

2012 (2) ECS ( 177) (Tri-Mum)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL  
BENCH AT MUMBAI  
COURT No. I

**Space Age Associates**  
**Vs.**  
**Commissioner of Central Excise, Pune III**

Application No ST/St-1679/12 in Appeal No. ST/513/12

[Arising out of Order-in-Original No.53/P-III/ST/COMMR/2011-12 dated 21.03.2012 passed by  
Commissioner of Central Excise, Pune III.]

Space Age Associates

...Appellant

(Represented by: Mr Anupam  
Dighe, Advocate)

Vs.

Commissioner of Central Excise,  
Pune III

Respondent

(Represented by: Mr Shobha  
Ram, Commissioner (A.R.))

**CORAM:**

**Hon'ble Mr. S.S. Kang, Vice President**

**Hon'ble Mr. Sahab Singh, Member (Technical)**

Date of Hearing: 12.09.2012

Date of Decision: 12.09.2012

ORDER No. S/1155/2012/CSTB/C-I

**“In respect of the benefit of Notification No.1/2006-ST, the contention of the Revenue is that the benefit of notification is available in case no credit has been availed, by the service provider. The applicant availed credit. Hence the benefit of the notification is not available.” [Para 11]**

**“We find that the demand for the period i.e., 2009-10 which is within the normal period of limitation comes to Rs.2,54,04,126/-. The benefit of the Notification claimed by the applicant is not available, as the applicants are not fulfilling the conditions of the Notification.” [Para 14]**

**“In the present case, the admitted fact is that the applicants availed credit of service tax in respect of the inputs service to the extent of about Rs.30 lakhs. In these circumstances, the applicants have not made out a prima facie case for total waiver of the dues. Keeping in**

**view the facts and circumstance of the case, the applicants are directed to deposit Rs One Crore within eight weeks and report compliance on 03.12.2012.” [Para 15]**

**Per S.S. Kang.**

1. Applicants is filing this application for waiver of pre-deposit of service tax of Rs.6,35,71,242/-, interest and penalties.
2. The applicants are providing taxable services under erection, commissioning and installation of power stations to various Electricity Boards and also to other customers. Applicants are paying service tax on 10% of the value of the material used in respect of the erection, commission or installation where the service provider is the State Electricity Boards. Applicants are paying 15% on the contract amount received from other customers.
3. The Revenue is demanding service tax after taking into consideration the gross amount received in respect of the various contracts. The case of the Revenue is that the applicants entered into contract regarding which applicant received lump sum amount as consideration of the contract for erection, commissioning etc.
4. The demand is confirmed by invoking the extended period of limitation on the ground of suppression of material facts with intent to evade payment of service tax.
5. The contention of the applicant is that the Revenue had taken into consideration, for confirmation of demand, the balance-sheet figures which were on annual basis. The contention of the applicants is that the applicants are also undertaking activity of trading which is reflected in the balance sheet and the activity of trading is also held as liable to service tax.
6. In respect of the contracts which are in respect of erection, commissioning or installation, the contention is that the applicants had supplied materials under the contract as per the details given in the contract. Therefore, the cost of material is not to be taken into consideration for the purpose of levy of service tax on erection, commissioning or installation charges in view of Notification No. 12/2003-ST.
7. In the alternative, the contention of the applicant is that another Notification No. 1/2006-ST provides abatement to the extent of 67% from the gross amount received in respect of taxable service. It is also submitted that invocation of extended period is not sustainable as in the year 2009, the Revenue conducted audit and the audit party raised certain questions and also raised certain demands of service tax, which were paid, in respect of the payment on Goods Transport Service. As the detailed audit has been conducted and certain demands were made in the year 2009, therefore, confirmation of the demand now raised by issuing the Show Cause Notice dated 18.10.2010 for the period 2005-06 to 2009-2010 on the allegation of suppression with intent to evade payment of service tax is not sustainable.

8. It is also submitted that cum-duty- tax benefit has not been allowed by the adjudicating authority.
9. The Revenue relies upon the terms and conditions of the contract and submitted that as per the terms and conditions of the contract, the applicants are receiving lump sum amount as consideration for providing taxable service.
10. In respect of the benefit under Notification No. 12/2003-ST, the contention is that as per the condition of the notification, the sale consideration of the goods under the contract are not to be taken into consideration in case there is documentary proof specifically indicating the value of the goods and material sold and no credit of duty paid on such inputs or materials sold has been taken. In the present case, applicants failed to produce evidence regarding sale of goods and material. Hence the benefit of Notification is not available.
11. In respect of the benefit of Notification No.1/2006-ST, the contention of the Revenue is that the benefit of notification is available in case no credit has been availed, by the service provider. The applicant availed credit. Hence the benefit of the notification is not available.
12. In respect of the time bar issue, the contention of the Revenue is that the applicant never disclosed that the contract was for lump sum amount. Therefore, the extended period has been rightly invoked.
13. We find that in the present case, there is no issue of taxability of the service. The issue is regarding commutation of assessable value of the service. Applicants are paying 10%/15% of the value of material used for providing service. The Revenue has taken the gross amount received for providing taxable service. We find that in the present case the demand for the period 2005-06 to 2009-10 is confirmed by invoking the extended period by issuing a Show Cause Notice dated 18.10.2010. The audit was conducted in the year 2009 and the audit raised issue in respect of Goods Transport Service and the applicants paid tax as per the objection raised by the audit. In view of this, prima facie the applicants have a strong case on the issue of the time bar.
14. We find that the demand for the period i.e., 2009-10 which is within the normal period of limitation comes to Rs.2,54,04,126/-. The benefit of the Notification claimed by the applicant is not available, as the applicants are not fulfilling the conditions of the Notification. In respect of the claim of the applicants regarding Notification No. 12/2003-ST, the value of the goods and raw materials sold by the service provider to the recipient of the service are not to be taken into consideration for the purpose of levy of tax subject to the condition that there is documentary proof regarding sale of the goods and materials. In the present case, even before us, the applicants had not produced evidence by way of invoices under which the goods were sold to the service recipient.

15. In respect of the claim of the applicants of Notification No.1/2006-ST whereby erection, commissioning and installation, the applicants are entitled for 67% of the contract value as abatement in respect of the value of the materials, equipment, machinery sold during the course of erection, commissioning or installation subject to the condition that the credit in respect of duty paid on inputs/ capital goods or the Cenvat credit of service tax on input service has not been taken. In the present case, the admitted fact is that the applicants availed credit of service tax in respect of the inputs service to the extent of about Rs.30 lakhs. In these circumstances, the applicants have not made out a prima facie case for total waiver of the dues. Keeping in view the facts and circumstance of the case, the applicants are directed to deposit Rs One Crore within eight weeks and report compliance on 03.12.2012. On compliance, we waive pre-deposit of the balance amount of service tax, interest and penalties during the pendency of the appeal.

(Dictated in Court.)