, M/s IMC Ltd., JNPT, and M/s man Infra Project Ltd., Mumbai as a sub-contractor. They have also provided taxable services to few other companies like BPCL, Viraj Agro Products Pvt. Ltd. etc besides the afore-stated major companies.
 - The appellant asserted that they have already paid major part of their service tax liability except in respect of services provided to M/s Gammon India Limited in capacity of sub-contractor.
 - The reason for non-payment of service tax on the taxable services provided to M/s Gammon India Limited is mainly that they are providing services in capacity of subcontractor and that they have not received Service tax from them. It is further asserted that they have not paid the service tax liability (service provided as sub contractor) on the advice of M/s Gammon India Limited
 - On verification of record submitted by the appellant, it is observed that they have charged and shown service tax separately in few of the invoices whereas in other invoices no service tax is shown separately.
 - They have received/ collected service tax of Rs.1,44,904/- for the period 2007-08 and Rs.14,49,484/- for the period 2008-09 (till Oct. 2008) but not paid the same.

- Since the appellant has deposed that as sub-contractor, he has not discharged his service tax liability under advice from the main contractor; enquiries were then caused accordingly.
- In background of this factual position, certain undisputed facts are mentioned as below:
 - Appellant has provided taxable services directly to their client as well as under sub-contract agreement.
 - Appellant has issued invoices charging service tax as well as without charging Service tax. Appellant received/ collected Service tax but has not paid the same to the govt. exchequer. They have not charged/paid service tax till 31.03.2008 being sub contractor but have started charging service tax from 01.04.2008 onwards.
 - appellant themselves admitted the applicability of Service Tax liability on the provision of taxable services under the sub-contract agreement with different clients as they have started to pay service tax on such services from 01.04.2008 vide his statement dated 10.11.2008 recorded under Section 14 of the Central Excise Act, 1944 as made applicable to Service Tax matter.
- The case laws cited by the appellant is also not applicable in the present matter

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has in the impugned order recorded following findings-

"13. I have carefully gone through the case records, allegations made in the notice. Having considered and granted adequate opportunities for providing natural justice to them I ensue with the quasi-judicial proceedings in the matter. The short issue that necessitates quasi-judicial proceedings is whether the noticee has discharged its duty liability properly and whether its contention that service tax liability on commercial or industrial construction service provided by them as sub contractor arises or not.

14. I find that the noticee has not cared to file any written submissions in the matter even after one year and also not cared to turn up for the personal hearings granted on initial three occasions.

to an afterthought they have requested and attend the hearing on 07.11.2012 and made a frail attempt to cover up their duty liability.

15. I find that the noticee has not produced proof of tax payment by Gammon India Ltd in spite of their claim that Gammon India Ltd would pay the service tax, which is their primary defence. I also find that the noticee by its own admission submitted that from 15 April 2008 they started charging service tax on the service provided as sub-contract and that the same would be credited to the service tax department. This itself is a clear admission by themselves that they are liable to pay duty the issue is resolved squarely by the Board vide its circular No. 96/7/2007-ST, dated 23.07.2007 wherein it has been clarified that a sub-contractor is essentially a taxable service provider and liable to pay service tax. Besides, para 4 of the CBE&C circular No. 138/7/2011-ST dated 06.05.2011 specifically states that service provided by the sub-contractors/consultants and other service providers are classifiable as per section 65A of the Finance Act under respective clause of sub-clause (105) of section 65 of Finance Act, 1994.

16. I observe that there are several allied allegations against the noticee. One such is that they had not declared these facts to the department and willfully concealed and suppressed the same with intent to evade payment of service tax. Had the department not noticed, non-payment of service tax would have been undetected. Besides, in view of the discussion in foregoing paras, a pre-meditation for non-compliance of tax liability on their part is obvious. Accordingly invoking of extended period under proviso to section 73(1) of the Finance Act, 1994 is justified. I find from the case records that the noticee had indubitably suppressed the relevant information and they failed to pay the tax liability. It is their own admission as appearing in the notice that they have paid part service tax duty only after being

pointed out. In view of the foregoing discussion it is concluded that the noticee (i) did not determine and pay the service tax due on the services rendered to their customers as per the provisions of section 66 67 and 68 ibid read with rule 6 ibid (ii) is liable to pay the amount along with interest as proposed in the notice. As proposed in the notice the amount of Rs. 9,45,516.00 paid by them towards the service tax shall be appropriated against the respective demands.

17. The noticee admits their tax liability on commercial or industrial construction service but still not paid the duty on flimsy ground that it is a sub-contractor and not liable to pay service tax. Their plea cannot be acceptable in view of the discussion above. Part payment of tax by them after the investigation initiated does not belittle their offence either. As discussed supra, had the department not noticed, the tax evasion would have been unnoticed. The noticee is, therefore, liable to penal action as proposed under section 78 ibid. It is also seen that they had not filed ST-3 returns on due dates. Hence, they are liable to penal action under section 77 ibid. However, I refrain from imposing penalty under section 76 as the noticee is liable for penal action under section 78 ibid"

4.3 On merits we find that issue has been decided by larger bench of tribunal in the case of Melange Developers Private Limited [2020 (33) G.S.T.L. 116 (Tri. - LB)] wherein larger bench has held as follows:

"12. *It is true that prior to 2007, various Service Tax, Trade Notices/ Instructions/ Circulars/ Communications had been issued exempting certain category of persons from payment of Service Tax. A sub-contracting Customs House Agent was exempted from payment of Service Tax on the bills raised on the main Customs House Agent. When an architect or interior decorator sub-contracted part/whole of its work to another architect or interior decorator, then no Service Tax was required to be paid by the sub-contractor, provided the principal architect or interior decorator had paid the Service Tax. However, all these Trade Notices/ Instructions/ Circulars/ Communications were superseded by the Master Circular dated 23 August, 2007 issued by the Government of India, Ministry of Finance. The*

Circular noticed that when Service Tax was introduced in the year 1994 there were only three taxable services, but later 100 services had been specified as taxable services and that since the introduction of Service Tax, number of clarifications had been issued, but it had become necessary to take a comprehensive review of all the clarifications keeping in view the changes that had been made in the statutory provisions, judicial pronouncements and other relevant factors. The relevant portion of the Master Circular, insofar as it relates to sub-contractors, is reproduced below :

999.03/ 23-8- 2007	<i>A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.</i>	<i>A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor.</i> <i>Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.</i>
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13. *The Master Circular clarifies that the services provided by sub-contractors are in the nature of input services and since a sub-contractor is a essentially taxable service provider, Service Tax would be leviable on the taxable services provided. It has also been clarified that even if a taxable service is intended for*

use as an input service by another service provider, it would still continue to be a taxable service.

14. *It can be used that if a main contractor has paid Service Tax on the entire amount of the main contract out of which a portion has been given to a sub-contractor, then if a sub-contractor is required to pay Service Tax, it may amount to 'Double Taxation', but this issue has to be examined in the light of the credit mechanism earlier introduced through Service Tax Credit Rules, 2002 granting benefit of tax paid on input services if the input services and the output services fell under the same taxable services and the subsequent amendment made on 14 May, 2003 granting benefit of tax paid on input services even if the input service and the output service belonged to different taxable categories. The aforesaid Service Tax Credit Rules were later superseded on 10 September, 2004 by Cenvat Credit Rules, 2004. Rule 3 of these Rules provides that a manufacturer or producer of final product or a provider of output service shall be allowed to take credit (known as 'Cenvat Credit') of various duties under the Excise Act, including the Service Tax leviable under Sections 66, 66A and 66B of the Act. Rule 3(4) further provides that Cenvat credit may be utilized for payment of Service Tax on any output service. It is for this reason that the Master Circular dated 23 August, 2007 was issued superseding all the earlier Circulars, Clarifications and Communications.*

15. *It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefit of the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the Cenvat Rules allow a*

provider of output service to take credit of the Service Tax paid at the preceding stage.

16. *It is in this light that the main contention of Learned Counsel for the Respondent that if a sub-contractor is required to pay Service Tax when the main contractor has actually discharged Service Tax liability, it would amount to 'Double Taxation', has to be examined. For this contention, reliance has been placed by the Learned Counsel for the Respondent on the following decisions of this Tribunal :*

- (i) Urvi Construction v. Commissioner of Service Tax, Ahmedabad, reported in 2010 (17) STR 302 (Tri. - Ahmd.);*
- (ii) BCC Developers and Promoters Pvt. Ltd. v. Commissioner of Central Excise, Jaipur, reported in 2017 (52) S.T.R. 22 (Tri. - Del.);*
- (iii) M/s. Dhaneshra Engineering Works v. Commissioner of Central Excise, Allahabad, reported in 2018 (2) TMI 788 - CESTAT - Allahabad;*
- (iv) Power Mech Projects Ltd. v. Commissioner of Customs, Guntur, reported in 2017 (48) S.T.R. 165 (Tri.- Hyd.); and*
- (v) M/s. Edac Engg. Ltd. v. CST, Chennai, reported in 2017 (6) TMI 685 CESTAT Chennai.*

17. *In Urvi Construction a Learned Member of the Tribunal observed :*

"2. Further the learned advocate also submits that in the Master Circular issued by the Board vide Circular No. 96/7/2007-S.T., dated 23-8-2007, a stand has been taken that there is no exemption to a sub-contractor from payment of service tax merely because the contractor pays the tax. However, he submits that for the period circular issued late by the Board in 1997 was applicable and according to this Circular where the services have been provided by the sub-contractors such sub-contractors are not liable to pay service tax and service tax liability is on the main contractor. Taking note of the fact of the contention that main contractor has paid the service tax and charging service tax on the sub-contractor again would amount to taxing the same service twice and also taking note of the circular cited by the learned advocate and the decisions of the

Tribunal cited, I find that if the appellant is required to pay the service tax it would amount to taxing the same service twice and the circular and the Tribunal's decision are squarely applicable to the facts of this case and accordingly appeal is allowed with consequential relief to the appellant."

18. *In BCC Developers and Promoters Pvt. Ltd. it was observed :*

"6.1 We agree with the submission of the Ld. Counsel that no double taxation is permissible under the law. The Constitution (Article 265) provides to take the exact amount of tax i.e. neither more nor less. In the instant case, if the principal has already paid the Service Tax, then the same cannot be demanded from the appellant. As per the clarification of the Board's Circular dated 23-8-2007 as well as dated 7-10-1998, if the principal had not paid the Service Tax then the same can be charged. If the Service Tax has already been paid by the principal, then the same cannot be demanded again."

19. *M/s. Dhaneshra Engineering Works followed the aforesaid decision in BCC Developers and Promoters Pvt. Ltd.*

20. *In M/s. Edac Engg. Ltd., the Division Bench, after placing reliance upon the decision of the Tribunal in Urvi Construction, observed :*

"6.2 We are therefore of the considered opinion that these case laws are distinguishable from the decision taken by this very Bench in the case of the present appellants Edac Engineering Ltd. in Final order dated 19-12-2016. We also find that the very same Board's Circular No. 97/8/2007-S.T., dated 23-8-2007, relied upon by the Ld. AR has been taken note of by the Tribunal in Urvi Construction (supra). This being so, we have no hesitation in ruling that when Service Tax has been paid by the main contractor, charging the subcontractor again will amount to taxing the same service twice. In the circumstances, the issue at hand also requires to be remanded to the adjudicating authority to verify whether the service rendered by the appellant has suffered tax in the hands of the principal contracts. If that aspect is able to be proved by the appellants, no tax liability will accrue to them. Towards this end, the adjudicating authority will give

suitable opportunity to the appellants to present their case. Appellants are also produce all evidence and documents to establish their claim that the tax liability required to be discharged by them has already been paid up by the main contractor. If that is provided, their will obviously be no demand for interest unless such demands have been made belatedly. Once this aspect is also able to be proved by the appellant, imposition of penalty will also not arise."

21. *The aforesaid decisions do not take into consideration the impact of the Cenvat Rules. It would, therefore, not be correct to conclude that double taxation would result if a sub-contractor is required to discharge the Service Tax liability even if the main contractor has discharged the tax liability.*

22. *The decisions of the Tribunal holding that double taxation will not result if a sub-contractor discharges the tax liability because of the Cenvat Rules, now need to be referred to.*

23. *In Max Tech Oil & Gas Services Pvt. Ltd. v. Commissioner of Service Tax, Delhi, reported in 2017 (52) S.T.R. 508 (Tri. - Del.), the Division Bench has held :*

"6. Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. If at all, the service tax paid by a sub-contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the Cenvat Credit Rules, 2004 will come into play subject to fulfilment of conditions therein. It is nobody's case that the sub-contractors per se are not liable to service tax even if they rendered taxable service....."

[emphasis supplied]

24. *The same view was taken by the Division Bench of the Tribunal in CCE & S.T., Raipur v. M/s. J.K. Transport, reported in 2017 (9) TMI 993 - CESTAT New Delhi. The relevant paragraph is reproduced below :*

"5. We find that the CBEC vide Circular dated 23-8-2007 has clarified that the services provided by the sub-contractor is a taxable service, even if the same is used for completion of the work by the main service provider. Thus, for providing the taxable service, the sub-contractor is liable for payment of service tax on provision of such service....."

25. Similar views were taken by the Tribunal in (i) Max Logistics Ltd. v. Commissioner of Central Excise, Raipur, reported in 2017 (47) S.T.R. 41 (Tri. - Del.); (ii) Hargovind Electric Decorators v. Commissioner of Central Excise, Jaipur-I, reported in 2016 (43) S.T.R. 619 (Tri. - Del.); and (iii) Sew Construction Ltd. v. Commissioner of Central Excise, Raipur, reported in 2011 (22) S.T.R. 666 (Tri. - Del.).

26. At this stage, it would also be useful to refer to a Larger Bench decision of the Tribunal in Vijay Sharma & Company v. CCE, Chandigarh, reported in 2010 (20) S.T.R. 309 (Tri. - LB). The issue that arose before the Larger Bench was as to whether service provided by a sub-broker are covered under the ambit of Service Tax and taxable or not. After noticing that a sub-contractor is liable to pay Service Tax, the Larger Bench examined as to whether this would result in double taxation if the main contractor has also paid Service Tax and observed that if service tax is paid by a sub-broker in respect of same taxable service provided by the stock broker, the stock broker is entitled to the credit of the tax so paid in view of the provisions of the Cenvat Credit Rules. The relevant paragraph 9 is reproduced below :

"9. It is true that there is no provision under Finance Act, 1994 for double taxation. The scheme of service tax law suggest that it is a single point tax law without being a multiple taxation legislation. In absence of any statutory provision to the contrary, providing of service being event of levy, self same service provided shall not be doubly taxable. If Service tax is paid by a sub-broker in respect of same taxable service provided by the

stock-broker, the stock broker is entitled to the credit of the tax so paid on such service if entire chain of identity of sub-broker and stock broker is established and transactions are provided to be one and the same. In other words, if the main stock broker is subjected to levy of service tax on the self same taxable service provided by sub-broker to the stock broker and the sub-broker has paid service tax on such service, the stock broker shall be entitled to the credit of service tax. Such a proposition finds support from the basic rule of Cenvat credit and service of a sub-broker may be input service provided for a stock-broker if there is integrity between the services. Therefore, tax paid by a sub-broker may not be denied to be set off against ultimate service tax liability of the stock broker if the stock broker is made liable to service tax for the self same transaction. Such set off depends on the facts and circumstances of each case and subject to verification of evidence as well as rules made under the law w.e.f. 10-9-2004. No set off is permissible prior to this date when sub-broker was not within the fold of law during that period.”

27. *The Commissioner did express in the impugned order that under the Cenvat Scheme every stage of provision of service is required to be taxed and if a sub-contractor discharges the Service Tax liability, it will not result in double taxable even if the main contractor discharges the Service Tax liability because the credit of the earlier tax paid is available at a subsequent stage, but it is because of the decision of the Tribunal in Urvi Construction, that the Commissioner held that double taxation would result if a sub-contractor is also required to discharge Service Tax liability when the main contractor has discharged the entire liability.*

28. *Learned Counsel for the Respondent has, however, relied upon the decision of the Supreme Court in Larsen and Toubro Ltd. v. Additional Deputy Commissioner of Commercial Taxes and Anr., reported in 2016-TIOL-155-SC-VAT. In this case, the contracts which were secured by the Appellant therein were works contract and a part thereof was assigned to the sub-contractor who had submitted returns and paid taxes for the execution of the works contract. During the course of the*

assessment, the Appellant submitted that the sub-contractors had already been taxed and, therefore, the Appellant cannot be taxed again under Section 6B of the Karnataka Sales Tax Act. The submission, therefore, was that the value of the work entrusted to the sub-contractors could not be taken into account while computing the total turnover of the Appellant for the purpose of taxation under the Karnataka Sales Tax Act. It is in view of the provisions of the Karnataka Sales Tax Act that the Supreme Court observed that the value of the work entrusted to the sub-contractors or payments made to them shall not be taken into consideration while computing total turnover for the purposes of Section 6B of the Karnataka Sales Tax Act. This decision of the Supreme Court will not come to the aid of the Respondent in this case in view of the specific provisions of Section 66 and 68 of the Act as also the Cenvat Rules discussed in the foregoing paragraphs of this order. It also needs to be noted that there is no provision for input tax credit on deemed sales in levy of VAT.

29. *The submission of the Learned Counsel for the Respondent regarding 'revenue neutrality' cannot also be accepted in view of the specific provisions of Section 66 and 68 of the Act. A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The contractor can, as noticed above, take credit in the manner provided for in the Cenvat Credit Rules of 2004.*

30. *Thus, for all the reasons stated above, it is not possible to accept the contention of the Learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.*

31. *The reference is, accordingly, answered in the following terms :*

"A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract."

4.4 Appellant do not challenge the above position and agree that the issue is squarely covered by the decision of larger bench of tribunal. However they challenge the demand on the ground of limitation and have also claimed that abatement as per the Notification No 15/2004-ST dated 10.09.2004.

4.7 It is evident from the facts of the case that the appellant are merely providing the taxable services simplicitor without any element of transfer of the material along with the service. Hon'ble Supreme Court has in case of Larsen and Tubro Ltd [2015 (39) S.T.R. 913 (S.C.)] observed as follows:

"24. *A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."*

Thus the contracts for provision of services wherein not transfer in property occurs, qualify as service contracts simplicitor. In case of service contracts simplicitor there can be no question of abatement. In light of above observation we refer to the Notification No 15/2004-ST dated 10.09.2004. Notification No 15/2004-Service Tax, dated the 10th September, 2004 was rescinded vide n Notification No 2/2006-ST dated 01.03.2006.

Hence this claim made by the appellant is under a notification which was not available after 01.03.2006. Hence the claim made under this notification is denied.

4.8 To argue on the limitation appellant have pressed the ground of bonafide belief and for that reason they rely upon the certificate issued to them by M/s Gammon. They also submit that there were conflicting views in the matter. However on query from the bench the counsel for appellant was unable to point out to a single decision available during the relevant period giving a contrary view. Further the submission to the effect that there were conflicting circulars is also not borne out by any evidence. Larger bench has in case of Melange Developer Pvt Ltd. clearly in para 12 noted that all Trade Notices/ Instructions/ Circulars/ Communications were superseded by the Master Circular dated 23 August, 2007, and this circular had clarified the liability of sub contractor to pay the service tax. It is settled law that bonafide belief is not the blind belief and needs to be established. Hon'ble Bombay High Court has in case of Responsive Industries Ltd [2019 (26) G.S.T.L. 457 (Bom.)] held as follows:

"9. The contention that there was a bona fide belief that the Appellant are not liable to pay the service tax on outward transportation of goods and the GTA is not supported by any reasonable explanation. The bona fide belief that one is not liable to pay the tax has to be based on some facts on record which led to the belief. It is not the Appellant's case that the belief based on a ruling of the some authority that it not liable to pay service tax on outward transportation. A mere statement to the effect that the Appellant was under a bona fide belief of non liability of paying tax cannot be accepted in the face of clear provision of law. Thus, it is not possible to accept the contention that the Appellant had bona fide belief of for non-payment of tax, so as to invoke Section 80 of the Act."

4.9 A statement of Shri Sukhdeo Vasudeo Yadav (proprietor of appellant} was recorded on 10.11.2008 wherein he stated that he has paid the service tax but has not filed any service tax return so far and submitted copies of taxable invoices, bank pass book and bank statement for 2006-07; that as a sub-contractor,

he has provided commercial & industrial construction service to Gammon India Ltd, Mumbai, Japsin Jacob Wire Drawing P Ltd, New Delhi and Man Infra Project Ltd, Mumbai but has not paid any service tax till 31.03.2008 being a sub-contractor; that from 01.04.2008, he started charging service tax on the service provided as sub-contract and that the same would be credited to the service tax department; that he does not have any agreement with these 3 firms but has letter of indent from Gammon India Ltd.

4.10 Shri Sukhdeo Vasudeo Yadav, in his statement dated 21.11.2008 deposed that he paid service tax for the year 2006-07 but did not pay service tax for 2007-08 and 2008-09(up to October 2008); that in 2006-07, he discharged service tax on the invoices where contract was direct but where contract was on sub-contract basis, he did not discharge service tax; that he was not aware that a sub contractor is liable to pay service tax; that he collected Rs 1,44,904.00 @12.24% for the period 2007 08 and Rs.14,49,484.00 @12.36% for the period 2008-09 (till Oct 2008); that he would pay the service tax amount by December 2008 after rechecking his liability and agreed to submit VAT returns and balance sheet on 05.12.2008.

4.11 On verification of sample work order bearing number 8450/112 dated 07/04/2007, issued by M/s Gammon India Limited in favor of the appellant, it is observed that as per Clause/ Condition No. 23 of the said contract, "Sub-Contractor has agreed that the service tax is included in his offer and so no claim whatsoever shall not be entertained in this regard & Gammon shall not be liable to pay the same." This condition clearly indicates that contract itself placed service tax liability on the appellant. In contradiction to specific provision of the contract, the submission of the appellant on the basis of the certificate issued by the M/s Gammon India only need to be negated. This condition in contract itself shows that appellant was aware of his liability to pay service tax.

4.12 The Appellant concealed the correct taxable amount with the service tax department, until the Departmental officers initiated an inquiry in this regard. These facts were suppressed with intent to evade the payment of service tax due on various

taxable services provided by them thereby facilitating the evasion of service tax payable on the said services so rendered by them. Thus in the extended period, as provided for under the proviso to sub-section (1) of section 73 *ibid* for recovery of such service tax not paid and/or short paid by Appellant has been correctly invoked by the revenue authorities.

4.13 For the facts as stated above when we hold that the ingredients for invocation of the extended period of limitation were present, we are bound to uphold the penalties imposed on the appellant under Section 78 of Finance Act, 1994 in view of the decision of Hon'ble Apex Court in case of Rajasthan Spinning Mills [2009 (238) ELT 3 (SC))] wherein following has been held:

"20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee

on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what *Dharamendra Textile* decides."

4.14 As appellant had not taken registration and had not filed ST-3 returns within the prescribed time, penalty imposed under Section 77 is justified.

4.15 As we uphold the demand for service tax, demand for interest follows, and needs to be upheld. It is now settled law that once the tax is demandable the interest as prescribed by law will automatically follow.

4.16 Appellant has in his appeal and during the arguments relied upon certain other case laws which have been rightly distinguished by the authorized representative in the manner as stated in table below:

Sr. No.	Case details	Ratio
1	Vijay Sharma & Company [2010 (20) STR 309 (Tri.-LB)].	It is true that there is no provision under Finance Act, 1994 for double taxation. The scheme of service tax law suggest that it is a single point tax law without being a multiple taxation legislation. In absence of any statutory provision to the contrary, providing of service being event of levy, self same service provided shall not be doubly taxable. If Service tax is paid by a sub-broker in respect of same taxable service provided by the stock-broker, the stock broker is entitled to the credit of the tax so paid on such service if entire chain of identity of sub broker and stock broker is established and transactions are provided to be one and the same. In other words, if the main stock broker is subjected to levy of service tax on the self same taxable service provided by sub-broker to the stock broker and the sub-broker has paid service tax on such service, the stock broker shall be entitled to the credit of service tax. Such a proposition finds support from the basic rule of Cenvat credit and service of a sub-broker may be input service

		provided for a stock-broker if there is integrity between the services. Therefore, tax paid by a sub-broker may not be denied to be set off against ultimate service tax liability of the stock broker if the stock broker is made liable to service tax for the self same transaction. Such set off depends on the facts and circumstances of each case and subject to verification of evidence as well as rules made under the law w.e.f. 10-9-2004. No set off is permissible prior to this date when sub-broker was not within the fold of law during that period.
2	Max Tech Oil & Gas Services Pvt. Ltd. [2017 (52) STR 508 (Tri.-Del.)]	Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. If at all, the service tax paid by a sub contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the Cenvat Credit

		Rules, 2004 will come into play subject to fulfilment of conditions therein. It is nobody's case that the sub contractors per se are not liable to service tax even if they rendered taxable service.
3	M/s J.K. Transport [2017 (9) TMI 993 - CESTAT New Delhi	We find that the CBEC vide Circular dated 23.08.2007 has clarified that the services provided by the sub contractor is a taxable service, even if the same is used for completion of the work by the main service provider. Thus, for providing the taxable service, the sub contractor is liable for payment of service tax on provision of such service
4	Max Logistics Ltd [2017 (47) STR 41 (Tri. Del.)]	
5	Hargovind Electric Decorators [2016 (43) STR 619 (Tri.-Del.)]	
6	Sew Construction Ltd. [2011 (22) STR 666 (Tri.- Del.)]	

4.17 Thus we do not find any merits in this appeal

5.1 Appeal is dismissed.

(Order pronounced in the open court on 29.09.2022)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)