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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11656 of 2014-DB

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-COM-077-13-14 dated 27.01.2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Heena Enterprises .... **Appellant**
Room No. 04, 1st Floor, Tower Bridge Apartment,
Rander Road, Adajan Patia, SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-i .... **Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

AND

SERVICE TAX Appeal No. 11657 of 2014-DB

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-COM-073-13-14 dated 27.01.2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

M K Enterprises .... **Appellant**
Room No. 04, 1st Floor, Tower Bridge Apartment,
Rander Road, Adajan Patia, SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-i .... **Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

APPEARANCE :

Shri JC Patel and Shri Rahul Gajera, Advocates for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 01.07.2022
DATE OF DECISION: 26.07.2022

FINAL ORDER NO. A/10815-10816 / 2022

RAMESH NAIR :

The present appeals arise out of Order-In-Original No. SUR-EXCUS-001-COM-073-13-14 dated 27.01.2014 and Order-In-Original No. SUR-EXCUS-001-COM-077-13-14 dated 27.01.2014 in respect of M K Enterprises

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and Heena Enterprises, proprietorship firms of Mr. M K Alam (herein after referred to as "appellant") passed by the Commissioner, Central Excise & Customs, Surat vide which Commissioner has confirmed the demand of service tax amounting to Rs. 124,76,425 and Rs. 61,82,144 respectively upon the appellants under section 73 (2) of the Finance Act, 1994 ("Act") along with interest and further imposed penalties under section 76, 77 and 78 of the Act.

2. Briefly, facts of these cases are that during the period October 2004 to March 2009, the Appellant undertook the activities such as construction or fabrication works as sub-contractor of L & T Ltd in respect of Flyover/ Bridge at Kolkatta and Allahabad; construction or fabrication works as sub-contractor of L & T Ltd in respect of Metrorail and Monorail at Delhi and Vadala; construction or fabrication works as sub-contractor of Geodesic Techniques in respect of Airport; fabrication of Steel Structures as sub-contractor of Techno Fab; construction or fabrication works as sub-contractor of L & T Ltd in SEZ unit of Reliance Petroleum Ltd, Jamnagar and in SEZ unit of Reliance Oil & Gas Terminal, Kakinada; work of fabrication of steel structures as sub-contractor of L & T Ltd at various sites such as Panipat for Indian Oil Corporation and Sipat for NTPC. The Appellants did not charge and recover service tax from their principal contractors namely L & T Limited, Geodesic Techniques and Techno Fab on the above activities and did not pay service tax.

3. The Director General of Central Excise Intelligence (DGCEI), Ahmedabad, in or about April 2009, initiated investigations and based on Appellant's Annual Reports, Ledgers, and Statements of various persons issued Show Cause Notices both dated 21-4-2010 under section 73(1) of the

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Act on the premise that although appellants had rendered service of Erection, Commissioning or Installation covered by Section 65 (39a) of the Finance Act 1994 however failed to discharge their service tax liability.

4. The Appellants by their replies dated 30.10.2013 contested the said Show Cause Notice, both on merits and on limitation. The Commissioner of Central Excise, Surat, after considering the said reply of the appellants, vide his Order in respect of M K Enterprises held that activity undertaken by the Appellant in the State of Jammu and Kashmir is not liable to Service Tax since the Finance Act, 1994 does not extend to Jammu and Kashmir. Further, as regards service rendered in SEZ unit of Reliance Petroleum Ltd in Jamnagar, he has held that Service Tax is not payable. Except the said findings, the Commissioner has confirmed the demand for Service Tax of Rs.1,24,76,425/- with interest and penalty equal to the said amount under section 76 and Section 78 of the Act and further penalty amounting to Rs.20,000/- under Section 77 of the Act. As regard, Heena Enterprises, Commissioner confirmed the demand of Service Tax of Rs. 61,82,144/-. The appellants are in appeal against the confirmation of demand of service tax as held by the above Orders of the Commissioner.

5. Shri J.C. Patel Learned Counsel appearing for the appellant at the outset submits that the show cause notice has not examined the individual sub-contracts/work contracts and that the approach adopted in the Show Cause Notice is that since in the Annual Report/Audit Report of the Appellants, the nature of Appellants' business is mentioned as Erection and Commissioning Contractor; the Appellants had rendered service of Erection, Commissioning or Installation covered by Section 65 (39a) of the Finance Act 1994The show cause notices proceeded on the assumption that entire

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amounts received by the Appellants from the principal contractor are towards the service of Erection, Commissioning or Installation covered by Section 65 (39a) of the Finance Act 1994; that such an approach is untenable in law and proposal of demand made by such Notices and confirmed by the impugned orders is bad in law. He submitted that whether the service rendered under each individual sub-contract/work contract, satisfies the definition of Erection, Commissioning or Installation given in Section 65 (39a) of the Finance Act 1994 has to be examined and decided with reference to the terms of each individual sub-contract/ work contract and the nature of work involved in execution thereof; that no blanket presumption can be made because of the way the nature of business is described in the Annual Report/ audit report. He submitted that construction activity undertaken by the Appellant as sub-contractor in respect of Flyovers, Bridges, Railways, Airport etc. are not liable to service tax under the taxable service of "Erection, Commissioning or Installation" covered by Section 65 (39a) of the Finance Act 1994.

6. He submitted that activity undertaken during the period 2004-05, 2005-06 and 2007-08 by the Appellant as Sub-Contractor of L & T Ltd, in respect of Flyover/ Bridge at Kolkatta and Allahabad was one of construction service which is not liable to service tax, much less was it liable to service tax under the taxable service of "Erection, Commissioning or Installation" as defined in Section 65 (39a). The definition of "Commercial or Industrial Construction Service" as given in Section 65 (25b) of the Finance Act 1994, specifically excluded service in respect of Bridges. Therefore, any construction activity undertaken by the Appellant in respect of Bridges was not liable to service tax. The definition of "Erection, Commissioning or Installation" under Section 65 (39a) as in force during 2004-05 and 2005-

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06, covered Erection, commissioning or installation of Plant, Machinery or Equipment. He submitted that construction activity undertaken in respect of Bridges**,** can by no stretch of imagination be said to be Erection, Commissioning or Installation of Plant, Machinery or Equipment. Bridges cannot be equated with Plant, Machinery and Equipment. The Commissioner has in his Order-in-Original wrongly proceeded on the basis that the work undertaken by the Appellant in relation to Bridges/ Rails was one of fabrication and that this does not amount to undertaking of work of Civil construction. The said finding of the Commissioner that fabrication of various Beams, Struts, Pylons, etc for Bridges/Rail is not civil construction work is totally misconceived and fallacious; it is indeed part of Civil construction. The definition of "Commercial or Industrial Construction Service" as given in Section 65 (25b) of the Finance Act 1994 speaks of construction of Civil Structure or Part thereof and then excludes from its purview services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. A Bridge is indeed a Civil structure and Beams, Struts, Pylons, etc would be Part of such Civil Structure. However, any service in respect of Bridges is excluded from liability to service tax. When the Appellants undertook fabrication of various parts of the bridges such as beams, struts, pylons, etc, it was service in respect of bridges and therefore excluded from the tax net. In this behalf he relied upon the Tribunal decision in the case of Jagdish Prasad Agarwal v CCE – 2017 (3) ELT GSTL 455 in which it has been heldthat the words "in respect of" contained in clause (25b) of Section 65 ibid has a wider connotation and bears the widest possible scope. Clearly therefore, fabrication/ construction of Beams, Struts, etc for Bridges/Rails is a service in respect of Bridges/Rails and therefore outside the tax net.

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7. He further relied upon the case of Pioneer Fabrications P. Ltd v CCE – 2016 (42) STR 563 in which it is held that supplying and fixing of Metal Crash Barriers along the Highways is part of activity of construction of roads and therefore not liable to service tax and the same cannot be considered as taxable activity of erection, commissioning or installation of plant, machinery or equipment. Similarly, in the case of PES Engineers P. Ltd v CST – 2017 (17) GSTL 57, the issue was whether fabrication and installation of Shaft Liners/ Steel Liners/ Pen Stocks in the course of construction of Tunnels is liable to Service Tax under the Service of Erection, Commissioning or Installation. It was held in that judgment that the fabrication and installation of the said Liners/Shafts/Pen Stocks was an integral part of construction of Tunnel and cannot be said installation of plant, machinery or equipment, independently of the Tunnel since without the said Liners/Shafts/ pen stocks, the tunnel would be incomplete. He submitted that applying the ratio of the aforesaid decisions to the present case, it would follow that construction or fabrication of Beams, Struts, etc undertaken by the Appellants for Bridges and Railways is integral part of Construction of Bridges and Railways as without which the Bridges and Railways would not be completed, and that since the said activity is excluded from taxable service under the definition of Commercial or Industrial Construction service under Section 65 (25b) of the Act, the same cannot therefore be taxed as Erection Commissioning or Installation of Plant, machinery or equipment. He submitted that fabrication or construction of Beams, Struts, etc of Bridges and Railways certainly does not amount to Erection, Commissioning or Installation of Plant, Machinery or Equipment as Beams, Sturts etc. of Bridges and Railways are not Plant, Machinery or Equipment.

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8. As regards, the construction or fabrication undertaken by the Appellant in 2008-09 in respect of Metrorail and Monorail at Delhi and Vadala, he submitted that the same will also not be taxable as Erection, Commissioning or Installation as defined in Section 65 (39a). He submitted that although with effect from 1-5-2006, the said definition was amended to cover "Structures" in addition to Plant, Machinery or Equipment, the same would make no difference since no Structure is erected and installed by the Appellant independently of the construction of the Railway and the fabrication undertaken by the Appellant is integral part of the Railway. He submitted that for the same reasons, construction activity undertaken by the appellant as Sub-Contractor of Geodesic Techniques, in respect of Airport will also not be taxable under Erection, Commissioning or Installation.

9. As regards, activity of undertaking fabrication of steel structures as sub-contractors of Techno Fab and L & T Ltd out of the raw materials of clients, the same was in the nature of job-work activity of production on behalf of clients and as steel structures are excisable goods liable to duty the same was not liable to service tax. It is held in the following decisions that fabrication of steel structures is not liable to service tax under the category of "Erection, Commissioning and Installation":

(a) Hazi Ap Bava& Co v CCE – 2014 (33) STR 470, Swift Engineers v CGST – 2019 (8) TMI 826,

(b) Jagat Jeet Engineers v CST – 2018 (7) TMI 1791, Plus Tech Engineering P. Ltd v CCE – 2015 (39) STR 454,

(c) Neo Structo Construction Ltd v CCE – 2010 (19) STR 361.

10. He submitted that assuming that the aforesaid job work activity of production amounts to rendering of service, it would at best be Business

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Auxiliary Service covered under Section 65 (19) (v) of Finance Act 1994, which, was exempted by Notification No.8/2005-ST dated 1-3-2005. He pointed out by referring from the appeal papers that Techno Fab had by their letter specifically instructed the Appellants not to charge service tax for that reason. He submitted that the Commissioner has wrongly held that Appellants have not submitted documentary evidence in support of contention based on Notification No.8/2005-ST. It is not in dispute that the production was done with materials of the clients at their site and therefore Notification No.8/2005-ST is satisfied. Even if the said exemption is to be held to be inadmissible there is no demand for Service tax in the Show Cause Notice under the category of Business auxiliaryservice. The demand in the Show Cause Notice is under Erection, Commissioning or Installation, which is clearly not tenable in law.

11. As regards, fabrication of Hulls/ Parts of body of Ships, etc for ABG Shipyard Ltd, he submitted that the same was not undertaken by Appellant and in any event, the same is liable to service tax under "Erection, Commissioning or Installation", that it is an admitted position in the Show Cause Notice that the Annual reports of the Appellant do not show any receipt of any amount from ABG Shipyard Ltd. This clearly shows that Appellant has not undertaken any fabrication work for ABG Shipyard. The Show Cause Notice has demanded service tax from the Appellant on payments made by ABG Shipyard to a firm other than the Appellant, having the same name as the Appellant. He pointed out from the records that Form 16A issued by ABG Shipyard shows payment to M.K. Enterprise with PAN AACPZ5313R, which is not PAN of the Appellants' proprietor; that the Commissioner, in his findings has not rebutted this aspect. In any event, fabrication of Hulls/ Parts of body of Ships, etc is manufacture of exciseable

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goods on job work basis out of the materials of the clients and can by no stretch of imagination be called Erection, Commissioning or Installation of Plant, Machinery or Equipment or Structures.

12. Learned counsel for the appellant further submitted that the Show Cause Notices dated 21-4-2010 demands Service tax for the period October 2004 to March 2009, which is time barred as the same covers the period beyond the limitation period of "one year" specified in Section 73 (1) of the Finance Act, 1994. He submitted that the larger period of limitation of 5 years specified in the Proviso to said Section 73 (1) is inapplicable in the present case as there is no fraud, collusion, wilful mis-statement, suppression of facts or contravention with intent to evade payment of service tax, that there is no clandestine activity and complete records have been maintained in normal course of the activity undertaken by the Appellants. He submitted that the non-payment of service tax is on account of the belief that no service tax was payable in respect of the activities undertaken by the Appellants; that the very fact that various decisions of Tribunal referred to herein above have also held that no service tax is payable on activities such as those undertaken by the Appellants, itself shows that the Appellants' belief was reasonable and bona fide. That it is settled law that where complete records are maintained and there is no clandestine activity and where non-payment of service tax is on account of bona fide belief that no service tax was payable, the larger period of limitation cannot apply. He relied upon the following judgements in this behalf: Steelcast Ltd v CCE – 2009 (14) STR 129 (upheld in 2011 (21) STR 500),

(a) Religare Securities Ltd v CST – 2014 (36) STR 937,

(b) Lanxess Abs Ltd v CCE – 2011 (22) STR 587

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(c) K.K. Appachan v CCE – 2007 (7) STR 230.

13. He further submitted that even assuming that service tax was payable, the question whether the sub-contractor is liable to pay the service tax, itself had not been free from doubt. The Central Board of Excise and Customs changed its previous view that service tax is not payable by sub-contractor, by Circular dated 23rd August 2007. Even after the said Circular, there were conflicting decisions of the Tribunal, necessitating reference to Larger Bench and only recently by its decision in CST v Melange Developers – 2020 (33) GSTL 116 Tri (LB) the Larger Bench decided the said issue, that is settled law that where the issue has not been free from doubt requiring reference to Larger Bench, the larger period of limitation cannot apply.

14. Learned Counsel for the appellant pointed out that in any event Commissioner of Central Excise, Surat did not have jurisdiction to pass Order demanding service tax, when the alleged taxable events had occurred outside his jurisdiction in places such as Kolkatta, Allahabad, Chennai, etc., that it is an admitted fact that the activities in question were undertaken by the Appellant at various sites located outside the jurisdiction of Commissioner of Central Excise, Surat, in places such as Kolkata, Allahabad, Chennai, etc. The alleged taxable events had therefore occurred outside the jurisdiction of Commissioner of Central Excise, Surat. He therefore did not have jurisdiction to pass Order demanding Service tax in respect of alleged taxable events which occurred outside his jurisdiction, in support of the said proposition that where the alleged taxable events have occurred outside the jurisdiction of the authority in question, such authority cannot pass order demanding the tax, he relied upon the following decisions:

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(a) Supermax Personal Care P. Ltd v UOI – 2021 (377) ELT 399,

(b) B.L.Mehta Construction Co. P. Ltd v CST- 2018 (8) GSTL 92,

(c) Transocean Offshore v UOI – 2017 (356) ELT 45 (AP).

15. Shri Vinod Lukose, learned Superintendent, Authorised Representative appearing for the revenue reiterates the findings given in the impugned orders. He further submitted that appellant in his appeal on one hand took a stand that they have carried out fabrication work covered under the definition of taxable service of commercial or industrial construction that excludes services provided in respect of roads, airports, transport terminals, bridges, tunnels & dams. On the other hand, they contended that their contracts involved labour plus sale of material – a works contract and hence not taxable. He runs through the work orders, bills etc from the appeal papers to submit that activity of the appellant was simplicitor a service and not one encompassing supply of goods and service; that services when performed required use of certain consumables by the sub-contractor, however since consumables consumed by the sub-contractor is not exigible to VAT, hence the averment that contract is a work contract involving both supply of goods and service is not tenable argument. He submitted that there is no dispute that appellant was engaged in fabrication work. He invited attention to the relevant paras of show cause notices and Orders of the Commissioner and submitted that Commissioner has in his order explained in details as to how the said activity of fabrication is correctly classifiable under the definition of taxable service of "commission and installation service" under section 65 (29) of the Act as it existed upto 09.09.2004 and "erection, commissioning and installation service" under section 65 (39a) of the Act. In this behalf he referred to para 20 of the Order of Commissioner.

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16. As regards, the appellants plea that they had not charged service tax in their invoices raised on their principal contractor and that service tax was already paid by the principal contractor is not tenable in law; he cited CBEC Circular No. 96/2007-ST dated 23.08.2007 and Larger Bench decision of Tribunal in the case of Melange Developers P. Ltd - 2020 (33) GSTL 116 Tri-LB and Shree Gurukrupa Construction Company – Final Order No. A/11471/2019 to substantiate the point that sub-contractor was liable to pay service tax and that payment of service tax by the main contractor was not a deciding factor as far as taxability of the service rendered by the sub-contractor is concerned. In support of his argument, learned AR also placed reliance on the following judgments:-

(a) Shree Gurukrupa Construction Company [Final Order - A/11471/2019]

(b) VPSSR Facilities vs. Commissioner of VAT [WP (C) 7843/2014]

(c) Nitin Spinners Limited - [2017 (355) E.L.T. 562 (Tri. -Del.)]

(d) Star Industries - [2015 (324) E.L.T. 656 (S.C.)]

(e) Northern Operating Systems Pvt. Limited [2022 Live Law (SC) 526]

(f) Neminath Fabrics Pvt. Limited - [2010 (256) E.L.T. 369 (Guj.)]

(g) Mathania Fabrics - [2008 (221) E.L.T. 481 (S.C.)]

(h) Josts Engineering Company Limited – 2002 (8) TMI 107-Supreme Court

17. On specific query by the bench, it was clarified by the learned counsel appearing on behalf of appellant that as regard service rendered by appellants as sub-contractor of L&T, they are not contesting the demand on

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the ground that their activity covered under works contract as their only stand is that their activity was one of construction service of civil structure in respect of Brides, Railway, Airport etc and further that fabrication of steel structure using raw material of client would be covered under business auxiliary service and exempted, and as regards liability of sub-contractor to pay service tax is concerned, the contest is only on limitation.

18. We have carefully considered the submissions made by both the sides and perused the records. From facts of the present case, the main issue falls for the consideration of this bench is whether Appellants were liable to pay service tax under the taxable service of "Erection, Commissioning or Installation" covered by Section 65 (39a) of the Finance Act 1994 rendered at various places in India as follows:

i) as sub-contractor of L & T Ltd in respect of Flyover/Bridge, Railway etc;

ii) as sub-contractor of Techno Fab & L & T in respect of fabrication of various steel structures

iii) as sub-contractor of Geodesic Techniques in respect of Airport and

iv) fabrication of Hulls/ Parts of body of Ships, etc for ABG Shipyard Ltd

v) as sub-contractor of L & T, activity of construction in SEZ unit of Reliance Petroleum Ltd, Jamnagar and in SEZ unit of Reliance Oil & Gas Terminal, Kakinada.

19. As the outset, the entire demand of service tax in the show cause notice is based upon the Annual Report/Audit Report of the Appellants wherein the nature of Appellants' business is mentioned as Erection and

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Commissioning Contractor; without examining the individual sub-contracts/work contracts it has been concluded that entire amounts received by the Appellants from the principal contractor are towards the service of Erection, Commissioning or Installation covered by Section 65 (39a) of the Finance Act 1994; no efforts made to find out whether the service rendered under each individual sub-contract/work contract satisfies the definition of Erection, Commissioning or Installation given in Section 65 (39a) of the Finance Act 1994.

20. From the Perusal of show cause notice and records viz. work order, bills etc, it emerges that the appellant undertook the activity of fabrication of various structural items as sub-contractor of L & T, Techno Fab & ABG Shipyard. It also emerges that the said activity of fabrication of structural items viz. beams structs, pylons etc was carried out at various places in India in respect of Flyover, Bridges, Railway and Airport. Fabrication of structural items viz beams, structs, pylons etc which would become part of civil structure viz. Flyover/Bridge etc would therefore fall within the definition of taxable service of "Commercial or Industrial Construction Service" as given in Section 65 (25b) of the Finance Act 1994 which specifically excluded service in respect of Bridges, Railways, Airport etc from the tax net. Flyovers/Bridges cannot be equated with Plant, Machinery and Equipment. Therefore, activity undertaken by the Appellants would not fall within the definition of "Erection, Commissioning or Installation" under Section 65 (39a) as in force during 2004-05 and 2005-06 which covered Erection, commissioning or installation of Plant, Machinery or Equipment.

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21. The impugned orders vide which it is held that work undertaken by the Appellant in relation to Bridges, Rails, Airport etc was of only fabrication of various beams, structs, pylons etc and does not amount to undertaking of work of Civil construction is not tenable as fabrication of various Beams, Struts, Pylons, etc is indeed part of Civil construction and hence fall under the definition of "Commercial or Industrial Construction Service" as given in Section 65 (25b) of the Finance Act 1994 which excludes from its purview services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams and hence not taxable. This issue has been considered in the following judgments:-

(a) Jagdish Prasad Agarwal vs. CCE, Jaipur – 2017 (3) GSTL 455

"5. Heard both the sides and examined the case records. We find that services provided by the appellant in respect of maintenance and repair of roads during the period 16-6-2005 to 27-7-2009 were exempted from payment of service tax under Section 97 ibid. Since, the said statutory provision mandates that no service tax shall be levied on management, maintenance or repair of roads, we are of the view that service tax demand of Rs. 2,85,18,695/- confirmed by the lower authority will not be sustainable. Commercial or Industrial Construction service provided in respect of roads are specifically excluded from the purview of levy of service tax in terms of clause (25b) of Section 65 ibid. It is an admitted fact on record that the demand of Rs. 48,99,741/- is towards construction of Toll Plaza and Lanes, which are in relation to the service provided in respect of - roads. The phrase "in respect of roads" contained in clause (25b) of Section 65 ibid has a wider connotation and bears the widest possible scope and may be taken to mean "for the provision of". Thus, the service tax demand on Toll Plaza and Lanes will not be sustainable in this case."

(b) Pioneer Fabrications P. Limited vs. CCE – 2016 (42) STR 563

"4. Heard both the sides and perused appeal records. The point for decision is the liability for service tax in respect of supply and installation of Metal Crash Barriers along the side of highways by the appellant. On perusal of the submissions made by the appellant, we find that on all three points raised by the counsel, they have a strong case.

5. Regarding the nature of service rendered by the appellant it is clear from the work order as well as the observations of the lower authorities that these are composite work involving supply of materials and provision of service. These are rightly to be categorized under works contract and the Hon'ble Supreme Court in the case of *CCE, Kerala* v. *Larsen & Toubro Ltd.* (supra) held that prior to 1-6-2007 there is no charging section for levying service tax on works contract. We find on this ground alone, the appellant will succeed.

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6. We also find that the classification followed by the lower authorities is not sustainable. From the nature of work and the material involved it is clear that supplying and fixing Metal Crash Barriers along the highways cannot be considered as erection and commissioning of any plant and machinery or similar equipments.

7. The Metal Crash Barriers are essentially part and parcel of highways and appellant's plea that the exemption available to the construction of road will cover these structures also has much force. The Manual of Specifications and Standards for National Highways, issued by Government of India, Ministry of Shipping, Road Transport & Highways mentions Metal Beam Crash Barriers as one of the manufactured materials for use in the highways.

8. Considering the above discussions and findings, we hold the impugned order is not sustainable and accordingly allow the appeal with consequential relief, if any."

(c) PES Engineers P. Limited vs. CST – 2017 (17) GSTL 57

"5.7 Discernibly, steel liners fabricated by the appellants is meant to reinforce and complete the excavated tunnel area. Tunnel becomes complete for the purposes it has to serve, only after the steel liners are put in place and, as submitted by the appellants, the gap between liner and the rock filled with concrete, cement grout and sealed with steel plugs. While the fabrication would be an assist and crucial requirement for enabling and assisting transport of water, the steel liners themselves cannot, by any stretch of imagination, be considered as a penstock per.se or a closed conduit *per se* for transporting water under pressure, as the department seeks to allege.

5.8 Viewed in this light and also taking note of the fact that the work has been performed by the assessee on specific sub-contract agreements for specific works detailed therein, the nature of work cannot, but, be otherwise than *"Works Contract"* and definitely not under *"ECIS"* as perceived by the department for the period upto March, 2010. The nature and scope of the activity performed by the assessee also answers to the scope of works contract defined in Section 65(zzzza) of Finance Act, 1994 for fabrication and installation work in respect of tunnel for transport of water from the Dam projects."

22. The next issue is that whether the activity of undertaking fabrication of steel structures out of the raw materials of clients is taxable under "erection, commissioning and installation services" There is no dispute to the fact that the appellant undertook fabrication of steel structures using raw material of clients viz Techno Fab and L & T Ltd. The said activity was thus in the nature of job-work activity of production on behalf of clients; and as steel structures are excisable goods liable to duty, the same was not liable to service tax. It is held in the following decisions that fabrication of steel structures is not liable to service tax under the category of "Erection, Commissioning and Installation":-

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(a) Hazi Ap Bava& Co vs. CCE – 2014 (33) STR 470,

"6. We have thoroughly examined the show cause notice as to what was the requirement of issuing the same. That makes clear that Revenue intended to bring item No. 1, 3 & 6 in the purview of Service Tax under Section 65(39a) of Finance Act, 1994. We are conscious that Service Tax is not commodity taxation. When the fabrication work is very clear from the work order, that does not submit to any taxable entry as the law exists. Had the fabrication been brought to any taxable entry, Revenue would have a case. In absence of such taxable entry, the erection, Commissioning or installation does not embrace fabrication for bringing the appellant to the fold of Section 65(39a) of Finance Act, 1994. Therefore, on such preliminary observation of the law, the appellant should succeed when paras 2 & 3 of the show cause notice has not made any effort to bring out service element involved in Sl. No. 1, 3 & 6 of the work order to the ambit of taxation.

7. When we find that the aforesaid moot point govern the case, we are not inclined to remit the matter to the adjudicating authority. We also do not consider that Revenue may be prejudiced, if appeal is allowed, since law does not warrant the commodity to be taxed under the provision of Finance Act, 1994. As we have gone by aforesaid logic and conclusion, we do not consider to discuss further on the citation made by the ld. Counsel."

(b) Swift Engineers vs. CGST – 2019 (8) TMI 826.

"4. Ld. DR appearing for the Revenue drew our attention to the detailed discussions of adjudicating authority. He has relied on the adjudicating authority's findings that the appellant are undertaking the erection and fabricating structurals. He has held the appellant's activity to be falling under the category of erection, commissioning and installation services. He submits that fabrication and erection are two separate services and merely because the applicant was engaged in the fabrication of the goods it is not meant that he was not undertaking erection of the same. As regards, the payment of service tax on the gross value by principal contractor, he submits that the appellant's activity is a separate activity and under the law, they are liable to pay service tax and their principal contractor can taken credit of the same. He submits that inasmuch as the erection amounts to 33% of the total consideration, they should be directed to deposit a part amount. As regards the limitation, he submits that the appellant have not maintained any records, etc. inasmuch as as per their submission, they were under bonafide belief and were not aware of the requirement of law. In these circumstances, the Revenue is justified in invoking the longer period of limitation

5. After going through the impugned order, we find that the Tribunal's decision in the case of **Neo Structo Construction Ltd (supra)** dealt with the activity of the fabrication and erection of the structurals for various industrial project at their client's site. Identical activity is involved in the present case also. The issue required to be decided by the Tribunal in the case of Neo Structo Construction Ltd. (supra) was as to whether the assessee was liable to pay service tax under the category of erection, commissioning and installation services where he was fabricating as also erecting the various structurals. The Tribunal concluded that such as activity would amount to manufacture and not rendering of any service at this stage. As the said decision was not before the Commissioner at the time of adjudication, we deem it fit to set aside the impugned order and remand the matter for fresh decision in the light of the law declared in the above referred decision of the Tribunal

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6. Apart from the above, we also note that as the main contractor has discharged the service tax liability on the gross value of the contract giver to him and the present appellant is only a sub contractor, the entire exercise would be revenue neutral. As we are remanding the matter, the said fact would also be verified by the Commissioner."

(c) Plus Tech Engineering P. Limited vs. CCE – 2015 (39) STR 454.

"After hearing both sides duly represented by Shri Anand Nainawati, learned advocate appearing for the assessee and Shri R.S. Srova, learned JDR appearing for the Revenue, we find that the service tax stand confirmed against the appellant by holding that they are providing service of 'Erection, Commissioning and Installation' to their clients. On the other hand, it is the appellant's contention that they are engaged in fabrication of structures at site for their clients, which activity amounts to manufacture resulting in emergence of excisable items. However, no Excise duty is being paid on the same, as the same is exempted in terms of Notification No. 67/95. Accordingly, it stand contended before us that inasmuch as they are engaged in manufacture of excisable goods, activity undertaken by them cannot be considered to be a service being provided to their clients so as to make them liable to service tax payment. The above plea of the appellant stand rejected by the Commissioner on the ground that the fabrication of various goods at site does not amount to manufacture as has been held in various decisions of the Tribunal like in the case of *Dodsal (P.) Ltd.* v. *CCE* - 2006 (193) E.L.T. 518 (Trib. - Mum.) and others.

2. Learned advocate has drawn our attention to a recent order passed by this Bench in the case of *Neo Structo Construction Ltd.* v. *CCE&C* - 2010 (19) S.T.R. 361 (Tri.) = [2010] 27 STT 1 (Ahd. - CESTAT), wherein an identical issue was discussed. The Bench, taking note of the Larger Bench decision in the case of *Mahindra & Mahindra Ltd.* v. *C.C.E.* - 2005 (190) E.L.T. 301 (Tri. - Delhi)(LB), has held that the fabrication of structures by the appellant at the site for their principals amounts to emergence of excisable goods. As such, the applicability of the judgment in the case of *Dodsal (P.) Ltd.* (supra) was not accepted. Accordingly, the Bench held that as the activity undertaken by the appellant amounts to manufacture in terms of provisions of Section 2(f) of Central Excise Act, no service tax, can be levied and demanded on the same. Learned JDR appearing for the Revenue fairly agree that the ratio of the law declared in above decision in the case of *Neo Structo Construction (P.) Ltd.* (supra) fully applies to the facts of the present case.

3. As such, by following the same, we set aside the impugned order and allow the appeal with consequential relief to the appellant."

(d) Neo Structo Construction Ltd v CCE – 2010 (19) STR 361.

"25. The activity undertaken by the appellant is covered under Chapter 73.08 of the Central Excise Tariff and the activity of the appellant is covered under Chapter sub-heading 7308.50 which reads that all goods fabricated at site or work for use in construction work at site.

26. From the above, it is clear that the activity undertaken by the appellant covered under Central Excise Tariff, amounts to manufacture. The decision referred by the learned SDR is not applicable in this case as in that case the work was undertaken by the appellant under a works contract for fabrication and laying of M.S. Pipes and in that process they fabricated the tank from bits and pieces of plates. The issue in that case was whether the resultant product at site which was part of the project was marketable and liable to Excise duty or not and in that context, it was held that the tanks were not

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parts of pipelines and hence the erection of tanks at site was held not amounting to manufacture. Here the issue before us is that whether the fabrication of structures by the appellants at the site of their principal amounts to service and is liable to service tax under the category of erection, commissioning and installation service. Hence, the decision referred to by the learned SDR is not applicable to this case. On the other hand, we find that the decision of Larger Bench in the case of *Mahindra & Mahindra Ltd*. reported in 2005 (190) E.L.T. 301 (Tri.-LB) is applicable to the facts of this case.

27. From the above discussion, it is clear that the activity undertaken by the appellant is covered under Section 2(f) of Central Excise Act as manufacturing activity. Hence the appellants are not liable to pay the service tax on the activities undertaken by them. Hence, the impugned order does not hold any merit on this issue. The same is set aside and the appeal filed by M/s. Neo Structo Construction Ltd. is allowed."

23. Even if the said job work activity of production amounts to rendering of service, it would at best be Business Auxiliary Service covered under Section 65 (19) (v) of Finance Act 1994 and exempted under Notification No.8/2005-ST dated 1-3-2005. It is not in dispute that the production was done with materials of the clients at their site and therefore Notification No.8/2005-ST is satisfied. Even if the said exemption is to be held to be inadmissible there is no demand for Service tax in the Show Cause Notice under Business auxiliary service. The demand in the Show Cause Notice is under Erection, Commissioning or Installation, which is clearly not tenable.

24. The next demand of service tax is on the fabrication of Hulls/ Parts of body of Ships, etc for ABG Shipyard Ltd. Apart from the foregoing reasons the same is not liable to service tax under "Erection, Commissioning or Installation", it is an admitted position in the Show Cause Notice that the Annual reports of the Appellant do not show any receipt of any amount from ABG Shipyard Ltd. This clearly shows that Appellant has not undertaken any fabrication work for ABG Shipyard. The Show Cause Notice has demanded service tax from the Appellant on payments made by ABG Shipyard to a firm other than the Appellant, having the same name as the Appellant. It is available from the records that Form 16A issued by ABG Shipyard shows

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payment to M.K. Enterprise with PAN AACPZ5313R, which is not PAN of the Appellants' proprietor. This aspect has not been rebutted by the Commissioner in his Order. Hence service tax demand on the fabrication of Hull/parts of body of ships, etc from ABG Shipyard Ltd cannot be sustained.

25. On limitation the Show Cause Notices dated 21-4-2010 demands Service tax for the period October 2004 to March 2009, which is time barred to the extent the same covers the period beyond the limitation period of "one year" specified in Section 73 (1) of the Finance Act 1994. Therefore, unless there is evidence of suppression of facts or contravention with intent to evade payment of service tax, larger period of limitation of 5 years specified in the Proviso to said Section 73 (1) is inapplicable. It appears that non-payment of service tax could be on account of the belief that no service tax was payable in respect of the activities undertaken by the Appellants; that the very fact that various decisions of Tribunal referred to herein above have also held that no service tax is payable on activities such as those undertaken by the Appellants, itself shows that the Appellants' belief was reasonable and bona fide. It is settled law that where demand has been worked out based on the records of maintained by the assessee and where non-payment of service tax is on account of bona fide belief that no service tax was payable, the larger period of limitation cannot apply as held in the following judgements: Steelcast Ltd v CCE – 2009 (14) STR 129 (upheld in 2011 (21) STR 500),

(a) Religare Securities Ltd v CST – 2014 (36) STR 937,

(b) Lanxess Abs Ltd v CCE – 2011 (22) STR 587 and

(c) K.K. Appachan v CCE – 2007 (7) STR 230.

26. Further, the question whether the sub-contractor is liable to pay the service tax, itself had not been free from doubt during the disputed period.

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The Central Board of Excise and Customs changed its previous view that service tax is not payable by sub-contractor, by Circular dated 23rd August 2007. Although, the Larger Bench recently by its decision in CST v Melange Developers – 2020 (33) GSTL 116 Tri (LB) decided the said issue, it is settled law that where the issue has not been free from doubt requiring reference to Larger Bench, the larger period of limitation cannot apply. Accordingly the demand for the extended period is not sustainable on limitation also.

27. As regards the issue of jurisdiction is concerned, it is seen that appellant have obtained registration from 2007 and hence Commissioner of Central Excise & Service Tax, Surat may have jurisdiction to demand tax for the period after the date of registration in respect of services provided outside his jurisdiction, however the tax demand is not sustainable on merits and on limitation the said issue is of only academic importance. Hence we are not giving our conclusive finding on this issue of jurisdiction.

28. As per our above discussions and findings, we are of the considered view that the impugned orders are not sustainable, hence the same are set aside. The appeals are allowed with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 26.07.2022*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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