CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. III

SERVICE TAX APPEAL NO. 51540 OF 2019

[Arising Out Of Order in Original No. 52-32/Commr/RK/Audit-II/2018-19 dated 28.02.2019 passed by the Commissioner of Central goods and Service tax, Audit II, New Delhi]

M/S. EMM AAR EL Constructions Pvt. Ltd. .....APPELLANT

S-8&9, HL Plaza, Plot No.9
Sector 12, Dwarka, Delhi 110075

Vs.

COMMISSIONER OF CGST &CX (Audit II) .....RESPONDENT

1st Floor, EIL Annexe Building, Bhikaji Cama Place,
R K Puram, New Delhi 110066

WITH

SERVICE TAX APPEAL NO. 51306 OF 2019

[Arising Out Of Order in Original No. 52-32/Commr/RK/Audit-II/2018-19 dated 28.02.2019 passed by the Commissioner of Central goods and Service tax, Audit II, New Delhi]

Mr. Anil Lohchab .....APPELLANT

Flat No. 2305, Sleuth CGHS, Plot No.6,
Sector 19-B, Dwarka, New Delhi 110075

Vs.

COMMISSIONER OF CGST &CX (Audit II) .....RESPONDENT

1st Floor, EIL Annexe Building, Bhikaji Cama Place,
R K Puram, New Delhi 110066

AND

SERVICE TAX APPEAL NO. 51307 OF 2019

[Arising Out Of Order in Original No. 52-32/Commr/RK/Audit-II/2018-19 dated 28.02.2019 passed by the Commissioner of Central goods and Service tax, Audit II, New Delhi]

Mr. Rajinder Singh Lohchab .....APPELLANT

House No. 1095, Sector I, HUDA,
Rohtak, Haryana 124001

Vs.

COMMISSIONER OF CGST &CX (Audit II) .....RESPONDENT

1st Floor, EIL Annexe Building, Bhikaji Cama Place,
R K Puram, New Delhi 110066

Appearance:

Mr. Abhas Mishra, Advocate for the appellants

Mr. Rajiv Kapoor, Authorised Representative for the Department

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)
HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO'S. 51703-51705 /2026

DATE OF HEARING : 3/11/2026
DATE OF DECISION : 05/11/2026

P.V.SUBBA RAO

1. The order dated 28.02.2019 passed by the Commissioner[1] deciding the proposals made in the show cause notice dated 22.4.2016 read with the corrigendum dated 18.12.207 and the Statement of Demand dated 11.4.2018 issued to the appellants is assailed by M/s EMM AAR EL Construction Pvt. Ltd.[2], Shri Anil Lohchab, Director[3] and Shri Rajender Singh Lohchab, Director[4] of the assessee in these three appeals. The appeals of Anil and Rajender are confined to the personal penalties of Rs. 1,00,000/- each imposed on them under section 78A of the Finance Act, 1994 with respect to the first SCN. No penalty was imposed on these two appellants with respect to the subsequent Statement of Demand.

2. We have heard learned counsel for the appellants and the learned authorized representative for the revenue and perused the records.

3. The officers of the service tax department received information that the assessee was providing taxable services such as 'Construction services other than residential complex, including commercial/industrial buildings or civil structures', and 'Works Contracts services' but was not registered with the service

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1 Impugned order
2 Assessee
3 Anil
4 Rajender

tax department nor was it paying service tax. Detailed investigation was conducted and statements of various persons were recorded and it was found the appellant had provided services as sub-contractors to M/s.Steel Authority of India Ltd. (SAIL) at Bhilai and as a sub-contractor of National Thermal Power Corporation (NTPC) at Raigarh. The turnover of the appellant was significant for the period of dispute viz., 2010-11 to 2015-16.

4. Therefore, the SCN was issued proposing to recover service on the value of taxable services provided under the proviso to section 73(1) of the **Finance Act, 1994**[5] along with interest under section 75 of the Act. Penalties were proposed to be imposed under sections 76, 77(1) (a), 77(1) (c), 77(2) and 78 of the Act on the assessee. Personal penalties were proposed to be imposed on Anil and Rajender under section 78A of the Act.

5. The second SCN (Statement of Demand) dated 11.4.2018 proposed recovery of service tax for the subsequent period.

6. The assessee's position has been that it was not required to pay any service tax because it was only the sub-contractor and service tax on the entire value of services was paid by the main contractors SAIL and NTPC.

Submissions on behalf of the appellants

7. Learned counsel had three primary submissions. First, that as the sub-contractor, the assessee was not required to pay service tax because the main contractor had paid service tax on the entire value including the work done by the assessee as the

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5 Act

sub-contractor. Thus, there was no loss of Revenue. It is his further submission that had the assessee paid service tax, it would have recovered it in its invoices to SAIL and NTPC who would have taken CENVAT Credit of the tax paid by the assessee and this would have reduced the amount of service tax paid in cash by SAIL or NTPC. Thus, at any rate, it is revenue neutral.

8. Secondly, according to the learned counsel, during the relevant period, there were both views- that the sub-contractor need not pay service tax if the main contractor pays and that the sub-contractor also has to pay service tax. In view of the conflicting views, the matter was referred to the Larger Bench in **Commissioner of Service Tax, New Delhi vs Melange Developers Pvt. Ltd.**[6] and the larger bench decided that the sub-contractor also had to pay service tax and the main contractor could take CENVAT credit of the tax so paid. Since there were conflicting views even among different benches of the Tribunal, the assessee cannot be faulted and penalized for holding the view that it was not liable to pay service tax as a sub-contractor. Therefore, it cannot be alleged that the assessee had any intent to evade and in the absence of any evidence of intent, extended period of limitation could not have been invoked.

9. The third submission of the learned counsel is that at any rate, the work carried out by the assessee was that of fabrication at site which clearly amounts to manufacture. Therefore, this activity cannot be treated as providing a taxable service.

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6 2020(33) GSTL 116 (Tri-LB)

10. On a specific query from the bench, learned counsel submitted that this ground that the activity amounted to manufacture was not taken before the Commissioner and hence it was not considered or examined in the impugned order. However, learned counsel vehemently argued that this was a purely legal ground and it goes to the very core issue as to whether the taxable event of providing any service had occurred at all. If this submission of the assessee is accepted, then there will be no basis for the demand at all. Hence, it may be permitted to be taken before this Tribunal in this appeal.

Submissions of the Revenue

11. Learned authorised representative for the Revenue, on the other hand, vehemently supported the impugned order and asserted that it calls for no interference. It is also his submission that appellant cannot make out a completely new case at this stage and argue that its activity amounted to manufacture as such a ground was never taken during the investigation or in the proceedings before the Commissioner.

12. Learned authorised representative further submitted that the assessee had not even obtained a registration let alone paying any service tax. It is only after considerable efforts and detailed investigation, the assessee's activities came to light.

Findings

13. We have considered the submissions advanced by both sides. Usually, we would be reluctant to allow an appellant to raise new grounds not taken before the lower authorities. However, the ground taken before us is a serious legal ground

and it goes to the very core question as to whether any taxable event exigible to service tax had taken place at all. If the activity amounted to manufacture, it cannot be called a service either during the pre-negative list (before 1.7.2012) or after that date.

14. However, the Commissioner never got an opportunity to examine this submission because the assessee had not taken this ground before him. To determine if the activity amounted to manufacture, one needs to look into the nature of the fabrication done by the appellant and whether any new marketable good had arisen in the process.

15. In our considered view, the Commissioner should get an opportunity to examine this issue and give his finding. Needless to say that if the Commissioner finds that all the activities of the assessee were in the nature of manufacture, no service tax can be demanded.

16. We also find that if the activity amounted to providing a service as a sub-contractor on which activity the main contractor had already paid service tax, in view of the conflicting views on the subject even by different benches of this Tribunal (until it was resolved in **Melange Developers)**, extended period of limitation could not have been invoked. For the same reason, the penalties imposed on Shri Anil Lohchab and Shri Rajinder Singh Lohchab under section 78A deserve to be set aside.

17. In view of the above, without passing any remarks on the merits of the case, we remand the matter to the Commissioner to examine the submission of the assessee that is activities amounted to manufacture and not providing a service. We make

it clear that if any demand of service tax is confirmed, it shall be only for the normal period of limitation.

18. **Service tax appeal No. 51306 of 2019** filed by Shri Anil Lohchab and **Service tax appeal No. 51307of 2019** filed by Shri Rajender Singh Lohchab are allowed and the penalties against them are set aside. **Service tax appeal No. 51540 of 2019** filed by **M/s. EMM AAR EL Constructions Pvt. Ltd** is allowed by way of remand to the Commissioner to decide as above and the impugned order is set aside.

[Order pronounced on **05/11/2026**]

(AJAY SHARMA)
MEMBER (JUDICIAL)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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