

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 76555 of 2016

(Arising out of Order-in-Original No. 24/COMMR/ST-II/KOL/2016-17 dated 20.06.2016 passed by the Commissioner of Service Tax-II, Kendriya Utpad Shulk Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Precision Trenchless Laying Private Limited : Appellant

41B, Shamsul Huda Road, 2nd Floor,
Kolkata – 700 017

VERSUS

Commissioner of Service Tax-II

: Respondent

Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road,
Kolkata – 700 107

APPEARANCE:

Shri Shovendu Banerjee, Advocate, for the Appellant

Shri R.K. Agarwal, Authorized Representative, for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77910 / 2025

DATE OF HEARING / DECISION: 15.12.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Precision Trenchless Laying Pvt. Ltd., 41B, Shamsul Huda Road, 2nd Floor, Kolkata – 700 017 [hereinafter referred to as the "appellant"] has filed this appeal against the Order-in-Original No. 24/COMMR/ST-II/KOL/2016-17 dated 20.06.2016 passed by the Commissioner of Service Tax-II, Kolkata, wherein the Ld. Commissioner has confirmed the demand of Service Tax of Rs.93,69,436/- for the period from 2008-09 to 2012-13, along with interest, and imposed equal amount of tax as penalty under Section 78 of the Finance Act, 1994.

2. Brief facts of the case are that the appellant is a specialised contractor engaged in laying of underground telecom/optical fibre cables using trenchless technology (Horizontal Directional Drilling) as well as conventional trenching methods for major telecom operators such as BSNL, Airtel, Vodafone, Reliance and Tata.

2.1. The scope of works executed by the appellant includes the following activities: -

- (a) Route survey and alignment;
- (b) Obtaining Right of Way (ROW) permissions from statutory authorities;
- (c) Trenching / HDD drilling and laying of ducts;
- (d) Pulling / blowing of OFC cables;
- (e) Jointing, splicing and termination;
- (f) Installation of joint chambers, route markers and GI pipe protection;
- (g) Restoration of roads and surfaces; and
- (h) Periodic maintenance of telecom cables.

2.2. The appellant executes: -

- (i) Pure service contracts;
- (ii) Composite works contracts involving supply of materials and services; and
- (iii) Pure supply contracts liable to VAT only.

2.3. The appellant has duly discharged VAT/WCT and Service Tax, as applicable, and has not availed CENVAT credit of Service Tax. The Service Tax liability of the above said activities rendered by the appellant has been in dispute and there was no uniform practice followed by the service providers. In some cases, the

customers paid Service Tax and in some cases, the customers contended that the said activities were not liable to Service Tax. The appellant has been paying whatever service tax collected by them and filing their returns regularly.

2.4. During the course of audit conducted on the records of the appellant, it was observed that the appellant had not paid appropriate Service Tax on the said activities undertaken by them. On that basis a Show Cause Notice was issued, demanding service tax from the appellant. After due process, the said Notice was adjudicated by way of the impugned order dated 20.06.2016 wherein the Ld. Commissioner has confirmed the demands under the following heads:

(i) Alleged undervaluation based on Sundry Debtors – Rs. 54,98,465/-

(ii) Demand under Point of Taxation Rules – Rs. 15,44,091/-

(iii) Disallowance of abatement under Notification No. 01/2006-ST – Rs. 19,83,467/-

(iv) Service Tax on ROW reimbursements – Rs. 36,050/-

(v) Reverse Charge liability – Rs. 3,07,367/-

2.5. Aggrieved by the confirmation of the demands of Service Tax, along with interest, and imposition of equivalent amount of tax as penalty, the appellant has filed this appeal.

3. The submissions made by the appellant under each of the heads mentioned above are summarized as under: -

3.1. Alleged Undervaluation based on Sundry Debtors – Rs.54,98,465/-:

- (i) The appellant submits that the demand is based on an artificial formula derived from opening and closing balances of Sundry Debtors, without examination of invoices or identification of any specific taxable service. According to the appellant, Sundry Debtors include:
 - (a) VAT-only supply bills;
 - (b) Composite works contract bills;
 - (c) Reimbursement bills;
 - (d) Retention money
 - (e) Service Tax Bills
- (ii) Section 67 of the Finance Act, 1994 permits levy only on consideration for taxable services. The Hon'ble Supreme Court in *Intercontinental Consultants [(2018) 10 GSTL 401 (SC)]* has categorically held that value cannot be expanded beyond consideration for taxable service. The appellant submits that the Department failed to segregate taxable and non-taxable receipts, rendering the entire computation arbitrary and illegal. Further, the appellant submitted a detailed calculation and claimed that they have in fact, made excess payment amounting to Rs.28,68,418/-.
- (iii) Accordingly, the appellant submits that the demand confirmed on account of 'Sundry Debtors' mentioned in the books of accounts is not sustainable.

3.2. Demand under Point of Taxation Rules – Rs. 15,44,091/- :

- (i) In respect of the above demand, the appellant has pointed out that the contracts executed by them were continuous supply of service under Rule 2(c) of the Point of Taxation Rules, 2011 read with Notification No. 28/2011-ST. Under Rule 3(b), service is deemed completed only upon milestone certification and measurement. Hence, Service Tax cannot be demanded on unrealised or uncertified amounts.
- (ii) Further, laying of cables under or alongside roads is not liable to service tax as clarified by CBEC vide Circular No. 123/5/2010-TRU.
- (iii) Thus, the appellant contends that the demand of Service Tax confirmed on this count is not sustainable.

3.3. Disallowance of Abatement – Rs. 19,83,467/- :

- (i) It is their submission that abatement was rightly claimed under Notification No. 01/2006-ST. However, the eligible abatement has been denied on the ground that they have not claimed the said abatement in the ST-3 returns filed by them. In this regard, the appellant's contention is that mere non-mention of the notification number in ST-3 returns cannot deny the substantive benefit. The procedural lapses cannot defeat substantive exemption. Further, the same value has already been included in the alleged undervaluation demand, resulting in impermissible double taxation.

- (ii) Thus, the appellant submits that the demand of service tax confirmed on this count is not sustainable.

3.4. ROW Reimbursement – Rs. 36,050/-:

- (i) The appellant has explained that ROW charges are statutory payments made to Government authorities and reimbursed on actual basis. They are not consideration for any service and hence, there is no Service Tax liable to be paid on such charges which has been reimbursed on actual basis. In support of this claim, the appellant relied on the decision of the Hon'ble Apex Court in the case of *Intercontinental Consultants (S.C.) (supra)*. Thus, the appellant submits that the demand confirmed on this count is liable to be dropped.

3.5. Reverse Charge Liability – Rs. 3,07,367/-:

- (i) It is the appellant's submission on this score that Service Tax under RCM on job-work and legal services has already been paid with interest. Regarding the demand of service tax on Directors' remuneration, they have submitted that the amount received represents salary under employer-employee relationship, which has been specifically excluded from the definition of 'service' as defined under Section 65B(44).
- (ii) Thus, it is their contention that no Service Tax is payable on such amount under RCM.

3.6. The appellant states that they have submitted category-wise reply since the demand has been made in the Notice and confirmed in the impugned order under these specific categories. However, without prejudice, the appellant has pointed out that all the amounts received by them pertain to laying of cables under or alongside roads, which are not liable to Service Tax as clarified by CBEC vide Circular No. 123/5/2010-TRU. Thus, in view of this, it is the appellant's contention that the entire demand of Service Tax confirmed in the impugned order is not sustainable as all the amounts received by them were in connection with the exempted activity.

3.7. The appellant also contested the demands confirmed in the impugned order on the ground of limitation. It is their submission that they have not suppressed any information from the department; that in fact the demands have been raised and confirmed on the basis of information available in the records maintained by them. Thus, they submit that the demands confirmed against by invoking extended period of limitation are not sustainable and are therefore required to be quashed. In this context, the appellant points out that in the present case, the demand confirmed in the impugned order pertains to the period from 2008-09 to 2011-12 and the Show Cause Notice bearing C. No. V(15)71/ST-Adjn/Commr./14/1550 was issued on 22.04.2014 and thus, most of the demand confirmed is barred by limitation and hence, unsustainable in law.

3.8. In view of the above submissions, the appellant has prayed for setting aside the demands of Service Tax confirmed in the impugned order, along with interest and penalty thereon.

4. The Ld. Authorized Representative of the Revenue has reiterated the findings in the impugned order.

5. Heard both sides and perused the appeal records.

6. We observe that the appellant is a specialised contractor engaged in laying of underground telecom/optical fibre cables using trenchless technology (Horizontal Directional Drilling) as well as conventional trenching methods for major telecom operators such as BSNL, Airtel, Vodafone, Reliance and Tata. We take note of the fact that Service Tax liability in respect of the activities undertaken by the appellant has been in dispute and there was no uniform practice followed by the service providers. In some cases, the customers paid Service Tax and in some cases, the customers contended that the said activities were not liable to Service Tax and accordingly, had not paid Service Tax. It is on record that the appellant has been paying whatever Service Tax was being collected by them to the department and filing returns regularly.

6.1. We find that the liability of payment of Service Tax on the activity of laying of cables under or alongside roads has been clarified by C.B.E.C. vide Circular No. 123/5/2010-TRU dated 24.05.2010, wherein it has been categorically clarified that no Service Tax is payable on such service. For ready reference, the contents of the said Circular are reproduced below: -

"Circular No. 123/5/2010-TRU, dated 24-5-2010

F. No. 332/5/2010-TRU

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Applicability of Service tax on laying of cables under or alongside roads and similar activities - Clarification regarding.

Disputes have arisen in some parts of the country regarding applicability of service tax on certain activities such as shifting of overhead cables to underground on account of renovation/widening of roads; laying of electrical cables under or alongside roads/railway tracks; between grids/sub-stations/transformers the distribution points of residential or commercial complexes and such activities as electrification of railways, installation of street-lights, traffic lights, flood-lights. This clarification takes into account the taxability of different activities taking into account the scope of all services (such as site formation/excavation/ earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance Act, 2010.

2. Scope of certain taxable services in brief;

(i) 'Commercial or industrial construction services', in brief, cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits. Therefore, only such electrical works that are parts of (or which result in emergence of a fixture of) buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under this taxable service.

(ii) Under 'Erection, commissioning or installation services', the activities relevant to the instant issue are (a) the erection, commissioning and installation of plant, machinery, equipment or structures; and (b) the installation of electrical and electronic devices, including wiring or fitting there for. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (i.e. a machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.

(iii) Works Contract' incorporates the inclusions and exclusions of the aforementioned two taxable services (amongst others) and it is the nature of the contract (i.e.

a contract wherein the transfer of property in goods involved is leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services. Thus, even in the case of 'works contract' if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.

(iv) 'site formation and clearance, excavation, earthmoving and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road.

3. The taxable status of various activities, on which disputes have arisen

Based on the foregoing, the following would be the tax status of some of the activities in respect which disputes have arisen,

S. No.	Activity	Status
1.
2.	<i>Laying of cables under or alongside roads</i>	<i>Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994</i>
.....		

4. The conclusions drawn above are essentially general in nature and would have to be applied in an individual case depending upon its facts and circumstances. The pending disputes/cases may be decided based on the clarifications contained in this circular."

6.2. We also take note of the fact that the above Circular is clarificatory in nature and hence, the said clarification issued is applicable retrospectively. Thus, as per the clarification issued by Board, cited supra, no Service Tax is payable by the appellant for the activity of laying of cables under or alongside roads, for the entire period covered under the impugned order.

6.3. From the impugned order, it can be seen that the demand of Service Tax has been confirmed under five different categories, as mentioned in paragraph 2.4 of this Order (supra). However, we find that the appellant has in fact received the entire consideration for the activity of laying of cables under or alongside roads, which has been clarified as an activity not liable to Service Tax vide the C.B.E.C. Circular cited supra. Hence, we are of the considered view that the entire demand confirmed in the impugned order under these specific categories are not liable to Service Tax, as all the amounts received by the appellant pertain to laying of cables under or alongside roads, which is not leviable to Service Tax as clarified by C.B.E.C. vide Circular No. 123/5/2010-TRU. Accordingly, we hold that the entire demand of Service Tax confirmed in the impugned order is not sustainable and hence, we set aside the same.

7. As regards the appellant's contentions on the ground of limitation, we find that the appellant have not suppressed any information from the Department. In fact, the demands have been raised and confirmed on the basis of information available in the records maintained by them. Thus, we hold that the demand confirmed, by invoking the extended period of limitation, is not sustainable.

8. In the present case, we find that the appellant has been collecting Service Tax from the clients in some cases and paying the Service Tax collected by them to the Department. Even though the said activity undertaken by the appellant is not liable to Service Tax as clarified by C.B.E.C. vide Circular No. 123/5/2010-TRU, as already observed hereinbefore, we make it clear that the appellant would not be

eligible for refund of Service Tax paid by them, as they have already collected it from their clients and deposited the same in the government account.

9. As the demand of Service Tax itself cannot be sustained, the question of demanding interest or imposing penalty thereon does not arise. Accordingly, we set aside the demand of interest and imposition of penalty as confirmed in the impugned order.

10. In view of the above discussions, we set aside the demands of Service Tax along with interest and penalty confirmed in the impugned order and allow the appeal filed by the appellant with consequential relief, if any, as per law.

(Operative part of the order was pronounced in open court)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd