

CRICKET APPRA

The Assistant Commissioner, Service Tax Division, Bhubaneswar (hereinafter referred to as 'the appellant') authorized by the Principal Commissioner, Central Excise & Service Tax, Bhubaneswar vide Review Order of F. No. V/3-208/Re/2014/2016-17 dated 20.02.2017, has filed an appeal against the Order of appeal No. B/300/2016 dated 23.11.2016 passed at the office of the appellant under the provisions of the Assistant Commissioner, Service Tax Division, Bhubaneswar (hereinafter referred to as the 'Adjudicating Authority').

2. Brief facts of the case are as under:-

- (i) M/s. Veng Construction Co. Block-3, 2nd Floor, Sector Taxa Shopping Centre, Old Post Office Road, Santal Panchayat (hereinafter referred to as 'the respondent'), Service Tax Registration No. SAHTV06156S1001, filed refund claim of Rs.10,00,000/- on 28.9.2016 under section 11-B of the Central Excise Act, 1944 as made applicable to Service Tax vide Section 68 of the Finance Act, 1994, on account of retrospective exemption granted in the exercise recorded in the Government Departments and Local Authorities in terms of the provision of section 102 of the Finance Act, 1994. The refund claim was filed on 28.09.2016 along with documents as detailed at Para-5 of the impugned order. However, on scrutiny of the said claim, Query Memo dated 16.10.2016 was issued to the respondent asking them to furnish the documents/information as detailed at Para-5 of the impugned order.
- (ii) After following the provision of Section 102 of the Finance Act, 1994, the respondent's refund claim of Rs. 10,00,000/- under the provisions of Section 11-B of the Central Excise Act, 1944 as made applicable to service tax under Section 68 of the Finance Act, 1994 read with Section 102 of the Finance Act, 1994.

3. Being aggrieved by the impugned order, the appellant duly supported by the Principal Commissioner, Central Excise & Service Tax, Bhubaneswar vide Review Order dated 20.02.2017 issued from F. No. V/2-208/Re/2014/2016-17 has filed an appeal against the impugned order wherein it is inter alia contended that;

(Handwritten signature)

- (i) The respondent did not submit the copy of any contract entered into by them with the service provider for providing the services on which they paid Service Tax and for which refund in question was claimed. In absence of copy of contract, it can not be verified and ascertained that the respondent had provided the said construction services to the Government Department's under contract which has been entered into before 01.03.2015 and on which stamp duty had been paid by them, on or before 01.03.2015. This is a prime condition under sub-section (1) of Section 102 of the Finance Act, 1991.
- (ii) without scrutiny of the contracts, the Adjudicating Authority has erred by holding that the burden of service tax had not been passed on to any other person by the respondent. These facts could only be verifiably/verified/ascertained by scrutiny of Contracts and R.F.C. invoices issued by the respondent.
4. The respondent vide letter dated 21.01.2017 filed their Cross Objection on the grounds which they submitted that:
- They had submitted Certificate of Chartered Accountants certifying that burden of service tax paid by them was not passed on to any other person.
 - After submitting the copy of Contract entered into with the subject Central of Elementary Education (Govt. as Respondent), stated that all the contract had been entered into before 1.3.2015 and hence they were eligible to get refund. Further, submitted the copy of their Service Tax Return filed during the Financial Year 2015-16.

5. Hearing in the matter was held on 21.02.2017 when Shri R. S. Anandaram Advocate appeared on behalf of the respondent and duly represented his case in detail and also submitted the copy of Notification No. 10/2015-87 as well as copy of the stamp duty certificates.

6. I have carefully gone through the facts of the case on records, grounds of the appeal in question, filed by the appellant and also the Cross Objection (written submission) filed and oral submissions made at the time of hearing by the respondent. I have up the appeal for final decision.



Legal Positions:

1. **Notification No. 25/2012-ST dated 20.6.2012** (Exemption from Service tax
Vide Notifications - Notification No. 12/2012-ST is repealed)

(12) Service provided to the Government, or to an agency or a governmental authority by way of construction, or other construction related activities including repair, maintenance, renovation and alteration-

- (a) in relation to any other subject which is not substantially in the nature of the services specified in clause (12) of this notification;
- (b) in relation to material, technological or scientific information, industrial expertise, industrial cooperation or technical support under the Special Memorandum of Understanding signed between India and Germany for 1978 (19 of 1978);
- (c) in relation to any predominantly for use in (i) education, (ii) a clinical, or (iii) social or cultural establishment;
- (d) in relation to any political party;
- (e) in relation to any contract which is for the use of a building, or any structure, or any other immovable property or of a residential complex predominantly owned by, or for the use of their employees or other persons specified in the Schedule of the said Act;

2. **Vide Notification No.06/2016-ST Dated 1.3.2016, E.No. 12,icem(a),(c) and (f) were omitted.(Relevant part is extracted below)**

"(i) clause (1) of sub-section (1) shall be omitted."

3. **Vide Notification No. 8/2016-ST Dated 12.2016 E.No. 12A was inserted in 25/2012-ST Dated 20.6.2012(Relevant part is extracted below)**

"(g) in sub-section (1) of section 66B as it stood on the 1st March, 2016, the following entry shall be inserted:-

"(12) Service provided to the Government, or to an agency or a governmental authority by way of construction, or other construction related activities including repair, maintenance, renovation and alteration-

- (a) in relation to any other subject which is not predominantly for use in the nature of the services specified in clause (12) of this notification;
- (b) in relation to material, technological or scientific information, industrial expertise, industrial cooperation or technical support predominantly for use in (i) education, (ii) a clinical, or (iii) social or cultural establishment;
- (c) in relation to any complex predominantly owned by, or for the use of their employees or other persons specified in the Schedule 2 to clause (12) of section 66B of the said Act;

under a contract which has been entered into prior to the 1st March, 2016 and on which appropriate stamp duty, where applicable, has been paid prior to such date."

provided that neither contained in this entry shall apply on or after the 1st April, 2016.

4. **SECTION 102.** Special provision for exemption in certain cases relating to construction of Government buildings.

"(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2016 and ending with the 31st day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, or to an agency or a governmental authority, by way of construction, or other construction related activities including repair, maintenance, renovation and alteration, or alteration of:-

- (g) a credit institution or any other financial institution predominantly for use other than for insurance, banking or any other business or profession;
- (h) a charitable trust predominantly for use as:
- (i) an educational institution;
- (ii) a clinical establishment; or
- (iii) an art or culture establishment;
- (j) a residential complex predominantly meant for enjoyment for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 90B of the Act, 1954,

under a contract entered into before the end of March 2015 and an establishment which starts doing such activities, had been previously exempted with

- (k) Agreements shall be made by all such service tax which has been collected by which would not have been an essential services as defined under the terms of all the notified rates.
- (l) Irrevocably, no stamp required in this Charter on application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Act, 2016 comes into force of the President.

11.3 The respondents entered into agreements/contracts with Government/Local Government Authority to undertake work/services as detailed in Para 17 of the impugned order. The mentioned work/services provided to the Government in relation to the construction work were previously exempted vide entry 12(a) and (b) of Mega Exemption Notification No. 25/2012-ST dated 20.06.2012, applicable from 01.04.2012. There was new levy of negative list based service tax. However, above said exemption entries were modified with Finance Act, 2015 and accordingly, a Notification No. 06/2015-ST dated 01.05.2015 issued for withdrawal of the said exemption. Hence, with effect from 01.04.2015, services provided by the respondents to the Government or Local Authority or Governmental Authority became taxable. Accordingly, the respondents paid service tax on bills raised from 01.04.2015 for above mentioned services provided to various Government Departments under the contracts claimed to have been entered into with them prior to 1st March, 2015. Such service tax is aggregating to Rs. 10,41,66,97/- on bills raised during the period from 01.04.2015 to 30.09.2016 and amount summing to Rs 21,53,71/- on bills raised pursuant to such service tax under the above mentioned contracts. Further, through the Finance Act, 2016, the exemption in respect of such construction related services provided to the Government etc. has been withdrawn. Accordingly, Notification No. 9/2016-ST dated 01.04.2016 has been issued to amend notification 12/2012-ST dated 20.06.2012 to be to insert entry 12A to exempt above stated services in respect of which service tax had been levied. It has to



on 1st March, 2015. However, in the case of such services provided and bill is issued by the assessee during the period from 01.03.2015 to 31.02.2016 (both days included) to the Government, Local Authority, Governmental Authority etc., on which the service tax was paid by the service provider on the basis of the Section 102 was not levied through the Finance Act 2016, to grant relief of the amount of Service Tax paid on such services during that period Accordingly, the Respondent claimed refund of Rs. 37,10,000/- paid by them in respect of the services provided to the Government during 01.03.2015-16.

Keeping the aforesaid factual aspects in mind, I proceed further to decide the appeal.

7. The first issue before me to decide is whether the refund claimed by the Adjudicating Authority under the impugned order is legally sustainable or otherwise in reference with the appellant plea.

8. The first contention of the appellant that the respondent did not submit the copy of any contract entered into by them with the service receiver and contended that in absence of copy of contract, it can not be verified and ascertained that the respondent had provided the said construction service to the Government Departments under contract which had been entered into before 01.03.2015 and on which stamp duty had been paid by them on or before 01.03.2015, which is a prime condition under sub-section (1) of Section 103 of the Finance Act, 1994.

9.1. From the question on the impugned order, I find that the refund claim in question was filed alongwith the claim form viz. Copies of Work Orders and Copies of Service Tax payment statements. Copy of Sales Invoice etc. in question was forwarded to the Range officer and accordingly, Range Officer submitted the verification report and submitted his/her verification report vide their letter dated 26.10.2016. Further, from the verification report and the impugned order I find that copy of contracts/agreements were not called for vide Query Memo dated 27.10.2016 but the Adjudicating Authority had ascertained the eligibility of the service in question on the basis of the given work order as mentioned in the impugned order at Para-13. Further while concerning the duration of work given in the copies of statement, dated 24.07.2014 & 17.10.2014

submitted by the respondent before me, with narration of work orders given to the respondent by the said local name and identification number of contract given as shown as (11%) Additional Classroom & DRC Hall in Anand district package No. DE/2014/AMR/090. & Construction of classrooms (21Nos.) at different primary schools in various villages of Anand district-Package No. SSAM/ACR/AMR/08- whereas in the impugned order it is mentioned as Construction of (18) Additional Classroom & DRC Hall in Anand district-package No. DE/2014/AMR/090. & Construction of classrooms (15Nos.) at different primary schools in various villages of Anand district-Package No. SSAM/ACR/AMR/08- The above anomalies lead to create confusion as to all the work orders and tickets or otherwise which are relevant to the matter in question.

5.2 It is worthy to note that the section 113(a) specific requirement mentioned in the said Section 113 that the original claim should invariably be accompanied by the copies of the work order and any other instructions issued by the department for the same. In view of the above facts, I find no force in the contention of the appellant and therefore, it is not sustainable in the eyes of law. However looking to the above factual anomalies been observed which may vitiate or render the illegality of order under section 102 of the Finance Act, 1991. It is not necessary to necessarily tie same with the other supporting documents.

3. On the contention of the appellant on the basis of judicial pronouncement as inter-alia mentioned at para 5(ii) above, I find that in the present case, no original work sanctioned under the impugned order is in view of the provisions of Section 113 of the Central Excise Act, 1944. The relevant provisions of the said Section 113 is reproduced as under for better appreciation of the issue.

Claim for refund of duty and interest, if any, paid on such duty; — (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty, may make an application for refund of such duty and interest, if any, paid on such duty, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, before the expiry of five years from the relevant date of payment and manner as may be prescribed and the application shall be accompanied by such documents or other evidence as may be prescribed referred to in section 124 as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is

(10)

dividend was collected from or paid by him and the incidence of such duty and interest if any, paid on such duty, had not been passed on by him to any other person;

Provided,

(Provided),

(i) on receipt of any such application,

(ii).

Provided that the amount of duty of excise and interest if any, paid on such duty, as determined by the Government Commission, or Central Board or Deputy Commissioner of Central Excise, under the respective provisions of this sub-section shall, instead of being credited to the Fund be paid to the applicant, if such amount is ascertainable to reduce of duty of excise on commodities goods

(iii) ...

(iv)

(v) ...

(vi) The duty of excise and interest if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

for the duty of excise and interest, if any, paid on such duty, borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty, to any other person;

(vii) the duty of excise and interest if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify;

Provided further that no notification under clause (vii) of the first proviso shall be issued unless on the request of the Central Government the incidence of duty and interest if any, paid on such duty, has not been passed on by the person concerned to any other person.

From the underlined and bold portion of the said provisions of Section 11-B (ii), it is clearly transpires that the burden is ascertainable to the claimant if any, payment of such duty and interest, if any, paid on such duty, had not been passed on by him to any other person. Thus, even the service tax is not collected from if the burden thereof is transferred to the service recipient, the deduction of input tax credit is not available. Therefore, it is imperative to examine whether the respondent has charged the service tax and accordingly raised the liability to that extent on the service providers in their books of accounts.

10.1 From the facts on record, it is clear that the department did raise this issue of input credit in the Query Memo and asked for the Central Board to the extent that the burden of service tax paid by them was not passed on to any other person. I find that the Adjudicating Authority has recorded its findings on the issue of Tax 15 (input tax credit) on clear reference of the impugned order.

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7. I find that the aforesaid writ letter received at this office on 03.11.2016 has submitted a C.A Petition issue by Adjudicating & Co. No.107721, proving that the incidence of the Service Tax so paid by them has not been passed on to any other person.

8.2 Further, on going issue through the Chartered Account. Certification dated 10.11.2016 it is observed that certificate was issued in the following manner:

" We have checked the following RA Bill of M/s Vraj Construction Co. situated at Block No.-4, 3rd Floor, Sardar Patel Shopping Center, Jilla Panchayat Road, Amroli-365001 and issued on verification of following RA Bill and to the information and explanation given to us this is to certify that burden of service tax paid by M/s Vraj Construction Co. on following RA bill is not passed on to any other person....."


It is observed that the said issue was issued on the basis of verification of RA Bills and the information and explanations given to Chartered Accountant by the respondent, it does not appear that what sort of information and explanation were sought for by the Chartered Accountant before issuance of the certificate; whether certificate was issued after going through the relevant financial records, whether Chartered Accountant had verified/confirmed the details on or in his own proficiency in accounting skills. Further copy of agreement produced before me does not show any taxation clause.

9.3 In view of the writ and discussion herein above, I find it appropriate that the issue of unjust enrichment needs to be re-examined in light of my above observations so as to ascertain whether or not the incidence of service Tax has not been passed on by him to any other person or service receiver. Further, it is also essential to examine whether or not the respondent has changed the service tax and accordingly raised the liability to that extent on the service receiver in their books of accounts. Hence, the matter needs to be returned back to Adjudicating Authority for disposal subject to a writ issue in light of my above observation after giving an opportunity of hearing to the Respondent. The Respondent is also directed to put all the evidences in support of his contention before the authority. The writ may be closed by the

Appellate Authority when the matter is not in standard procedure in order to enable the Adjudicating Authority to provide the value added. These findings of mine are supported by the decision of the Hon'ble High Court of Gujarat in the Tax Appeal No.276/2011 in the case of Commissioner, State Tax Administration Mys Associated Hotels Ltd, reported in 2014(27) STR 248 (Guj.) and also by the decision of the Hon'ble CESTAT, WKB Mumbai in case of Commissioner of Central Excise, Ahmedabad Association Ltd and reported in 2012 (27) STR 46 (Mumbai).

In view of the facts and reasons herein foregoing, I set aside the impugned order in above terms and disposed off the appeal as per the following:


 Additional Director, Central Excise


 Additional Director, Central Excise

By R.P.Ad/Speed Post

F.No. V2M/EA2/BVR/2017

Dated

2018

To:

1. The Assistant Commissioner, D/S to the Commissioner, CGST, Bhavnagar, Gujarat.
 (Kanchanbhai Service Tax Division, Bhavnagar)
2. M/s. Vya. Ch. Aradhana Co.,
 B-20/4, 2nd Floor,
 Gandhi Patel Shopping, Ghatiya,
 Jile - Gandhinagar Road,
 Anand 388001

Copy to:-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner (Appeals), Central Taxes, Rajkot.
- 3) The Commissioner, GST & Central Excise, Bhavnagar, Gandhinagar, Bhavnagar.
- 4) The Assistant Commissioner, GST & Central Excise, D/S to the Commissioner, Bhavnagar.
- 5) The Superintendent, Range-1, GST & Central Excise, D/S to the Commissioner, Bhavnagar.
- 6) GST Cell File.
- 7) Copy File for C/o the Additional Director, Central Excise (Mys Associated Hotels Ltd), Ahmedabad.