

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70345 of 2022

(Arising out of Order-in-Original No.33/Pr.Commr./ST/Noida/21-12 dated 28.01.2022 passed by Principal Commissioner, Central Goods & Service Tax, Noida)

Shri Arvind Solanki,

(F-133, D, Sector-8, Noida-201301 U.P.)

.....Appellant

VERSUS

Principal Commissioner of Central Goods &

Service Tax, Noida

(C-56/42, Renu Tower, Sector-62, Noida U.P.)

....Respondent

APPEARANCE:

Shri Krishna Pratap Singh, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Respondent

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

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70147/2024

DATE OF HEARING : 12 March, 2024

DATE OF DECISION : 12 March, 2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Original No.33/Pr.Commr./ST/Noida/21-22 dated 28.01.2022 passed by the Principal Commissioner of Central Goods & Service Tax, Noida, wherein the demand of Service Tax amounting to Rs.2,07,72,259/- has been confirmed alongwith interest and equal penalty under Section 78 and penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994¹.

2. Briefly stated, the facts of the case are that the Appellant is providing Security Agency Services. Audit was conducted and it was noticed that lesser amount was reflected in the value of taxable services shown in ST-3 Returns as compared to Revenue

¹ The Act

from operation in the Balance Sheet for the financial years 2015-16 and 2016-17. Accordingly, a Show Cause Notice² dated 30th March, 2021 was issued by invoking extended period of limitation for the abovementioned financial years proposing demand of service tax, interest and imposition of penalty. The impugned order confirmed the demand as proposed in the SCN on the basis of mismatch of ST-3 Returns and Balance Sheets/26AS. Hence, the present appeal before the Tribunal.

3. The learned Advocate appearing on behalf of the Appellant submits that the income shown to the Income Tax Authorities could not be the basis to determine the service tax liability unless there is any proof that the income was towards taxable services. It is his submission that the allegation of suppressing the material facts and contravention of the provisions of the Act, are absolutely baseless and improper. He further submits that it is trite law that figures of Form-26AS could not be used for determining service tax liability unless there is proof to show that it was on account of any taxable services. He relies on the following decisions in support of his submissions:-

- Balajee Machinery vs. Commissioner of CGST & Excise, Patna-II (Appeal No.ST/77214/2019);2022(66) G.S.T.L.440(Tri. Cal)
- M/s Luit Developers Pvt. Ltd. Junction Mall vs. Commissioner of CGST & Central Excise, Dibrugarh (Service Tax Appeal No.75792/2021);2022 – TIOL -180-CESTAT- KOL
- M/s J. M. Manpower & Security Pvt. Ltd. vs. Commissioner of Central Excise & Service Tax, Lucknow (ST Appeal No.70394/2023);
- M/s K. N. International Ltd. vs. Commissioner of Central Excise Customs & Service Tax, Allahabad (ST Appeal No.70695/2016).

4. Learned Advocate further states that extended period of limitation cannot be invoked as the Appellant was regularly filing

² SCN

ST-3 Returns, so the Department cannot take a stand that it is only on going through the Balance Sheets that it could examine the factual position.

The learned Advocate referred to the CBEC Circular No.113/7/2009-S.T., dated 23-4-2009 vide F.No.137/158/2008-CX. 4 and CBEC Circular No.185/4/2015-ST dated 30.6.2015 vide F.No.137/314/2012 and submits that it clearly directs the Assessing Officer to effectively scrutinize the Returns at the preliminary stage as held by the Tribunal in Gannon Dunkerley & Co Ltd. vs. CST(Adj) Delhi 2021 (47) G.S.T.L. 35 (Tri-Del) and Luit Developers (supra).

5. The Learned D.R. justifies and reiterates the findings of the impugned order and prays that the appeal be dismissed being devoid of any merits.

6. Heard both sides and perused the appeal records.

7. We find that it has been held in a catena of decisions that only the amount received by the Appellant was liable to Service Tax, amounts reflected in Balance Sheets cannot be used to determine the Service Tax liability. The Hon'ble Madras High Court in Firm Foundations and Housing Pvt. Ltd. vide order dated 06.04.2018 in W.P. No.21799/2017 held that the reporting of income in the P & L is irrelevant for the purposes of determination of service tax payable and thus the basis of the impugned assessment is erroneous. Moreover, income reflected in the Balance Sheet is for Income Tax purposes, which cannot be used for the purpose of service tax without any corroboratory evidence as also supported by Luit Developers (supra) which held in Para 11 that :

"11. I also find force in the submission of the learned Counsel for the Appellant that figures reflected in Form-26AS cannot be used to determine Service Tax liability unless there is any evidence shown that it was due to a taxable service as held in Kush Constructions (supra). Also, figures shown to Income Tax authorities cannot be used to determine Service Tax liability as held in Synergy

Audio Visual Workshop Pvt. Ltd. (supra) and Deluxe Enterprises (supra)."

8. The same proposition was applied in Indian Machine Tools Manufacturers Association vs. CCE, Panchkula Final Order No.60403/2023 dated 18.09.2023 in Appeal No.ST/4174/2012 which held in its Para 11 that,

".....we are of the considered opinion that it is not open for the Department to raise demands on the basis of other statutory returns like Income Tax Returns or balance sheets without proving that such service has been rendered by the assessee and consideration thereof has been received....".

9. We find that the Hon'ble Calcutta High Court in Larsen & Toubro vs. Assistant Commissioner, Service Tax Commissionerate, Division III, Kolkata (2023) 2 Centax 327 held that audit objections cannot be the sole criteria to invoke extended period. Since the SCN has been issued solely on the basis of the Appellant's own Records, extended period cannot be invoked.

Notably, the Hon'ble Punjab & Haryana High Court in CCE, Ludhiana vs. Mayfair Resorts 2011 (22) S.T.R. 263, held that the Department had to show evasion of Service Tax and that the money found with the assessee represented proceeds of services provided by it, which has admittedly not been done in the present case by the Department.

10. We find that since the Appellant was filing ST-3 Returns regularly, the Department's stand that it could examine the correct facts only on going through the Balance Sheets cannot be sustained as CBEC Circular No.113/7/2009-S.T., dated 23-4-2009 vide F.No.137/158/2008-CX. 4 and CBEC Circular No.185/4/2015-ST dated 30.6.2015 vide F.No137/314/2012 categorically puts duty on the assessing officer to effectively scrutinize the returns at the preliminary stage, as held in Gannon Dunkerley & Co Ltd (supra).

11. We find that extended period of limitation cannot be invoked solely on audit queries and objections. We observe that

the Department has not adduced any positive evidence to show *mala fide* intention for evasion of service tax and therefore extended period is erroneously invoked.

12. In so far as the issue of limitation is concerned, we do not find any ingredient of fraud or suppression with an intent to evade payment of tax. In the case of Pappu Crane Services vs. CCE, Lucknow (Final Order No.71246/2019 in Service Tax Appeal No.70707/2018), the Tribunal has held that where the demand is merely based on the data appearing in the Income Tax Portal, there cannot be any fraud or suppression so as to justify the invocation of extended period of limitation. Therefore, in the present case, in our view, the demand raised is completely barred by limitation and accordingly the demand is set aside. Further, since there is no element of fraud or suppression, we are of the view that penalty under Section 78 is liable to be set aside. In view of the above discussions, the appeal filed by the Appellant is allowed with consequential relief, as per law.

(Operative part of the Order pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS