CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH

SERVICE TAX APPEAL NO. 42599 OF 2018

[Arising out of Order-in-Appeal No. 452/2018- (CTA-I) dated 27/08/2018 passed by The Commissioner of GST & Central Excise (Appeals-I), Chennai.]

M/s Touchstone Infrastructure and Solutions Private Limited,
No. 1553, 17th Main Road, 14th Cross Street, Anna Nagar,
Chennai – 600 040. **...Appellant**

Versus

The Commissioner of Central Taxes and Central Excise, Chennai North Commissionerate,
26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034 **...Respondent**

APPEARANCE:

Shri G. Natrajan, Advocate for the appellant.
Shri L. Nandkumar, Authorised Representative for the Department.

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

DATE OF HEARING: 20.07.2021
DATE OF DECISION: 18.11.2021

FINAL ORDER No. 42436/2021

P.V. SUBBA RAO

This appeal is filed by the appellant assailing order-in-appeal dated 27.08.2018[1] passed by the Commissioner of GST & Central Excise (Appeals – I), Chennai upholding the order-in-original dated 23.03.2018 passed by the Additional Commissioner of GST & Central Excise, Chennai.

[1] impugned order

2. The facts of the case, after filtering out unnecessary details, are that the appellant provides finishing services on works contract basis to various parties. This work includes providing false ceiling, flooring, glazing, fixing up of partition, electrical work etc. The appellant charges a single amount for the entire contract without invoicing separately for the goods and the services. It is undisputed that the appellant is liable to pay service tax on these services under the head of works contract service and the appellant is also liable to pay VAT on the goods component of these contracts. The appellant paid VAT on the goods component reckoning 70% of the total contract of the value of the goods as per the provisions of Tamil Nadu Value Added Tax Act and Rules and paid service tax on 30% of the total contract value. The case of the Revenue is that since the appellant could not ascertain the actual value of goods transferred, it should have paid service tax under composition scheme. After calling for information from the appellant and examining the records, a show cause notice dated 21.12.2016 was issued to the appellant demanding differential service tax of Rs. 1,51,82,658/- as follows :-

Period	**No. of Invoices**	**Gross Value (Rs.)**	**Taxable value after abatement**	**Rate of (%)**	**Service Tax Payable**	**Service Tax paid**	**Differential Tax to be paid**
1.04.2011 to 30.6.2012	51	29228340	29223840	4/4.8	1222294	932989	289305
1.07.2012 to 31.03.2016	269	385523736	251792634	12.36/ 14/14.5	32814774	17921421	14893353
TOTAL		**414752076**			**34037068**	**18854410**	**15182658**

3. It was also proposed in the show cause notice to charge interest under Section 75 and impose penalties under Section 76, 77 and 78 of the Finance Act, 1994. The Original Authority confirmed the demand and imposed penalties as follows:

> "(i) I confirm the demand of Rs. 1,51,82,658/- (Rupees One Crore Fifty One Lakhs Eighty Two Thousand Six Hundred Fifty Eight only) against M/s Touchstone Infrastructure and Solutions Pvt. Ltd. towards service tax including Education Cess,

Secondary Education Cess and Swachha Bharat Cess under Section 73 (1) of Finance Act, 1994.

(ii) I demand the interest on the aforesaid amount of service tax under Section 75 of Finance Act, 1994.

(iii) I impose a penalty of Rs. 1,51,82,658/- (Rupees One Crore Fifty One Lakhs Eighty Two Thousand Six Hundred Fifty Eight only) against M/s Touchstone Infrastructure and Solutions Pvt. Ltd. under Section 78 of Finance Act, 1994 for the contravention of the aforesaid provisions. However, the assessee shall pay the reduced penalty calculated to the extent of 25% of service tax determined at sl. no. (i) above, provided the amount of 25% penalty along with the demand and interest confirmed is also paid within 30 days from the date of receipt of this order.

(iv) I do not impose penalty under Section 76 and 77 of Finance Act, 1994 as I have imposed penalty under Section 78 of Finance Act, 1994".

4. The appellant paid VAT as per Section 5 of the Tamil Nadu VAT Act, read with Rule 8 (5) (d) of Tamil Nadu VAT Rules which prescribe that in case of works contracts 30% of the total amount charged would be treated as the service component and VAT shall be paid on the remaining 70%. The appellant discharged VAT accordingly and paid service tax on the 30% of the total amount reckoning it as the service component. The case of the Revenue is that service tax on works contract is chargeable on the consideration received for service portion of works contract if such consideration is available in the contract/invoice separately, otherwise service tax must be paid under the "Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007[2]" upto 30.06.2012. For the period after 01.07.2012, the value of service portion of works contract of composite nature has to be arrived at as specified in Rule 2A (ii) of Service Tax (Determination of Value) Rules, 2006, as amended. Thus, there are two periods in question upto 30.06.2012 and thereafter.

[2] Composition Scheme

Period Upto 30.06.2012

5. For the period upto 30.06.2012, the case of Revenue is that since the appellant did not separately invoice for the service and goods components of the works contract, it was bound to follow the composition scheme and pay service tax accordingly. Paragraph 6.8 of the impugned order reads as follows:

> "6.8 It is to be further noted that the provisions of Composite Scheme reads as "Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to two per cent (4% vide Notification No. 7/2008-ST dated 01.03.2008 and 4.8% vide Notification No. 10/2012-ST dated 17.03.2012) of the gross amount charged for the works contract. It is noteworthy to mention here that the word ***"shall"*** is imperative in nature, for the reasons that wherever Appellant is not in a position to demarcate between the goods and service part in the value of the contract and is also not able to arrive at the value of the goods as provided for under the statue".

6. The case of the appellant is that the composition scheme is an option given to the appellant and it cannot be forced upon it. Revenue also cannot choose any option for the appellant who is free to choose to pay as per Composition Scheme or otherwise in case of works contracts. It has paid service tax on the service component of the works contract and paid VAT on the goods component of it. To bifurcate the amount charged for 'works contract' between goods and services, it is bound to follow the law laid down in the Tamil Nadu VAT Act which specifies the 30% of the value can only be taken as service component. Once VAT is paid on the remaining 70% service tax cannot also be charged on that amount for this period.

7. We have considered the arguments of both sides for this period.

8. The Commissioner (Appeals) has misread the provisions of works contract composition scheme and held that "it is not worthy mention

here that the word “shall” is imperative in nature, for the reasons that whenever appellant is not in a position to demarcate between the goods and service part and the value of the contract and it is also not able to arrive at the value of the goods as provided for under the statue”. What Rule 2A of the Composition Rules says is that the person liable to pay service tax in relation to works contract service **shall have the option** to discharge his service tax liability under the composition scheme. In other words, the option available to the tax payer cannot be taken away. It is nowhere laid down that the ‘tax payer shall opt for the Composition Scheme’ or that ‘the tax payer shall pay tax according to the composition scheme’ as wrongly understood by the officer issuing the show cause notice, the Original Authority as well as the Appellate Authority. It has been held in **Tiara Advertising** versus **Union of India**[3] by High Court of Andhra Pradesh and Telangana that where options are given to the assessee it is not open for the Department to choose an option for it. We, therefore, find that for the period prior to 01.07.2012, the demand in the show cause notice based on enforcing the composition scheme upon the appellant, which is only an option available to the appellant, cannot be sustained and needs to be set aside.

Period from 01.07.2012

9. From 01.07.2012, service tax became payable on all services except those which are in the negative list. Section 66E was introduced in the Finance Act, 1994 whereby certain services have been declared as “declared services” and service tax is payable on such services. Clause (h) of this list includes “service portion in the execution of works contract”. The composition scheme has been abolished and valuation

[3] **2019 (30) G.S.T.L. 474 (Telangana)**

has to be done as per new Rule 2A of the Service Tax (Determination of Value) Rules, 2006 which reads as follows:-

> **"RULE 2A. Determination of value of service portion in the execution of a works contract. —** Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-
>
> **(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods or in goods and land or undivided share of land, as the case may be transferred in the execution of the said works contract.**
>
> ***Explanation.*** - For the purposes of this clause,-
>
> (a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;
>
> (b) value of works contract service shall include, -
>
> (i) labour charges for execution of the works;
>
> (ii) amount paid to a sub-contractor for labour and services;
>
> (iii) charges for planning, designing and architect's fees;
>
> (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
>
> (v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;
>
> (vi) cost of establishment of the contractor relatable to supply of labour and services;
>
> (vii) other similar expenses relatable to supply of labour and services; and
>
> (viii) profit earned by the service provider relatable to supply of labour and services;
>
> **(c) where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause;**
>
> (ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the

execution of the works contract shall determine the service tax payable in the following manner, namely :-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

Provided that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.

[(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent. of the total amount charged for the works contract.

Explanation 1. - For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(b) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2. - For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

(2) Where the value has not been determined under sub-rule (1) and the gross amount charged includes the value of goods as well as land or undivided share of land, the service tax shall be payable on twenty-five per cent. of the gross amount charged for the works contract, subject to the following conditions, namely :—

(i) the CENVAT Credit of duty paid on inputs or capital goods or the CENVAT Credit of service tax on input services, used for providing such taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004;

(ii) the service provider has not 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 sub-rule, the gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider."

10. The appellant's case is that it has already paid VAT from the goods component as per the Tamil Nadu VAT Act and the service portion of the contract is only chargeable to service tax as per Section 66E (h) as applicable during the relevant period. As per Rule 2A (i), the value of service portion in execution of works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract. As the value of the property has already been determined as per the Tamil Nadu VAT Act, no service tax can also be charged on the value of the goods. The case of the Revenue is that as per Explanation (c) of this clause "where value added tax or sales tax **has been paid or payable on the actual value of property in goods transferred** in the execution of works contract, then, **such value adopted for purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract,** for determination of the value of service portion in the execution of works contract under this clause". Since in this case, the appellant has not paid VAT on the basis of the actual value of the goods transferred but on presumption as per the Tamil Nadu VAT Act

such value cannot be adopted for the purpose of calculating the value of service. It is undisputed that the actual value of the property transferred is not available since it was a composite contract. Therefore, Revenue's case is that the appellant is not covered by Rule 2A (i) at all and the value of service has to be determined as per Rule 2 A (ii). This clause deals with three categories of works, of which 'B' applies to the present case:

> A : works contract for execution of original work whether the service tax shall be payable on 40% of the total amount charged;
>
> B : works contract for maintenance or repair or reconditioning or restoration or servicing of any goods where the service tax shall be payable on 70% of the total amount charged ;
>
> C : in cases not covered by A or B, the tax shall be payable on 60% of the total amount charged for the works contract. The demand has been made accordingly.

11. Learned Counsel for the appellant submits that it has been held by Supreme Court in **Safety Retreading Co. (P) Ltd.** versus **Commissioner of Central Excise, Salem**[4] that in a contract involving transfer of property and service, the value attributable transfer of property in goods cannot be subjected to service tax. In this case the value attributable was 70% as per the Tamil Nadu VAT Act. He also submits that this judgment was followed by the Tribunal in **Johnson Lifts Pvt. Ltd.** versus **Commissioner of Service Tax, Chennai**[5] He further relies upon the judgment of **Bright Marketing Company** versus **Commissioner of Central Excise, Coimbatore**[6] wherein it has been held that if the assessee paid tax under the State Statute on the value of the material used, service tax would be exigible only on the remaining value of services provided.

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[4] **2017 (48) S.T.R. 97 (S.C.)**
[5] **2018 – TIOL – 1142 - CHE**
[6] **2018 (9) TMI 1592 – CESTAT CHENNAI**

12. We have considered the arguments of both sides for this period.

13. The question which falls for consideration in this case is where the value of the works contract is split notionally into value of goods and value of services as per the State Act and Rules and VAT has been paid on the goods component on which and there is no break-up of the actual value of the goods which are transferred or deemed to have transferred in execution of the contracts, can service tax also be charged on the same amount? In this case in view of the Tamil Nadu VAT Act and Tamil Nadu VAT Rules (which were also in existence prior to 01.07.2012 also) the appellant is bound to pay VAT on 70% of the value of the indivisible works contract deeming it to be the value of the goods transferred. It is undisputed that the appellant paid VAT accordingly and paid service tax on the remaining 30%. On the other hand, as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006, Explanation (c) of Clause (i) where value added tax has been paid or is payable on the actual value of property in goods transferred in the execution of works contract the same shall be taken into account for determining the value of the works contract on which service tax has to be paid and the actual value is not available from the records. According to the Revenue, the value should be determined as per the clause (ii), which also, like the Tamil Nadu VAT Act and Rules, lays down a proportion of the consideration for the indivisible works contracts on which service tax should be paid. Since the works in this case were not original works, it falls under category B of clause (ii) of this Rule and service tax should be paid on 70% of the value of the works contract. In other words, if the Revenue's argument is accepted, the appellant will have to pay service tax on 70% of the gross amount charged for the works contract and the appellant has already paid VAT on 70% of the gross amount charged as per the Tamil Nadu VAT Act. This will lead to an anomalous situation where the appellant has to pay VAT as well as

service tax on 40% of the total value of the works contract. On identical situation the Supreme Court in **Safety Retreading Co. (P) Ltd.** (supra) held as follows:

> "10. **The exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee had paid taxes under the local Act whereunder it was registered as a Works Contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service**. This, in fact, is what is provided by the Notification dated 20th June, 2003 and CBEC Circular dated 7th April, 2004, extracted above, subject, however, to the condition that adequate and satisfactory proof in this regard is forthcoming from the assessee. On the very face of the language used in Section 67 of the Finance Act, 1994 we cannot subscribe to the view held by the Majority in the Appellate Tribunal that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. **The finding of the Appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%.**
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> 11. An argument has been advanced by Ms. Pinky Anand, learned Additional Solicitor General that there is no evidence forthcoming from the side of the assessee that the value of the goods or the parts used in the contract and sold to the customer amounts to seventy per cent (70%) of the value of the service rendered which is the taxable component under the State Act. The aforesaid argument overlooks certain basic features of the case, namely, the undisputed assessment of the assessee under the local Act; the case projected by the Department itself in the show cause notice; and thirdly the affidavit filed before this Court by one S. Subramanian, Commissioner of Central Excise, Salem.
>
> 12. No dispute has been raised with regard to the assessment of the appellant on its turnover under the local/State Act, insofar as payment of Value Added Tax on that component (70%) is concerned. A reading of the show cause notice dated 24th January, 2008 would go to show that the entire thrust of the Department's case is the alleged liability of the appellant-assessee to pay service tax on the gross value. In the aforesaid show cause notice, the details of the value of the goods, raw materials, parts, etc. and the value of the services rendered have been mentioned and service tax has been sought to be levied at the prescribed rate of ten per cent (10%) on the differential amount. It is now stated before us that the aforesaid figures have been furnished by the assessee himself and, therefore, must be understood not to be authentic. This, indeed, is strange. No dispute has been raised with regard to the correctness of the said figures furnished by the assessee in the show cause notice issued to justify the stand now taken before this Court; at no point of time such a plea had been advanced.

13. Besides the above, the affidavit of the learned Commissioner, referred to above, proceeds on the basis that the appellant assessee is also liable to pay service tax on the remaining seventy per cent (70%) towards material costs in addition to the 30% of the retreading charges. This is clear from the following averments made in the said affidavit of the learned Commissioner :

> "The relevant bills showed that the Appellant had paid service tax only on the labour component after deducting 70% towards material cost on the gross tyre Retreading charges billed and received for the period from 16-6-2005. In short, they have paid service tax only on the 30% of the tyre Retreading charges received from the customers, by conveniently omitting 70% of the consideration received towards Retreading charges to avoid tax burden.
>
> The verification of invoices of the Appellant for the period from Jan.-2007 to March-2007, the officers noticed that the Appellant have shown material cost, patch cost and misc. charges i.e. Labour charges separately in their invoices. However, on the follow-up action the customers of the Appellant revealed that they have neither purchased nor received raw materials intended for Retreading and they had paid only the Retreading charges for carrying out the Retreading activity."

The invoices which the appellant assessee has also brought on record by way of illustration show the break up of the gross value received. There is again no contest to the same. Leaving aside the question that the case now projected, with regard to lack of proof of incurring of expenses on goods and materials which has been transferred to the recipient of the service provided, appears to be an afterthought, even on examination of the same on merits we have found it to be wholly unsustainable.

14. **We, therefore, in the light of what has been discussed above, set aside the majority order of the Appellate Tribunal dated 14th October, 2011 and hold that the view taken by the learned Vice-President of the Appellate Tribunal is correct and the same will now govern the parties. All reliefs that may be due to the appellant-assessee will be afforded to it forthwith and without any delay. All amounts, as may have been, deposited pursuant to the order(s) of this Court shall be returned forthwith to the appellant, however, without any interest. Bank guarantee furnished insofar as the penalty amount is concerned shall stand discharged.**

The appeal is allowed in the above terms".

14. Respectfully following ratio of the Supreme Court in **Safety Retreading Co. (P) Ltd.** (supra), we hold that where the value has already been split as per the state law and VAT has been paid on the goods component of the composite works contract, no service tax can be levied on such component again taking recourse to Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006. The demand for the period post 01.07.2012 also needs to be set aside on this ground. Since

the demand of service tax does not sustain, the demand of interest under Section 75 and imposition of penalty under Section 76, 77 and 78 do not also survive.

15. In view of the above, the impugned order dated 27.08.2018 needs to be set aside and is set aside. The impugned order is set aside and the appeal is allowed with consequential relief, if any, to the appellant.

(Order pronounced in court on 18/11/2021.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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