

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70695 of 2016

(Arising out of Order-in-Original No.ALD/EXCUS/000/(ST-139/2014) 09 of 2016 dated 16.03.2016 passed by Commissioner of Central Excise, Customs & Service Tax, Allahabad)

M/s K. N. International Ltd., **.....Appellant**
(Cinema Road, Anpara, Sonebhadra, U.P.-231225)

VERSUS

**Commissioner of Central Excise Customs
& Service Tax, Allahabad** **....Respondent**
(38, M.G. Marg, Civil Lines, Allahabad-211001)

APPEARANCE:

Shri Dushyant Kumar, Consultant for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70038/2024

DATE OF HEARING : 29 November, 2023
DATE OF DECISION : 30 January, 2024

P. K. CHOUDHARY:

The Appellant has filed this appeal against the impugned Order-in-Original demanding Service Tax of Rs.3,43,97,544/- for the period from 2009-10 to 2012-13 by issuance of Show-Cause-Notice dated 29.10.2015

2. The facts of the case in brief are that the Appellant was engaged by M/s Steel Works Construction Limited (HSCL) and M/s Baghel Infrastructure Private Limited, M/s Reliance Infrastructure Limited, M/S SASAN & M/s HINDALCO etc. for construction related services / works contract services in relation to construction of road, reservoir etc. The Revenue on specific information, undertook scrutiny of records of the Appellant and found short payment of service tax on comparison of amount shown in their ST-3 returns with that in Profit & Loss Account in

the respective period from 2009-10 to 2012-13. The Revenue, therefore, demanded service tax of Rs.3,43,97,544/- on differential value for the period from 2009-10 to 2012-13. The Appellant contested the Show-Cause-Notice but the demand proposed in the Show-Cause-Notice was confirmed. Being aggrieved, the Appellant has filed the present appeal before the Tribunal.

3. The Ld. Counsel appearing on behalf of the Appellant submits that the Appellant had undertaken 'Works Contract Services' and had received contractual payment on execution of 'works contract services' and submitted copies of the work orders, payment particulars, copies of invoices and form 26AS. The work orders show that they have executed composite work including exempted services in relation to construction of PMGSY Road etc. for which they have also submitted work orders.

4. The Ld. Counsel has also submitted that the Revenue has issued show-cause-notice without making proper inquiries and ignoring the documents submitted by the Appellant in this regard. The regular audit during the period (2009-10, 2010-2011, 2011-12 and 2012-13) had also been conducted by the Audit Wing of the Revenue before the issuance of Show-Cause-Notice on 16.10.2014. Copies of the audit reports have been submitted and it was pleaded that all audit objections have been duly complied except one for the year 2009-10. The Appellant also submitted copies of the invoices raised.

5. It is also submitted that they have duly discharged their tax liability on taxable/'abated value of services' and have also submitted copy of the reconciliation chart for tax payment. It was further argued that the demand is barred by limitation as regular yearly audit has been conducted by the Revenue and therefore extended period of limitation is not invocable and thus it was not a case of invocation of conditions prescribed in proviso to Section 11A of the Central Excise Act. The Ld. Counsel also submitted copies of the relied upon decisions of the Tribunal and quoted the reference of the Hon'ble Supreme Court's Order in this connection.

6. On the other hand, the Ld. AR for the department reiterated the findings of the impugned order and submitted that there is substantial difference in the value shown in ST-3 returns and the Profit & Loss Account, but he did comment on the issue of limitation.

7. The Ld. Counsel explained that this difference in taxable value of ST-3 returns and Profit & Loss Account is on account of non-inclusion of value of services in respect of exempted services provided in construction of PMGSY Road and works contract services provided to the service recipients viz M/s HSCL and M/s BIPL who have paid the Service Tax on behalf of the Appellant. It was explained that they were thus not required to pay any tax on the same services and have discharged tax liability on the remaining value of services as reflected in the reconciliation chart.

8. Heard both sides and perused the appeal records.

9. In this case, the Appellant have contended that the demand has been raised on the basis of differential value shown in ST-3 return viz-a-viz Profit & Loss Account. Admittedly, no investigation has been conducted in this case at the Appellant's end by the Adjudicating Authority. There is no finding of the Commissioner on the issue of regular audits conducted by the Revenue on the basis of which the issue of time bar is being raised by the Appellant.

10. The Adjudicating Authority has also contended that the Appellant cannot take a plea that they are not liable to pay service tax as their main contractors M/s HSCL and M/s BIPL have paid service tax. He also quoted the reference of Circular No.96/7/2007-ST Dated 23.08.2007 regarding service tax liability on the part of subcontractor if service tax has been paid by their main contractor on their behalf. He has also quoted the reference of some case laws in which Tribunals have held that the Finance Act 1994 does not grant any immunity to the subcontractor from levy of service tax when undisputedly taxable service is provided by them.

11. We find that mainly the following two issues are required to be decided in this appeal.

- (a) Whether the Appellant are still required to pay Service tax on the value of services on which service recipients have discharged tax liability on their behalf.
- (b) Whether the demand is barred by limitation as regular audit inspections have been conducted by the Revenue during the disputed period.

12. As regards liability of tax payment by the Appellant where their main contractors have already paid the tax on their behalf, we find that this remained a vexed issue for the assesses for over the period of time. It would be pertinent to examine it in light of some orders of the Tribunal pronounced from time to time.

- (i) The larger bench of the Tribunal New Delhi in ***Vijay Sharma & Co. Vs. Commissioner of Central Excise Chandigarh 2010 (20) STR 309 (TRI-LB)*** held that the tax paid by sub broker may not be denied to be set off against ultimate tax liability on the stock broker.
- (ii) In the case of ***Loan Star Engineers Vs. Commissioner of Central Excise Panchkula 2017 (47) STR 133 (Tri-Chan)*** it has been held that the payment of the main contractor on behalf of the Appellant shall be treated as payment made by the Appellant.
- (iii) In case of ***Commissioner of New Delhi Vs. Melange Developers Pvt. Ltd. 2020 (33) GSTL 116 (Tri-LB)***, it has been held that a subcontractor would be liable to pay service tax even if the main contractor has discharged service tax liability on the activity undertaken by the subcontractor in pursuance of the contract.
- (iv) The Hon'ble Supreme Court in the case of ***Om Sai Fabricators Vs. Commissioner of Service Tax Raigarh (2023) 6 CEN-TAX 2010 (SC)*** has affirmed the order of the Tribunal holding that a subcontractor would be liable to pay tax even if the main contractor has discharged service tax on entire contract value.

Hence, the Tribunals / Courts have been accepting tax payment by the service recipient as valid payment as the same was revenue neutral exercise till 2020, thereafter, the issue stands settled and it is service provider / sub-contractor to pay tax even if the main contractor / service recipient has discharged the tax liability on his behalf (Appellant).

13. Hence, this was a legal dispute which involved interpretation of law and mala-fide intention or suppression with intent to evade payment of service tax cannot be attributed to the Appellant.

14. As regards the issue of applicability of extended period of limitation, we find that the Appellant have been regularly filing their ST-3 returns and their records have been regularly audited by the Audit Wing of the Department and they have been complying with audit objection. They have also submitted audit reports and compliance thereof. Further, Adjudicating Authority has not made any observation as to how suppression of facts is invokable when regular Audit of records have been conducted by the Revenue.

15. The Hon'ble Supreme Court has laid down guidelines for invoking extended period of limitation. The Court has observed that extended period of 5 years is not invokable when there is no willful misstatement or suppression involved. Mere failure to pay duty without any collusion, fraud or willful misstatement not sufficient to invoke extended period of limitation.

(i) *Easland Combines vs. Collector of c. Ex., Coimbatore, 2003 (152) E.L.T. 39 (S.C.).*

(ii) *I t w Signode India Ltd. vs. Collector of Central Excise 2003 (158) E.L.T. 403 (S.C.).*

16. Further the various Benches of the Tribunal in number of cases from time to time have been unanimous in their findings that Revenue should not invoke extended period of limitation when records of assessee have been audited by the Department. Some of the cases decided by the Tribunal in this regard are as under:-

(i) *Commissioner of Central Excise, Bangalore-1 Vs. MTR Foods Limited 2012 (282) ELT 196 (Kar).*

- (ii) *Commissioner of C.Ex. Aurangabad Vs. Yeshwant Industries 2014 (313) ELT 667 (Tri – Mumbai).*
- (iii) *Trans Engineers India Pvt. Ltd. Vs. Commissioner of C.Ex., Pune 2015 (40) STR 490 (Tri-Mumbai).*
- (iv) *Khaira and Associates Vs. Commr. of Cus., C.Ex. & S.T., Bhopal 2020 (34) GSTL 224 (Tri-Del).*

Similar view has also been expressed by the Hon'ble Supreme Court to the effect that there cannot be any suppression if the unit of the assessee was audited during the period several times.

Commissioner Central Excise, Bangalore Vs. M/s Pragathi Concrete Products (P) Ltd, 2015-TIOL-223-SC-CX.

Thus matter was in the knowledge of the department in 2010 when the first audit was conducted and thereafter regular audit was conducted every year, but the show-cause-notice was issued in 16.10.2014 without carrying out any investigation and without adducing any new corroborative evidence for invoking any suppression in the show-cause-notice in as much as service tax was also demanded on the exempted services valued at Rs.11,67,04,375/- pertaining to construction of PMGSY roads.

17. In view of the above discussions, the impugned order holding that the extended period has been correctly invoked, therefore, cannot be sustained and is set aside. It would, in such circumstances, not be necessary to examine the issues on merits that have been raised by the learned counsel for the Appellant.

18. The appeal filed by the Appellant is allowed with consequential relief as per law.

(Order pronounced in open court on **30th January, 2024**)

**Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)**

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

LKS