# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# HYDERABAD

REGIONAL BENCH – COURT NO. I

## Service Appeal No. 3546 of 2012

(Arising out of Order-in-Original No. 11/2012-(Service Tax)-Commr. dated 27.09.2012 passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004)

**M/s. IVRCL Assets and Holdings Ltd.,** **: Appellant**
M-22/3RT, Vijayanagar Colony,
Hyderabad, Andhra Pradesh – 500 057

**VERSUS**

**The Commissioner of Customs, Central Excise and Service Tax,** **: Respondent**
Hyderabad-I Commissionerate,
Kendriya Shulk Bhavan, L.B. Stadium Road, Basheerbagh,
Hyderabad, Andhra Pradesh – 500 004

**APPEARANCE:**

Shri G. Natarajan, Advocate for the Appellant

Shri C. Mallikarjun Reddy, Authorized Representative (A.R.) for the Respondent

**CORAM:**

**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**
**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. A/30020/ 2021**

DATE OF HEARING: 07.12.2020

DATE OF DECISION: 15.02.2021

**Order: Per Hon'ble Mr. P. Dinesha**

This appeal is filed by the assessee against Order-in-Original No. 11/2012-(Service Tax)-Commr. dated 27.09.2012 passed by the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-I Commissionerate. The appeal pertains to various demands apart from penalty under Section 78 of the Finance Act, 1994 and applicable interest.

2. When the matter was taken up for e-hearing via video conferencing, Shri G. Natarajan, Learned Advocate, appeared for the assessee-appellant and Shri C. Mallikarjun Reddy, Learned Departmental Representative, appeared for the respondent-Revenue.

3.1.1 The first demand is towards Construction of Complex Service ('CCS' for short) for the period from 2006-07 to 2009-10. Learned Advocate for the appellant would submit that the demand is raised and confirmed in respect of residential apartments constructed by the appellant, in pursuance of a tripartite agreement entered into between the Sports Authority of Andhra Pradesh (hereinafter referred to as 'SAAP'), Andhra Pradesh Industrial Infrastructure Corporation and M/s. IVRCL Infrastructure & Projects Ltd., by which the appellant was formed as a Special Purpose Vehicle (SPV) to undertake construction of residential apartments in the lands owned by SAAP. He would also submit that the residential apartments so constructed would be used by the sportspersons during the Asian Games, after completion of which they would be sold to various buyers.

3.1.2 The appellant was permitted to undertake such selling activity after completion of the remaining construction activities and that the demand of Service Tax under CCS was confirmed on such value received from customers, excluding the sale-deed value, but without granting the benefit of abatement.

3.2. The next demand pertains to the Service Tax under site formation and clearance, excavation and earthmoving and demolition service for the period from 2009-10 and 2010-11. Learned Advocate would, in all humility, submit that the appellant has not contested the demand on merits, but however, has only contested the imposition of equal penalty under Section 78. Learned Advocate would submit that none of the ingredients as prescribed under Section 78 is available,but without verifying in the proper perspective, the Adjudicating Authority has proceeded to

confirm the penalty. He would also submit that it is only the case of non-payment of Service Tax which was on account of the *bona fide* belief that the work relating to sewerage project, originally awarded by the Government to M/s. IVRCL Infrastructure & Projects Ltd., was not liable to Service Tax as it was a Government work without involving any commercial benefit and not even for any industrial purpose.

3.3.1 The next demand relates to the Service Tax under Works Contract Service ('WCS' for short) for the period 2009-10. Learned Advocate submits that the above demand was in respect of PranahithaChevella Lift Irrigation Project, which was sub-contracted to the appellant by M/s. IVRCL Infrastructure & Projects Ltd. Learned Advocate would submit that the above demand was raised since the exemption provided in the definition of Works Contract under Section 65(105)(zzzza) of the Act specifically covered EPC projects.

3.3.2 He would also rely on the decision of the Hon'ble Larger Bench of the Tribunal in *M/s. LancoInfratech Ltd. v. C.C., C.E. & S.T., Hyderabad,*reported in *2015 (38) S.T.R. 709 (Tri. – L.B.),* wherein the Hon'ble Larger Bench has specifically held that in order to attract levy of Service Tax, EPC projects must be for commercial purposes.

3.4.1 The next demand is in respect of Service Tax under Erection, Commissioning and Installation Service ('ECIS' for short) for the period from 2009-10 and 2010-11. Learned Advocate submits that here also, the definition of Works Contract covers pipeline works which is meant for commercial or industrial purpose alone, which is absent here in the case on hand.

3.4.2 He would also submit that the expression "plumbing, drain laying or other installations for transport of liquids" in the definition of ECIS would cover only such works undertaken in the buildings, but does not include

pipeline works for the supply of drinking water undertaken on the roads.

3.4.3 He also relies on the following judgements :

(i) *Commissioner of C.Ex., Mumbai. v. M/s.Surindra Engineering Co. Ltd. [2014 (36) S.T.R. 1191 (Tri. – Mum.)];*

(ii) *M/s. P.B. Rathod v. Commissioner of C.Ex., Nashik [2015 (39) S.T.R. 650 (Tri. – Mum.)];*

(iii) *M/s. Strategic Engineering P. Ltd. v. Addl. Commr. ofC.Ex., Madurai [2011 (24) S.T.R. 387 (Mad.)] affirmed in Addl. Commr. ofC.Ex. Madurai v. M/s. Strategic Engineering P. Ltd. [2016 (41) S.T.R. 373 (Mad.)]*

3.5 The next demand pertains to the Service Tax which, according to the Learned Advocate, is not disputed as the same was paid along with interest. He would submit that the appellant is contesting only the levy of penalty under Section 78 on the ground of *bona fides*.

3.6 Learned Advocate thus pleads for deletion/setting aside of the demands as well as penalty confirmed in the impugned order.

4.1 *Per contra*, Learned Departmental Representative for the Revenue, while relying on the reasons recorded in the impugned Order-in-Original, also reiterated the findings of the lower authority. He would also *inter alia* submit that primarily the construction activity was brought under Service Tax net with effect from 16.06.2005 itself, which fact the appellant was very much aware of; that as could be observed from the composite contract as also the pleadings of the appellant, the land belonged to SAAP, which upon construction was only sold to the customers by the appellant; that the obligation on the part of the appellant was only to complete the remaining construction activity and thereupon sell it, etc.

4.2 Learned Departmental Representative would also submit that for the above reasons, the plea as to the

*bona fide* belief by the appellant is without any basis whatsoever and thus, pleads for sustenance of the demands as well as the penalty.

5. We have heard both the parties, perused the documents placed on record and have also gone through the various decisions relied upon by both the parties.

6.1 A perusal of the documents placed on record would indicate that the appellant was involved in providing taxable service under the category of Construction of Complex Service (CCS), which included construction of residential complex as well on account of the appellant having constructed semi-finished flats/villas by the time of the commencement of the National Games in 2002. This semi-finished job required further construction in order to complete the same into residential flats/villas, which was undertaken by the appellant under construction agreements with the respective owners/customers, which clearly brings the scope of the above work out of the purview of the exclusion clause under Section 65(91a) of the Finance Act, 1994 since the residential complex was never intended for the personal use of the appellant. But the law requires that such complex shall not be constructed by a person directly engaging any other person for designing or planning of the layout, which according to us stands satisfied here since the Revenue has nowhere flagged any objections on the satisfaction of this requirement of law.

6.2 In view of the above clear facts, the case-laws relied upon by the appellant are squarely applicable which we have to follow. Consequently, the demand cannot sustain.

6.3 On the demand under CCS, the appellant has again relied on the decision in the case of *Commissioner of C.Ex. &Cus., Kerala v. M/s. Larsen & Toubro Ltd.* reported in *2015 (39) S.T.R. 913 (S.C.)* wherein Service Tax is

payable only on the gross amount in the case of composite activities. Here also in view of our findings in the above paragraph, the demand cannot sustain. Moreover, the law provides for 67% abatement on the value, which should not have been denied to the assessee.

7. On the second demand which is not contested here in this appeal but the contest is only on the imposition of penalty under Section 78, the appellant has all along pleaded *bona fides* that there was no liability to Service Tax. Moreover, we find that there is basis for assuming bona fide since Govt was also a party to the contract. On the other hand, revenue has never dislodged such belief entertained by the appellant nor is there anything brought on record to even suggest that such assumption of bona fide was wrong; rather penalty was levied as a routine. We find force in the arguments that the same is levied without verifying if the ingredients of S.78 are present to justify levy. Hence, we are of the considered opinion that even this levy of penalty cannot sustain.

8.1 On the next demand under Works Contract Service (WCS) in respect of PranahithaChevella Lift Irrigation Project, we note that the Hon'ble Larger Bench of the Tribunal in *M/s. LancoInfratech Ltd. (supra)* has held as under :

> *"18. Analyses of Issues (B), (C) and (D)*
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> *(a)..*
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> *(b)..*
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> *(c)..*
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> *(v) From the guidance provided by the above precedents and in view of the fact that in the commercial world and practice, in legal and technical Dictionaries, "EPC contracts" are synonymously known and referred to as "turnkey contracts" as well, we conclude that in clause (e) under Explanation (ii) of the*

*definition of WCS, turnkey projects and EPC projects are employed to signify similar, not dissimilar transactions, to indicate contracts in which a builder agrees to execute the whole of the enterprise awarded to him and if the agreement so provides from the stage of design and planning till execution and completion of the whole work entrusted; and undertakes wide variety of other responsibilities which may include design, engineering, procurement, construction of the facility, conduct of performance tests and other associated activities pre or post-construction."*

8.2 The appellant as a builder was expected to put up partial construction as per plan which thereafter, i.e., after sale, was required to be completed. Hence, we find that the appellant was required to undertake a host of activities to ensure completion of the project before handing over possession. Thus, the above special bench decision would apply here too and hence, following the same we hold that the demand cannot sustain.

9.1 The next demand pertains to the Service Tax on pipe laying and pipe laying civil works at MCGM-TANSA Pipeline, which even the Revenue is not able to establish that this is a commercial or industrial project. Hence, we agree with the appellant's contentions and therefore, following the decisions relied on by the Learned Advocate for the appellant (*supra*), the demand on this count cannot sustain.

10. On the last demand of penalty, under Section 78 per se, we find that even though the entire demand is raised by invoking the extended period, but however, the Show Cause Notice at paragraph 11.1 has specifically alleged wilful suppression.

11. In order to attract Section 78, it is necessary that tax must have remained unpaid for the reasons of fraud or collusion or wilful mis-statement or suppression of facts, etc, with an intention to evade payment of tax. We have perused the Order-in-Original passed by the Assessing Authority and we find that there is no such finding against the assessee of it being guilty of wilfully

not paying tax by reason of any of the clauses provided in clauses (a) to (e) of Section 78(1) of the Act. Furthermore, as per first proviso to Sub-section (1) of Section 78 of the Act, no penalty shall be imposable for any failure referred to in the said Provision viz., for failure to pay service tax, for contravention of Rules and Provisions of the Act, or for suppression of facts etc., if the assessee proves that there was reasonable cause for such failure.

12. From the facts available on record, it is noticed that entire facts were available on record and on this there is no dispute; nor is there any contrary finding by the adjudicating authority. The entire dispute arose, as pleaded by the appellant, on account of wrong interpretation/understanding of the provisions of the Act and the lower authority has not disputed the *bona fide* pleadings of the appellant. But the penalty is levied as if it is automatic. However, it can hardly be said that there was evasion, much less wilful evasion, to pay tax or not to comply with the provisions of the Act. On the above analyses, we are inclined to accept the case of the assessees and hold that there was no justification for imposition of penalty, especially when there was no allegation of fraud, mis- representation, etc. Accordingly, the penalty imposed on the appellant shall stand deleted.

13. In view of the above, the appeal stands allowed on the above terms with consequential benefits, as per law.

(Order pronounced in the open court on 15.02.2021)

**(P. VENKATA SUBBA RAO)**
MEMBER (TECHNICAL)

**(P. DINESHA)**
MEMBER (JUDICICAL)

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