CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.71067 of 2018

(Arising out of Order-in-Appeal No.NOIDA-EXCUS-001-APP-1952-17-18 dated 27.03.2018 passed by Commissioner (Appeals) Central Tax, Noida)

M/s Bamrah Constructions (India) Pvt. Ltd., ...Appellant
(F-414, Sector-63, Noida U.P.)

VERSUS

Commissioner of Central Excise &
CGST, Noida ....Respondent
(Noida)

<u>APPEARANCE:</u>

Shri Kapil Vaish, Chartered Accountant 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.- 70435/2024

DATE OF HEARING : 26 June, 2024
DATE OF DECISION : 26 June, 2024

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-in-Appeal No.NOIDA-EXCUS-001-APP-1952-17-18 dated 27.03.2018 passed by Commissioner (Appeals) Central Tax, Noida. By the impugned order learned Commissioner (Appeals) has held as follows:-

"5. I have gone through the facts of the case in the impugned order evidence and material available on record, the grounds of the appeal filed by the appellant department and the submissions made by the respondent during the course of the personal hearing from the facts of the case, I find that in the impugned order, the adjudicating authority has confirmed some of the demands but at the same time also dropped a major portion of demand as proposed in the show cause notice. The

appellant department has filed the instant appeal against the dropping of such demand.

5.1 As regards, the dropping the demand of Rs.46,74,088/- I find that the adjudicating authority has dropped the demand of Rs.46,74,088/- on "erection, commissioning and installation service" mainly on the ground that the same has been raised on assumption and presumption basis. It has been held that the figures of "income" shown in Balance Sheet for 2011-12 to 2012-13 were merely compared with the ST-3 returns. The Audit or the Range offices did not establish the basis or grounds for the demand or differential tax. Further it has been held that the difference in the values was done to the fact that Balance Sheet value included the service tax paid by the party, exempted services and amount of work carried forward on which the service tax was to be paid next year.

5.2 I find that the adjudicating authority has simply accepted the contention of the appellant regarding the justification for difference between the figures in the Balance Sheets and the ST-3 returns relating to calculation of the service tax on "erection, commissioning and installation services". The adjudicating authority has not corroborated the said observation by any other documentary evidence and it is not clear as to how the adjudicating authority came to the conclusion that the difference in the values was due to Balance Sheet showing all inclusive value in the impugned order, there is no mention of any verification done to ascertain which exempted services were included in the value shown in the Balance Sheet or whether the carried forward work as mentioned by the appellant has been verified or ascertained from records or documents. The adjudicating authority has not gone through any documents or ledgers vouchers etc. to hold that indeed the party's contention is correct. It has been alleged in the show cause notice itself that the party could not produce any documentary *evidences in support of their claim as stated by them. It is also observed that since 2011-12 Service Tax was chargeable on the payments made on accrual basis and not on receipt basis. Thus the contention of the appellant and the observation of the adjudicating authority that the difference in figures of Balance Sheets and ST-3 returns was due to payment of service tax on payment basis is not proper and correct. In view of the above, I hold that the adjudicating authority has erred in simply accepting the contention of the appellant and dropping the demand of Rs.46,74,088/- without going into the facts or the merit of the case only by holding that the demand has been issued on assumption and presumption. The dropping of the said demand is thus not justified.*

5.3 As regards the dropping of demand of Rs.19,717/- on freight paid, I find that the adjudicating authority has dropped the said demand on the grounds that the same was paid for manual rickshaw pullers bullock carts and other mean modes of transport which were less than Rs.750/- per entry. On perusal of the evidence available on record, it is observed that the ledger account in respect of freight has been submitted only for the year 20114-15 and the ledgers are not available for the period from 2010 onwards till 2014-15. Further, even in the case of ledger available for 2014-15, it is evident that the expenses have been shown as "Cash" and there is no mention whether the said cash was paid to rickshaw bullock cart, etc. The SCN itself clearly holds that they had paid the amount more than Rs.750/- per entry during the period 2010-2011 to 2012-13, which has not been refuted by the adjudicating authority and the party's contention has been accepted on face value. It is observed that the adjudicating authority has not given any clear findings to arrive at the conclusion that the amount was paid for manual rickshaw pullers bullock carts and other mean modes of transport which were less than Rs.750/- per entry for the entire *period of 2010-11 to 2014-15. Thus in the absence of the ledgers vouchers etc. or any other documentary evidence to prove that the amount was indeed paid for rickshaw /bullock carts etc. and that the amount was less than Rs.750/-per entry the adjudicating authority has erred in accepting the contention of the appellant put forth in this regard, without going into the facts of the case. In view of the above dropping of the said demand is not justified.*

5.4 As regards the dropping of the above demand of Rs.39,987/- on "legal consultancy" I find that the adjudicating authority has dropped the said demand on the grounds that the same has been shown in the Balance Sheet as "legal expenses" was actually paid for purchase of stamp paper for tender of documents and not for "legal consultancy". On perusal of the evidence available on record, it is observed from the ledgers that the expenses have been shown as "Audit Fees" which have apparently been paid to consultants etc. It has nowhere been mentioned that the same was paid for purchase of 'stamp paper for tender documents'. It is also observed that the appellant have themselves submitted in the defence reply that they agree to pay the service tax on reverse charge if any amount has been paid to the consultants in this head. The adjudicating authority has not considered this fact in the impugned order and simply accepted the contention of the appellant the impugned amount was paid for purchase of 'stamp paper for tender documents' without going into the facts or the merits of the case. I therefore hold that the adjudicating authority is not justified in dropping the said demand of Rs.39,987/- on "legal consultancy".

5.5 As regards the dropping of demand of Rs.35,282/- on Vehicle hiring charges I find that the adjudicating authority has dropped the said demand on the grounds that the amount has been spent on metered taxi auto rickshaw. On perusal of the evidence available on record it is observed from the ledgers accounts pertaining to "vehicle hiring *charges" that the amount has been shown as "Cash" and there is no mention whether the said cash was paid to metered taxi auto rickshaw etc. or to cab hiring service providers. I observe that in the absence of the relevant supporting vouchers etc. or any other documentary evidence to prove that the amount was indeed paid for metered taxi auto rickshaw etc. the adjudicating authority has erred in accepting the contention of the appellant put forth in this regard, without going into the facts of the case I therefore hold that the adjudicating authority is not justified in dropping the said demand of Rs.35,282/- on Vehicle hiring charges.*

5.8 In view of the discussion and findings as above, I find substance in the departmental appeal. The impugned Order-in-Original No.07-ADC-Noida-Cus-2017 dated 16.03.2017 read with Corrigendum dated 24.03.2017 is therefore required to be set aside to the extent as discussed in the foregoing paras and the demand of Rs.47,69,074/- alongwith interest and equal penalty is liable to be confirmed against the appellant. The departmental appeal is therefore allowed and the submissions of the respondent are also disposed of accordingly."

2.1 On the basis of scrutiny of the records for the Appellant and observation made during the audit of the show cause notice dated 13.04.2016 issued to the Appellant asking them so as to why:-

"(i) Service Tax amounting to Rs.46,74,088/- on Erection, Commissioning & Installation Services for the period 2010-11 to 2012-13 should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994;

(ii) Service Tax amounting to Rs.20,181/- on freight paid for the period 2010-11 to 2014-15 Rs.39,987/- on Legal Consultancy and Rs.35,282/- on Vehicle Hiring for the period 01.07.2012 to 2014-15 should not be demanded

and recovered from them under proviso to Section 73(1) of Finance Act, 1994;

(iii) Interest at the appropriate rate as applicable from time to time on the aforesaid amount as specified in (i) to (ii) above should not be demanded under Section 75 of the Finance Act, 1994;

(iv) Service Tax amounting to Rs.30,84,224/- on Manpower Recruitment/Supply agency service for the period 2012-13 to 2013-14 should not be demanded and recovered from them under proviso to Section 73(1) of Finance Act, 1994 and as the party have already paid Rs.30,84,224/- as mentioned in the foregoing paras, why the said amount deposited by the party should not be appropriated against the said demand;

(v) Interest at the appropriate rate as applicable from time to time on delayed payment of Service Tax of Rs.30,84,224/- as specified in (iv) above should not be demanded and recovered under Section 75 of the Finance Act, 1994;

(vi) Interest Rs.1,36,055/- on delayed payment of Service Tax for the period 2010-11 & 2011-12, as mentioned in the foregoing paras, should not be demanded and recovered from them under Section 75 of the Finance Act, 1994; and

(vii) Penalty on the amount of service tax as specified in (i), (ii) and (iv) above should not be imposed upon them under Section 78 of the Finance Act, 1994."

2.2 Appellant in response to the show cause notice submitted detailed submissions including reconciliation of the service tax paid in their ST-3 returns and the balance sheet. After due consideration of Adjudicating Authority adjudicated the matter as follows:-

"ORDER

(i) I drop the demand of service tax amounting to Rs.46,74,088/- on Erection, Commissioning & Installation Services for the period 2010-11 to 2012-13.

(ii) I drop the demand of Service Tax amounting to Rs.19,717/- on freight paid for the period 2010-11 to 2012-13, Rs.39,987/- on Legal Consultancy and Rs.35,282/- on Vehicle Hiring for the period 01.07.2012 to 2014-15. I confirm service tax of Rs.464/- (for hundred and sixty four only) on GTA services amounting to Rs.15,000/- availed by the party under reverse charge mechanism. The amount of service tax will be paid along with applicable interest under Section 75 of the Finance Act, 1994.

(iii) I confirm he demand of Service Tax amounting to Rs.30,84,224 (thirty lacs eighty four thousand two hundred and twenty four only) on Manpower Recruitment/ Supply agency service for the period 2012-13 to 2013-14 under the proviso to Section 73 (1) of the Finance Act, 1994. Since the party have already paid Rs.30,84,224/- the said amount deposited by the party, shall be appropriated against the said demand.

(iv) I impose the penalty of Rs.30,84,224/- (thirty lacs eighty four thousand two hundred and twenty four only) in respect of demand of Service Tax amounting to Rs.30,84,224/- on Manpower Recruitment/ Supply agency service for the period 2012-13 to 2013-14 under Section 78 of the Finance Act, 1994.

The aforesaid amounts should be paid forthwith. The amounts already paid will be appropriated against the amounts adjudged as above. This order is issued without prejudice to any other action that may be taken or proposed to be taken against the said persons or firms under the Finance Act, 1994, or any other law for the time being in force in the Republic of India."

Subsequently Corrigendum dated 27.03.2017 was issued adding -

> *"(v) I also confirm demand of interest amounting to Rs.1,36,055/- (One Lakh Thirty Six thousand fifty five only) in respect of delayed payment of service tax for the year 2010-11 & 2011-12, under Section 75 of the Finance Act, 1994."*

2.3 Aggrieved Revenue filed the appeal before the learned Commissioner (Appeals) which has been allowed as per the impugned order.

2.4 Appellant had also filed a cross objection in appeal before the learned Commissioner (Appeals). From the cross objections filed it is evident they were only filed countering the department appeal against the dropped demand. Cross objections were not filed in respect of the demand confirmed. However cross objections challenged the penalty imposed under Section 78. Cross objections filed have been dismissed

2.4 Aggrieved by the impugned order, Appellant has filed this appeal.

3.1 We have heard Shri Kapil Vaish learned Chartered Accountant appearing on behalf of the Appellant and Shri Santosh Kumar learned Authorized Representative for the Revenue.

3.2 Arguing counsel for the Appellant submits that,-

- The Adjudicating Authority has on the basis of consideration of all the relevant documents including reconciliation submitted explaining the differences in the ST-3 returns and balance sheet and have dropped the demand in respect of erection commissioning and installation.
- In the case of demand made on reverse charge basis from legal professional services of goods transport agency services and Renting of Motor Vehicle Services concluded after consideration of the fact that most of the payments were much below the provided limit for levy of service tax.
- In the case of Rs.500/- and other minor payments were made not to any for hire carriage for provision of Motor vehicle services.
- In respect of Legal Professional Fees no verification was made. It was observed that no verification is available as to whether these charges were paid to the Advocate or for purchase of stamp paper. Hence the Adjudicating Authority has dropped the demand.

- ➢ In respect of Manpower Supply Services admittedly at the time of payment of taxes initial stages they have made payment on 25% as per Notification No.30/12 as applicable. However subsequently during the course of audit it was framed and the said Notification was not applicable in their case. That being a corporate entity they have made goods by payment of entire due service tax much prior to the issuance of the show cause notice.
- ➢ Original Authority has after due verification of all the documents and facts proceeded to drop the demands.
- ➢ Impugned order to the extent that the Original Authority's view is based on presumption is without any basis in the law.
- ➢ In case of Manpower Supply Services the entire tax amount was paid prior to the issuance of the show cause notice. The matter should have been closed as per 73 (3) and not even a show cause notice was required and if the show cause issued for the amount remaining paid at the time of issuance of show cause notice. The penalty imposed under Section 78 by the adjudicating authority thus is not justifiable.

3.3 Learned Authorized Representative reiterates the findings of the impugned order.

4.1 We have considered the impugned order along with the submissions in appeal and during the course of argument.

4.2 We find that the order of the Original Authority is based on due consideration of the facts on record including the reconciliation charges submitted. The discussions and findings recorded by the original authority are reproduced below:-

"DISCUSSION AND FINDINGS:

5.1 have carefully gone through the facts and records of the case, the documents placed before me as well as various written and verbal submissions made by the party and their Chartered Accountant (CA) in this regard. The main issues *for decision in the show cause notice dated 18.04.2016 are as under:-*

i. *Whether the party is liable to pay Service Tax amounting to Rs.46,74,088/- on Erection, Commissioning & Installation Services for the period 2010-11 to 2012-13 ?*
ii. *Whether the party is liable to pay Service Tax amounting to Rs.20,181/- on freight paid for the period 2010-11 to 2012-13, Rs.39,987/- on Legal Consultancy and Rs.35,282/- on Vehicle Hiring for the period 01.07.2012 to 2014-15?*
iii. *Liability of Interest on the party at the appropriate rate as applicable from time to time on the aforesaid amount as specified in (i) to (ii) under Section 75 of the Finance Act, 1994;*
iv. *Whether the party is liable to pay Service Tax amounting to Rs.30,84,224/- on Manpower Recruitment / Supply agency service for the period 2012-13 to 20 13-14 ? The appropriation Rs.30,84,224/- already paid by the party against the said demand*
v. *Liability of Interest on the party at the appropriate rate as Applicable from time to time on delayed payment of service tax of Rs.30,84,224/- as specified in (iv) above under Section 75 of the Finance Act, 1994;*
vi. *Liability of Interest on the party Rs.1,36,055/- on the delayed payment of service tax for the period 2010-11 & 2011-12, under Section 75 of the Finance Act, 1994;*
vii. *Penalty on the amount of service tax as specified in (i), (ii) and (iv) above under Section 78 of the Finance Act, 1994*

5.2 Now, I take up all these issues one by one:-

SERVICE TAX AMOUNTING TO RS.46,74,088/. ON ERECTION, COMMISSIONING & INSTALLATION SERVICES FOR THE PERIOD 2010-11 TO 2012-13.

A1 As per show cause notice the differential duty has been worked out on the basis of the figures shown in the head of "Income" in the balance sheets for the year 2011-12 to 2012-13. The audit officers in their report merely took the figures from the Balance sheets for the relevant financial year and compared the same with the value of services shown in the ST-3 returns for the respective periods of that financial year.

A.2 The party in their reply vide dated 18.06.2015 addressed to the Jurisdictional range officer submitted the reconciliation statement for all the three financial years as above and on going through the reconciliation charts, I find that the difference in the values was due to:-

i. The balance sheet value included the service tax paid by the party,

ii. Exempted services and

iii. Amounts of work carried forward on which the service tax paid next year.

A.3 In this type of case, once the party explained the reasons for the difference in the values as per Balance sheets vis a vis ST-3 returns, the show cause notice should have established the basis and grounds for the demand of differential service tax. But neither the audit nor the range officers nor show cause notice established the basis and grounds for the demand of differential duty. None of them challenged the explanation and the reconciliation sheets submitted by the party

A.4 The demand of service tax raised on this account is on assumption and presumption basis as there is no evidence that for the differential amount of value the party provided the taxable services, The High Court of Punjab, and Haryana in the case of Commissioner of C. Ex., Ludhiana Versus Mayfair Resorts [2011 (22) S.T.R. 263 I & H) held that demand on assumption and presumption is not sustainable. In view of the above, I find that the demand is not sustainable on this account

B. SERVICE TAX AMOUNTING TO RS.20,181/- ON FREIGHT PAID FOR THE PERIOD 2010-11 TO 2012-13, RS.39,987/- ON LEGAL CONSULTANCY AND RS.35,282/- ON VEHICLE HIRING FOR THE PERIOD 01.07.2012 TO 2014-15.

B.1 The show cause notice demanded service tax on the basis of reverse charge mechanism on services availed/ taken by the party under the head of (i) Freight (ii) Legal Consultancy and (iii) Vehicle hiring

B.2 I have gone through the written submissions dated 18.00.2015, 29.12.2015 before the issuance of the show cause notice and written submission dated 22.02.2016 after the issuance of the show cause notice. I take all the three services as above one by one.

B.2.(i) The audit officers in their audit note calculated the service tax liability of the party in respect of the GTA services for the year 2010-11 to 2012-13 on the basis of freight & cartage expenses shown in the balance sheets of the respective financial years.

The party vide their written submissions stated that the assessee expenses on this account for delivery of purchased material and supplied material through manual rickshaw pullers, bullock carts and other mean mode of transport and the payment was less than 750/- every time. It was paid to the rickshaw pullers, bullock carts and any other person. As per the provision of the GTA, it is not applicable to manual transport operators. Copies of the All ledger account for the financial year 2010-11 to 2014-15 had already been submitted with the department dated 29.12.2015 in which it has been clearly reflected that the party had never paid any amount above Rs. 750/- except one entry amounting to Rs 15,000/- which was paid on 20.09.2014 and they agree to pay the reverse charges on the above payment.

In this case, once the party submitted the ledger account of the head "freight & cartage", the show cause notice should have *established the basis and grounds for the demand of differential service tax. But SCN did not challenge the explanation and the ledger sheets submitted by the party*

In view of the above, I find that the allegation of the SCN is merely on the basis of assumption and presumption, without any material evidence. So, I do not find any reason to demand service tax from the party on account of GTA under reverse charge mechanism. However, in respect of the amount of Rs.15,000/- the: party has acknowledged their service tax liability, The service tax of Rs.464/- on this amount is payable by the party.

B.2.(ii) With reference to the liability of service tax in respect of legal expenses, the audit team took these figures from the profit and loss account of the company and demanded service tax under reverse charge. In this matter the party clarified that most of the amount mentioned above has been paid for the purchase of stamp paper which will be required for execution of tender documents and some time required for execution of other documents and as per the provision reverse charges it is not applicable on the stamp paper purchased.

The party submitted the copies of the ledger for the relevant period. But SCN did not challenge the explanation and the ledger sheets submitted by the party.

In view of the above, I find that the allegation of the SCN is merely on the basis of assumption and presumption, without any material evidence. So, I do not find any reason for service tax liability on the party for legal expenses under reverse charge mechanism

B.2.(iii) The SCN alleges that during the financial year 2012-13 to 2014-15, assessee has incurred an amount of Rs.1,71,747/-, Rs.1,65,400/- and Rs.3,76,500/- respectively as shown in the head of vehicle hiring charges in the profit and loss account of the company which is liable to reverse charges. In the party clarifies that most of the amount mentioned above has been paid *to the metered taxi or auto rickshaw operators by the staff of the company. The company has operating various sites at a time and the staff of the company has hired outside vehicles for smooth operation of the work., in this connection they hired metered taxi or metered auto rickshaws and according to the provision of the reverse charges the same is not applicable for payments made to metered taxis and metered auto rickshaw. Reply in response to this has already been submitted by the assessee vide their reply dated 25.12.2015 along with the copies of ledger account.*

In this also the SCN did not challenge the explanation and the ledger sheets submitted by the party

In view of the above, I find that the allegation of the SCN is merely on the basis of assumption and presumption, without any material evidence. So, I do not find any reason for service tax liability on the party for legal expenses under reverse charge mechanism

C. INTEREST AT THE APPROPRIATE RATE AS APPLICABLE FROM TIME TO TIME ON THE AFORESAID AMOUNT AS SPECIFIED IN (I) TO (II) ABOVE

In this connection the Party already agreed to pay the interest charged if any on the demand raised. Therefore, the interest amount is payable only on the service tax amounting to Rs. 464/- under the head of CTA,

D. SERVICE TAX AMOUNTING TO RS. 30,84,224/- ON MANPOWER RECRUITMENT/ SUPPLY AGENCY SERVICE FOR THE PERIOD 2012-13 TO 2013-14

ln this regard the party has acknowledged their service tax liability and deposited the service tax for the period 2012-13 to 2013-14, The copies of the two deposit challans both dated 28 01.2015 was also submitted by the party.

E. INTEREST AT THE APPROPRIATE RATE AS APPLICABLE FROM TIME TO TIME ON DELAYED PAYMENT OF SERVICE TAX OR Rs.30,81,224/-.

The section 75 of the Finance Act, 1994 provides for the Interest on delayed payment of service tax as under:-

Every person, Liable 1o pay the Tax in accordance with the provisions of section 68 or rules made any part thereof to the account of the Central Government thereunder, who fails to credit the lax or within the period prescribed, shall pay simple interest [at such rate nor below ten per cent, and not exceeding thirty-six per cent per annum, as it for the time being fixed by the Central Government, by notification in the Oficial Garette] for the period by which such crediting of the tax or any part thereof is delayed

Since the party has acknowledged their service tax liability and deposited the for the period 2012-13 to 2013-14, The party is liable to pay the service tax applicable interest under section 75, of the Finance Act, 1994.

F. INTEREST RS.1,36,055/- ON THE DELAYED PAYMENT OF SERVICE TAX FOR THE PERIOD 2010-11 & 2011-12.

The Annexure-2 and the charts containing the details of the month wise service tax payable /paid by the importer as enclosed with IAR report no.165/2014-15 (document relied upon), clearly show and calculate the intere::t liability of the party for delayed payment of service tax. The ycar-wisc liability of the interest for the year 20110-11 and 2011-12 is of Rs. 6,860/- and Rs.1,29,291/- respectively. The party has also never challenged this amount. Therefore, the party is liable to pay the interest of Rs.1,35,055/ - under section 75 of the Finance A t, 1994

PENALTY ON The AMOUNT OF SERVICE TAX AS SPECIFIED ABOVE

From the above discussion and findings it is evident that only a small amount of service tax on GTA i.c. of Rs.464/- is recoverable. The other aspect is of Payment of interest on the service tax amounts already paid by the party. Therefore, no penalty is imposable on the party

Besides this on the issue of Manpower recruitment / supply services the party has already paid the differential service tax. This payment of service tax cannot be said to be a voluntary act. The evasion was detected by the department and after having been caught on the wrong foot, the party cannot escape the liability for payment of penalty by simply depositing the service tax before the issuance of show cause notice. Therefore, penalty under Section 78 of the Finance Act, 1994 equal to the amount of the service tax is imposable."

4.3 We find that the Original Authority has in a very objective manner examined the issue and have concluded in favour of the Appellant in respect of the three demands made. Nothing has been pointed out in the impugned order or in the appeal that was filed by the Revenue before the learned Commissioner (Appeals) as to what further verification was needed. Impugned order just records that no proper verification was done. Having examined and concluded the demand in favour of the Appellant by the Adjudicating Authority Appellate Authority should not have set aside the order just for the reason which he has recorded that he should have done this or that. Though all the ledgers and related documents with regards to receipt of the amounts were produced by the appellant before the audit party and then before the range officer, these documents have not been adversely commented upon while making the demand in show cause notice. Adjudicating authority specifically records the findings after taking note of these documents and reconciliation statements prepared on the basis of these documents. He objectively satisfies himself about the claim made by the appellant and records his findings. In the adjudication process objective satisfaction of the Adjudicating Authority should be the basis of the examination and Appellate Authority should not sit in decision of such objective decision making till he finds anything perverse. Interestingly impugned order records:

"5.1 As regards the dropping the demand of Rs.46.74.088 – I find that the adjudicating authority has dropped the demand of Rs.40.74.088/- on erection, commissioning and installation service mainly on the ground that the same has been raised on assumption and presumption basis. It has been held that the figures of "income" shown in Balance Sheet for 2011-12 to-2012-13 were merely compared with the ST-3 returns. The Audit or the Range offices did not establish the basis or grounds for the demand or differential tax. Further it has been held that the difference in the values was due to the fact that Balance Sheet value included the service tax paid by the party, exempted service and amount of work carried forward on which service tax has been paid next year.

5.2 I find that that the adjudicating authority has simply accepted the contention of the appellant regarding the justification for difference between the figures in the Balance Sheets and the ST-3 returns relating calculation of the service tax on "erection commissioning and installation service". The adjudicating authority has not corroborated the said observation by any evidence and it is not clear as to how the adjudicating authority came to the conclusion that the difference in the values was due to the Balance Sheet showing all inclusive values. In the impugned order, there is no mention of any verification done to ascertain which exempted services were included in the Balance Sheet or whether the carried forward work as mentioned bi the appellant has been verified or ascertained from records or documents. The adjudicating authority has not gone through any documents or ledgers, vouchers to hold that indeed the party's contention is correct. It has been-alleged in the show cause notice itself that the party could not produce any documentary evidence in support of their claim as stated by them. It is also observed that since 2011-12, Service Tax was chargeable payments made on accrual basis *and not on receipt basis. Thus the contention of the appellant and the observation of the adjudicating that the difference in figures of Balance Sheets and ST-3 returns was due to payment of service tax on payment basis is not is not proper and correct. In view of the above, I hold that the adjudicating authority has erred in simply accepting the contention of the appellant and dropping the demand of Rs.46,74.088 without going into the facts or the merit of the case, only by holding that the demand has been issued on assumption and presumption. The dropping of the said demand is thus not justified.*

5.3 As regards the dropping of demand of Rs.19,717/- on freight paid, I find that the adjudicating authority has dropped the said demand on the grounds that the same was paid for manual rickshaw pullers, bullock carts and other mean modes of transport which were less than Rs.750 per entry. On perusal of the evidence available on record, it is observed that the ledger account in respect of freight has been submitted only for the year 2014-15 and the ledgers are not available for the period from 2010 onwards till 2014-15. Further even in the case available for 2014-15 it is seen that the expenses have been shown as "cash" and there is no mention whether the said cash was paid to rickshaws, bullock cart etc. The SCN itself clearly holds that they had paid the amount more than Rs. 750/- per entry during the period 2010-2011 to 2012-13, which has not been refuted by the adjudicating authority and the party's contention has been accepted on face value. It is observed that the adjudicating authority has not given any clear findings to arrive at the conclusion that the amount was paid for manual rickshaw pullers, bullock cart and other means of transport which were less than Rs.750/- per entry for the entire period of 2010-11 to 2014-15. Thus in the absence of the ledgers vouchers or any evidence to prove that the amount was indeed paid for rickshaw, bullock cart etc., and that the amount was less than Rs.750- per entry the adjudicating authority has erred in accepting the contention of the appellant put forth in this *regard, without going into the facts of the case In view of the above dropping of the said demand is not justified.*

5.4 As regards the dropping of the demand of Rs.39,987/- on "legal consultancy" I find that the adjudicating authority has dropped the said demand on the grounds that the same has been shown in the Balance Sheets as "legal expenses" was actually paid for purchase of stamp paper for tender of documents and not for legal consultancy. On perusal of the evidence available on record, it is observed from the ledgers that the expenses have been shown as Audit Fees which have apparently been paid to consultants, etc. It has nowhere been mentioned that the same was paid for purchase of stamp paper for tender documents. It is also observed that the appellant have themselves submitted in the defence reply that they agree to pay the service tax on reverse charge if any amount has been paid to the consultants in this head. The adjudicating authority has not considered this fact in the impugned order and simply accepted the contention of the appellant, the impugned amount was paid for purchase of stamp paper for tender documents without going into the facts or the merits of the case. I therefore hold that the adjudicating authority is not justified in dropping the said demand of Rs.39,987/- on "legal consultancy".

5.5 As regards the dropping of demand of Rs.35282/- on Vehicle hiring charges, I find that the adjudicating authority has dropped the sand demand on the grounds that the amount has been spent on metered taxi, auto rickshaw. On perusal of the evidence available on record, it is observed from the ledgers accounts pertaining to vehicle hiring charges that the amount has been shown as "Cash" and there is no mention whether the said cash was paid to metered taxi, auto rickshaw etc., or to cab hiring service providers. I observe that in the absence of the relevant supporting vouchers etc., or any other documentary evidence to prove that the amount was indeed paid for metered taxi auto rickshaw etc., the adjudicating authority has erred in accepting contention of the appellant put forth in this regard *without going into the facts of the case. I therefore hold that the adjudicating authority is not justified in dropping the said demand of Rs 35,282 on Vehicle hiring charges."*

From the perusal of the entire impugned order reproduced above, we do not find anywhere that First Appellate authority has in respect of any of then demands made, did the analysis of the documents which were produced before the adjudicating authority or has after proper examination of the said documents concluded that the findings recorded by the original authority were unreasonable and perverse. The sole ground which runs through the entire order, is that adjudicating authority has not looked into the documents. He rejects the findings recorded by the original authority without arriving at any findings on the basis of appreciation of the documents and evidence. Such an approach of First Appellate authority is contrary to the settled principles of law. In case of Malluru Mallappa(D) THR. LRS Vs. Kuruvathappa & ORS. [MANU/SC/0166/2020] Hon'ble Supreme Court observed:

> *"14. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs. [*(2001) 3 SCC 179*], Madhukar and others v. Sangram and Others*

[(2001) 4 SCC 756*], B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another[*(2011) 15 SCC 476*], H. K. N. Swami v. Irshad Basith (Dead) By Lrs.[*(2005) 10 SCC 243*] and M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar[*(1980) 4 SCC 259*]]"*

In the case of B V Nagesh v. H.V. Sreenivasa Murthy [(2010) 13 SCC 530], Hon'ble Supreme Court has observed as follows:

"4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179 : (2001) 1 SCR 948] , SCC p. 188, para 15 and Madhukar v. Sangram [(2001) 4 SCC 756] SCC p. 758, para 5.)"

4.4 We find that the entire amount of service tax due in respect of Manpower Supply Services was paid by the Appellant prior to the issuance of the show cause notice. Section 73(3) of the Finance Act, 1994 reads as follows:-

"(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise

> ***Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:..”***

If the said Section had been applied in letter and spirit to the demand made against the Manpower Recruitment/ Supply agency services, then taking note of the fact that appellant had deposited the entire amount of service tax due much before the issuance of show cause notice, no notice should have been issued. In a similar situation in respect of the demand made under GTA Services, adjudicating authority after taking note of the fact that appellant has admitted the liability and has paid the service tax, refused to invoke the provisions of Section 78 for imposition of penalty.

In fact the appellant had provided said services to M/s L & T and were under the bonafide impression that they were required to pay 25% of the amount and 75% was to be paid by the service recipient under reverse charge mechanism. However, when the fact was pointed out by the audit and appellant examined the issue, they agreed that this 75% was to be paid by them. Accordingly they deposited the entire amount. There being no malafide, the penalty imposed under Section 78 is not justified. Accordingly, we set aside the said penalty which has been imposed equivalent to the amount of taxes sought paid by the Appellant in respect of these services.

4.5 We do not find any merits in the impugned order.

5.1 In view of the above, appeal is allowed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS