CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Miscellaneous Application No.70040 of 2022
(On behalf of appellant)
IN
Service Tax Appeal No.70634 of 2017

(Arising out of Order-in-Original No.06/COMMISSIONER/ AUDIT-II GHAZIABAD /2017-18 dated 01/06/2017 of the Commissioner Central Excise & Service Tax (Audit), Audit-ll, Ghaziabad)

M/s L.G. Electronics (India) Pvt. Ltd., ...Appellant
(Plot No.51, Udyog Vihar, Noida)

VERSUS

Commissioner of Central Excise &

CGST, Ghaziabad ....Respondent

(Commissionerate, Ghaziabad)

APPEARANCE:

Shri Atul Gupta, Advocate &
Ms Usmeet Kaur Monga, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70514/2024

DATE OF HEARING : 19 April, 2024
DATE OF PRONOUNCEMENT : 08 August, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.06/COMMISSIONER/ AUDIT-II GHAZIABAD /2017-18 dated 01.06.2017 of the Commissioner Central Excise & Service Tax (Audit), Audit-ll, Ghaziabad. By the impugned order following has been held:

ORDER

(i) I confirm the demand of the Service Tax amounting to Rs. 1,27,94,087/-, in respect of GTA Service, against

M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar, Greater Noida under the provisions of Section 73(2) of the Finance Act. 1994. However, as the said amount already stands. deposited by them, the same is ordered to be appropriated and adjusted against the total amount confirmed. I alsc impose penalty amounting to Rs. 1,27,94,087/- upon M/s LG Electronics (India) Pvt Ltd., Plot No. 51, Udyog Vihar, Greater Noida under the provisions of Section 78 of Chapter V of the Finance Act, 1994

(ii) *I order to demand and recover the interest amounting to Rs. 7,97,345/- from M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar, Greater Noida under the provisions of Section 75 of the Finance Act, 1994:*

(iii) *l disallow the inadmissible Cenvat Credit of service tax amounting to Rs 2,24,08,117/- availed on "Maintenance and Repair Services' provided by their Authorized Service Centres and order to recover the same along with interest at the appropriate rate as applicable from time to time from M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar, Greater Noida under the provisions of Rule 14 of the Cenvat Credit Rules 2004 read with Section 11A and 11AB of the Central Excise Act, 1944. I also impose a penalty of Rs. 2,24,08,117/- under Rule 15 of the Cenvat Credit Rules, 2004 `read with Section 11AC of the Central Excise Act upon M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar, Greater Noida for their above act of omission and commission*

(iv) *l also confirm the demand of the differential amount of Service Tax amounting to Rs 2,69,25,575/- on M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar Greater Noida due to wrong availment of benefit under Notification No. 19/2003-ST dated 21.08.2003 under the provisions of Section 73(2) of the Finance Act,*

1994 and order to demand and recover the interest at the appropriate rate as applicable from time to time from M/s LG Electronics (India) Pvt. Ltd., Plot No. 51, Udyog Vihar Greater Noida under the provisions of Section 75 of the Act ibid. I also impose a penalty of Rs. 2,69,25,575/- under Section 78 of the Act; /38

(v) I drop the penal proceeding against M/s LG Electronics (India) Pvt. Ltd., Plot No. 51. Udyog Vihar, Greater Noida under the provisions of Section 76 and 77 of Chapter V of the Finance Act, 1994; and

(vi) I order to drop the following demands along with interest issued against M/s LG Electronics (India) Pvt Ltd., Plot No 51, Udyog Vihar, Greater Noida by issuance of the show cause notice dated 30.07.2007:-

I. Demand of Rs 4,29,89,553/-

II. Demand of Rs. 6,25,37,216/-

III. Demand of Rs. 13,86,700/-

IV. Demand of Rs. 2,12,50,176/-

V. Demand of Rs. 42,79,606/-.

2.1 Appellant is engaged in the manufacture of electronic and electrical goods such as Colour Television, Computer sets and Computer Monitor, Air Conditioner, refrigerator etc. They are also providing taxable services in categories such as Repair & Maintenance, Commissioning and Installation, Consulting Engineer, Online Information & Data Access and Retrieval, Intellectual Property Rights etc, and are paying service tax on Transport of goods by Road (GTA) as a service recipient under reverse charge mechanism.

1.2 Though the show cause notice in the present case was issued answerable to Commissioner Central Excise Noida, however vide letter C. No. V(19)CCO/MRT/Stt/ADJ/60/2016/6359 dated 08.12.2016 issued by the office of the Chief Commissioner, Customs, Central Excise and Service Tax, Meerut Zone, Meerut, the Chief Commissioner transferred / assigned the show cause notice for

adjudication in terms of the Circular No 1049/37/2016-CX dated 29.09.2016 issued by the Central Board of Excise & Customs Commissioner, Central Excise & Service Tax (Audit), Audit-l Ghaziabad. New Delhi. Accordingly, vide C. No. V(15)Adj./Noida/LG/13/ 07/1554-58 dated 30.12.2016, a corrigendum to the show cause notice was issued and matter has been adjudicated by the Commissioner (Audit).

2.1 Appellant is engaged in the manufacture of electronic and electrical goods. They also undertake sale and installation of the Air Conditioner imported by them. They pay appropriate taxes and duty as leviable under the Finance Act, 1994 and Central Excise Act, 1944. They are availing the credit of taxes and duties paid by them on inputs, input services and capital goods.

2.2 During course of audit of the records of the Appellant for the period July 2004 to August 2005 following irregularities were observed:

S No	Issue	Amount
1.	Service Tax on GTA Services through CENVAT Account	12794087
2.	Availed CENVAT Credit on invoices of Authorized Service Stations for the services provided during the Warranty Period	22408117
3.	Wrongly Availed the benefit of Notification No 19/2003-ST in respect of installation services provided for imported AC	26925575
4	Not paid service tax on Design and Development Fees	42989553
5	Not paid Service Tax on Royalty paid	62537216
6	Not paid service tax on export commission	1386700
7	Not paid service tax on Advertisement and Publicity services received from foreign based service providers	21250176
8	Not paid service tax under category of Business Auxiliary Services against service charges paid for training of its personnel and other similar services to foreign service providers	4279606
	Total	194571030

2.3 A show cause notice dated 30.07.2007 was issued to the appellant asking them to show cause as to why,-

(i) Service Tax amounting to Rs. 17,21,62,913/- (including education cess as applicable) should not be demanded and recovered under Section 73 of the Act and Service Tax amounting to Rs. 1,27,94,087/- already paid by them should not be appropriated and adjusted against the total amount so payable;

(ii) Penalty under Section 76, 77 & 78 of the Act should not be imposed upon them for the contravention of the various provisions of the Service Tax law:

(iii) Interest under Section 75 of the Act should not be demanded and recovered from them on the amount of Service Tax not paid by them as well as for late payment of Service Tax on GTA services as discussed above

(iv) Inadmissible Cenvat Credit amounting to Rs. 2,24,08,117/- availed by them should not be demanded and recovered along with interest from them under Rule 14 of the CCR read with proviso to Section 11A and Section 11AB of the CEA; and

(v) *Penalty under Rule 15 of the CCR read with Section 11AC of the CEA should not be imposed upon them*

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

3.1 We have heard Shri Atul Gupta and Ms Usmeet Kaur Monga, Advocates for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsels submit that:

- SCN has been adjudicated after lapse of about 10 years. Such unexplained delay is arbitrary and hence the impugned order is unsustainable. Reliance is placed on decisions in case of-
    - C N H Industrial (India) Pvt Ltd [2022 (64) GSTL 274 (Bom)]

- Bombay Dyeing and Manufacturing Company Limited [2022 (382) ELT 206 (Bom)]
- Parle International Limited [2021 (375) ELT 633 (Bom)]

- Appellant had rightly paid service tax, in respect of GTA service on reverse charge basis from the CENVAT account, and there was no requirement to make the payment in cash as have been held in following cases:
  - Oundh Sugar Mills Ltd. [2017 (52) STR 353 (ALL)]
  - Panchmahal Steel Ltd [2014 (34) STR 351 (T-LB)] affirmed in [2015 (37) STR 965 (Guj)]
  - Pallipalyam Spinners Pvt Ltd [2008 (9) STR 544 (T-Chennai)] affirmed in [2014 (36) STR J20 (Mad)]
  - Mccann Erickson (India) Pvt Ltd [2019 (30) GSTL 425 (Del)]
  - Godrej & Boyce Mfg Co Ltd [Order dated 24.06.2019 in Central Excise Appeal No 23/2019]
  - Trinayani cement Pvt Ltd. [2017 (47) STR 91 (T-All)]
- As appellant was not required to pay the said amount in cash demand for interest needs to be set aside.
- Services provided by ASC are input services for the appellant and appellant is entitled to avail CENVAT credit of service tax paid on such services as have been held in the following cases:-
  - Carrier Air conditioning & Refrigeration Ltd. [2016 (41) STR 1004 (Tri.-Del.)]
  - Delta Electronics India Pvt. Ltd.[Appeal no. 50801 of 2020 [DB]]
  - Leroy Somer India Pvt. Ltd. [2015 (39) S.T.R. 466 (Tri. - Del.)]
  - Mahindra & Mahindra Ltd. [2012 (28) S.T.R. 382 (Tri. - Mumbai)]
  - Danke Products [2009 (16) S.T.R. 576 (Tri. - Ahmd.)]
  - Johnson Controls Hitachi Air Conditioning India Ltd. [2022-VIL-482-CESTATAHM-ST]
  - Escorts Construction Equipment Ltd [2023-VIL-13 10-CESTAT-CHD-CE]

- Service provided by the appellant were in nature of work contract services which have been made taxable only from 01.06.2007. No service tax was payable prior to that date as has been held in the case of,-
  - Larsen & Toubro Ltd, [2015 (39) S.T.R 913 (SC)]
  - Total Environment Building Systems Pvt. Ltd.[2022 (63) G.S.T.L. 257 (S.C.)]
  - Praveen Electrical Works [2024 (2) TMI 504- CESTAT Banglore]
  - Aalidhra Textool Engineers Pvt. Ltd. [2022 (12) TMI 11- Cestat Ahmedabad]
  - Blue Star Ltd. [2019 (9) TMI- CESTAT Kolkata]
- Extended period of limitation could not have been invoked
- Penalties imposed cannot be sustained as demand itself is bad in law.

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 As is evident from the impugned order it is evident only three demands made in the show cause notice have been upheld and all other demands have been dropped. The demands upheld are in respect of:

S No	Issue	Amount
1.	Service Tax on GTA Services through CENVAT Account	12794087
2.	Availed CENVAT Credit on invoices of Authorized Service Stations for the services provided during the Warranty Period	22408117
3.	Wrongly Availed the benefit of Notification No 19/2003-ST in respect of installation services provided for imported AC	26925575
	Total	62127779

4.3 **Service Tax on GTA Services payable under Reverse Charge Mechanism through CENVAT Account:**

We find that this issue is no longer res-intregra and has been decided in series of decisions referred to by the Appellant during the arguments. In case of Panchmahal Steel, Hon'ble Gujarat High Court while upholding thje decision of larger bench of tribunal observed a s follows:

"4. We notice that the Punjab and Haryana High Court in the said decision in the case of M/s. Nahar Industrial Enterprises Ltd. (supra), for accepting the payment of service tax on GTA service out of Cenvat credit relied on Rule 3(4)(e) of Cenvat Credit Rules, 2004. The view of the High Court is that the said Rule allowed utilization of Cenvat credit for payment of service tax of any output service. This would also include the GTA service.

6. The view of the Punjab and Haryana High Court in the case of M/s. Nahar Industrial Enterprises Ltd. (supra) was taken into account by the Delhi High Court in the case of Hero Honda Motors Ltd. (supra). While pursuing the same line, Delhi High Court also placed heavy reliance on Section 68 of the Finance Act, 1994, and in particular sub-section (2) thereof. Sub-section (2) of Section 68 of the Finance Act, 1994, provides that every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in the same manner and within such period as may be prescribed. Sub-section (2) of Section 68, however, provides that notwithstanding anything contained in sub-section (1) in respect of any taxable service notified by the Central Government, the service tax thereon shall be paid by such person in such manner as may be prescribed at the rate specified in Section 66, and all the provisions of said Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service. In view of such statutory provisions, Delhi High Court rejected the Revenue's appeal observing as under:-

"6. In view of the specific reference to service tax and the benefit allowed to a service provider, read with the fiction

created by Section 68(2) of the Finance Act, 1994, this Court is of the opinion that there is no ground to disagree with the judgment and reasoning of the Punjab and Haryana High Court in Nahar Industrial Enterprises Ltd. The appeal consequently fails and the question of law is answered in favour of the appellant and against the Revenue."

7. Learned counsel Shri R.J. Oza produced on record a Notification No. 36/2004 dated 31st December 2004, under which, in terms of subsection (2) of Section 68, various services were notified by the Central Government; one of them being specified categories of goods transport service in relation to transportation of goods by road in goods carriage where a consignor or consignee of goods is any company established by or under the Companies Act, 1956. By virtue of this Notification, in terms of sub-section (2) of Section 68, therefore, the liability to pay service tax was thus shifted on the present assessee, i.e. service recipient instead of service provider in exception to the general rule provided under sub-section (1) of Section 68.

8. Rule 3 of the Cenvat Credit Rules, 2004 pertains to Cenvat credit. Sub-rule (1) thereof allows the manufacturer or purchaser of final products or provider of output service to take credit of Cenvat of various duties specified therein. Sub-rule (4) of Rule 3 of the said Rules provides that the Cenvat credit may be utilized for payment of various duties specified in clauses (a) to (e) thereof; clause (e) pertains to "service tax on any output service". A combined reading of these statutory provisions would, therefore, establish that though the assessee was liable to pay service tax on G.T.A. Service, it could have utilized Cenvat credit for the purpose of paying such duty. In view of the decisions of Punjab and Haryana High Court and Delhi High Court noted above, we do not find any error in the view of the Tribunal."

Thus we do not find any merits in the demand made. However as the appellant has already paid the amount in cash no refund

shall be admissible to the appellant because the liability to pay the service tax has not been set aside. However the demand for interest of Rs 7,97,345/- made in respect of these amounts is set aside.

4.4 **Availed CENVAT Credit on invoices of Authorized Service Stations for the services provided during the Warranty Period**

This issue is also no longer res-integra. In case of Escorts Construction Equipment Ltd, supra after taking note of previous decisions on the issue Chandigarh Bench has observed as follows:

"6. After considering the submissions of both the parties and perusal of material on record, we find that the issue involved in the present case has been considered in the appellant's own case for a different period by this Bench of the Tribunal and vide its order dated 05.07.2018 cited (supra), it has been held as under:-

"As the issue has already been settled by this Tribunal that the free service sale services of the vehicle provided during warranty period is an input service for the manufacturer i.e. the appellant in this case. Therefore, we do not find any merit in the impugned order, the same is set-aside."

6.1 Further, we find that this issue has also been considered by this Tribunal recently in the case of JCB India Ltd. cited (supra) wherein this Tribunal on identical facts has considered various decisions rendered on the issue of cenvat credit of service tax paid on repair and maintenance service during the warranty period and has also considered the definition of input service prior to 01.04.2011 and after 01.04.2011 and held as under:-

"19. The issue, therefore, that arises for consideration in the present appeal is whether CENVAT credit of service tax paid by the appellant on „repair and maintenance services" provided by the dealers for fulfilling the warranty

obligations of the appellant has been denied for good and valid reasons.

20. To examine this issue, it would be necessary to reproduce the relevant portion of the definition of „input service", as defined in rule 2(l) of the Credit Rules. Rule 2(l) was substituted by Notification dated 01.03.2011 w.e.f 01.04.2011 and it is reproduced below : w.e.f 01.04.2011

"2(l) "input service" means any service,-

(i) used by a provider of output service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but exclude, Xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx"

(emphasis supplied)

21. Rule 2(l), as it stood prior to 01.04.2011, is also reproduced below : 5. prior to 01.04.2011

"2(l) "input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;"

(emphasis supplied)

22. "Input service" either prior to 01.04.2011 or w.e.f. 01.04.2011 means any service used by the manufacturer, whether directly or indirectly, or in relation to the manufacture of final products. The appellant is under an obligation to provide after sale service on the final products manufactured by it. The dealers provide the services and the appellant pays service tax on the amount paid by it to the dealers. The service is provided free of cost by the dealers during the warranty period but the appellant makes payment to the dealers for the services they provide to the customers. The repair and maintenance services are, therefore, linked to the sale. The services are, therefore, used indirectly in relation to the manufacture of final products.

24. Further, we also find that the department has filed appeals before the Hon"ble High Court where the Tribunal has given the relief to the assessee but the decisions of the Tribunal in those cases have not been stayed and hence, the ratio of the said decisions are binding on the lower authorities.

25. Further, we also find that the department has not been able to distinguish the latest two decisions of the Tribunal in the case of Johnson Controls Hitachi Air Conditioning India Ltd. and M/s Case New Holland Construction Equipment (I) Pvt. Ltd. cited (supra) involving identical issues wherein all earlier decisions of the Tribunal were considered and thereafter, the demands were dropped.

26. Further, we are of the opinion that the decisions relied upon by the Revenue are not directly on the issue and does not reflect the controversy involved in the present case.

27. In view of our discussion above, we hold that the appellant has correctly availed cenvat credit on the amount of service tax paid for the services provided by the dealers to the customers on behalf of the appellant for fulfilling the warranty obligations of the appellant.

28. The ratio of the decisions relied upon by the appellant is squarely applicable to the instant case and relying upon the aforesaid decision, we find that the credit on warranty service provided free of cost during the warranty period through third parties cannot be denied.

29. As regards, the invocation of extended period of limitation, we hold that there does not exists any reason for invoking the extended period of limitation as the issue involved in the present case has already been decided in favour of the appellant. Moreover, the department did not bring any material on record to show that the appellant has suppressed the material facts with intend to evade payment of service tax. Besides this, the audit of the

record of the appellant was conducted in February/March 2007 whereas the show cause notice was issued in 2009 after the expiry of two and half years which makes the substantial demand beyond the period of limitation.

30. In view of our discussion above, the impugned orders are set-aside and both the appeals of the appellant are allowed with consequential relief, if any, as per law."

6.2 Further, we find that the Tribunal in the case of M/s New Hollend Construction Equipment (I) Pvt. Ltd. cited (supra) has considered the identical issue and has held as under:-

"41. It is, therefore, considered appropriate to follow the three decisions rendered by the Tribunal in Carrier Airconditioning & Refrigeration, Honda Motorcycle and Samsung India Electronics in preference to the later decision rendered on 24.11.2017, which has distinguished these three decisions on a non-existent ground. This is what was observed by the Supreme Court in Babu Parasu Kaikadi and the relevant portion is reproduced below:

"18. Furthermore, this Court, while rendering judgment in Dhondiram Tatoba Kadam vs. Ramchandra Balwantrao Dubal15 was bound by its earlier decision of a coordinate Bench in Ramchandra Keshav Adke vs. Govind Joti Chavare. We are bound to follow the earlier judgment which is precisely on the point in preference to the later judgment which has been rendered without adequate argument at the Bar and also without reference to the mandatory provisions of the Act."

42. In this view of the matter, the appellant correctly availed CENVAT credit on the amount of service tax paid for the services provided by the dealers to the customers on behalf of the appellant for fulfilling the warranty obligations of the appellant.

43. The order dated 25.05.2018 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed."

6.3 Further, we find that the contention of the Revenue is that the earlier decisions of the Tribunal in the appellant's own case as well as in the case of CCE, Nashik vs. Mahindra & Mahindra Ltd. cited (supra), the department has filed appeal which is pending before the Hon'ble High Court of Punjab and Haryana and Hon'ble High Court of Bombay will not help the case of the Revenue because in both the cases only appeal has been admitted and no stay granted.

6.4 Further, we find that this Tribunal in various decisions relied upon by the appellant on identical issues has consistently held that the assessee is entitled to cenvat credit of service tax paid on Repair and Maintenance during the warranty period as the same fall within the ambit of 'Input Service' as provided in Rule 2(l) of CCR, 2004."

In view of the above we find that CESTAT has constantly been taking view in respect of admissibility of CENVAT credit in on warranty services provided through third party – authorized service centres. Thus we do not find any merits in this demand and set aside the same

4.5 **Wrongly Availed the benefit of Notification No 19/2003-ST in respect of installation services provided for imported AC.**

In the impugned order following findings has been recorded:

29. On going through the allegation labeled against the party and the defence reply of the party, it is observed that erstwhile Section 65(105)(zzza) of the Act, which has also been referred to by the party, defines works contract" as a contract wherein as per sub clause (a) transfer of property in goods involved in the execution of such contract is leviable to sales tax. Secondly, under clause (b) such contract is for the purposes of carrying out

erection, commissioning or installation; commercial or industrial construction; construction of residential complex, 'Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects. The party had provided the "Installation and Commissioning Services" to their customers during the period 10.09.2004 to 31.03.2006 and the 'works contract was introduced with effect from 01.06.2007, therefore, it is observed that it is unwarranted to go in so much of details to discuss the provisions laid down there under 'works contract". It is also irrelevant that they were not liable to pay service tax in the period under examination because there was no 'works contract. It is important to mention here that the business activity undertaken by the party has to be tested under the existing law at the material time and Erection of plant, machinery or equipment was taxable since 10.09.2004 whereas Commissioning or installation of plant, machinery or equipment was already taxable from 01.07.2003 under the Finance Act, 1994. Therefore, I do not find force in above averments put forth by the party.

30. In their submissions, the party have contended that ***"The SCN merely mentions that the Noticee was having a Centralized accounting system for both manufacturing and service activities and that the Noticee was in general availing Cenvat credit on inputs and capital goods. It is submitted that the Noticee was availing Cenvat credit only on inputs and capital goods which were used for manufacturing other dutiable products or for providing taxable services. The Noticee was not availing Cenvat credit on inputs and capital goods used for providing erection, commissioning service"*** *It or installation iS observed that at one place the party has asserted that in the centralized accounting system for both manufacturing and service activities they were*

availing Cenvat credit in respect of only those inputs and capital goods which were used for manufacturing other dutiable products or for providing taxable services and, therefore as a corollary not for the exempted goods & services. However at other place in the case file itself [Para 1.A.14 & 1.A.15 of their defence reply of the first issue], they pleaded that there cannot be one to one correlation in respect of Cenvat Credit availed U cannot be accepted that the party has not availed cenvat credit in respect of these Centralised accounting system. In view of such contradictory stand of the party it cannot be accepted that the party has not availed cenvat credit in respect of these goods or services which were used for Erection, Commissioning or Installation services provided by them.

31. I find that the legal requirement in respect of availing benefit of abatement under Notification No. 19/2003-ST dated 21.08.2003 or under Notification No. 1/2006-ST dated 01.03.2006 supra. Firstly, the definition of Erection, commissioning or installation in the relevant period under erstwhile Section 65(39a) of the Act is as under:

I. From 10.09.2004 to 15.06.2005, "erection, commissioning or installation means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment;

II. W.e.f. 16.06.2005: "erection, commissioning or installation' means any service provided by a commissioning and installation agency in relation to:-

(i) erection, commissioning or installation of plant, machinery or equipment; or

(ii) installation of -

a. electrical and electronic devices, including wiring or fitlings thereof; or

b. *plumbing, drain laying or other installations for transport of fluids; or*
c. *heating, ventilation or air-conditioning including related pipe work, duct work and sheet melal work; or*
d. *thermal insulation, sound insulation, fire proofing or water proofing; or*
e. *lift and escalator, fore escape staircases or travelators; or*
f. *such other similar services*

32. It is observed that the Finance Act, 1994 has defined 'Commissioning and Installation Agency' under erstwhile Section 65(29) of the Act as any agency providing services in relation to commissioning or installation. With effect from 10.09.2004, the definition stands amended, so as to read as 'any agency providing the services in relation to erection, commissioning or installation'. Thus, I find that the services provided by the party were well covered under the then existing 'Erection commissioning or installation' service and their plea that "the Noticee was not liable to pay any service tax under 'erection, commissioning or installation service" is not tenable

33. Further, it is observed that during the period under examination there was an optional exemption by Notification No. 19/2003 dated 21.08.2003 wherein it was provided that in case of a contract which involves the commissioning or installation service along with supply of plant, machinery or equipment, service tax will be payable only on 33% of the gross amount charged for commissioning or installation and supply of plant, machinery or equipment It was optional for the assesse to avail of this notification. It is emphasized under this notification that the gross amount shall include the value of the plant, machinery, equipment, parts and any other material sold by the service provider along with the

commissioning or installation service. The benefit of this notification can be availed for a contract only if the exemption under Notification No. 12/2003-ST, dated 20.06.2003 on the value of goods and materials sold is not availed for the contract. Further, with effect from 10.09.2004, the benefit under this notification shall be allowed only if no credit of duty paid on inputs or capital goods has been taken under the provisions of the CCR

34. From 10.09.2004, Notification No. 19/2003 dated 21.08.2003 exempts the taxable service provided to a customer in relation to commissioning or installation by a commissioning and installation agency, from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the amount of service tax calculated on a value which is equivalent to thirty-three per cent. of the gross amount charged from the customer under a contract for supplying a plant, machinery or equipment and commissioning or installation of the said plant, machinery or. equipment, subject to the following conditions, namely.

(i) installation agency and the exemption contained in this notification is optional to the commissioning and installation agency; and

(ii) the benefit under this notification shall be allowed only if the commissioning and installation agency has not availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax dated the 20th June, 2003, [G.S.R. 503 (E). dated the 20th June, 2003], for the said contract;

(iii) the benefit under this notification shall be allowed only if no credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules 2004.]

**Inserted w.e.f. 10.09.2004*

Explanation. - For the purposes of this notification, the gross amount charged shall include the value of the plant, machinery, equipment, parts and any other material sold by the commissioning and installation agency, during the course of providing commissioning or installation service

This notification was effective until rescinded with effect from 01.03.2006 by the Notification No. 01/2006-ST dated 01.03.2006, with similar provisions, which exempts the taxable service of the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of section 65 of the Finance Act " specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid

Table

S. No	*Sub-clause of clause (105) of Section 65*	*Description of taxable service*	*Conditions*	*Percentage*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
5	*(zzd)*	*Erection, commissioning or installation under a contract for supplying a plant, machinery or equipment and erection, commissioning or installation of*	*This exemption is optional to the commissioning and installation agency. Explanation. The gross amount charged from the customer shall include the value of the plant, machinery, equipment, parts and any other material sold by the*	*33*

		such plant, machinery or equipment.	*commissioning and installation agency, during the course of providing erection, commissioning or installation service.*	

Provided that this notification shall not apply in cases where,-

i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G. S.R. 503 (E), dated the 20th June, 2003].

35 It is observed that, in the first proviso to the notification No. 01/2006 dated 01.03.2006, it has been clearly mentioned that this notification shall not apply in cases where ***"the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004"****.I find that, with effect from 01.03 .2006, the law has been amended to limit the condition of not availing CENVAT credit only on those inputs or capital goods or the CENVAT credit of service tax on input service which are used for providing such taxable service. However, in the previous Notification No. 19/2003 dated 21.08.2003 there was no such stipulation in respect of CENVAT credit on inputs/ capital goods that the same should have been 'used for providing such taxable service'. Therefore, 1 am of the considered opinion that credit taken on any input / capital goods debarred the party from the benefit of notification No. 19/2003-ST dated 21.08.2003 in the period prior to 01.03.2006*

36. Further, in respect of the period from 01.03.2006 to 31.03.2006 the party in their defence have contended that

they have not availed Cenvat credit on any input, capital goods and input service used for providing the impugned taxable services of Erection Commissioning or Installation during he period under consideration. However, the party have not furnished any material evidence in support of their contention. They were required to produce / furnish the evidences in support of their claim that no CENVAT credit was taken on the inputs/ capital goods/ input services used for providing the services under ' Erection, commissioning or installation'. The party had to adduce material evidences to corroborate their claim. The burden of proof regarding the admissibility of Notification No. 19/2003-ST dated 21.08.2003 and also Notification No 01/2006 dated 01.03.2006 was on the party as they were availing the benefit of these notifications. There is catena of judgements wherein even the Hon'ble Apex court has stated that it is upon them to establish that all the conditions to avail the benefit have been completely fulfilled.

37. In the case of COLLECTOR OF CUSTOMS Versus PRESTO INDUSTRIES 2001 (128) E.L.T. 321 (S.C.)], the Apex Court held that onus of proof of fulfilment of condition subject to which an exemption may be admissible lies on the assessee or upon a party claiming benefit under the notification - Where condition precedent is not fulfilled before claiming any exemption such benefit would not be admissible. Also, in the case of HOTEL LEELA VENTURE LTD. Versus COMMISSIONER OF CUS (GEN.), MUMBAI [2009 (234) E.L.T. 389 (S.C.)] again it was held that burden or importer to prove satisfaction of terms and conditions of exemption notification - Section 25 of Customs Act, 1962. Again, in the case of COMMISSIONER OF C. EX. & CUS. INDORE Versus PARENTERAL DRUGS (!) LTD. [2009 (236) E.L.T. 625 (S.C.)] Hon'ble Supreme Court observed and held that exemption notifications to be interpreted strictly -Burden on assessee to prove that the item falls within four corners of exemption notification - Section 5A of Central Excise Act, 1944. The Apex

Court in the case of BOC INDIA LTD. Versus STATE OF JHARKHAND [2009 (237) E.L.T. 7 (S.C.)] held that for purpose of claiming exemption from paymcnt of tax/special rate of tax applicable to a commodity, assessee must bring on record sufficient materials to show that it comes within the purview of notification - Bihar Finance Act, 1981. Further more, in the case of COMMISSIONER OF C. EX., NEW DELHI Versus HARI CHAND SHRI GOPAL [2010 (260) E.L.T 3(S.C.)] it was held that person who claims exemption or concession has to establish that he is entitled to that exemption or concession. Also in the case of NOVOPAN INDIA LTD. Versus COLLECTOR OF C EX. AND CUSTOMS, HYDERABAD1994 (73) E.L.T. 769 (S.C.), it was held that interpretation of statute - Exemption being in the nature of exception to be construed strictly at the stage of determination whether assessee falls within its terms or not and In case of doubt or ambiguity, benefit of it must go to the State But once the provision IS found applicable to him, full effect must be given to it - Section 5A of Central Excises and Salt Act, 1944 - Section 25 of Customs Act, 1962".*

38 In the instant case, it was on to the party to furnish adequate evidences in support of their claim. The party failed to substantiate their claim. In the case of Steel Authority of India Limited versus Commissioner, Central Excise Raipur [2007 (208) EL.T 367 (Tri.- Del.)], the Hon'ble Tribunal observed that assessee failed to produce any supporting documentary evidence regarding period/duration of use of such CI/Steel rolls before sale/removal of same as waste and scrap- No efforts made by assessee to substantiate their claim..... Also, in the case of WHIRLPOOL OF INDIA LTD. Versus UNION OF INDIA [2001 (137) E.L.T. 42 (P&H)], the Hon'ble High Court of Punjab & Haryana at Chandigarh held that the submission is misconceived. The petitioner has come with a complaint against the action of the authorities. The merits have been examined. It has failed to substantiate its claim. Thus, the relief as prayed for cannot be granted. In

the case of Commissioner of Central Excise, Bangalore v. Brindavan Beveragaes (P) Ltd. & Ors. [(2007) 5 SCC 388], the Apex Court held that as no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted. This judgement was also relied upon by Hon'ble Supreme Court in the case of VINOD SÓLANKI Versus UNION OF INDIA [2009 (233) E.L.T. 157 (S.C.)].

39. In the light of the above discussions and pronouncement of the highest court of the land I find that the party could not make their case. Therefore, the SCN sustains and the party is liable to pay the differential amount of Service Tax amounting to Rs 2,69,25,575/- along with interest at the appropriate rate as applicable from time to time " under the provisions of Section 73 and 75 of the Act. The party had availed the abatement under Notification No. 19/2003-ST in respect of Erection, Commissioning and Installation service by concealing the facts in respect of availment of facts regarding availment of cenvat credit against inputs, Capital Goods and Input Services and still they are contesting the issue on the basis that they were covered under the Works Contract Service. While it is evident on a perusal of the record that they were availing the benefit under Notification No. 19/2003-ST in respect of Erection, Commissioning and Installation service. It proves that the party has suppressed the facts with intent to evade the payment of Service Tax. Thus, they rendered themselves liable for penal action under the provisions of Section 78 of the Act in view of the facts as discussed hereinabove. However, I am not inclined to impose the penalty under Section 76 of the Act."

4.6 We are not in position to agree with the above findings. In case of Larsen and Tubro [2015 (39) S.T.R 913 (SC)] Hon'ble Supreme Court observed as follows:

"1. This group of appeals is by both assessees and the revenue and concerns itself with whether service tax can be levied on indivisible works contracts prior to the introduction, on 1st June, 2007, of the Finance Act, 2007 which expressly makes such works contracts liable to service tax.

6. Service tax was introduced by the Finance Act, 1994 and various services were set out in Section 65 thereof as being amenable to tax. The legislative competence of such tax is to be found in Article 248 read with Entry 97 of List I of the 7th Schedule to the Constitution of India. All the present cases are cases which arise before the 2007 amendment was made, which introduced the concept of "works contract" as being a separate subject matter of taxation. Various amendments were made in the sections of the Finance Act by which "works contracts" which were indivisible and composite were split so that only the labour and service element of such contracts would be taxed under the heading "Service Tax".

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.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

42. It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by Mcdowell's case.

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of."

4.7 The request made by the revenue for reconsideration of the Larsen and Tubro case has also been rejected by the Hon'ble Supreme Court in case of Total Environment Building Systems Pvt. Ltd.[2022 (63) G.S.T.L. 257 (S.C.)].

4.8 Thus we are of considered view that in the case of indivisible contracts were the supply or transfer of property in goods was also involved along with the provision of service of erection, installation and commissioning no service tax could have been levied prior to 01.06.2007. As we hold that service tax itself was not leviable in respect of these services provided by the appellant, then question of admissibility of abatement/ exemption under Notification No 19/2003-ST becomes irrelevant. Hence we do not find any merits in the demand made by disallowing the benefit of said notification. Similar view has been expressed by tribunal in series of decisions referred by appellant at the time of arguments.

4.9 As all the demands are set aside on merits we set aside the demand of interest and also the penalties imposed on appellant.

4.10 As we have set aside the impugned order on merits itself we are not recording any findings on the other submissions made by the appellant.

5.1 Appeal allowed.

(Pronounced in open court on-08 August, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp