CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. III

Service Tax Appeal No. 59397 Of 2013

[Arising out of Order-in-Original No. 12/ST/COMMR/DM/RTK/2013-14 dated 20.05.2013 passed by the Commissioner of Central Excise, Rohtak]

M/s Topaz Service Corporation **: Appellant (s)**
203, 2nd Floor, Gupta Arcade, Inder Enclave
New Rohtak Road, New Delhi

Versus

Commissioner of Central Goods Service Tax, Central Excise **: Revenue (s)**
SCO 6, Sector 1, Rohtak (Haryana)

APPEARANCE:
Shri Atul Kumar Gupta, Chartered Accountant for the Appellant
Shri Manoj Kumar, Authorized Representative for the Department

CORAM :
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 57987/2024

Date of Hearing:19.04.2024

Date of Decision:09.08.2024

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Topaz Service Corporation (hereinafter referred to as the appellant) against the Order-in-Original No. 12/ST/COMMR/DM/RTK/2013-14 dated 20.05.2013 wherein the Commissioner has confirmed the demand of Rs. 1,17,48,282/- along with interest and penalty.

2. The brief facts of the case are that the appellant is engaged in the activity of supply, fixing, laying of wire cables, pipe and telephone connections for various Government departments including inter-alia

Central Public Works Department (CPWD) and Public Works Department (PWD). The proceedings were initiated against the appellant vide summons dated 15.12.2010 seeking copy of service tax registration, contracts/agreement awarded by CPWD for providing services in or in relation to Common Wealth Games 2010, challans, ST-3 returns, Balance Sheets for the period 2005-06 to 2009-10. On investigation, it appeared that the appellant was not paying service tax on the activity of laying of cables/wires. It appeared that the appellant believed that their activity would be chargeable to VAT not Service Tax, and was paying VAT. The Department formed an opinion that the appellant is liable to pay Service Tax in terms of Circular No. 123/5/2010-TRU. On completion of investigations, SCN dated 13.04.2012 invoking extended period of limitation was issued to the appellant demanding Service Tax amounting to Rs.1,17,48,282/- under Section 73(1); interest under Section 75 and imposition of penalty under Section 76, 77 & 78 of the Finance Act, 1994. The matter was adjudicated by the Commissioner vide Order-in-Original dated 20.05.2013 confirming demand of Rs.1,17,48,282/- (appropriating Rs.2,45,406/- already paid) under Section 73(1); interest under Section 75; imposing penalty of Rs. 5,000/- under Section 77 and equivalent penalty of Rs. 1,17,48,282/- under Section 78 of the Finance Act, 1994. Aggrieved by the said order, the appellant filed the present appeal.

3. Learned Chartered Accountant for the appellant submitted that in the present case, the appellant is carrying on the activity of supply, fixing, laying of telephone cables for connections, cables, pipes etc. for various Government departments like Central Public Works

Department and Public Works Department. The other works include inter alia fixing of master console phone system with digital EPBAX, maintenance of telephone intercom networking system at Rashtrapati Bhawan etc. The Learned Counsel submitted that the department formed an opinion that the activity carried on by the Appellant would be covered under 'Erection, Commissioning or Installation Services." In this context, he submitted that as per the definition of Erection, Commissioning or Installation, it is evident that to attract the taxability under said category, there must be installation of electrical and electronic devices, including wiring or fitting. In other words, he stated it can be said that the service should be installation of an electrical or electronic device i.e., a machine or equipment that uses electricity to perform any other function) with all other activities incidental thereto. However, in the instant case, the appellant had been awarded contracts by Government Department/ organizations primarily consisting of activities such as laying of cables rather than installation of electrical or electronic devises. Further, the activity of supply, fixing, laying of wires of telephone, cables, pipe which as per the department are covered under Erection, Commissioning and Installation Service cannot be classified into a separate category of service in terms of Section 65A, where the prime or dominant nature is laying of cables or pipelines. Therefore, the activities of the Appellant cannot be classified into a separate category of service, where the prime or dominant nature of contract is laying of cables or pipelines, which is exempt vide Circular 123/05/2010-TRU. In support of his submission, he relied upon the following decisions and Circular:-

- **Circular: 123/5/2010-TRU dated 24.05.2010**

- **Lakshmi Constructions Vs. Commissioner of C. Ex., Tirupathi - 2015 (39) S.T.R. 175 (Tri. - Bang.)**
- **Mr. Rakesh Kumar Partner, Mr. Nand Lal Gar, Proprietor Vs. C.C.E. & S.T., Panchkula Final Order No. 6230062302 dated 04.05.2018.**

3.1 He further contended that the activity carried on by the appellant would also be exempt vide Circular: 80/10/2004 S.T. dated 17.09.2004, which provides exemption to the similar kind of services provided to Government department/organisations and are not meant for commercial purposes.

3.2 Learned Chartered Accountant submitted that the appellant had provided the services of laying of cables of pipelines inclusive of material, whereas the demand raised against the appellant was under the category of Erection, Commissioning & installation, which is not maintainable. Further, he submitted that the work done by the appellant being composite in nature can be taxed under the category of Works Contract only. In support of his submission, he relied upon the following decisions:-

- **Real Value Promoters Pvt. Ltd. V/s Commissioner of GST & Central Excise, Chennai cited in 2018 (9) TMI 1149 - Tribunal Chennai**
- **M/s Madhusudan Engg. Co. v/s Commissioner - I, Central Excise and Customs, Jaipur cited in 2020 (10) TMI 474 CESTAT NEW DELHI**
- **M/s Shanti Construction co. v/s C.C.E. 7 S.T. Rajkot cited in 2023 (3) TMI 14-CESTAT AHMEDABAD**
- **M/s SS Constructions v/s C.C.E. & S,T. Chandigarh cited in 2021 (12) TMI 429-CESTAT Chandigarh**

Besides, the service of works contract provided by the Appellant would not be taxable prior to 01.06.2007 i.e., 'Introduction of Works Contract Service', in view of judgment of Hon'ble Supreme Court in the case of

Commissioner of C. Ex. & Cus., Kerala Vs. Larsen & Toubro Ltd. - 2015 (39) S.T.R. 913 (S.C.).

3.3 The Learned Chartered Accountant further submitted that as the appellant was providing the services of cable laying and pipelines along with material, therefore was eligible for abatement of 67% provided under Notification No. 1/2006 dated 01.03.2006. He further submitted that in the instant case, the appellant was eligible for benefit of exemption for small scale service provider on the ground that gross amount received is less than the threshold limit. He stated that demand had been wrongly calculated by the department, as even if it is assumed that the appellant is liable to pay service tax, the demand could only have been confirmed after giving the benefit of Notification No. 1/2006, which would be much lesser than the demand confirmed by the department.

3.4 Learned Chartered Accountant contended that the appellant was issued with subsequent show cause notices dated 17.10.2012 for the period 2011-12 & 17.04.2015 for the period 2012-13 & 2013-14, proposing demand on the similar issue. The Commissioner (Appeals) vide his order dated 23.01.2018, , dropped the demand for the period 2011-12 taking support of the Circular No. 123/5/2010 TRU dated 24.05.2012. Also, the demand was dropped for the period 2012-13 as time barred and for the period 2013-14, the appellant had already paid the amount of required service tax. Thus, the appeal was allowed in toto. However, the relevant period for the present matter is 2011-12, for which the demand was dropped by the Ld. Commissioner Appeals and the said order has attained finality, and has not been challenged by the revenue. Therefore, now in the present case, the department

cannot take a different view and confirm the demand against the appellant for carrying on the same activity. Taking different views for the same assessee, and for the similar kind of activity, is not permissible under law. In support of his submission, Ld. Counsel relied upon the following decisions:-

- **Rosmerta Technologies Ltd. Vs. Commissioner of CE & ST, LTU Delhi - 2019 (11) TMI 1573-CESTAT Chandigarh.**
- **M/s SRF Ltd. Vs. Commissioner, Central Excise & Service Tax, LTU, New Delhi-2021 (8) TMI 696-CESTAT New Delhi.**

3.5 Learned Chartered Accountant further submitted that it is a well settled position from the provisions of Finance Act and judgment of various courts that in case there is no separate recovery of service tax, the amount realized by him is to be considered as inclusive of Service Tax. He further contended that there is no suppression and willful mis-statement with the intention to evade of payment of tax on the part of the appellant. The invocation of extended period in the present matter is not sustainable. In support of his submissions, the Learned Chartered Accountant relied upon the following case laws:-

- **Sant Roadlines Vs. Commissioner of C. Ex. & S.T., Panchkula- 2020 (43) G.S.T.L. 206 (Tri.-Chan.)**
- **Jaiprakash Industries Ltd. Vs. Commissioner of C. Ex., Chandigarh 2002 (146) E.L.T. 481 (S.C.)**

Consequently, Learned Chartered Accountant contended that as there is no suppression, fraud, willful mis-statement on the part of the appellant, the imposition of penalty is not maintainable.

3.6 Learned Chartered Accountant for the appellant stated that under Section 73 of the Finance Act, the department can issue a show

cause notice within the extended period of 5 years from the relevant date, if there is fraud & suppression on the part of the Assessee. However, in the instant case there is no suppression or fraud on the part of the appellant, the show cause notice has been issued invoking the extended period of limitation. Further, even if it is assumed that the extended period has been rightly invoked, the demand for the period April 2006 to September 2006, would be beyond the period of 5 years and thus, liable to be set-aside. He prayed that the appeal be allowed.

4. Learned Authorized Representative for the Department reiterated the findings in the impugned order and submitted that it is not in dispute that the appellant during the relevant period had been providing services in relation to Erection, Commissioning and Installation Service'. In respect of services provided by them to CPWD and in connection with CWG-2010, the appellant had already deposited Service Tax for the period 2009-10 and 2010-11 treating the same as Works Contract. However, on scrutiny of VAT returns submitted by the appellant for the entire period of demand i.e. 2006-07 to 2010-11, it was found that the appellant had forged the acknowledgement and figures mentioned in the VAT returns. During the course of investigation or even in their reply to Show Cause Notice, the appellant did not put forth any argument regarding allegation of forging of VAT returns. In that view of the matter, the Learned AR submitted it can be safely concluded that the appellant had committed fraud as they had no ground for rebutting the said allegation. It is settled law that fraud vitiates everything. Therefore, none of the submissions made by the appellant regarding claim of abatement,

non-imposition of penalty ete. including claim of bona fide belief on their part are not acceptable. Further, the appellant did not submit copy of Balance Sheet for the period 2010-11, therefore, value of services for the said period is liable to be determined on pro-rata basis (as calculated in the Show Cause Notice) under the provisions of Section 72 of the Finance Act, 1994.

4.1 Ld. AR further submitted that the services provided by the appellant are classifiable under Erection, Commissioning and Installation Service' and in absence of any evidence of providing services of the nature which are excluded from the scope of the said service, the demand of Service Tax as raised in the Show Cause Notice is liable to be confirmed against them.

4.2 Ld. AR further contended that the appellant never disclosed the facts to the Department regarding the taxable services provided by them since 2006 and willfully avoided discharge of their Service Tax liability till initiation of investigation with reference to services provided in or in relation to CWG-2010. Only after initiation of investigation they obtained Service Tax registration for providing 'Erection, Commissioning or Installation Services', defined under Section 65(39a) and taxable under Section 65(105) (zzd) the Finance Act, 1994 as amended and filed ST-3 return for the period Oct-Mar 2010-11 and discharged Service Tax liability against payments received including the payments received for providing taxable services in or in relation to CWG-2010 work from CPWD but failed to discharge entire Service Tax liability for the period from 2006-07 to 2010-11 on the ground that they had paid VAT on balance sheet figures which was found contrary when verified with their VAT acknowledgements for the period

2006-07 & 2007-08. Had the department not initiated investigation against the appellant regarding discharge of their Service Tax liability against the payments received on account of providing taxable services in or in relation to CWG-2010 through CPWD. He further contended that the department would not have come to know about these irregularities and would have been deprived of its legitimate revenue. Further, Ld. AR stated that the appellant had neither registered himself with the department nor had he discharged their Service Tax liability with respect to CWG-2010 work also and against the payments received for providing taxable services prior to or after the CWG work. The appellant had also not filed Service Tax-3 return prior to initiation of said investigation nor observed other statutory obligations. It was obligatory on the part of the appellant to be fully aware about their statutory liabilities when they were rendering taxable service and receiving payments there against, wherein they failed and even on persuasions they discharged Service Tax liability only for a limited period including payments received from CPWD for providing taxable services in or in relation to CWG-2010 related work and had shown their inclination in not discharging entire Service Tax liability with interest for the entire period from 2006-07 to 2010-11. In view of the above, the show cause notice has correctly invoked the provisions of extended period under Section 73(1) of the Act ibid and the plea of the appellant is rejected.

5. We have heard the arguments of the Ld. Chartered Accountant for the appellant and the Ld. AR for the department. We have also perused the connected records.

6. A perusal of the show cause notice reveals that for the years 2006-07 & 2007-08 that the investigations of the VAT returns revealed that the appellant had forged the acknowledgements of VAT Returns. Two sets of VAT return acknowledgments were found wherein figures were tampered. The same is indicated in the table below:

Period	Ack No. & Dt	Turnover (in Rs)	Ack No & Dt	**Forged Figures**	Excess Turnover	VAT paid
Oct-Dec 2006	396062/dt 20.09.07	19,72,524	396062/dt 20.09.07	**51,58,119**	31,85,595	28,235
Jan-Mar 2007	396063/dt 20.9.07	18,65,655	396063/dt 20.9.07	**48,31,365**	29,65,710	118552
	Balance Sheet T/o figs = 1,49,52,641/				**VAT paid value forged by Rs. 61,51,305/**	
Apr-Jun 2007	656879/dt 14.01.08	790608	656879/dt 14.01.08	**32,25,643**	24,35,035	8482
Jul-Sep	656880/dt 14.01.08	8,16,086	656880/dt 14.01.08	**39,29,484**	31,13,398	21251
	Balance Sheet T/o= 19,27,6570/-				**VAT paid value forged by Rs. 55,48,433/**	

We find that despite forging an enhanced turnover for two quarters in the financial year 2006-07 and two subsequent quarters in the financial year 2007-08, the appellant has not paid higher VAT, in proportion to the enhanced VAT turnover. We note that one of the defences taken by the appellant is that they were under the bonafide belief that Service tax provisions were not applicable and that their activities are chargeable to VAT, which they were discharging at appropriate rates. We find that this argument falls flat in the face of such blatant tampering of the VAT returns, as indicated above. We also note that the appellant did not put forth any arguments regarding the allegation of forging of the Vat returns during the adjudication proceedings before the original authority. It is also a fact that the

appellant has not addressed any arguments on this matter, even in the present appeal. In this context, we note that the Courts have consistently held that the parties seeking relief must approach the court with clean hands and disclose all material facts that may affect the decision. In the case of **Harbans Lal Vs Mohinder Lal & Others, the Hon'ble High Court of Jammu & Kashmir, on 14.01.2020**, held as follows:-

> "15. That apart, the petitioner/plaintiff as rightly observed by the appellate Court is, prima facie, guilty of suppression of material fact about the filing of earlier suit and its fate, in the present suit. A party seeking discretionary relief has to approach the Court with clean hands and it is required to disclose all material facts which may one way or the other affect the decision. The suppression of material facts itself is a sufficient ground to decline the discretionary relief of injunction. Suppression of material facts from the Court itself is a ground for declining to exercise discretion and grant equitable relief of injunction."

6.1 The appellant has not submitted any evidence to the contrary before this Tribunal, and has not taken cognisance of this vital aspect of investigations. It is settled law that fraud vitiates everything. If a petitioner/appellant/applicant is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to summarily deny relief to such person to prevent an abuse of the process of law and reject the Petition/Appeal on this ground alone without going to the merits of the case. The Apex Court has repeatedly invoked and applied the rule that a person who does not disclose all material facts has no

right to be heard on the merits of his grievance. We rely on the following judgments in this regard-

i. State of Haryana v. Karnal Distillery Co. Ltd. [(1977) 2 SCC 431]
ii. Vijay Kumar Kathuria v. State of Haryana [(1983) 3 SCC 333]
iii. Agricultural and Processed Food Products v. Oswal Agro Furane and others [(1996) 4 SCC 297]
iv. Union of India and others v. Muneesh Suneja [(2001) 3 SCC 92]
v. Sunil Poddar and others v. Union Bank of India [(2008) 2 SCC 326]
vi. G. Jayshree and others v. Bhagwandas S. Patel and others [(2009) 3 SCC 141].

Consequently, in view of the fact that the appellant had tampered with his VAT returns for the years 2006-07 and 2007-08, we decline to examine any of his submissions pertaining to this period.

7. We note that the ld. Chartered Accountant has submitted that their service is not covered under Erection, Commissioning and Installation Service as the dominant nature of the contract is laying of cables or pipelines. We note that as per the letter dated 27.12.10 of Shri Vishnu Aggarwal, CA and authorised representative of the appellant, which stated that the appellant had received two work orders from PWD/CPWD which involved the following:-

(i) LOA No. 54(11) EE(E)CW-114/PWD/2009-10/516 dt 25.11.2009 for supply, installation, testing and commissioning of ISDN EPABX system at Chhatrasal Stadium

(ii) Worl of remodelling & upgradation of MDC National Stadium for CWG-2010.

7.1 We find that the issue involved in this case relates to non-payment of tax under the category, "Erection, Commissioning and Installation Services". At the outset, there is considerable merit in the contention of the Appellant that composite contracts involving supply of both goods and services could not have been taxed under the category, "Erection, Commissioning and Installation Services" in view of the law laid down by the Hon'ble Supreme Court in the L&T case as under,

> "24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of

properly in goods transferred in the execution of a works contract."

7.2 Therefore, the taxable category "Erection, Commissioning and Installation Services" could only cover pure service contracts within its fold. In the present case, we note that the work order in respect of Chhatrasal Stadium involved supply of material and installation commissioning of the EPABX system. Consequently, with effect from 01.06.2007 only, such composite contracts would be eligible to tax under Works Contract Service. We find force in the arguments of the Ld. Chartered Accountant that the appellant is eligible for abatement as provided under the relevant notification. We also note that the demand for the period 2010-2011 has been arrived at by taking recourse to the best judgment method under section 72 of the Finance Act, 1994. It has been submitted before us that as the Balance Sheet for the period was not available, it was not possible to arrive at the actual demand. As the same is available now, the demand will have to be calculated based on the actual turnover figures. In view of the above, we hold that it would be appropriate to remand the case for recalculation of the demand by giving the benefit of abatement to the appellant.

7.3 We now come to the issue of invocation of extended period alleging suppression and fraud along with interest and penalty under section 78 of the Finance Act, 1994. In this context, we note that the there is evidence that the appellant had tampered with four of his VAT returns, in order to substantiate his claim that as VAT had been paid on the transactions, hence no service tax is leviable. This act of the appellant cannot be overlooked. This clearly indicates his intent to

evade payment of duty, and satisfies the requirement for invocation of the extended period. Consequently, the penalty under Section 78 is also leviable.

7.4 The interest liability is upheld as it is a statutory.

8. In view of the above discussions, we partially allow the appeal, and also by way of remand for calculating the demand under Works Contract Service by extending the benefit of abatement under the relevant notification. We uphold the invocation of extended period and hold the appellant liable for penalty under Section 78, which will be based on the reworked quantum of duty. The appeal is disposed off accordingly.

(Order pronounced in the open Court on 09.08.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.