CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH

Service Tax Appeal No. 70517 of 2017

(Arising out of Order–in-Original No. 31 to 34/Commissioner/ST/Noida/2016-17 dated 31.03.2017 passed by the Commissioner, Service Tax, Noida)

M/s. Interarch Building Products Pvt. Ltd. **...Appellant**
B-30, Sector 57, Noida-201301

Versus

The Commissioner of Service Tax, **...Respondent**
Noida Commissionerate,
C-56/42, Renu Tower,
Sector-62, Noida.

APPEARANCE:

Shri V. Raghuraman, Senior Advocate and Shri Shailesh P. Sheth, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative of the Respondent

CORAM:

HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 05.07.2023
Date of Decision: 29.09.2023

FINAL ORDER No. 70093/2023

JUSTICE DILIP GUPTA:

M/s. Interarch Building Products Pvt. Ltd.[1] has filed this appeal to assail the order dated 31.03.2017 passed by the Commissioner of Service Tax, Noida[2].

2. Earlier, this appeal was allowed by the Tribunal by order dated 09.11.2017, which order was assailed by the department before the Supreme Court in Civil Appeal No. 11330 of 2018. This Civil Appeal has been allowed by the Supreme Court by judgment dated 2.05.2023 and the matter has been remitted to the Tribunal to compute the service tax in terms of rule 2A of the Service Tax

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1. **the appellant**
2. **the Commissioner**

(Determination of Value) Rules 2006[3] as the appellant had not opted for the composition scheme under the Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007[4]. The Supreme Court also directed the Tribunal to decide whether the extended period of limitation could have been invoked by the department.

3. The appellant had a centralized registration under the Finance Act under 'commercial or industrial constructions' services and 'construction services'. It entered into contracts with consumers for execution of contracts in respect of pre-engineered or pre-fabricated buildings/structures and paid service tax on the gross amount of the contract under the category 'commercial or industrial constructions' service made taxable under section 65 (105)(zzq) of the Finance Act 1994[5].

4. The department was, however, of the view that the services rendered by the appellant would fall under 'works contract', chargeable to service tax under 65(105)(zzzza) of the Finance Act.

5. A show cause notice dated 23.10.2012 was, accordingly, issued to the appellant for the period January 2007 to March 2012 alleging that the appellant had utilized CENVAT credit of Rs. 112.61 crores on building material, which was inadmissible. The appellant filed a reply to the show cause notice. A second show cause notice dated 22.05.2014 was issued to the appellant for the period April 2012 to June 2012 raising the same allegations. This was followed by a third show cause notice dated 27.10.2014 for the period July 2012 to December 2013 and a Statement of Demand dated 23.10.2015 for the period January 2014 to March 2014.

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3. the 2006 Rules
4. the Composition Scheme
5. the Finance Act

6. The Commissioner, by order dated 31.03.2017, confirmed the demands raised in all the three show cause notices and the Statement of Demand holding that the services rendered by the appellant would be classifiable under works contract service and rejected the availability of CENVAT credit and directed for its recovery.

7. The Tribunal, by decision dated 09.11.2017, allowed the appeal observing that the Composition Scheme was optional and the provisions of rule 2A of the 2006 Rules were subject to the provisions of section 67 of the Finance Act. The Tribunal, therefore, held that there was no question of applicability of rule 2A, nor could the Composition Scheme be forcibly applied.

8. The Supreme Court, by the judgment rendered on May 2023, while allowing the Appeal filed by the department filed against the aforesaid order of the Tribunal, observed as follows:

> "8. **The short question which is posed for consideration before this Court is as to whether an assessee who is liable to pay service tax under works contract service has the legal right not to follow Rule 2A for the Service Tax (Determination of Value) Rules, 2006 nor the Composition Scheme on the ground that in terms of Section 67 of the Finance Act, 1994 an assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as works contract service and in the process also entitled to avail the CENVAT Credit?**
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> xxxxxxxxxxxxx
>
> 8.9 With respect to the 'works contract service' and/or the Composition Works Contract the valuation has to be made as per Rule 2A of the Valuation Rules, 2006. Even as per the Composition Scheme vide Notification 32/2007 dated 22.04.2007 an assessee has an option to discharge the 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 equivalent to 2% of the gross amount charged for the works contract. It is to be noted that Rule 3(1) provides notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006. Therefore, as per the Scheme of the Act the determination of value of service portion in the execution of the works contract is to be made as per Rule 2A, however with an option to the assessee to avail the benefit of Composition Scheme. **Therefore, either the assessee has to go for Composition Scheme or go for Determination of Value as per Rule 2A and the assessee has to pay service tax on the service element and can claim CENVAT Credit on the said amount only.**

9. **In view of the above the impugned judgment and order passed by the CESTAT taking the contrary view is unsustainable by which it is held that the assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as 'works contract' and the assessee is also entitled to avail the CENVAT Credit on the same.**

9.1 **However, at the same time the service tax needs to be paid in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2006 and since the assessee has not opted for composition scheme, the matter is to be remitted back for recomputation of the demands in terms of Rule 2A. As the issue with respect to the extended period of limitation has also not been decided by CESTAT the matter is to be remanded to the CESTAT to decide the issue of limitation.**

10. In view of the above and for the reason stated above, the present appeal succeeds. The impugned judgment and order passed by the CESTAT is hereby quashed and set aside and it is held that the assessee is not entitled to take the total contract value which includes both goods and services and remit service tax on the value as works contract service and, in the process, also entitled to avail the CENVAT Credit on the entire amount. It is observed and held that the assessee has to pay the service tax on the value of services as per Rule 2A of the

(Determination of Value) Rules, 2006 and thereafter to avail the CENVAT Credit accordingly. However, it is also observed and held that demand for the period January 2007 to May 2007 is unsustainable.

10.1 In that view of the matter now the service tax needs to be computed in terms of Rule 2A of the (Determination of Value) Rules, 2006 and as the assessee has not opted for the composition scheme, the matter is remitted back to the CESTAT for recomputation of the demands in terms of Rule 2A. As observed hereinabove the Tribunal has also not decided the issue of extended period of limitation. **Therefore, while quashing and setting aside the impugned judgment and order passed by the CESTAT, the matter is remitted back to the CESTAT limited only to decide the issue of limitation and re-computation of demand in terms of Rule 2A.** The aforesaid exercise be completed by the CESTAT on remand within a period of three months from the date of the present order. Present appeal is accordingly allowed. However, in the facts and circumstances of the case there shall be no order as to costs."

(emphasis supplied)

9. Shri V. Raghuraman, learned senior counsel for the appellant assisted by the Shri Shailesh P. Sheth made the following submissions:

(i) From a perusal of rule 2A of the 2006 Rules, as was in force prior to 30.06.2012 and after 01.07.2012, it will be evident that in respect of the 'works contracts', the rule provides for determination of the assessable value i.e. the value of taxable service, by excluding –

(i) the value of transfer of property in goods involved in the execution of the said works contract.

(ii) Value Added Tax (VAT) or Sales Tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the works contract.

Clause (ii) of the Explanation to rule 2A (as it stood

for the period up to 30.06.2012) further provided that where Value Added Tax or Sales Tax, as the case may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or Sales Tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of said works contract for determining the value of works contract service under clause;

(ii) The appellant was clearing the pre-fabricated/pre-engineered steel buildings/structures and the parts thereof from its plants on payment of excise duty as applicable and under the cover of the statutory prescribed invoices. This duty paid goods were cleared to the designated sites where erection, installation and commissioning were to be undertaken;

(iii) In terms of directions issued by Supreme Court in its judgment dated 02.05.2023, the appellant has to pay service tax on the value of services as per rule 2A of the 2006 Rules and thereafter avail the CENVAT credit; and

(iv) In regard to the first show cause notice dated 23.10.2012 issued to the appellant for the period from January 2007 to March 2012, the extended period of limitation could not have been invoked for the period prior to October 2010.

10. Shri Santosh Kumar learned authorised representative appearing for the department supported the impugned order, both on merits as well as on limitation.

11. The submissions advanced by the learned senior counsel for the appellant and the learned authorized representative appearing for the department have been considered.

12. The Supreme Court has remitted the matter to the Tribunal to examine two issues, namely the issue of limitation and re-computation of the demands in terms of rule 2A of the 2006 Rules. These two issues are being dealt with.

Limitation

13. Section 73(1) of the Finance Act with the proviso, as stood at the relevant time prior to 01.07.2012, is reproduced below:

> **"73.(1)** Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
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> **PROVIDED** that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-
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> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,
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> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

14. It would be seen from a perusal of sub-section (1) of section 73 of the Finance Act that where any service tax has not been levied or

paid, the Central Excise Officer may, within one year from the relevant date, serve a notice on the person chargeable with the service tax which has not been levied or paid, requiring him to show cause why he should not pay amount specified in the notice.

15. The "relevant date" has been defined in section 73 (6) of the Finance Act as follows;

> "**73(6)** For the purposes of this section, "relevant date" means,-
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> (i) In the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short paid-
>
> (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;
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> (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
>
> (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;"

16. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "one year", the word "five years" has been substituted.

17. Learned senior counsel appearing for the appellant, in so far as the limitation is concerned, confined his submission to the first show cause notice dated 23.10.2012 covering the demand for the period

June 2007 to March 2012. The normal period for issuing the notice at the relevant time was one year. The notice that was issued invoked the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act.

18. The allegations made in the show cause notice for invoking the extended period of limitation are as follows:

> "43. **In view of foregoing, it appears that M/s IBPPL had wrongly classified their service in the category of Commercial or industrial construction service in lieu of work contract service despite such lucid and explicit provisions.** Even after issuance of numbers of the wrong circulars and clarifications M/s IBPPL resorted classification deliberately, with intent to evade payment of service tax in cash and to avail the inadmissible Cenvat credit of goods used in transfer of property to recover it in form of cash. **The short payment of service tax, availment of the inadmissible Cenvat credit of goods used in transfer of property and collection of amount in excess of the service tax assessed or determined and paid as representing service tax not credited to the government was unearthed by department by causing investigation against them, hence, the provisions of Section 73(1) of Finance Act, 1994 for extended period of limitation appears to be invokable** and the service tax amount and inadmissible credit as detailed in para appears to be recoverable from party. Further, interest at appropriate rate on the said amount of service tax and education cess also appears to be recoverable from M/s IBPPL, under the provisions of section 73-B & 75 of Finance Act, 1994."
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> **(emphasis supplied)**

19. The appellant filed a reply to the aforesaid show cause notice and in respect of the invocation of the extended period of limitation stated as follows:

> "5.1. **It is submitted that we were registered for Commercial and Industrial construction service**

and discharging service tax on the full value including material prior to 01.06.2007. We have disclosed this fact to the department. Thus the department was fully aware that we were availing credit on the duty paid on material in providing commercial of industrial construction service. Department was thus having complete knowledge of the facts. **Only because from 01.06.2007 works contract service was introduced the department cannot be allowed to raise the issue of suppression of facts with intention to evade payment of tax as late as in October 2012 that is nearly after expiry of 5½ years after the introduction of works contract service. Our service tax records were audited by the Excise Department during various period,** even MLU Audit by Delhi Zonal has been done (details as below). Apart from this our regular AG Audits are also been conducted from time to time.

Audit Period April 2008 to March 2010 conducted by Audit Team No IX which also declares the Audit for the prior period upto March 2008 (Annexure - II)

Audit Period (April 2010 To June 2010) conducted by Audit Group No VII. (Annexure - II)

In none of the audits so conducted the issue of non availability of the CENVAT Credit on the materials used was raised by the audit team. Thus the audit teams were also fully aware of all the facts. It is submitted that the Hon'ble Supreme Court has held in a number of cases that where facts have been disclosed or the facts were in the knowledge of the department. Extended period of limitation cannot be invoked.

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Similarly it is settled law where audit have been conducted of the records of the company and no objection was taken in regard to non availability of credit, it cannot be said that there is any suppression of facts with intention to evade payment of tax.

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5.2 Appellants have been filing their half-yearly returns showing, CENVAT credit availed on inputs/input services. There is thus a clear disclosure in the returns filed. In respect of such disclosure made in the returns filed, there cannot be any allegation of suppression of facts with intention to evade tax.

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5.3 It is further submitted that the department itself was aware that from 01.06.2007 works contract service was introduced in the statute book. Therefore, the department should have automatically checked up whether our company was paying service tax correctly under the erst-while category namely Commercial or Industrial construction service and should have advised the company to shift to Works contract service. But the department did not do anything nor the department issued any show cause notice within the normal period of limitation that is with in one year of the date of the introduction of works contract service in the statute book. **The allegations which are contained in the show cause notice certain facts are not new and these facts were within the knowledge of the department in 2007 itself, if the department kept silence and accepted the tax is discharged under the commercial or industrial construction service, the same cannot be questioned by invoking extended period of limitation.** The department thus having worked under the assumption that our company was right in law in discharging the service tax liability under commercial and industrial construction service and accepted the tax so paid including the value of the material and after availing the CENVAT Credit of excise duty so paid on the goods used in providing the service. It is not possible for the department to turn around in October 2012 nearly alter 5½ years after the introduction of works contract service and choose to allege suppression of facts with intention to evade payment of tax."

(emphasis supplied)

20. The order impugned records the following findings on the extended period of limitation:

"(B). **I find that the SCN issued on 23.10.2012 covers the period from 01.06.2007 to 31.03.2012.** The assessee had wrongly classified their service in the category of Commercial or industrial construction service instead of Works Contract Service despite such lucid and explicit provisions. **Even after introduction of the works contract service w.e.f. 01.06.2007** vide Notification No. 23/2007-ST dated 22.05.2007, insertion of Rule 2A to the Service Tax (Determination of Value) Rules, 2006 vide Notification No. 29/2007-ST dated 22.05.2007, issuance of Rule 3 of the Work Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 vide Notification No. 32/2007-ST dated 22.05.2007 as amended vide Notification No. 23/2009-ST dated 07.07.2009 and issuance of Master Circular No. 96/7/2007-ST dated 23.08.2007, **the assessee resorted the wrong classification deliberately, with intent to evade payment of the service tax in cash and to avail the inadmissible CENVAT credit of goods used in transfer of property to recover** it in form of cash. **The short payment of service tax** availment of the inadmissible CENVAT credit of goods used in transfer of property and collection of amount in excess of the service tax assessed or determined and paid as representing service tax not credited to the government **was unearthed by department by causing investigation against them.**

(C). The fact is that the present dispute has arisen on the basis of the enquiry undertaken by the department. **Hence it is clear that the said wrong availment would have gone unnoticed but the enquiry and consequently there would have been a huge loss of revenue to the Department.** It is observed that the assessee has claimed the filing of ST-3 return & visit of the audit team on a regular basis to justify that there was no suppression of facts on their part as the availment of credit was known to the dept. In this connection it is a fact that the nature & eligibility of the service was known only to the assessee. **The assessee has not produced any evidence to the effect that the nature of service & its eligibility was well within the knowledge of the department.** The assessee being a reputed organization with fully

> equipped staff well versed with the excise formalities would have known that the CENVAT credit so availed was ineligible, **but made a deliberate attempt to conceal the fact of the ineligibility of the CENVAT credit from the department with the intent to avail the ineligible credit."**
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> **(emphasis supplied)**

21. The contention of the learned senior counsel for the appellant is that the appellant had been regularly filing the half yearly returns in form ST-3 and the demand is based only on the information declared in the ST-3 returns and the other statutory prescribed records maintained by the appellant. The contention is that the appellant had not resorted to non-declaration of facts or information in the returns, nor there was any failure on the part of the appellant to furnish any information required to be disclosed in the returns. Thus, there was no suppression of facts, much less willful suppression with an intent to wrongly avail CENVAT credit. According to learned senior counsel for the appellant, the levy of service tax on works contract service attained clarity only in the year 2015 when the Supreme Court pronounced the judgment in **Commissioner of Central Excise** vs. **Larsen and Toubro**[6] wherein it was held that indivisible contracts are liable to service tax under 'works contract' which was introduced w.e.f. 01.06.2007. Learned senior counsel also pointed out that the Supreme Court in **Total Environment Building Systems Pvt. Ltd.** vs. **Deputy Commissioner of Commercial Taxes**[7] affirmed the aforesaid judgment of the Supreme Court in **Larsen and Toubro** and held that this judgment was not required to be referred to a Larger Bench of the Supreme Court. According to the learned senior counsel, continuation of discharging the service tax liability under the taxable

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6. 2015 (39) STR 913 (S.C.)
7. 2022 (63) G.S.T.L. 257 (S.C.)

category namely, commercial or industrial construction services at the full applicable rate on the gross amount charged in terms of section 67 of Finance Act, as was being done prior to the introduction of the works contract service w.e.f. 01.07.2007, was resorted to by the appellant bona fide and based on the prevailing practice. The appellant, therefore, justifiably held a belief regarding the valuation of works contract services as well as availment of CENVAT credit on 'inputs' and 'input services'. Thus, the allegation of willful suppression of facts with an intent to evade the payment of tax by availing wrongful CENVAT credit is not correct and the invocation of the extended period of limitation for denial of CENVAT credit could not have been resorted to under the proviso to section 73(1) of the Finance Act. Learned senior counsel for the appellant also pointed out that the records were regularly subjected to comprehensive audits and, therefore, it cannot be alleged that there was suppression of facts. To support this contention learned senior counsel placed reliance upon the decision of the Tribunal in **Incredible Unique Buildcon Pvt. Ltd.** vs. **CCE & ST, Alwar**[8]. It is for these reasons that the learned senior counsel for the appellant submitted that the demand for the period from June 2007 to September 2010 is barred by limitation.

22. Learned authorised representative appearing for the department, however, submitted that in the facts and circumstances of the case the Commissioner was justified in holding that the extended period of limitation was correctly invoked. Elaborating this submission, learned authorised representative submitted that the appellant wrongly classified the service under the category of

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8. 2022 (65) G.S.T.L. 377 (Tri.-Del.)

commercial or industrial construction service whereas the service actually rendered by the appellant was works contract service. The Supreme Court also, while remanding the matter, observed that the services rendered by the appellant w.e.f. 01.06.2007 would fall under works contract service. Thus, according to the learned authorised representative of the department, the Commissioner committed no illegality in invoking the extended period of limitation.

23. The submissions advanced by the learned senior counsel for the appellant and the learned authorized representative appearing for the department on the issue of limitation have been considered.

24. In the present case the appellant had been regularly filing ST-3 returns and as noted above, audits of the records of the appellant were regularly undertaken. The details of the audit are as follows:

S. No.	Date of Audit	Period	Audit Report Ref.
1.	March, 2008	April, 2007 to March, 2008	
2.	March, 2010 to May, 2010	April, 2008 to March, 2010	AR No. 67/2010-11 dated 27.09.2010
3.	February, 2012 to April, 2012	April, 2010 to June, 2011	AR No. 9/2012-13 dated 25.05.2012

25. It would be seen that audit reports are dated 27.09.2010 and 25.05.2012. It is, therefore, clear that even after examination of the records of the appellant, the department did not raise any objection regarding the category of the service rendered by the appellant. The reason assigned for invoking the extended period of limitation is that the appellant had willfully wrongly classified the service under category of commercial or industrial construction service instead of works contract service. There is, therefore, force in the contention

advanced by the learned senior counsel for the appellant that the department was aware of the facts in as much as the audits were conducted and, therefore, it cannot be alleged that the appellant had concealed material facts from the department, much less concealed them with an intent to evade payment of service tax.

26. As noticed above, there was a lot of ambiguity regarding the category of the services after the introduction of works contract service w.e.f. 01.06.2007 and it is only when the Supreme Court clarified the position in **Larsen and Toubro** that it was settled that indivisible contracts were liable to service tax under works contract w.e.f. 01.06.2007. Infact, disputes were subsequently also raised and the Supreme Court in **Total Environment Building Systems** affirmed the judgment of the Supreme Court in **Larsen and Toubro** and held the judgment did not require to be referred to a Larger Bench of the Supreme Court.

27. In similar facts, the Tribunal in **Incredible Unique Buildcon** held that the invocation of the extended period of limitation would not be justified and the relevant portion of the decision of the Tribunal is reproduced below:

> "15. It is undisputed that the appellant had been rendering the services and has been paying service tax under the head CICS although its service involved for provision of service and use of goods. Revenue does not dispute its classification under the head CICS under Section 65(105)(zzq) for the period prior to 1-6-2007. After 1-6-2007, WCS was introduced by virtue of **Section 65(105)(zzzza) of the Act, the appellant continued to classify its services under CICS, which according to the Revenue was not correct. We find that as per the ratio of *Larsen* & *Toubro* Composite Work Contracts involving supply of goods or deemed supply of goods along with rendering of services are only chargeable to**

service tax under the head of WCS from 1-6-2007. They were not exigible to service tax prior to this date. **Therefore, on merits we find in favour of the Revenue that for the period October, 2010 to June, 2012 the appellant's services were chargeable to service tax under WCS.**

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17. **We are unable to find any proof of intent to evade either from the show cause notice or from the impugned order. Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of *Larsen & Toubro* dated 20 August, 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty.** Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September, 2015 for the period covered October, 2010 to June, 2012, which is clearly beyond the normal period of limitation. **Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld."**

(emphasis supplied)

28. This apart, the issue as to whether the service provider, in case of works contract service, has an option or not to pay service tax at full applicable rate on gross amount charged for contract and to avail

CENVAT credit on inputs used for execution of the contract or not had been decided by the Tribunal in **S.V. Jiwani** vs. **CCE**[9]. This decision of the Tribunal was affirmed by the Bombay High Court in Commissioner of **C. Ex., Cus. & S.T., Vapi** versus **S.V. Jiwani**[10].

29. The aforesaid decision of the Bombay High Court was accepted by the department by a Circular dated 16.02.2018, which is reproduced below:

> "3. Decision of the High Court of Bombay dated 01.02.2016 in the matter of M/s. S.V. Jiwani in Central Excise Appeal No. 252/2014 [2016-TIOL-503-HC-Mum-ST=2016 (42) S.T.R. 209 (Bom.)]
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> 3.1 Department has accepted the order of the Hon'ble High Court of Gujarat in the case of M/s. S.V. Jiwani in Central Excise Appeal No. 252/2-14 where the Hon'ble High Court had inter alia held on the question framed, whether input service credit could have been availed without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 or whether CENVAT credit can be claimed after discharging the liability in full, that having paid the service tax in full, Revenue is not incurring any loss of revenue, hence the Court should not undertake an academic exercise.
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> 3.2 In the matter the issue that was examined by the Hon'ble Court was that, whether input service credit could have been availed without exercising the options provided in Rule 2A of the Service Tax (Determination of Values) Rules, 2006 after having discharged the tex liability in full. It was held by the Hon'ble Court that having paid the service tax in full, Revenue has not incurred any loss of revenue hence court should not undertake an academic exercise."

30. The aforesaid Circular also supports the view of the appellant that it was under a bona fide belief that it was entitled to pay the service tax at the full applicable rate on the gross taxable value in

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9. 2014-TIOL-559-CESTAT-AHM
10. 2016 (42) STR 209

respect of the taxable service provided by it and avail the CENVAT credit on 'input' as well. The Supreme Court, by judgment dated 02.05.2023 has now held that such an option was not available to the appellant.

31. It is, therefore, not possible to sustain the invocation of the extended period of limitation from June 2007 upto September 2010 resorted to in the first show cause notice dated 23.10.2012 issued for the period January 2007 to March 2012.

Rule 2A of the 2006 Rules

32. To examine this issue, it would be appropriate to reproduce rule 2A of the 2006 Rules as it stood for the period upto 30.06.2012 and during the period 01.07.2012 to 30.06.2017. It is as follows:

Upto 30.06.2006

"2A. Determination of value of services involved in the execution of a works contract:

(1) Subject to the provisions of section 67, the value of taxable service in relation to services involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in sub- clause (zzzza) of clause (105) of section 65 of the Act, shall be determined by the service provider in the following manner:-

(i) Value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

Explanation. - For the purposes of this rule, -

(a) gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract;

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(ii) Where Value Added Tax or sales tax, as the case

may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or sales tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under clause (i)."

From 01.07.2012

"**2A Determination of value of taxable services involved in the execution of a works contract.-** Subject to the provisions of section 67, the value of taxable service involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in clause (8) of section 66E of the Act, shall be determined by the service provider in the following manner, namely :-

(i) Value of works contract service shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved 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, if any, on transfer of property in goods involved in the execution of the said works contract;

xxxxxxxxxxx

(c) Where value added tax has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under this clause.

xxxxxxxxxxx

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

xxxxxxxxxx

> Explanation 2. - For the removal of doubts, it is clarified that duty of excise paid on any goods, property which is transferred (whether as goods or in some other form) in the execution of works contract, shall not be availed as CENVAT credit.".

33. From a perusal of rule 2A of the 2006 Rules, as was in force prior to 30.06.2012 and after 01.07.2012, it will be evident that in respect of the 'works contracts' it provided for the determination of the assessable value (i.e. the value of taxable service) by excluding–

> **(i)** the value of transfer of property in goods involved in the execution of the said works contract.
>
> **(ii)** Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the works contract.

34. Clause (ii) of the Explanation to Rule 2A (as it stood for the period up to 30.06.2012) further provided that where Value Added Tax or Sales Tax, as the case may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or Sales Tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of said works contract for determining the value of works contract service under the clause.

35. The appellant was clearing the pre-fabricated/pre-engineered steel buildings/structures and the parts thereof from its plants on payment of the excise duty as applicable and under the cover of the statutory prescribed invoices. This duty paid goods were cleared to the designated sites where erection, installation and commissioning were to be undertaken.

36. In terms of directions issued by Supreme Court in the judgment dated 02.05.2023, the appellant has to pay service tax on the value of services as per rule 2A of the 2006 Rules and thereafter avail the CENVAT credit.

37. Learned senior counsel has referred to the written submissions and has pointed out that in a situation where the demand from June 2007 to September 2010 is found to be time barred, the demand under section 73 of the Finance Act under rule 2A of the 2006 Rules would be from October 2010 to 31.03.2014 in the following manner:

Scenario 5: There is refund of Rs. 28.72 crores

Basis:

(A) Time-bar under section 73	Considered – the demand for June 2007 to September 2010 time barred. Demand for October 2010 to 31.03.2014
(B) Cenvat credit on Input service	Considered – availed for the period 01.10.2010 to 31.03.2012 and then for entire period upto March 2014 covered by the subsequent 3 show cause notices.
(C) Cenvat credit on Inputs (goods)	Considered – credit on inputs is availed from 01.10.2010 to 31.03.2012 and then upto June 2012 (i.e. 2nd show cause notice) only.
(D) Service Tax paid in cash by the appellant	Yes, considered for entire period.

38. Learned senior counsel for the appellant has, in a situation where the demand for the period from June 2007 to September 2010 is found to be time barred, submitted the appellant would be entitled to refund of Rs. 28.72 crores if the taxable value of the works contracts executed by the appellant for the period from 01.06.2007 to 31.03.2014 is calculated in terms of rule 2A of the 2006 Rules. The summary of the details provided in the written submissions are as follows:

Summary for all 4 show cause notice

S. Tax under 2A payable (for all SCN)	10,67,98,904
Less Tax paid in cash	6,36,84,872
Less Cenvat credit on services	15,45,15,538
Less cenvat on inputs	17,58,13,694
Net payable under rule 2A	**28,72,15,200**

39. This factual position was stated by the appellant in the written submissions, a copy of which was served upon the department, but it has not been controverted. By way of abundant caution, the appellant was required to submit a duly certified statement of a Chartered Accountant. The appellant has submitted such a certificate which is enclosed with this order. This certificate also mentions that in such a situation the appellant would be entitled to refund of Rs. 28,72,15,200/-. This certificate, which is enclosed with this order, shall form part of the order.

40. Thus, on calculation of the demand under rule 2A of the 2006 Rules, the appellant would be entitled to refund of Rs. 28.72 crores which, the learned senior counsel for the appellant has stated, the appellant would not claim as refund.

CONCLUSION

41. What, therefore, follows from the aforesaid discussion is:

(i) The extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act could not have been invoked for the period from January 2007 to September 2010 in respect of the first show cause notice dated 23.10.2012; and

(ii) Even if rule 2A of the 2006 Rules is applied for the period from October 2010 to March 2014, the appellant would be entitled to a refund of Rs. 28.72

crores as would be evident from the Certificate issued by the Chartered Accountant, which forms part of this order. The appellant, however, in view of the statement made by the learned senior counsel for the appellant, would not be entitled to claim refund of the said amount.

42. In view of the aforesaid discussion, the order dated 31.03.2017 passed by the Commissioner is set aside and the appeal is allowed.

(Order pronounced on **29.09.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya

Scenerio -05

SCN 1.								Service Portion as per Rule 2A	Rate of service Tax	Net tax payable uder rule 2A
Month	Gross Value of Work Contract	Assable value of Inputs received	Excise Duty	Cesss	H.Ed Cess	Total (Duty+Cess)	Total Landing cost of Material Inputs (assb +duties)	Gross Cont Value - (Landed cost of material) = Service Portion		
A	B	C	D	E	F	G = (D+E+F)	H = (C + G)	I = (B - H)	J	K = (I x J%)
Oct-10	13,97,78,353	7,81,31,712	1,08,89,526	2,17,786	1,08,891	1,12,16,204	8,93,47,916	5,04,30,437	10.3	51,94,335
Nov-10	5,57,05,734	6,06,57,047	60,65,712	1,21,318	60,653	62,47,684	6,69,04,731	(1,11,98,997)	10.3	(11,53,497)
Dec-10	12,93,47,071	13,59,83,729	1,35,98,386	2,71,980	1,36,025	1,40,06,392	14,99,90,121	(2,06,43,050)	10.3	(21,26,234)
Jan-11	12,18,80,781	11,81,62,592	1,25,80,334	2,51,613	1,25,804	1,29,57,751	13,11,20,343	(92,39,562)	10.3	(9,51,675)
Feb-11	24,40,03,251	14,27,71,796	1,42,77,194	2,85,550	1,42,795	1,47,05,538	15,74,77,334	8,65,25,917	10.3	89,12,169
Mar-11	59,70,38,806	29,49,61,145	2,94,97,040	5,89,946	2,94,968	3,03,81,954	32,53,43,098	27,16,95,708	10.3	2,79,84,658
Apr-11	7,91,01,938	10,53,25,774	1,05,32,594	2,10,658	1,05,324	1,08,48,576	11,61,74,350	(3,70,72,412)	10.3	(38,18,458)
May-11	23,39,69,485	10,76,23,304	1,07,62,344	2,15,251	1,07,624	1,10,85,219	11,87,08,523	11,52,60,962	10.3	1,18,71,879
Jun-11	5,29,32,192	2,89,64,480	28,96,460	57,922	28,991	29,83,373	3,19,47,852	2,09,84,340	10.3	21,61,387
Jul-11	2,69,24,576	1,06,09,160	10,60,916	21,218	10,619	10,92,753	1,17,01,913	1,52,22,663	10.3	15,67,934
Aug-11	7,37,96,651	3,82,39,945	38,24,005	76,481	38,252	39,38,738	4,21,78,683	3,16,17,968	10.3	32,56,651
Sep-11	9,07,91,030	2,09,50,547	20,95,058	41,902	20,961	21,57,921	2,31,08,468	6,76,82,562	10.3	69,71,304
Oct-11	2,89,87,359	1,23,44,559	12,34,463	28,351	14,185	12,76,999	1,36,21,558	1,53,65,801	10.3	15,82,677
Nov-11	3,47,57,163	96,30,936	9,63,101	63,248	31,626	10,57,975	1,06,88,911	2,40,68,252	10.3	24,79,030
Dec-11	5,44,15,435	1,37,24,726	13,72,477	1,12,736	56,364	15,41,577	1,52,66,303	3,91,49,132	10.3	40,32,361
Jan-12	7,25,15,361	3,36,62,423	33,66,253	1,43,225	71,621	35,81,099	3,72,43,522	3,52,71,839	10.3	36,32,999
Feb-12	10,45,67,516	4,47,02,171	44,70,225	1,23,920	61,957	46,56,102	4,93,58,273	5,52,09,243	10.3	56,86,552
Mar-12	15,17,15,981	5,98,04,343	62,29,132	1,91,961	95,985	65,17,077	6,63,21,420	8,53,94,561	10.3	87,95,640
	2,29,22,28,683					14,02,52,933	1,45,65,03,320	83,57,25,365		8,60,79,713
							less Tax paid in cash	(33050227-92000 prior Sep 2010)		3,29,58,227
							Less Cenvat credit on services allowed (01.10.2010 to 31.03.12)			5,22,60,178
							less cenvat credit on input allowed (01.10.2010 to 31.03.2012)			14,02,52,933
							Net payable under rule 2A			(13,93,91,625)

SCN 2								Service Portion as per Rule 2A	Rate of service Tax	Net tax payable uder rule 2A
Month	Gross Value of Work Contract	Assable value of Inputs received	Excise Duty	Cesss	H.Ed Cess	Total (Duty+Cess)	Total Landing cost of Material Inputs (assb +duties)	Gross Cont Value - (Landed cost of material) = Service Portion		
A	B	C	D	E	F	G = (D+E+F)	H = (C + G)	I = (B - H)	J	K = (I x J%)
Apr-12	9,87,99,555	9,84,52,702	1,17,69,813	235352	117672	1,21,22,838	11,05,75,540	(1,17,75,985)	12.36	(14,55,512)
May-12	15,42,82,863	11,22,85,711	1,34,41,982	268837	1,34,423	1,38,45,242	12,61,30,953	2,81,51,910	12.36	34,79,576
Jun-12	16,37,58,210	7,76,37,753	93,13,280	186273	93128	95,92,681	8,72,30,434	7,65,27,776	12.36	94,58,833
	41,68,40,628					3,55,60,761	32,39,36,927	9,29,03,701		1,14,82,897
							less Tax paid in cash			75,75,000
							Less Cenvat credit on services allowed			1,48,54,031
							less cenvat credit on input allowed			3,55,60,761
							Net payable under rule 2A			(4,65,06,894)

SCN 3								Service Portion as per Rule 2A	Rate of service Tax	Net tax payable uder rule 2A
Month	Gross Value of Work Contract	Assable value of Inputs received	Excise Duty	Cesss	H.Ed Cess	Total (Duty+Cess)	Total Landing cost of Material Inputs (assb +duties)	Gross Cont Value - (Landed cost of material) = Service Portion		
A	B	C	D	E	F	G = (D+E+F)	H = (C + G)	I = (B - H)	J	K = (I x J%)
Jul-12	6,41,84,847	4,40,65,987	53,20,065	104046	52021	54,76,132	4,95,42,119	1,46,42,728	12.36	18,09,841.21
Aug-12	6,14,93,148	4,09,81,012	49,17,721	95271	47644	50,60,636	4,60,41,648	1,54,51,500	12.36	19,09,805.36
Sep-12	4,62,66,691	4,11,35,643	49,36,279	91148	45560	50,72,987	4,62,08,630	58,061	12.36	7,176.40
Oct-12	8,23,76,353	4,88,72,332	58,64,691	117290	58642	60,40,623	5,49,12,955	2,74,63,398	12.36	33,94,475.97
Nov-12	4,76,70,323	2,16,19,945	25,94,386	51882	25952	26,72,220	2,42,92,165	2,33,78,158	12.36	28,89,540.28
Dec-12	2,65,22,497	1,57,17,912	18,86,152	37720	18868	19,42,740	1,76,60,652	88,61,845	12.36	10,95,324.00
Jan-13	88,32,092	1,28,00,807	15,33,054	30660	15330	15,79,044	1,43,79,851	(55,47,759)	12.36	(6,85,703.07)
Feb-13	1,32,09,296	1,34,88,142	16,18,578	32367	16182	16,67,127	1,51,55,269	(19,45,973)	12.36	(2,40,522.29)
Mar-13	5,86,78,835	3,86,57,400	46,38,897	92789	46392	47,78,078	4,34,35,478	1,52,43,357	12.36	18,84,078.92
Apr-13	55,23,620	95,52,258	11,45,873	22919	11461	11,80,253	1,07,32,511	(52,08,891)	12.36	(6,43,818.95)
May-13	5,54,53,700	3,68,81,465	44,25,774	88518	44253	45,58,545	4,14,40,010	1,40,13,690	12.36	17,32,092.07
Jun-13	9,40,25,675	5,78,43,419	69,41,214	138823	69414	71,49,451	6,49,92,870	2,90,32,805	12.36	35,88,454.64
Jul-13	5,92,81,381	4,75,05,373	57,00,646	114013	57004	58,71,663	5,33,77,036	59,04,345	12.36	7,29,776.98
Aug-13	5,28,32,940	2,90,69,500	34,88,329	69766	34889	35,92,984	3,26,62,484	2,01,70,456	12.36	24,93,068.33
Sep-13	6,43,90,574	11,82,28,133	1,42,16,798	284232	142119	1,46,43,149	13,28,71,282	(6,84,80,708)	12.36	(84,64,215.54)
Oct-13	81,98,568	4,31,90,643	51,82,877	103662	51830	53,38,369	4,85,29,012	(4,03,30,444)	12.36	(49,84,842.83)
Nov-13	6,53,74,271	4,41,68,856	53,00,263	106002	53004	54,59,269	4,96,28,125	1,57,46,146	12.36	19,46,223.70
Dec-13	53,63,464	3,37,04,124	40,44,495	80893	40446	41,65,834	3,78,69,958	(3,25,06,494)	12.36	(40,17,802.60)
	81,96,78,275					8,62,49,104	78,37,32,057	3,59,46,218		44,42,953
								less Tax paid in cash		1,64,26,645
								Less Cenvat credit on services allowed		7,35,84,163
								Net payable under rule 2A		(8,55,67,855)

SCN 4								Service Portion as per Rule 2A	Rate of service Tax	Net tax payable uder rule 2A
Month	Gross Value of Work Contract	Assable value of Inputs received	Excise Duty	Cesss	H.Ed Cess	Total (Duty+Cess)	Total Landing cost of Material Inputs (assb +duties)	Gross Cont Value - (Landed cost of material) = Service Portion		
A	B	C	D	E	F	G = (D+E+F)	H = (C + G)	I = (B - H)	J	K = (I x J%)
Jan-14	4,52,83,750	2,20,68,583	26,48,231	52968	26481	27,27,680	2,47,96,263	2,04,87,487	12.36	25,32,253.42
Feb-14	1,23,90,411	76,98,158	9,25,928	18517.44	9260.72	9,53,706	86,51,864	37,38,547	12.36	4,62,084.39
Mar-14	1,45,55,040					-	-	1,45,55,040	12.36	17,99,002.94
	7,22,29,201					36,81,386	3,34,48,127	3,87,81,074		47,93,341
								less Tax paid in cash		67,25,000
								Less Cenvat credit on services allowed		1,38,17,166
								Net payable under rule 2A		(1,57,48,825)

SUMMARY FOR ALL 4 SCN

S.Tax under 2A payable (for all SCN)	10,67,98,904
less Tax paid in cash	6,36,84,872
Less Cenvat credit on services	15,45,15,538
less cenvat on inputs	17,58,13,694
Net payable under rule 2A	**(28,72,15,200)**

This is to certify that the details and data reflected in the above statement are verified by us with the central excise and service tax statutory records for the relevant period produced before us, Show Cause Notice No-IV-CE(9) CP/N/172/10/1774 dated 23.10.2012, Show Cause Notice No V-(15)/Adj/Noida/Interarch/55/14/10184 dated 22.05.2014, Show Cause Notice No V(15) Adj/Noida/Interarch /220/14/20833 dated 27.10.2014 and Show Cause Notice No V(15)Adj/Noida/Interarch/103/15/5182 dated 23.10.2015 and the Order-in-original No 31 to 34 /Commissioner / ST / Noida/ 2016-17 dated 31.03.2017 passed by Commissioner , Service Tax, Noida to the company and the same are certified to be true and correct as per the records and statutory returns produced before us.

For Interarch Building Products (P) Ltd

Authorised Signatory
Shekhar Bhatnagar
Vice President (Tax and Logistics)

for K A R M & Associates
Chartered Accountants
FRN 020522N

Arvind Kumar Singh, FCA
Partner
M No 504155
UDIN : 23504155BGVCAX6560
Date : 11.07.2023
Place: New Delhi