# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# CHENNAI

REGIONAL BENCH - COURT No. I

## Service Tax Appeal No.41472 of 2017

(Arising out of Order in Appeal No. 155/2017 (CXA-II), dated 20.03.2017 passed by the Commissioner of Central Excise (Appeals – II), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034).

**M/s. Bay Forge Private Limited** **...Appellant**
Palayanoor P.O. Vedanthangal Road
Madurantakam Taluk
Kanchipuram District
Tamil Nadu 603 308

***Versus***

**Commissioner of GST & Central Excise** **...Respondent**
**Pondicherry**
1, Goubert Avenue
Beach Road
Pondicherry

**APPEARANCE:**

Shri G. Natarajan, Advocate for the Appellant
Shri N. Satyanarayana, Authorised Representative for the Respondent

**CORAM :**
**HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**
**HON'BLE MR. AJAYAN T.V. MEMBER (JUDICIAL)**

**FINAL ORDER No.41028/2026**

DATE OF HEARING :26.03.2026
DATE OF DECISION: 21.09.2026

**Per AJAYAN T.V.**

M/s. Bay Forge Ltd. the appellant herein is challenging the Order in Appeal No.155/2017 (CXA – II), dated 20.03.2017 to the extent the Appellate Authority has remanded the matter to the Adjudicating Authority for factual examination of the includability of TDS in the taxable value, while upholding the demand of Rs.1,47,574/- pertaining to short payment of service tax on account of adoption of wrong rate of service tax, along with interest and also upholding penalties imposed, except for setting aside the penalty imposed under Section 77.

2. Brief facts of the case are that the Appellant are manufacturers of Forgings and also hold service tax registration. Apart from providing Services to their clients, they also receive certain services from Foreign Service Providers (FSP). The Appellant used to discharge service tax for their liability, including services received from the FSP under Section 66A of the Finance Act, 1994. On verification of the records of the Appellant, it was noticed that they had received Consulting Engineer Service/Business Auxiliary Service from the FSP and had not paid Service Tax on a part of the value shown as withheld which was actually Tax Deducted at Source (TDS), towards payment of Income Tax. This apart, for the period 2007-08, there was also a short payment of service tax to the tune of Rs.1,47,647/- due to wrong adoption of rate of service tax. Hence four show cause notices were issued to the appellant proposing to demand the service tax arising on account of non-inclusion of the TDS for various periods from 2007-08 to 2011-12 and also for the short payment of service tax.

3. After due process of law, the Adjudicating Authority, vide the common Impugned Order No.90/2016-ST dated 19.07.2016, confirmed the entire demands of service tax of Rs.20, 25,962/-, Rs.14,77,860/-, Rest 35,901/- and Rs.97,109/- as proposed in the notices. This apart, he also imposed penalty equal to the service tax demand of Rs.20,25,962/- under Section 78 of the Finance Act, 1994 in respect of the demand pertaining to the period 2007-08 and also imposed penalties of 10% of the service tax each for the subsequent demands pertaining to the periods 2009-10, 2010-11 and 2011-12 under Section 76 of the Act. He also imposed a further penalty of Rs.10,000/- under Section 70 and also appropriated an amount of Rs.15,337/- paid against the demand of SHE Cess and Interest paid thereon of Rs.5145/- confirmed, which was paid vide Challan No.00265 dated 25.06.2010.

4. Aggrieved, the appellant preferred an appeal before the Commissioner of Central Excise (Appeals-II), Chennai. The Appellate Authority had passed the aforementioned impugned order. Having preferred an appeal challenging the impugned order, the appellant is before us.

5. Shri. G. Natarajan, Ld. Advocate appearing for the appellant submitted as under:

a) The original authority had confirmed the demand on the footing that the withholding tax paid by the appellant under the Income Tax Act formed part of the consideration paid to the service provider, notwithstanding a clear finding in paragraph 5.2(iv) of the order in original that the TDS was borne only by the appellant and never deducted from what was payable to the foreign service provider. The Commissioner (Appeals), though himself noticing this inconsistency in paragraph 9 of the impugned order, remanded the matter for verification instead of resolving it on the material already on record, a course said to be impermissible in any event since Section 35A(3) of the Central Excise Act does not confer on the Commissioner (Appeals) a power to remand. For the proposition that no service tax is payable on the withholding tax component, counsel relied on *FCI OEN Connectors Ltd. v. Commissioner, (2024) 22 Centax 497 (Tri. Bang.), Adani Bunkering Pvt. Ltd. v. Commissioner of Central Excise, Ahmedabad II, (2024) 23 Centax 405 (Tri. Ahmd.), Garware Polyester Ltd. v. Commissioner of Central Excise and Customs, Aurangabad, 2017 (5) G.S.T.L. 274 (Tri. Mumbai),* and *Magarpatta Township Development and Construction Co. Ltd. v. Commissioner, 2016 (43) S.T.R. 132 (Tri. Mumbai)*.

b) As regards the demand confirmed on the footing that the appellant ought to have paid tax at twelve per cent instead of ten per cent, it was submitted that the services in question were received while the rate stood at twelve per cent, but payment to the foreign service provider was made only on 24th February 2009 and 26th February 2009, as borne out at page 54 of the paper book. Since liability to pay service tax under reverse charge was said to arise only when payment is made, the adoption of the ten per cent rate was said to be in order, and reliance was placed on *Adani Enterprises Ltd. v. Commissioner of Service Tax, Ahmedabad, Final Order No. 12428/2023 dated 2nd November 2023 in Service Tax Appeal No. 13065 of 2014 (Tri. Ahmedabad)*.

c) that in as much as the demands of tax are thus not sustainable, there is no occasion for demand of any interest or imposition of any penalties. Further, the penalty under Section 78 cannot be imposed in this case, in as much as the issue is interpretative in nature and the demand is only on account of the issue whether tax is payable on withholding tax or not and what is the correct rate of tax applicable.

6. Shri. N. Satyanarayana, Ld. AR appearing on behalf of the Respondent reiterated the findings in the impugned order.

7. We have heard both sides and perused the materials available on record.

8. Two questions arise for our determination in this appeal. The first is whether the first appellate authority was justified in remanding the matter to the adjudicating authority for a fresh factual determination on the includability of the withholding tax in the taxable value, and, tied to it, whether the withholding tax retained by the appellant out of its own funds, and not deducted from the consideration payable to the foreign service provider, can at all be brought to charge under Section 67 read with Section 66A of the Finance Act, 1994. The second is whether the differential demand confirmed on the footing that the appellant ought to have discharged tax at twelve per cent instead of ten per cent is sustainable, having regard to the date on which payment was made to the Foreign Service Provider, is tenable. The question of penalty and interest would hinge on the answer to these two questions and is considered thereafter.

9. We take up the first question. Learned counsel for the appellant contended that the Commissioner (Appeals) had no power to remand the matter at all, drawing support from the amendment made to Section 35A(3) of the Central Excise Act, 1944 by the Finance Act, 2001, which withdrew the power of remand earlier available to that authority. The effect of that amendment in the field of central excise is well settled, and it has been held that the deletion of the relevant words from Section 35A(3) leaves the Commissioner (Appeals) without power to send a case back to the adjudicating authority. The decision in *Commissioner of Central Excise, Jalandhar v. B.C. Kataria, 2008 (221) E.L.T. 508 (P and H)* refers. The difficulty with the submission is that the present appeal arises not under the Central Excise Act but under Chapter V of the Finance Act, 1994, the appeal to the Commissioner (Appeals) having been preferred under Section 85 of that Act. Section

83 of the Finance Act, 1994 enumerates the provisions of the Central Excise Act that are made applicable to service tax, and Section 35A does not figure in that list. For this very reason, the Madras High Court has, in its Order in *A.S. Babu Sah Designs v. Commissioner of Central Excise (Appeals), Chennai I, 2020 (38) G.S.T.L. 161 (Mad.)*, held that the amendment to Section 35A(3) has no bearing on an order passed under the Finance Act, 1994, and that the Commissioner (Appeals) continues to possess the power to pass such order as he thinks fit, including an order of remand, in an appeal preferred under Section 85. The Gujarat High Court has reached the same conclusion by a different statutory route, holding that Section 85(5) of the Finance Act, 1994 does not import the limitation on remand found in Section 35A(3) of the Central Excise Act into an appeal under Section 85, since Section 85(4) confers on the Commissioner (Appeals) the power to pass such order as he thinks fit, including an order of remand. The Order in *Commissioner of Service Tax v. Associated Hotels Ltd., 2015 (37) S.T.R. 723 (Guj.)* refers. Bound as we are by the view of the High Courts, we are unable to accept the submission that the Commissioner (Appeals) lacked jurisdiction to remand the present matter.

10. Be that as it may, we are of the considered view that the power to remand is not to be exercised as a matter of course, more so in a case touching public revenue, which ought to attain finality without needless rounds of adjudication, as can be seen from the Judgement of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Pune I v. Syntel International Pvt. Ltd., 2015 (39) S.T.R. 27 (Boom.)*. We are fortified in our view by the observation of the Hon'ble Supreme Court in its Judgement in *Suvej Singh v. Ram Naresh and Ors., 2025 INSC 1405*, wherein it was observed that "*<u>The idea is to curtail the litigation and not generate it. Any unnecessary remand by a Higher Court generates fresh round of litigation, which should be avoided</u>*." A remand is warranted where a fact material to the decision remains to be ascertained. It serves no purpose where that very fact already stands recorded and is not in dispute. In this case, the original authority itself found, in paragraph 5.2(iv) of the order in original, that the withholding tax in question was borne by the appellant and was not recovered from, or deducted out of, the consideration payable to the Foreign Service Provider. That finding was rendered by the very authority whose order

was under appeal before the Commissioner (Appeals), and it has not been shown to rest on any material that requires further verification. Having recorded this finding in unambiguous terms, the original authority went on, in the operative part of the same order, to treat the withholding tax as part of the consideration and to confirm the demand upon it. An adjudication that accepts a fact as proved in one paragraph and confirms a demand founded on the opposite of that fact in the next cannot be called a reasoned order, and such an infirmity ought to have been corrected at the earliest opportunity rather than carried forward through a further round of remand. The Commissioner (Appeals), having himself noticed the inconsistency in paragraph 9 of the impugned order, ought to have resolved it.

11. The treatment of the withholding tax which was borne by the appellant, stands settled by a consistent line of decisions of this Tribunal. Tax deducted at source and paid to the credit of the Central Government by a service recipient out of its own funds, without recovering the same from the foreign service provider, does not form part of the value of taxable service under Section 67 of the Finance Act, 1994, since it is not a consideration flowing to the service provider but a statutory obligation discharged by the recipient on its own account *Magarpatta Township Development and Construction Co. Ltd. v. Commissioner, 2016 (43) S.T.R. 132 (Tri. Mumbai); Garware Polyester Ltd. v. Commissioner of Central Excise and Customs, Aurangabad, 2017 (5) G.S.T.L. 274 (Tri. Mumbai); Hindustan Oil Exploration Co. Ltd. v. Commissioner of GST and Central Excise, Chennai, 2019 (25) G.S.T.L. 252 (Tri. Chennai); T.V.S. Motor Company Ltd. v. Commissioner of Central Excise and Service Tax, Chennai III, 2021 (55) G.S.T.L. 459 (Tri. Chennai); FCI OEN Connectors Ltd. v. Commissioner of Central Tax, Cochin, (2024) 22 Centax 497 (Tri. Bang.); Adani Bunkering Pvt. Ltd. v. Commissioner of Central Excise, Ahmedabad II, (2024) 23 Centax 405 (Tri. Ahmd.)* are authorities for this principle. It being admitted, and indeed found by the original authority, that the withholding tax here was never part of what the appellant paid or was liable to pay to the Foreign Service Provider, the demand raised on that component cannot be sustained. We accordingly hold that the withholding tax retained by the appellant from its own funds is not includible in the value of taxable service, that no service tax is payable on that component, and that the remand directed

by the Commissioner (Appeals) on this aspect stood unnecessary and is set aside.

12. We now address the second question, touching the demand confirmed on the ground that the appellant ought to have paid the service tax at the rate of twelve per cent where as it had paid the tax at the rate of ten per cent. The receipt of the service when the rate of service tax was at twelve percent is undisputed. That the payment to the Foreign Service provider followed only on 24th and 26th February 2009, after the rate was reduced, also stands undisputed. There is no averment or evidence adduced by the appellant to the contrary that the services were also received only after the rate was reduced. Counsel contended that liability under the reverse charge mechanism created by Section 66A arises only when payment is made, so that the rate on the date of payment governs. We are unable to accept this. In *Commissioner of Service Tax, Delhi v. Consulting Engineering Services (India) Pvt. Ltd., 2013 (30) S.T.R. 561 (Tri. Del.), affirmed at 2013 (30) S.T.R. 586 (Del.),* and in *Commissioner of Service Tax, Delhi v. Lea Associates South Asia Pvt. Ltd., 2014 (36) S.T.R. 909 (Tri. Del.)*, it was held that the rate chargeable is the rate in force when the service is rendered, not the rate on the date of billing or of receipt of payment. Both decisions concerned the ordinary, forward charge, and to that extent stand on a different footing from the reverse charge before us. The same rate change came to be considered on the reverse charge side in *Tech Mahindra Ltd. v. Commissioner of Central Excise, Pune III, Order No. A/86893/2018 dated 18th June 2018, 2018 (7) TMI 1598 (Tri. Mumbai)*, where the Tribunal, following Consulting Engineering Services and Lea Associates, held that the date of receipt of the service, not the date of payment, fixes the rate under Section 66A as well, so that services received before 24th February 2009 bore tax at twelve per cent regardless of when payment or invoicing followed.

13. Ld. Counsel relied on a decision to the contrary, *Adani Enterprises Ltd. v. Commissioner of Service Tax, Ahmedabad, Final Order No. 12428/2023 dated 2nd November 2023 in Service Tax Appeal No. 13065 of 2014 (Tri. Ahmedabad)*, which held, on facts of a service rendered before 24th February 2009 but invoiced and paid for after, that the rate at realisation governs. That decision, like *Consulting*

*Engineering Services and Lea Associates*, arose on the forward charge, so the reverse charge fiction under Section 66A furnishes no ground to distinguish it. However, it does not advert to *Consulting Engineering Services, by then affirmed by the Delhi High Court, or to Lea Associates*, We accordingly do not follow Adani Enterprises, and hold that it is the date on which the service is received, not the date of payment, that governs. Indisputably the services here were received while the rate stood at twelve per cent, and hence the deferral of payment to 24th and 26th February 2009 does not attract the reduced rate. We accordingly hold that the demand confirmed on this count is sustainable in law.

14. Penalty and interest are consequential to demand. The demand on the withholding tax component having been held unsustainable, the penalty referable to that demand cannot survive. The demand confirmed on the difference in rate of tax having been upheld above, the interest confirmed along with it follows as a matter of course. However, given the nature of dispute which is interpretation, we are inclined to hold that no penalty is leviable in this regard. We are not called upon in this appeal to examine the setting aside of the penalty under Section 77 by the Commissioner (Appeals), since it has not been challenge before us by the Revenue, and our order leaves those findings undisturbed.

15. For the reasons recorded above, the impugned order cannot be sustained to the extent it remands the question of includability of the withholding tax in the taxable value, and is set aside, in place of which we hold that no service tax is payable on that component and hence no demand on the same made is tenable. The impugned order is, however, sustained to the extent it upholds the demand of Rs.1,47,574/- on account of adoption of wrong rate of service tax, together with interest thereon.

The appeal is partly allowed with consequential relief(s) in law, if any.

(Order pronounced in the open court on 21.09.2026)

**(AJAYAN T.V.)**
Member (Judicial)

**(VASA SESHAGIRI RAO)**
Member (Technical)

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