CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. IV

Service Tax Appeal No.54021 Of 2018

[Arising out of Order-in-Appeal No. 877-878/CRM/ST/JDR/2018 dated 08.08.2018 passed by the Commissioner (Appeals) of Central Excise and Central Goods, Service Tax, Jodhpur]

Unmaid Electricals **: Appellant**
236, Subhash Marg, Masuria, Jodhpur

Vs

Commissioner of Central Goods, Service Tax & Central Excise, Jodhpur **: Respondent**
G-105, New Industrial Area Basni Near
Diesel Shed, Jodhpur-342003

APPEARANCE:
Shri Om. P. Agarwal, Chartered Accountant for the Appellant
Shri Aejaz Ahmad, Shri Anand Narayan, Authorized Representative for the Respondent

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 50941/2025

Date of Hearing:17.04.2025

Date of Decision:27.06.2025

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Unmaid Electricals[1] to assail the Order-in-Appeal No. 877-878/CRM/ST/JDR/2018 dated 08.08.2018 wherein the Commissioner (Appeals) confirmed the service tax of Rs. 5,83,365/- along with interest and imposed penalties.

2. The brief facts of the case are that the appellant was engaged in providing Erection, Commissioning or Installation Service & Work Contract Service to M/s Jodhpur Development Authority & Nagar Nigam, Jodhpur but was not paying applicable Service tax on the

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1 The appellant

amount received in lieu of providing such services namely electrification work. During the period 2005-06 to 2008-09,the appellant performed the work of fixing the poles, wiring the poles, fixing of street light and laying of cables. The appellant was neither registered under Service Tax nor did they pay any Service Tax. As the appellant was not registered, hence, the composition scheme was not available to them. The Department formed an opinion that as Form VAT-41 issued by Senior Account Officer Jodhpur i.e. awarder of work contract, revealed that they had deducted VAT @3%, whereas VAT is deducted only in the case of works contract, and the work done by the appellant was covered under the definition of Erection, Commissioning & Installation Service and Works Contract Service as defined under Section 65(105) (zzd) & 65 (105)(zzzza) of the Finance Act, 1994 respectively. Therefore, the appellant appeared liable to pay Service tax at the appropriate rate prevalent at the relevant time. The appellant had not disclosed the material facts to the department either in letter form or in ST-3 returns. Further, the appellant had not furnished the details willingly to the department in spite of the fact that a number of letters issued to the appellant. Consequently, a Show Cause Notice dated 13.04.2010 was issued for the period 2005-06 to 2008-09 to the appellant demanding service tax of Rs. 22,03,499/- including cess along with interest and penalties. The adjudicating authority vide Order-in-Original dated 31.05.2017 confirmed the demand of service tax of Rs. 12,87,880/- along with interest under Section 75 and penalty under Section 76 of the Act, penalty of Rs. 5,000/- u/s 77(2), penalty u/s 77(1)(a) and penalty of Rs. 12,87,880/- u/s 78 of the Act.The Commissioner (Appeals) vide

impugned Order-in-Appeal dated 08.08.2018 confirmed the Service Tax of only Rs. 5,83,365/- and set-aside the rest of demand along with interest and various penalties imposed on the appellant. Aggrieved by the said order, the appellant has filed the present appeal.

3. Learned Chartered Accountant for the appellant submitted that demand was hit by limitation. He submitted that there were divergent views regarding the taxability of Works Contract Services and matter had been referred to different Larger Bench of the Tribunal. Learned counsel stated that the dispute was resolved by Supreme Court in the judgement in Larson & Turbo case in 2014. Hence, he contended that in such cases, the allegation of suppression of facts with intent to evade tax was not present. Therefore, the extended period was not invokable in view of decisions of the Tribunal. Learned counsel relied on the Tribunal's decision in **Anand Construction Work Vs. Commissioner of Central Excise**[2] and in **Chankya Enterprises Vs. Commissioner of Central Goods, Service Tax, Jodhpur**[3] wherein it was held that in case of construction activities, there has been a substantial litigation on the applicability of the various tax entries and in case of composite works contract, the position was clarified only after the judgement of the Supreme Court in Larsen & Toubro's case. In view of this, the learned chartered accountant stated that the demand for the period from 01.06.2007 to 30.09.2008 is hit by limitation, and the demand for normal period from 01.10.2008 to 31.03.2009 only survived.

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2 [2017-TIOL-642-Tri.-Del]
3 Final Order No. 50357/2025 dt. 13.02.2025

3.1 Learned counsel further submitted that the show cause notice was issued on 13.04.2010, i.e prior to 01.07.2012, under proviso to Section 73(1) and the charge of suppression of facts with intent to evade tax is not sustainable on above grounds. Therefore, the demand confirmed cannot be upheld under main section 73(1) even for normal period. He submitted that section 73 had been amended vide Finance Act, 2013 and Section 73(2A inserted) on 10.05.2013 (effective from 01.07.2012) to take care of such situation and that after passing of the Bill, in such cases of notices issued on or after 10.05.2013, demand for normal period is sustainable if the same is hit by limitation. The amendment is effective from 01.07.2012 as was expressly provided in the Finance Act, 2013. In this regard, the learned counsel relied on the decision of Hon'ble Supreme Court in **Collector of Central Excise, Jaipur vs. Alcobex Metal**[4]and the decision of Calcutta High Court in **Infinity Infotech Parks Ltd. Vs. Union of India**[5]. He submitted that the Tribunal had also followed the same in **Scorodite Stainless India Pvt Ltd. Vs. Commissioner of Central Excise, Jaipur-II**[6]**.**

3.2 Learned counsel further submitted that even if the demand was not hit by limitation, the appellant was eligible for the benefit of notification No. 6/2005-ST and while extending the benefit under notification No. 6/2005-ST, abated value is to be taken as per decision given by the Tribunal in the case of **Aryavrat Housing Construction (P) Ltd. & Ors Vs. Commissioner of Central Excise, Service Tax,**

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4 2003 (153) ELT 241 (S.C.)
5 2014 (36) STR 37 (Cal.)
6 Final Order No. 58798 of 2017 dated 01.12.2017

Bhopal[7]. Further, the benefit of cum tax is also liable to be extended. On the facts, penalty imposed under Section 76, 77(1)(a), 77(2) and 78 is also liable to be set aside in view of provisions of Section 80 of the Finance Act, 1994 and in the case of **Anand Construction Works (supra),** penalties imposed were also set aside in terms of Section 80 ibid.

4. At the outset, learned Authorized Representative for the Department drew attention to point No. 7 of the Board's Circular No. 123/5/2010-TRU dated 24.05.2010, wherein it had been clarified that installation of street lights, traffic lights flood lights, or other electrical and electronic appliances/devices or providing electric connections to them was taxable service, under erection, commissioning or installation services under section 65 (105) (zzd) of the Finance Act, 1994. The above clarification given by the Board was based on the ambit of definition of erection, commissioning or installation service as per clause (ii)(a) of Section 65 (39a) of the Finance Act, 1994, according to which the installation of electrical and electronic devices, including wiring or fitting thereof has been defined as taxable service in addition to others. Clause (ii) (f) covers "such other similar services". Hence, in the light of clause (ii)(f) of definition of erection, commissioning or installation services given under section 65 (105) (zzd) of the Finance Act, 1994, the scope of services is inclusive which may include such other services. Hence, other services relating to installation and erection are taxable under this category, though they may not be specifically included in the definition. Learned Authorized Representative further submitted that the appellant had not submitted

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7 Final Order No. 50672-50673/2018 dt. 15.01.2018.

any evidence in their support that they had undertaken only the work of wiring without fitting/installation of any electrical and/or electronic device.

4.1 Learned Authorized Representative further contended that the taxability of the impugned activities had to be determined with reference to services which were under the tax net at the relevant time i.e. prior to 1.6.2007 and after 1.6.2007. In the instant case, from the nature of work carried out by the appellant, it was evident that during the period 1.10.2004 to 31.05.2007, the services were covered under the scope of erection, commissioning or installation service. The argument of the appellant that the services if classified under the Works Contract Service with effect from 1.6.2007 cannot be classified under any other service prior to this date was unfounded. Learned Authorized Representative contended that it is evident from the definition of the 'erection, commissioning or installation' and 'Works Contract Service' that there is no difference in phraseology used. However, the sine qua non for the Works Contract Service is that the property in goods should pass to the service receiver and VAT or Sales tax should be paid on that property. Therefore, even after introduction of Works Contract Service, if the two conditions were not fulfilled, the same activity would fall under other category of taxable services. Therefore, the argument of the appellant is not legally tenable.

4.2 Learned Authorized Representative further submitted that the entry "Service in relation to execution of work contract" as defined in Section 65(105) (zzzza) is different from services defined in other sub-clauses of Section 65(105). In fact, Section 65(105) (zzzza) read with

Rule 2A of Service Tax (Determination of Value) Rules, 2005 only provides a new machinery provision for assessment of service tax on "Erection, Installation or Commissioning Contracts", or "Commercial or Industrial construction contracts", involving transfer of property in goods on which Sales tax/VAT is chargeable. But that did not mean that these contracts were not liable to Service Tax prior to 01-05-2007. Learned Authorized Representative further contended that "Erection, installation or commissioning services", and "commercial or industrial construction service" were taxable even prior to 1-6-07, even if the same involved use/supply of goods on which Sales tax/VAT was payable. The Tribunal in case of **Sunil Hi-Tech Engineers Ltd. vs. Commissioner of Central Excise Nagpur**[8] had held that construction service was taxable even during period prior to 01-06-2007, the date from which Section 65(105)(zzzza) regarding 'works contract service' was introduced. Learned Authorized Representative stated that from the copies of work orders and details of receipts provided by the appellant, the Department had found that the work orders are silent as to whether the contract price is inclusive or exclusive of taxes, if any. There was no evidence on record that the gross, amount charged by the appellant, for the service provided by them is inclusive of service tax payable, as specified in Section 67(2), as mentioned above. Therefore, the appellant was not eligible to avail of the benefit of provisions of Section 67(2) of the Finance Act, 1994, 1994.

4.3 Learned Authorized Representative further submitted that there had been a deliberate act by the appellant to suppress the information

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8 2010 (17) S.T.R. 121

in as much as they did not take registration, did not pay service tax and also did not file any returns and reflecting the consideration received from their client in the books of account cannot absolve them from the charge of suppression as showing on the books of account cannot be a ground for non-suppression of the facts from the department. In view of the above, the appellant had suppressed the facts with intent to evade payment of the due service tax, hence, imposition of penalty under Section 78 of the Finance Act, 1994 is warranted and the appellant is liable for penalty under Section 78 of the Finance Act, 1994.

5. We have heard the learned Chartered accountant for the appellant and the learned Authorised Representative for the department. The issue before us is whether the appellant had provided Erection and Commissioning service or works Contract Service during the period under dispute. A perusal of the facts of the case is that the appellant had provided Erection, Commissioning or Installation Service as well as Works Contract Service to M/s Jodhpur Development Authority and Nagar Nigam, Jodhpur and other authorities but they did not pay the applicable service tax on such services nor had taken registration under service tax. We find that the impugned order itself has noted that the appellant had provided Works Contract Services. The relevant paras are reproduced hereinafter:-

> "5.2. The appellant had provided services relating to street lighting, electrification work a public roads, temporary lighting on National Festival and electrification work at Nyas Bhawan etc mainly as per work orders given by Jodhpur Development Authority (earlier Urban Improvement Trust-UIT). I find that a

demand of Rs. 22,03,499/- was raised under category of Erection, Commissioning of Installation Service as well as Works Contract Service. I find that vide impugned order the demand has been confirmed for an amount of Rs. 12,87,880/- with interest and penalties have also been imposed. I find that for the period up to 31.05.2007, the demand has been confirmed under the category of erection, commissioning and installation services but without abatement. The demand for the period from 01.06.2007 has been confirmed under 'works contract services" applying composition rates but for the extended period. I find that for the year of 2007-08, the demand has been computed at full rates without composition rates.

5.3 I find that the appellant have submitted copies of all work orders, VAT-41 and Form 16A, year wise and claimed that all works done by them in 2005-06 to 2008-09 involved both goods and services. This is also clear from Para 12.10 of the impugned order. I find that the adjudicating authority has found on examination of the contracts that all contracts are with materials and there is transfer of property in goods involved in the execution of said contract which is leviable to tax as sale of goods. Further, the adjudicating authority also found that the appellant is registered with Sales Tax department and paying work contract tax to the sales tax department as is evident from VAT-41. On perusal of documents furnished by the appellant, I find that the services provided by them has been classified under works contract services from 01.06.2007.

5.4 I find from above, it is clear that services were rendered under works contract services involving both goods and services….”

5.1 We also note that the Commissioner(Appeals) has relied on the decision of the Hon'ble Supreme Court's decision in the case of **Larsen**

& Toubro Ltd[9] the services under works contract would be taxable only from 01.06.2007. The relevant portion of the decision is as under:-

> "15. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract.

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9 [2015-TIOL-187-SC-ST]

This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.
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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 property in goods transferred in the execution of a works contract.

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> 43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite work contracts, such arguments must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."

5.2 The Hon'ble Supreme Court held that the Section 65(105) of the Finance Act, 1994 refers only to service contracts simpliciter and not to composite works contracts - It defines "taxable service" as "any service provided", and all its sub-clauses refer to service contracts simpliciter without any other element in them. In the instant case, the impugned order has noted that all works done by the appellant in 2005-06 to 2008-09 involved both goods and services, hence services rendered during 01.04.2005 to 31.05.2007 also involved goods, therefore, the demand confirmed for this period is liable to be set-aside. We are in agreement with findings of the Commissioner (Appeals)

5.3 However, we note that the impugned order has upheld the invocation of the extended period as the appellant had not disclosed the material fact to the department either in letter or in ST-3 returns. Further they had not furnished the desired details willingly to the department in spite of the fact that a number of letters issued to them which resulted in lapse of considerable time. In this context, we note that there was substantial litigation on the issue relating to taxability of works contract services and divergent views had been taken in this

regard. In such a situation, allegation of fraud, suppression on the appellant is not tenable. The non-payment of service tax was due to the prevalent confusion regarding the nature of such services which involved transfer of goods as well. We draw support from the decision in the case of Uniworth Textiles Ltd. versus Commissioner of Central Excise, Raipur, wherein the Court held as follows :

> "Burden to prove malafide of noticee is on department who makes the allegation. Onus to prove bonafide conduct is not on noticee even in term of Section 28 of the Customs Act. Mere non-payment of duties is not equivalent to collusion or wilful mis-statement or suppression of facts. Otherwise, there would be no situation for which ordinary limitation of six months would apply. Inadvertent of six months, whereas deliberate default faces limitation of five years. Some positive act has to be there on part of appellant".

6. In view of the above discussions, we hold that the demand for the extended period cannot be upheld. Consequently, the demand for the normal period is only upheld with the benefit of cum tax extended to the appellant. In view of the circumstances, we set aside the penalties imposed on the appellant.

7. Consequently, the appeal is allowed to the extent indicated above, and the impugned order stands modified to that extent.

(Order pronounced in the open Court on 27.06.2025)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.