CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 52036 OF 2014

[Arising out of the Order-in-Original No. JAI-EXCUS-001-COM-104-13-14 dated 16/12/2013 passed by The Commissioner of Central Excise, Jaipur.]

M/s Protech Galvanizer and Fabricator (P) Ltd., **Appellant**
B-815, RIICO Industrial Area,
Jaipur.

VERSUS

Commissioner of Central Excise, **Respondent**
Central Revenue Building, Statue Circle, C-Scheme,
Jaipur – 302 005.

WITH
SERVICE TAX APPEAL NO. 52037 OF 2014

[Arising out of the Order-in-Original No. JAI-EXCUS-001-COM-104-13-14 dated 16/12/2013 passed by The Commissioner of Central Excise, Jaipur.]

M/s Protech Galvanizer and Fabricator (P) Ltd., **Appellant**
Plot 838, Sector 15,
Faridabad.

VERSUS

Commissioner of Central Excise, **Respondent**
Central Revenue Building, Statue Circle, C-Scheme,
Jaipur – 302 005.

APPEARANCE

Shri D.K. Tyagi, Advocate – for the appellant.
Shri Harsh Vardhan, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50028-50029/2024

DATE OF HEARING : 17.08.2023
DATE OF DECISION: 10.01.2024

P.V. SUBBA RAO

These two appeals have been filed by M/s. Protech Galvanizer and Fabricators Pvt. Ltd.[1] to assail the Order in Original[2] dated 16.12.2013 passed by the Commissioner deciding the proposals in the Show Cause Notice[3] dated 7.6.2012 covering the period October 2009 to March 2010. **Appeal no. 52036 of 2014 assails the demand of service tax, denial of CENVAT credit and imposition of penalties under section 78 of the Finance Act, 1994, while Appeal No. 52037 of 2014 assails the imposition of penalty of Rs. 5,00,000/- under Rule 26(2) of the Central Excise Rules, 2002.**

2. We have heard learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records.

3. The audit team of the department audited the appellant's records for the period 2009 to 2010 and pointed out that it had not filed the Service Tax Return in ST-3 for the half year ending March 2010. The anti-evasion party of the department also visited the appellant and found that three service tax returns were not filed. SCN dated 7.6.2012 was issued to the appellant demanding service tax, proposing to deny CENVAT credit and disallow abatement under notification number 1/2006-ST.

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1. **appellant**
2. **impugned order**
3. **SCN**

4. In reply, the appellant accepted the liability of service tax under Business Auxiliary Service, Erection, Commissioning and Installation Service and Transportation of goods by road service and paid the tax and the demands were confirmed in the impugned order and the amounts paid by the appellant were appropriated towards them.

5. The issues which are before us to decide are as follows:

a) Can the demand of Rs. 23,25,912/- as differential service tax on installation of towers by denying the benefit of abatement under notification no. 1/2006-ST dated 1.3.2006 be sustained along with equal amount of penalty under section 78?

b) Can the demand of Rs. 6,34,710/- under Rule 6(3) being 6%/8% of the value of exempted services rendered in the state of Jammu and Kashmir, be sustained along with an equal amount of penalty under section 78?

c) Can the denial of CENVAT credit of Rs. 13,45,364/- be sustained?

d) Can the penalty of Rs. 25,97,566/- imposed in the impugned order on the appellant under section 78 (being equal to the amount of service tax not paid) be sustained?

e) Was the extended period of limitation correctly invoked in the case?

f) Can the penalty of Rs. 5,00,000/- imposed on the appellant under Rule 26(2) of the Central Excise Rules, 2002 be sustained.

6. We proceed to examine these issues.

Denial of abatement under notification no. 1/2006-ST and consequential demand

7. According to the learned counsel for the appellant it manufactures and sells transmission towers and it also installs them. Its customers placed separate orders for supply of transmission towers and for installation of transmission towers. It sold the transmission towers to the customers paying the central excise duty and VAT as applicable. It has sub-contracted the installation work to others and the sub-contractors installed the towers and paid service tax and raised invoices on the appellant. The appellant, in turn, as the main contractor, raised invoices on the customers and paid service tax for installation. As the main contractor, it took CENVAT credit of the Service Tax paid by the sub-contractors treating it as input service and paid service tax. The appellant claimed the benefit of abatement under notification no.1/2006- ST dated 1.3.2006 but it was denied by the Commissioner on two grounds:

a) The value of the towers was not included in the in the installation charges by the appellant;

b) The appellant availed CENVAT credit of service tax paid on input services provided by the sub-contractors.

8. Learned counsel submits that as far as the value of the transmission towers itself is concerned, they were sold under a different invoice and the appellant paid the Central Excise duty and VAT on them. It did not take CENVAT credit of the duty so paid on the towers. These towers were installed and this service of installation also included using the materials for such installation and it was eligible for the benefit of abatement under the notification. As far as the invoice for the installation service is concerned, the transmission towers were materials supplied free by the service recipient and they cannot be included in the value as held in **Bhayana Builders Ltd.** versus **CCE**[4] by the Larger Bench and upheld by the **Supreme Court**[5].

9. As far as the availment of CENVAT credit of the service tax paid by the sub-contractors is concerned, learned counsel submits that as per the decision of the Larger Bench of this Tribunal in **Commissioner of Service Tax** versus **Melange Developers**[6], it can avail CENVAT credit of the service tax paid on input services provided by its sub-contractor. He relies on the CBEC's Circular No. 80/10/2004-ST dated 17.9.2004 in which it was clarified that the exemption under Notification No. 12/2003-ST would be available even if credit of input services is availed.

10. Learned authorised representative for the Revenue supported the impugned order on this question. He submitted

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4. 2013(32) STR 49(LB)
5. 2018(10) GSTL 401 (SC)
6. 2020(33)GSTL 116 (Tri-LB)

that although two invoices were raised by the appellant separately for the value of the transmission towers and for their installation, they were part of the same contract indicating the values separately. While the sub-contractor provided only the services, the appellant, as the main contractor, provided both the towers and the service of installation. The exemption Notification No. 12/2003-ST is optional and conditional for the service of erection, commissioning or installation and the relevant parts of it read as follows:

Effective rate of Service tax for specified services — Percentage of abatements

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby 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	This exemption is optional to the commissioning and installation	33

		plant, machinery or equipment and erection, commissioning or installation of such plant, machinery or equipment.	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 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].

Explanation. - For the purposes of this notification, the expression "food" means a substantial and satisfying meal and the expression "catering service" shall be construed accordingly.

[Notification No. 1/2006-S.T., dated 1-3-2006]

[**emphasis supplied]**

11. He submits that if the appellant wants to avail this optional exemption, it has to fulfill its conditions viz., the value of the goods which it sold must be included in the value and it cannot also take CENVAT credit on inputs, capital goods and input services. As the appellant had not met either of these conditions, it was not entitled to the benefit. The CBEC's Circular relied upon by the appellant clarified the scope of another exemption notification and it cannot apply to this notification. Therefore, the appellant is not entitled to the benefit of the exemption notification.

12. We have considered the submissions of both sides on this issue. As per **Melange Developers** relied upon by the appellant, both the main contractor and the sub-contractor have to pay service tax on the value of taxable services and the service tax paid by the sub-contractor can be taken as CENVAT credit of input service by the main contractor. The appellant has undisputedly, availed CENVAT credit on this input service. The proviso to the exemption notification no. 1/2006-ST makes it clear that the condition of the exemption notification is that no CENVAT credit on the inputs, capital goods or input services must be availed. Therefore, the Commissioner was correct in holding that the appellant had not fulfilled this condition. So far as the inclusion of the value of the towers is concerned, the Explanation to entry no. 5 of the notification relevant to this case states that the gross amount includes the value of the plant, machinery and equipment and parts and any other material sold during the

course of providing erection, commissioning or installation service. Since the towers are sold separately under a separate invoice and not during the course of providing the service, we find that the value of the tower need not be included. However, as the appellant had, undisputedly, availed CENVAT credit of input services, it cannot avail the benefit of the abatement under this exemption notification. The CBEC's Circular relied upon by the appellant does not carry its case any further as it was issued clarifying the scope of another exemption notification and it does not help the appellant's case.

13. The appellant made an alternative claim that its service should be classified as 'works contract service' under section 65(105)(zzzza) and it should be allowed to pay tax under Rule 2A (1) (ii) (A) of the Service tax (Determination of value) Rules, 2006 which the Commissioner had not considered. As the appellant's service was classified as erection, commissioning and installation service under section 65(105) (zzd) and it claimed exemption notification accordingly. The classification cannot change because the appellant's claim to an exemption notification was not accepted. **We, therefore, answer this question in favour of the Revenue and against the appellant.**

Demand under Rule 6(3) of the CCR

14. The appellant provided services in several parts of India including in Jammu and Kashmir through sub-contractors. The sub-contractors paid service tax and the appellant availed

CENVAT credit of the service tax so paid as input service and in turn, paid service tax on the value of the service which it had provided. Service tax is levied under Chapter V of the Finance Act, 1994. Section 64 of this chapter reads as follows:

> **SECTION 64. Extent, commencement and application -.**
>
> **(1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.**
>
> (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
>
> (3) It shall apply to taxable services provided on or after the commencement of this Chapter.

15. Undisputedly, since the charge of service tax did not apply to Jammu and Kashmir, no service tax was leviable on the services rendered in that State either by the appellant or by its sub-contractors. However, the sub-contractors of the appellant deposited an amount as service tax on such services erroneously and the appellant took credit of the amount so paid but it did not itself pay service tax on the services rendered in Jammu and Kashmir. The case of the Revenue is that the appellant had not maintained separate records of the inputs and input services used in the taxable services (rendered in rest of India) and exempted services (rendered in Jammu and Kashmir) and therefore, as per Rule 6(3) of CCR, it was required to pay an amount equal to 6% or 8% of the value of the exempted services.

16. The appellant's submission is that it had taken CENVAT credit of the service tax wrongly paid by its sub-contractors although the services rendered in the state of J&K were not taxable. It did not pay service tax as no service tax was payable. As per Rule 6(1) of the CCR, the assessee shall not take CENVAT credit on the inputs and input services used in the manufacture of exempted goods or provision of exempted services. If the assessee provides both taxable and exempted services, it has to maintain separate records of inputs and input services as per Rule 6(2) and if it does not follow Rule 6(1) or 6(2), then it has to pay an amount under Rule 6(3). Once the CENVAT credit taken on the input services of exempted services of Rs. 3,02,408/- paid under mistake of law by its sub-contractor is reversed, it will be squarely covered by Rule 6(1) and therefore, there is no need to pay an amount of Rs. 6,34,710/- being 6% or 8% of the value of the exempted services under Rule 6(3).

17. We have considered the submissions. Evidently, the services rendered in J&K were not taxable at all as the provisions of service tax did not extend to that State. In other words, it was beyond the taxable territory. The appellant had wrongly taken CENVAT credit of input services of the service tax wrongly paid by its sub-contractor. Once this amount of Rs. 3,02,408/- is reversed, the requirement under Rule 6(1) of CCR is fully met and therefore, Rule 6(3) will not apply. According to the appellant, CENVAT credit of this amount has already been denied to it as a part of CENVAT credit of Rs. 13,45,364/-. Therefore,

the demand of an amount under Rule 6(3) therefore, needs to be set aside.

18. Needless to say that the appellant could not have taken credit of an amount paid under mistake of law because CENVAT credit can only be taken of the service tax paid and not of any amount paid. If service tax is not chargeable, what was paid was not service tax and there is no provision under the CCR to allow credit of any amount paid as service tax. If the amount was paid by the sub-contractor under the mistake of law or fact, it can claim refund of such an amount.

Wrong availment of CENVAT credit of Rs. 13,45,364

19. This denial of CENVAT credit is for five reasons as follows:

a) CENVAT Credit availed of the amount deposited by the sub-contractors towards service tax on the services which were rendered outside the taxable territory (in J&K) **Rs. 3,02,408/-**

b) Input service bills were in the name of the registered or head office and not of the factory **Rs. 1,28,471/-**

c) Invoices in the name of its Faridabad company but the address tampered with **Rs. 3,24,931/-**

d) Invoices did not contain the Service Tax code of the service provider **Rs. 1,70,097/-**

e) Original copies of the invoices were not available and credit taken on photocopies of invoices **Rs. 4,19,457/-**

20. Of the above, we have already held that CENVAT credit of an amount which is not service tax but erroneously deposited under mistake of law or fact is not service tax and credit of such an amount is not available under CCR. CENVAT credit on the invoices where the address of the head office or wrong address is mentioned cannot, in our considered view, be a ground to deny CENVAT credit. Where the service tax registration code is not mentioned in the invoices, the appellant claims to have cured this defect and therefore, we do not find that CENVAT credit can be denied. However, where the original copies of the invoices are not available, CENVAT credit cannot be allowed on the strength of photocopies because photocopies of invoices are not valid documents under Rule 9 of CCR to allow CENVAT credit. Allowing such a credit can result in utter chaos because several copies of any invoice can be made and credit can be taken on them. In view of the above, we find that CENVAT Credit of the amount deposited by the sub-contractors for the services rendered in J&K **(Rs. 3,02,408/-)** and the CENVAT credit on photocopies of invoices are not admissible (**Rs. 4,19,457/-)** is not admissible. Rest of the CENVAT Credit is admissible.

Invoking extended period of limitation and imposition of penalty under section 78 of the Finance Act, 1994

21. The appellant submits that the entire issue is one of interpretation and that it had not suppressed any facts with

intent to evade. All the data was obtained by the department from the appellant's own records and there are no ingredients to invoke extended period of limitation, viz., fraud, or collusion, or wilful misstatement or suppression of facts or violation of the Act or Rules with an intent to evade payment of service tax. These very ingredients are required to impose penalty under section 78 of the Finance Act, 1994 and since they are absent and have not been proved in the case, the demands for extended period of limitation and imposition of penalty under section 78 need to be set aside.

22. The SCN invoked extended period of limitation on the ground that the facts mentioned in the SCN were not disclosed by the appellant and they came to the notice of the department only at the time of conducting audit of the records of the assessee and during subsequent investigation. The appellant is a long established company and has been dealing with service tax extensively and therefore, it appears that in a very well calculated and deliberate attempt, they have willfully suppressed the material facts from the department with an intent to defraud the exchequer. The Commissioner has, in the impugned order, confirmed the demand of service tax invoking extended period of limitation on the same grounds.

23. We have considered the submissions on this issue. Since the appellant had not disclosed the facts which were found from the appellant's own records when audited and investigated and

since the appellant has been a long established company, the presumption of wilful suppression of facts was drawn in the impugned order. We find no legal basis for such a presumption. The appellant is only required to disclose such facts as are required in the ST-3 returns. If these returns require aggregate values of say, services rendered and service tax paid, there is no scope for the appellant to disclose more facts which to the department in its returns. The scheme of the service tax law is clear. The appellant is required to self-assess service tax, pay it and file returns. The central excise officer with whom the return is filed is required to scrutinize it. If no return is filed but the return is filed and the self assessment is not done correctly, the officer can make his best judgment assessment under section 72 and raise a demand. For this purpose, the officer can call for any records, etc. and the assessee is bound to provide them. Thus, the remedy against incorrect self assessment is best judgment assessment by the officer. For this reason, the demand can be raised within the normal period from the relevant date which, if a return is filed, is the date of filing of the return and if no return is filed, is the last date on which the return should have been filed. If the officer does not scrutinize the returns and raise the demand within time, the fault lies at his door step. It only shows that the central excise officer has not done his job and it does not show that the assessee has willfully suppressed material facts with an intent to evade. Thereafter, if the audit or investigators find that the assessee had not self-assessed service tax correctly

as per the facts and figures available in its own records, it only shows that the officer has failed to perform his duty of scrutinizing the returns and such a failure cannot be a ground to invoke extended period of limitation under section the proviso to section 73 or to impose penalties under section 78. From the SCN it is evident that all facts and figures were in the appellant's records but they were belatedly scrutinized by auditors and investigating officers and the jurisdictional central excise officer has either not scrutinized the returns or having scrutinized, not issued a demand under section 73.

24. **We, therefore, hold in favour of the appellant on these two questions and set aside the demand for extended period of limitation and the penalties under section 78.**

Penalty under Rule 26(2) of Central Excise Rules, 2002

25. This penalty was imposed by the Commissioner on the ground that the Faridabad office of the appellant tampered with the addresses to facilitate availment of CENVAT credit by the appellant's Rajasthan unit. As we have allowed the CENVAT credit on these invoices, we set aside the penalty under Rule 26(2).

26. In view of the above, both appeals are disposed of as below:

a) **Appeal no. 52036 of 2014** is partly allowed and partly rejected and remanded as follows:

i) The demand for extended period of limitation is set aside

ii) Penalties imposed under Section 78 of the Finance Act, 1994 and under Rule 15 of the Central Excise Rules read with section 78 of the Finance Act, 1994 are set aside;

iii) Denial of abatement under notification no. 1/2006-ST is upheld and the demand on this count within the normal period of limitation, if any, is upheld;

iv) Demand of Rs. 6,34,710/- under Rule 6(3) is set aside;

v) Disallowance of CENVAT credit of an amount of Rs. 3,02,408/- deposited by the sub-contractor of the appellant on the services rendered in J&K and CENVAT credit of Rs. 4,19,457/- of the credit taken on the photocopies is upheld and they are recoverable insofar as they were within the normal period of limitation;

vi) For the limited purpose of calculation of the demands applicable during the normal period, the matter is remanded to the Commissioner.

b) **Appeal no 52037 of 2014** is allowed and the penalty under Rule 26(2) of Central Excise Rules, 2002 is set aside.

(Order pronounced in open court on 10/01/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

PK