CUSTOMS, EXCISE AND SERVICE TAX APPELLAT TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench – Court No. - I

Service Tax Appeal No.417 of 2009

(Arising out of Order-in-OriginalNo.07/2008 Service Tax dated26.12.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV.)

M/s.Swarnandhra IJMII Integrated Township Development Company Private Limited
(H.No.1-90/A, Plot No.20 & 21, RBI Colony, Madhapur, Hyderabad-500081.)
...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV
.....Respondent
(PosnettBhavan, Tilak Road, Ramkote, Hyderabad-500001.)

APPEARANCE

Shri G.Natrajan, Advocate for the Appellant (s)
Shri C.Mallikarjun Reddy, Authorized Representative for the Respondent (s)

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO : A/30055/2022

DATE OF HEARING : 1 March 2022
DATE OF DECISION : 22 April 2022.

P.K.CHOUDHARY :

This an Appeal against Order-in-Original No. 07/2008 dated 26.12.2008 passed by Ld. Commissioner of Central Excise and Service Tax Hyderabad IV Commissionerate. The Appellant M//s Swarnandhra IJMI Integrated Township Pvt. Ltd., is a Special Purpose Vehicle formed, on the basis of the MOU between Andhra Pradesh Housing Board and IJM (India) Infrastructure Limited, to carry out construction of apartments catering to the needs of lower and middle income groups. Based on this MOU the appellant was developing a huge residential complex in Kukatpally, Hyderabad comprising around 2300 apartment units. The apartments would be sold by the appellant to various buyers by entering into sale deed for transfer of undivided share of land along with a construction agreement. The entire

construction activity was sub contracted to the Appellant's group company, M/s IJM (India) Infrastructure Limited. The Appellant was paying Service Tax for the amounts received from the buyers, under "Construction of Complex Service" and the Appellant was also availing CENVAT Credit of the Service Tax paid by M/s IJM (India) Infrastructure Limited and various other service providers and utilising such credit for payment of their Service Tax liabilities. Wherever the CENVAT was not sufficient to discharge their liability the appellant have paid Service Tax in cash also.

2. In this connection, a Show Cause notice dated 23.07.2010 was issued to the Appellant wherein it is alleged that in as much as the Appellant is not undertaking any construction by themselves, but the entire construction activity is sub-contracted to M/s IJM (India) Infrastructure Limited.The Appellant is not providing any taxable service. Thus, the entire amount of Service Tax collected by the Appellant from their buyers was liable to be paid to the government in cash under section 11D of the Central Excise Act, 1944 made applicable to Service Tax as per Section 83 of the Finance Act, 1994 and Section 73(A) of the Finance Act 1994. To discharge this liability as CENVAT credit cannot be utilised, the entire credit availed by the Appellant was sought to be disallowed. Another demand of Service Tax to the tune of Rs.17,85,000/- was also raised in the Show Cause Notice on the ground that Appellant had received various technical services from foreign persons during the period 2005-06 and the Appellant was liable to pay Service Tax thereon under reverse charge mechanism (RCM).

3. In adjudication of the Show Cause Notice vide the impugned order the following demands have been confirmed;

(a) an amount Rs.4,75,36,478/- has been confirmed under Section 11D read with Section 73A of the Finance Act, 1994, ibid and after considering an amount of Rs.1,79,00,496/- paid

by the Appellant in cash, the remaining amount Rs.2,96,35,982/- was ordered to be paid in cash.

(b) Interest on the above demand under Section 73B of Finance Act 1994 has been confirmed;

(c) CENVAT Credit 3,29,32,249/- availed by the Appellant is held to be ineligible. But no interest is demanded in this regard in as much as the said credit has been reversed for payment of Service Tax;

(d) Demand of Service Tax of Rs 17,85,000 has been confirmed;

(e) Appropriate interest under Section 75 of Finance Act, 1994 has been confirmed on the above demand.

(f) A penalty of Rs 17,85,000 has been imposed under Section 78 of the Finance Act, 1994.

(g) A further penalty of Rs, 5000 under Section 77(2) of the Finance Act, 1994 was also imposed.

4. Assailing the impugned order the learned Counsel for the Appellant Mr. G. Natarajan made the following submission,

- By relying on CBEC Circular No. 80/10/2004 dated 17.09.2004, para 13.6 of CBEC's Letter F.No B1/06/2005/-TRU dated 27.07.2005 and DGST's Letter dated 16.02.2006, it was claimed that the Appellant has rightly paid the Service Tax under construction of complex service and hence collection of Service Tax form the buyers and availment and utilization of CENVAT credit by the appellant was proper and hence the demands are not sustainable. In this connection he also relied on the following decisions of the Hon'ble Supreme Court, viz., CCE Vs Ratan Melting & Wires Industries – 2008 (231) ELT 22 SC; Ranadey Micronutrients Vs CCE 1996 (87) ELT 19 SC, wherein it was held that the circular issued by the Government is binding on department.
- During the relevant period there was widespread confusion in the matter of Service Tax liability of builders and most of the builders were paying Service Tax.

- Much later, the Hon'ble Supreme court held in the case of CCE V Larson and Toubro Ltd [2015(39) STR 913 SC] that composite contracts involving transfer of property in goods are liable to Service Tax only under works contract service with effect from 1.06.2007 and not under construction of complex service. But the show cause notice in this case was not issued on this ground.
- The learned Counsel for Appellant has also relied on the decision of the Hon'ble Supreme Court in case of State of AP vs. Larson and Toubro Ltd. [MANU/SC/3876/2008] wherein it has been held that in cases where entire construction activity is sub-contracted, the transfer of property in goods for the purpose of VAT would be directly from the sub-contractor to the customer and not through the main contractor. Accordingly, he argued that activity between the Appellant and their buyers would not be in the nature of works contract and hence the above decision of the Supreme Court in L&T supra is not applicable.
- Section 11D of the Central Excise Act 1944, was applicable to Service Tax upto 17.04.2006 and from 18.04.2006 a similar provision has been introduced in Finance Act 1994 viz., Section 73A.
- Even assuming that the Appellant is not liable to pay Service Tax, sub section (1) of section 11D is not applicable in this case, since the said sub section deals only with a case involving collection of more amount of tax than the tax payable. Sub section (1A), which deals with collection of tax when no tax was payable was introduced only with effect from 10.05.2008. As the present case involves collection of Service Tax where no such Service Tax was leviable, the demand under section 11D(1) is not sustainable. In this connection reliance was placed on the decision of the Tribunal in the case Everest Industries Ltd V CCE 2019(369) ELT 1569 -Tri Chennai.
- With effect from 18.04.2006 the demand has been made under Section 73A of the Finance Act, 1994 and sub section (2) of 73A

covers the present situation and hence, if at all the demand is sustainable it can be demanded only for the period after 18.04.2006.

- With regard to demand of interest under Section 73B it was argued that said section castes interest liability only in respect of the demands under sub-section (1) of 73A and not for demands under sub-section (2) of 73 A. In this connection reliance has been placed on the decision of the Hon'ble Tribunal in Indu Eastern Province Projects Pvt Ltd.[2019(20) GSTL 88 Tri-Hyd].
- The penalty of Rs. 5,000 imposed under section 77(2) of the Finance Act 1994 is not sustainable in the given facts and circumstances of the case as there was widespread confusion during the relevant period.
- With regard to demand of Service Tax of Rs 17,85,000 in respect of technical consultancy service received from abroad, it was submitted that the liability to pay Service Tax under import of service is effective form 18.04.2006 under Section 66A of the Finance Act and hence this demand pertaining to the period 2005-06 is not sustainable. In this connection reliance is placed on the judgment of the Hon'ble Bombay High Court in the case of Indian National Shipowners Vs UOI – 2009 (13) STR 235 Bom, which has also been upheld by the Hon'ble Supreme Court in the case of Union of India Vs. Indian National Shipowners Association [2010 (17) STR J57 SC].

5. Per contra Shri C. Mallikarjun Reddy, learned Authorized Representative for the Department made the following submissions;

- A point wise rejoinder to the written submissions filed by the Appellant was filed by the department.
- By relying upon Circular F.No 332/35/2006/TRU dated 1.8.2006 the builder/promoters are not liable to Service Tax and hence the demands are sustainable.
- As per the decision of the Hon'ble Supreme Court in L&T case [2015(39) STR 913 SC] the Appellant is not at all liable to pay

Service Tax. Reliance was placed on the decision of Tribunal in Krishna Homes - 2014 (34) STR 881 (Tri-Del) to canvass that the Appellant is not liable to pay Service Tax. Reliance was also placed on Indu Eastern Province Projects Pvt. Ltd.[2019(20) GSTL 88 Tri-Hyd] where the facts are identical.

- With regard to the demand of Service Tax on the import of service, the learned Authorized Representative fairly conceded that the issue is squarely covered against the revenue by the judgement of the Supreme court in Indian National Ship Owners case.

6. In his rejoinder the learned Counsel for the Appellant submitted that the facts of this case and that of Indu Eastern Province Project Private Limited are not similar in as much as in the said case the issue was whether the assessee was liable to pay Service Tax under works contract service after 1.06.2007; whereas in the present case issue is whether the Appellant is liable to pay Service Tax under complex service prior to 1.6.2007.

7. We have carefully considered the elaborate submissions made by both sides and perused the relevant documents.

8. We observe that as per decision of the Hon'ble Supreme Court in CCE v L&T limited [2015 (39) STR 913 SC] composite contracts involving transfer of property in goods is not liable to Service Tax prior to 1.6.2007. Thus, the law on this point is well settled. Though the said grounds were not raised in the Show Cause Notice or in the impugned order, since the decision of the Hon'ble Supreme Court is binding on this Tribunal we cannot hold that the Appellant was liable to pay Service Tax. Hence, we uphold the finding of the Commissioner that the Appellant was not liable to pay Service Tax during the relevant periodi.e. from April 2005 to March 2007.

9. Once the Appellant is not liable to pay Service Tax, they are also not entitled to avail cenvat credit of the amount collected in the name

of Service Tax and is liable to be paid to the Government Exchequer. In this connection, we observe a similar issue had arisen before this bench in the case of Indu Eastern Province Project Ltd. supra. Even though the category of service and the period involved in this case was different, the ratio of said decision is required to be followed. The following observations from the said decision may be quoted.

> ***"10.*** *In this case since construction/completion of incomplete houses is not squarely covered by the 'Works Contract Service', the appellant is not liable to pay service tax. Therefore, we hold that the appellant was not liable to pay service tax. We have considered if such an interpretation might cause inconvenience or hardship to the appellant. However, as held by the Hon'ble Supreme Court in Para 20 in the case of M/s. Dilip Kumar & Co. and Others (supra), "In applying rule of plain meaning, any hardship and inconvenience cannot be the basis to alter the meaning of the language employed by the legislation. This is especially so in fiscal statutes and penal statutes." We, therefore, hold that the appellant is not liable to pay service tax in this factual matrix and any amount which they collected as representing service tax is liable to be deposited with the Government under Sec. 73A(2) of the Finance Act, 1994. Since, they were not required to pay service tax, they were not entitled to take Cenvat credit and they have wrongly done so.*
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> *11. Having taken Cenvat credit which they were entitled to, the appellant debited the credit so taken as "payment of Service Tax". An argument of the Learned Counsel for the appellant is that if it is held that they are not liable to pay service tax and the amount which they have collected is held to be liable to be deposited under Sec. 73A, the amount which they debited in their Cenvat account should be considered as deposit under Sec. 73A. We find nothing in the Cenvat Credit Rules, 2004 which entitles someone who is not liable to pay service tax to claim Cenvat credit. There is also nothing in the CCR, 2004 which entitle such a person to use the CENVAT credit so wrongly availed to discharge their liability to make a deposit under Sec.*

73A. We have considered the case laws relied upon by the appellant and none of them pertain to Sec. 73A of the Finance Act, 1994. However, on a similar provision, viz., Sec. 11D of the Central Excise Act, in the case of Inductotherm India Pvt. Ltd. (supra), CESTAT, Ahmedabad upheld such utilisation of CENVAT credit for making deposits under Sec. 11D. On an appeal by the Revenue, Hon'ble High Court of Gujarat has reversed this decision - CCE, Ahmedabad-II v. Inductotherm India Pvt. Ltd. [2012 (283) E.L.T. 359 (Guj.)]. The questions of law framed by the Hon'ble High Court were :

(a) Whether, in the facts and in the circumstances of the case, the Tribunal is justified in holding that provision of Section 11D are not applicable in the instant case?

(b) Whether, in the facts and in the circumstances of the case, the Tribunal is justified in holding that the amount deposited by the respondent by making a debit entry as Cenvat credit account amounts to payment of duty as required under Section 11D of the Central Excise Act, 1944?"

Both the above questions were answered in negative i.e., in favour of the department and against the assessee by the Hon'ble High Court. Thus, the appellant has to deposit the amount collected from its clients under Sec. 73A(2) and cannot use Cenvat credit for the purpose. The amount already collected in cash gets adjusted against this amount and the appellant is liable to deposit the rest.

12. As we have already held that the appellant is not entitled to take Cenvat credit, the same needs to be recovered from them. As they have already reversed the same (as payment of 'service tax' through Cenvat account), nothing more needs to be recovered on this account. Interest, if any, under Rule 14 of CCR, 2004 needs to be paid.

13. As far as the demand of interest under Sec. 73B is concerned, it applies to cases where an amount has been collected in excess of tax assessed or determined referred to

[in] Sec. 73A(1). There does not appear to be a corresponding provision for collection of interest under Sec. 73B where any amount has been collected as tax which is not required to be collected [Sec. 73A(2)]. In the absence of any statutory provision, the demand of interest is not sustainable.

14. As far as the penalties imposed on the appellants are concerned, we find that they have disclosed their operations to the department and also expressed their doubts if they were liable to pay service tax at all. We find sufficient reason to invoke Sec. 80 to set aside the penalties and we do so.

15. In conclusion :

(a) The demand under Sec. 73A(3) read with Sec. 73A(2) of the amounts collected by the appellants from their clients as representing service tax is confirmed. The amounts already deposited in cash will be setoff against this amount.

(b) The demand of interest under Sec. 73B on the above amount is set aside as the amounts under Sec. 73A(2) are not liable to interest under Sec. 73B.

(c) The demand of reversal of ineligible Cenvat credit taken by the appellant is confirmed and the amount reversed as payment of service tax will be treated as reversal.

(d) Interest under Rule 14 of CCR is confirmed for the period between the taking of credit and its reversal.

(e) All penalties are set aside invoking provisions of Sec. 80 of the Finance Act, 1994. The appeal is disposed of as herein above."

10. Now, coming to the plea of the Appellant that provisions of Section 11D are not applicable to the present case, we observe the following : (i) The present case is one where tax was collected even though the activity was liable to tax. Only sub-section (1A) of Section 11D covers such a situation and this sub-section was introduced only in 2008. (ii) The present case is not covered under Sub-section (1)

which deals with collection of an amount of tax in excess of the liability. For ready reference the relevant portion section 11D is reproduced below.

> ***Section 11D. Duties of excise collected from the buyer to be deposited with the Central Government. -***
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> *(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.*
>
> *(1A) Every person, who has collected any amount in excess of duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.*

11. In this connection, the reliance placed by the learned Counsel of the Appellant on the decision of this Tribunal in Everest Industries Ltd case is appropriate. Accordingly, we set aside the demand under Section 11D for the period upto 17.04.2006.

12. With regard to the demand under Section 73A(2) for the period after 18.04.2006 the same is bound to be upheld. Sub-section (2) of 73A, under which the demand is made is reproduced below.

> SECTION 73A. Service tax collected from any person to be deposited with Central Government. —
>
> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any

> manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

13. By relying upon the following finding of this Tribunal in the case of Indu Eastern Province Project Pvt Ltd we set aside the demand of interest under Section 73B of the Finance Act, 1994.

> *"13. As far as the demand of interest under Sec. 73B is concerned, it applies to cases where an amount has been collected in excess of tax assessed or determined referred to [in] Sec. 73A(1). There does not appear to be a corresponding provision for collection of interest under Sec. 73B where any amount has been collected as tax which is not required to be collected [Sec. 73A(2)]. In the absence of any statutory provision, the demand of interest is not sustainable."*

14. We are of the view that the penalty of Rs.5000/- imposed on the Appellant under section 77(2) of Finance Act 1994 is not sustainable in view of the fact that issues are contentious and there was widespread confusion during the relevant time.

15. Once it is held that Appellant is not liable to pay Service Tax they are accordingly not entitled to Cenvat credit. Hence the decision of Ld.Commissioner disallowing the credit of Rs.3,29,32,249/- is upheld. Since the said credit has already been utilised for payment of Service Tax which is not required to be paid, it is as good as reversal of credit and hence no further liability subsist. In this connection we also rely on the decision of Indu Eastern Province Project Ltd..

16. With regard to Service Tax demand of Rs.17,85,000/- on import of service during 2005-06, we set aside the same by relying on the decision of the Hon'ble Supreme Court in Indian National Shipowners case. As a consequence, the demand of interest and penalty in this regard is also set aside.

17. In conclusion,

A. The demand under Section 11D of the Central Excise Act for the period up to 17.04.2006 is set aside.

B. The demand under Section 73A (2) for the period from 18.04.2006 is upheld.

C. The demand of interest under Section 73B is set aside.

D. The imposition of penalty under Section 77 (2) set aside.

E. The demand towards ineligible credit is confirmed and the amount reversed as payment of Service Tax will be treated as reversal.

F. The demand of Service Tax of Rs.17,85,000 on import of service, along with interest and imposition of penalty are set aside.

The Appeal is thus allowed in part in the above terms.

(Order pronounced in the open court on 22.04.2022.)

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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