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

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 11193 of 2013-DB

[Arising out of Order-in-Original/Appeal No 22-COMMR-2013 dated 13.02.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT]

Shanti Construction Co **...Appellant**

C/O. Oza & Thakrar, Ca House, 1st Floor, Plot No. 71,
Walkeshwari Nagri Phase-Ii, B/H, Dr. Takwanis Hospital, Indira Gandi Marg,
Jamnagar,
Gujarat-361008

VERSUS

C.C.E. & S.T.-Rajkot **...Respondent**

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat-360001

APPEARANCE:
Shri Jigar Shah, Shri Ambar Kumarawat, Advocates for the Appellant
Shri. Tara Prakash, Deputy Commissioner (Authorized Representative) for the Respondent

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

FINAL ORDER NO. A/10327 / 2023

DATE OF HEARING: 20.01.2023
DATE OF DECISION: 27.02.2023

RAMESH NAIR

This appeal is filed against the Order-In- Original No. 22/COMMR/2013 dated 13.02.2013 passed by the Commissioner, Customs & Central Excise, Rajkot.

2. The facts of the case, in brief, are that during the course of audit of the records of the Appellant, it was found that appellant have provided services in

respect of Civil Work for terminal of HPCL as a sub-contractor of M/s Bridge and Roof Co. (India) Ltd. The appellant had stated in their letter dated 17.07.2009 that they had worked as sub-contractor and the principal contractor has paid the Service tax on such work and they were not liable for payment of service tax on such civil work carried out by them as sub-contractor. Further M/s Bridge and Roof Co. (India) Ltd. had also informed vide letter dated 16.06.2010 that they have paid the service tax on such Civil Works for terminal of HPCL. However revenue contended that the Board vide Circular No. 96/7/2007-ST dated 23.08.2007 had clarified that sub-contractor is essentially a taxable service provider and they are liable to pay service tax. Accordingly, show cause notice was issued proposing the Service tax demand along with interest and penalty. In adjudication, Ld. Commissioner, v*ide* impugned Order-in-Original confirmed the demand of service tax along with interest and penalty. Aggrieved by the impugned order-in-original present Appeal has been filed.

3. Shri Jigar Shah with Shri Ambar Kumrawat, Learned Counsels appearing on behalf of the appellant submits that the demand of Service tax is raised under the category of Commercial or Industrial construction services. Since the work performed by the Appellant was along with material the demand of Service tax should have been raised under the taxable category of works contract services. Further the period of dispute in the present matter is FY 2006-07 to FY 2008-09, the demand of Service tax is not applicable in any case for the period prior to 01.06.2007. He placed reliance on the decision of Real Value Promoters Pvt. Ltd. – 2018-VIL -648-CESTAT-CHE-ST.

3.1 He also submits that in the present case it is undisputed fact that M/s Bridge & Roof Co.(India) Ltd. has paid the Service tax on entire value of the contract. Appellant acted as sub-contractor to the main contractor M/s. Bridge

& Roof Co. (India) Ltd. During the period there were circulars issued by the CBEC to clarify that the sub-contractor need not to pay service tax if the Service tax is paid by the main contractor. The Larger Bench of the Tribunal in case of Melange Developers Pvt. Ltd. – 2019-VIL-352-CESTAT-DEL-ST held that the sub-contractor also need to pay Service tax in their individual capacity. However, the above verdict was delivered in 2019 after recording contrary views of the different benches of tribunal. The issue relates to bona fide interpretation of law and therefore, the entire demand in the present case is time barred. He placed reliance on the following judgments:

- M/s J S Kataria -2022-VIL-878-CESTAT-AHM-ST.
- Vinoth Shipping Services -2021-VIL -397-CESTAT-AHE-ST
- HPR Interior – 2020-VIL-281-CESTAT-DEL-ST
- CST Vs. Simplex Infrastructure -2022-VIL-984-CESTAT-DEL-ST.

3.2 He argued that since the demand of Service tax is not sustainable there is no question of charging interest under Section 75 and penalties under Section 76, 77 & 78 of the Finance Act, 1994.

3.4 He also argued that in any case in view of decision of Hon'ble Gujarat High Court in case of M/s Raval Trading Co. reported in 2016(42)STR 210(Guj) penalty under both Section 76 & 78 simultaneously not imposable.

4. Shri Tara Prakash, Learned Deputy Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

5. We have gone through the submissions made by both sides and perused the case records.

5.1. We find that the issue can be decided on the point of classification alone. We also find force in argument of Ld. Counsel that since the works performed by the appellant was along with material the demand of service tax should have been raised under the taxable category of works contract services. The demand of service under the head of Commercial or Industrial construction service is not sustainable. It is noted that the appellant's activity of construction also involved supply of goods/ material. The Appellate Tribunal in the matter of Aswini apartments Vs. Commissioner of GST & C.Ex. Chennai South 2019(31) GSTL 476 (Tri.-Chennai) had held that the composite contact involving supply of materials and rendition of services not taxable either prior to 1-6-2007 or w.e.f. 1-6-2007 under Commercial or Industrial Construction service. However, such composite contracts are taxable only w.e.f. 1-6-2007 under Works Contract service. Prior to 1-6-2007 or w.e.f. 1-6-2007, only those contracts which are purely for services, are taxable under Commercial or Industrial Construction service. The Tribunal in this matter also rely upon the decisions of Hon'ble Supreme Court in the case of *Larsen & Toubro Ltd.* - 2015 (39) S.T.R. 913 (S.C.).

Following the above decision, we are of the considered opinion that the demand of service tax under commercial or industrial construction service in the present matter also not sustainable.

5.2 On limitation also we agree with the argument of Ld. Counsel. We find that during the relevant period there were various Circulars and trade notices by the Commissionerate clarifying that where the principle service provider discharged his service tax liability on the entire value of the services, a separate liability cannot be imposed against the sub-contractor. The said Circulars stands taken note of by the Tribunal in various judgments and its

stand held that where the entire service tax has been paid on the full consideration of the services, the sub-contractors' liability would not arise to pay service tax again on the part of principle service. One such reference can be made by following circulars:

- TRU letter F. No. 341/18/2004-TRU (Pt.) dated 17-12-2004
- Circular No. 23/3/97-S.T., dated 13-10-1997
- Master Circular No. 96/7/2007-S.T., dated 23-8-2007

In fact, also from various following decisions of the Tribunal:-

- *Urvi Construction* v. *CST, Ahmedabad* - 2010 (17) S.T.R. 302 (Tri. Ahmd.)
- *CCE, Indore* v. *Shivhare Roadlines* - 2009 (16) S.T.R. 335 (Tri.-Del.)
- *Harshal & Company* v. *CCE, Vadodara* - 2008 (12) S.T.R. 574 (Tri.-Ahmd.)
- *Semac Pvt. Limited* v. *CCE, Bangalore* - 2006 (4) S.T.R. 475 (Tri.-Bang.)
- *Shiva Industrial Security Agency* v. *CCE, Surat* - 2008 (12) S.T.R. 496 (Tri.-Ahmd.)
- *Synergy Audio Visual Workshop P. Ltd.* v. *CST, Bangalore* - 2008 (10) S.T.R. 578 (Tri.-Bang.)
- *OIKOS* v. *CCE, Bangalore* - 2007 (5) S.T.R. 229 (Tri.-Bang.)

In the Tribunal's decision in the case of *OIKOS* v. *CCE, Bangalore - III* reported in 2007 (5) S.T.R. 229 (Tri.-Bang.) after taking note of the Board's Circular dated 7-10-1998 as also Delhi Commissionerate Trade Notice No. 53/CE (ST)/97, dated 4-9-1997, Tribunal held that as the main service provider has discharged the tax liability, no separate Service Tax can be confirmed against the sub-contractor. To the similar effect the Tribunal decision in the case of

Viral Builders v. *CCE, Surat* reported in 2011 (21) S.T.R. 457 (Tri.-Ahmd.) observed that service stands provided only once and as such tax is not payable twice for the same service. Further in the case of *Sunil Hi-Tech Engineers Ltd.* v. *CCE, Nagpur* reported in 2010 (17) S.T.R. 121 (Tri.-Mumbai), the service tax confirmed against the sub-contractor was set aside on the ground that the main contractor has already paid the Service Tax and the matter was remanded to verify the above effect. The same ratio was laid down by the Tribunal in the case of *Newton Engg. & Chemicals* v. *CCE, Vadodara* reported in 2008 (12) S.T.R. 378 (Tri.-Ahmd.) and by the Larger Bench decision of the Tribunal in the case of *Vijay Sharma & Co.* v. *CCE, Chandigarh* reported in 2010 (20) S.T.R. 309 (Tri.-LB).

5.3 However the Larger bench of Tribunal in case of Commissioner v. Melange Developers Pvt. Ltd. — 2020 (33) G.S.T.L. 116 (Tribunal) held that the sub-contractors also needs to pay Service tax in their individual capacity. We observed that in the present matter appellant has acted as sub-contractor. Earlier, as mentioned above, there were contrary clarifications by the government that the sub-contractor is not liable to pay service tax when the main contractor is discharging the service. Subsequently vide circular dtd. 23.08.2007, the CBEC has taken a U-turn and withdrawn the earlier stand and clarified that the sub-contractor is liable to pay service tax. There were contrary judgments on the issue that whether the sub-contractor is liable to service. Subsequently the matter was referred to Larger Bench. On the disputed issue, it is not only the larger bench decision which settled the law but there were contrary circular of the Board on the issue of payment of service tax by the sub-contractor. In view of this position, there is no suppression of facts or any mala fide intention to evade payment of service tax on the part of appellant. Further, the ground of *bona fide* belief can be invoked in the present case as the main contractor who entered into

agreement with the ultimate client were charging such client along with service tax as claimed by the appellant. There is a reason for a *bona fide* belief in such arrangement regarding non-liability of sub-contractor when the main contractor is liable to discharge full service tax. Though the said principle is not applicable against the tax liability but the question of invoking extended period is to be answered in favour of the appellant. Accordingly, we hold that there is no case of fraud, misstatement etc. in the non-payment of tax on this activity by the appellant and, we hold that extended period of limitation is not attracted.

6. Accordingly, the impugned order is set aside. The appeal is allowed with consequential reliefs, in accordance with law.

(Pronounced in the open Court on 27.02.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK