CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.57801 of 2013

(Arising out of Order-in-Appeal No.46/ST/ALLD/2012 dated 13/03/2012 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s Anil Construction Company, **.....Appellant**
(Main Road Murdhawa, Renukoot, Sonbhadra)

VERSUS

Commissioner of Central Excise, Allahabad ....Respondent
(38, M.G. Marg, Civil Lines, Allahabad-211001)

APPEARANCE:

None, for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70683/2024

DATE OF HEARING : 15 July, 2024
DATE OF PRONOUNCEMENT : 24 October, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.46/ST/ALLD/2012 dated 13/03/2012 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad. By the impugned order, Commissioner (Appeals) has upheld the Order-in-Original No.(ST-141/2010) 128 of 2011 dated 20.07.2011, wherein following has been held:-

"ORDER

1. *I hereby confirm the demand of The service tax amounting to Rs. 6,69,879/- (Service Tax Rs. 6,53,810/- + Education Cess Rs. 12,366/- + Secondary & Higher Education Cess Rs. 3,703/-) as service tax under the provision of section*

73(2) of the Finance Act, 1994 against the party alongwith interest under the provisions of section 75 of the Finance act, 1994 as amended from time to time. This amount is held to be recoverable from the party.

2. *I impose penalty of Rs.5, 000/- u/s 77 of the Act for violation of Section 70 readwith Rule 7 of the Rules.*
3. *I impose penalty Rs. 6,69,879/- under Section 77 of the Finance Act, 1994. However, penalty imposed under this Section shall stand reduced to 25% of the Service Tax amount if the entire dues including Service Tax, Interest and penalties imposed as above are paid within 30 days from receipt of this order."*

2.1 Appellant is registered as service provider mainly to M/s Hindalco Industries Ltd., Renukoot, Sonbhadra.

2.2 On scrutiny of records of M/s Hindalco Industries Ltd. as service recipient, it was observed that appellant was providing taxable services under the category of Maintenance & Repair Service, Man Power Recruitment Agency Service & Construction (Commercial & Industrial) Services to the service recipient. However, they have not discharged the service tax due in respect of these services.

2.3 After completion of investigation and inquiry, a show cause notice dated 11.10.2010 was issued to the appellant asking them to show cause as to why:-

"1. The service tax amounting to Rs. Rs. 859,048/- (Service Tax Rs. 8,39,269/- + Education Cess Rs. 16076/- + Secondary & Higher Education Cess Rs. 3703/-) should not be demanded and recovered from them alongwith appropriate Interest under the proviso to Section 73(1) of the Act r/w Section 75 of the Act.

2. Penalty should not be imposed upon them under the erstwhile Section 75A read with Section 77 of the Act for violation of Section 69 of the Act/rule 4 of the Rules.

3. Penalty should not be imposed upon them under Section 77 of the Act for violation of Section 70 read with rule 7 of the Rules, in case of each default.

4. Penalty should not be imposed upon them under section 76 of the Act for violation Section 68 of the Act read with Rule 6 of the Rules.

5. Penalty should not be imposed upon them under Section 78 of the Act."

2.4 This show cause notice was adjudicated as per the Order-in-Original referred in para 1 above. Aggrieved appellant filed appeal to Commissioner (Appeals), which has been dismissed as per the impugned order.

2.5 Hence this appeal.

3.1 This appeal was filed by the office of Lakshmikumaran & Sridharan attorneys, however, vide letter dated 09.07.2024, they withdrew their Vakalatnama and therefore notices for hearing was given to the appellant directly.

3.2 None appeared on behalf of the appellant. In terms of Rule 20 of CESTAT Procedure Rules, the appeal is taken up for decision on merits after hearing the learned Authorized Representative appearing for revenue.

3.3 Learned Authorized Representative appearing for revenue reiterates the findings recorded in the orders of the lower authorities.

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

4.2 Interestingly, appellant in the present case even before the Original Authority also did not contested anything in the show cause notice except for certain computations. Relevant paragraphs of the order of Original Authority are reproduced bellow:-

"The party submitted defence reply on 13.05.2011 and also appeared for personal hearing on 13.07.2011. The contention of the party was also verified by the Assistant Commissioner, Central Excise, Division, Mirzapur on

16.06.2011. The party stated that they do not wish to contest the show cause notice on merit except on the ground of quantification of demand in as much as the gross payments received include the amount of service tax, amount pertaining to a particular service not taxable prior to a particular date, benefit of threshold limit exemption, service amounting to manufacture and material handling within the plant not falling under the purview of service tax. Calculation chart provided by the party is as under-

Summary of calculation for tax liability of M/s Anil Construction Co., Main Road, Murdhawa, Renukoot, Sonebhadra		
Details	*Amount*	*Amount*
Gross Turnover as per SCN		*1,89,90,951.00*
Less PF included in gross turnover	*18,25,616.00*	
Less service prior to 16.06.2005	*4,06,784.00*	
Less service tax paid by M/s Hindalco	*14,47,807.15*	*36,80,207.15*
Add. Service not to be included in service prior to 16.06.05		*22,953.00*
Net taxable turnover		*1,53,33,696.85*
Service Tax		*15,79,370.78*
Less service tax already paid as per SCN		*13,27,201.00*
Net tax payable		***2,52,169.78***

That the party submitted that he is a petty contractor who is not having enough knowledge about the complex provisions of service tax and at the same time there is no help available in the form of outside consultants/experts in the subject from whom proper guidelines could have been obtained.

That the party has taken registration on its own and has been depositing tax and return thereafter on regular basis.

That the party is ready to deposit the service tax, due as per the chart for calculation of tax submitted with the reply, along with interest.

In view of the submissions party prays for waiver of penalty.

At the time of personal hearing Shri Anil Pandey, Proprietor of the firm appeared before me on 13.07.2011 and stated that they are willing to deposit the tax as per calculation chart. They were innocent and ready to pay the *tax due upon them. They are regularly paying the service tax after obtaining the service tax registration and furnishing the returns to the department. Further, they pleaded that now being ready to pay the due tax upon them and being innocent, penalty may please be dropped."*

4.3 After considering the submissions made, Original Authority has allowed the claim made by the appellant towards

- the amount received for providing services prior to 16.06.2005, from the gross amount as the services provided become taxable services only with effect from this date; and
- the amount of service tax paid by Hindalco included in the gross amount received.

4.4 Thus he has worked out the demand of service tax as follows:-

"On considering these facts, the service tax amount wrongly calculated in the SCN on the value of non-taxable services (prior to 16.06.2005) Rs. 4,06,784/- and amount of service tax collected by the service provider from M/s Hindalco Rs. 14,47,807.15/-, total amount Rs. 18,54,591.15 or Rs. 18,54,591/- on which Service Tax + Education Cess comes out to Rs. 1,89,169/- (Rs.1,85,459/- Rs.3,710/- Education Cess). Thus remaining liability on the party comes to Rs. 6,69,879/- (Rs. 8,59,048/- Rs. 1,89,169/-) The calculation chart is given as under:-

S. No	Particulars	Amt.	Service Tax (10%)	Ed. Cess (2%)	H. Sec. Ed. Cess	Total
1.	Service Tax paid by M/s Hindalco Indus. Ltd.	14,47,807.15	1,44,781.00	2,896.00	-	1,47,677.00
2.	Amt. received prior/ upto 16.06.2005	4,06,784	40,678.00	814.00	-	41,492.00
Total		**18,54,591.15**	**1,85,459.00**	**3,710.00**	**-**	**1,89,169.00**

Thus the amount of Rs. 6,69,879/- (Rs. 6,53,810/- Service Tax + Rs. 12,366/- Education Cess +3,703/-HSEd Cess) is *liable to be confirmed against the amount as demanded in the SCN."*

4.4 The only dispute was in respect of demand of service tax on the amount towards provident fund. On perusal of the invoices, we do not find any amount to be indicating any amount as provident fund. After going through the definition of value of taxable services adjudicating authority has observed as follows:-

"No deduction under the Head "Provident Fund" is permissible in the above provisions and I therefore, hold that the taxable value of Rs.18,25,616/- for which deduction has been claimed by the party is part of the value of taxable services and is not allowed."

4.5 In the impugned order, First Appellate Authority has observed as follows:-

"In view of the above, I do not find any merit in the appellant's prayer insofar as the confirmation of demand of service tax on PF amount is concerned. In any case in the show cause notice dated 11.10.2010, there is just no mention of any amount representing PF. There is nothing on record to indicate and prove that amount claimed to represent provident fund actually related to PF. In any case in terms of following Circular of C.B.E.C. [F. No. B1/6/2005-TRU, dated 27-7-2005], PF is not excludible. The relevant portion of the said Circular is as under;

"22 ***Manpower Recruitment Service***

22.1 Prior to 16-6-2005, service tax was leviable on services provided by manpower recruitment agencies in relation to recruitment of manpower. Amendments have been made to levy service tax on temporary supply of manpower by manpower recruitment or supply agencies.

22.2 A large number of business or industrial organizations engage the services of commercial concerns for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Services rendered by commercial concerns for supply of *such manpower to clients would be covered within the purview of service tax.*

22.3 In these cases, the individuals are generally contractually employed by the manpower supplier. The supplier agrees for use of the services of an individual employed by him to another person for a consideration. The terms of the individual's employment may be laid down in a formal contract or letter of appointment or on a less formal basis. What is relevant is that the staff are not contractually employed by the recipient but come under his direction.

22.4 Service tax is to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount."

4.6 Thus, the findings or facts rendered by both the authorities that the amount claimed as Provident Fund is part of the gross amount received as consideration, the provision of the said services cannot be disputed with. That being so, service tax has been rightly demanded and confirmed after allowing the deductions towards the amounts received for the services provided prior to 16.06.2005 and after deducting the amount of service tax included in the gross amount.

4.7 On limitation and penalty, Original Authority has observed as follows:-

"Now, I take the issue of invoking the proviso of Section 73 (1) for demand and recovery under the extended period. It is evident from the fact of the case and documents on record that during the relevant period party has not disclosed anything to the department inspite of the

fact that they have rendered taxable services and received payment thereof and also the amount of Service Tax and later also obtained service tax registration and charged service tax from the clients. The gross amount received by the party against providing taxable services was not disclosed to the department with clear intent to evade the payment of service tax. If the department would not have initiated enquiry the party might have escaped from paying due tax to the government. I also take note of the charges of non-payment/short payment which have not been rebutted by the party. It is also a fact that the party failed to discharge the statutory burden of declaring the value of taxable service to the department which amounts to suppression of facts, and provision of extended period is invokable in this case. Accordingly, I hold that the proviso of section 73 (1) of the Finance Act has rightly been invoked and therefore the demand is not barred by limitation.

Further, as regards, the payment of interest is concerned the same is payable under Section 75 of the Finance Act, 1994 on the due amount of service tax payable. In this regard 1, place reliance on the judgment of Hon'ble Supreme Court reported in 2008(231) ELT-3(SC) which held that: interest is automatically payable once it is held that tax was not paid by due date.

Now I take up the proposal for imposition of penalty under Section 76, 77 and 78 of the Finance Act, 1994.

As regards imposition of penalty under Section 76 and 78 of the said Act is concern, I observe that Section 78 has been amended and proviso has been inserted in the said Section 78 to the effect, that the provision of Section 76 shall not apply, if penalty is payable under Section 78. I also observe that the amended provisions of Section 78 shall apply to the subject notice issued earlier as per explanation. I therefore, do not impose any penalty under Section 76.

As regards imposition of penalty under Section 77 of the said Act for failure to comply with the statutory provisions of the Service Tax Act and Rules made thereunder, I find that the party has failed to comply with the provisions and therefore for their act of omission and commission, I hold the penalty under Section 77 of the Finance Act, 1994.

As regards imposition of penalty under Section 78, I observe that the party has consciously and deliberately suppressed the value of taxable service and never disclosed the payment received or services rendered by them. As I have observed herein above, in this case the party was conscious that the Services being provided by them are Taxable Services liable to Service Tax and they collected the Service Tax from the Service Recipient but did not deposit the same in clear dis regard to the law. Hon'ble Tribunal in the case of Suhita Ethnic Marketing Services Pvt Ltd. Vs. CCE [2005] 2 STT 222 (Mumbai-CESTAT), Mett MacDonald Ltd. Vs. CCE [1994-2006] STT 239 (New Delhi-CEGAT) and ACME Tele Power Pvt. Ltd. Vs. CCE, Chandigarh AIT-2008-13 (CESTAT) it has been held that when the amount of service tax has been determined by the department during the course of investigation then the levy of penalty is justified. In view of the facts and circumstances of the case the proposal for imposition under Section 78 of the Finance Act, 1994 is justified and therefore, I hold the penalty.

I also observe that the party has not deposited the total amount of service tax received from the service recipient which clearly shows the bad intention of the party."

4.8 The above findings cannot be disputed, as the appellant was well aware that he was providing taxable services and short paid the service tax, even after issuing invoices indicating the services tax payable and collecting the same from the service recipient. They were not filing the ST-3 returns on time in the manner as specified in law. They have suppressed the information with intend to evade payment of taxes. Accordingly, the demand by invoking the extended period of limitation and penalty imposed cannot be disputed with. In case of Afsar Tour and Travels [2019 (28) G.S.T.L. 153 (Tri. - Hyd.)] Hyderabad bench has observed as follows:

> ***"9.*** *We have carefully considered the submissions made by both sides and arguments. It is not in dispute that the appellant had provided cabs along with drivers from M/s. BSNL & BDL and two other rent-a-cab operators and collected the amounts from them. They have also collected service tax from some and had not deposited the same before the issue of show cause notice. It was never in dispute the service rendered by them amounts to rent-a-cab service and tax is liable thereon. Even when they collected the service tax, they have not deposited with the Government. The assessee has also not filed ST-3 returns and thereby suppressed the fact that they have rendered taxable services and collected service tax and retained the same with them. The only defense by the appellant before the lower authority and the First Appellate Authority and even in the grounds of appeal before this Bench is that they will pay the service tax if their clients reimburse the same to them. Otherwise, they have not paid the service tax. The leviable of service tax does not change that whether or not they have collected same from their clients. We cannot accept a new ground of liability of service tax at this stage, proposed by the Learned Counsel for the appellant because there was never a point of contention at the time of Order-in-Original or Order-in-Appeal. We therefore, find the Learned Lower Authority was correct and confirmed the demands along with interest and imposing penalties and the First Appellate Authority was correct in upholding the Order-in-Original. We find no reason to interfere with the Order-*

> *in-Appeal. In conclusion, we find the appeal is liable to be dismissed and we do so."*

Similarly in case of Digital Magic Visual India Ltd [2019 (21) G.S.T.L. 49 (Tri. - Chennai)] Chennai Bench observed:

> ***10.****However, coming to the demand on Video Tape Production Services, we find that they had collected the service tax from their customers. Further, Ld. Advocate has also conceded the liability and hence, it is ordered that based on the exact quantum of tax liability, equal penalty shall be imposed pertaining to the amount arrived in the remand for re-quantification, i.e., whether Rs. 16,29,611/- or Rs. 14,60,620/-. The equal penalty under Section 78 shall be applicable in respect of the this demand. No interference is also made with respect to the penalties imposed under Section 70 and 77 of the Act.*

In case of Air India Limited [2017 (3) G.S.T.L. 374 (Tri. - Del.)] Delhi bench observed:

> ***"12.*** *Next, we consider the ground of limitation raised by AIL. The contention of AIL is that no allegation of suppression can be fastened against them since the activities of AIL were within the knowledge of the department during the relevant period. Specifically the appellant had cited a letter dated 7-3-2006 written to the Joint Director of Service Tax to inform the various heads under which it was raising bills on AASL. Further, it has been contended that AIL had not paid service tax under the bona fide belief that it is not payable since AIL had not received payment from AASL.*
>
> *In the annual report 2003-04, it is mentioned "Non-charging of service tax on certain services". This implies that even where service tax has been collected the same was not deposited pending registration. It has also been recorded by the statutory auditors that service tax was payable on the services rendered by AIL to AASL. However, on the pretext that consideration has not been received (despite realization*

of the same from sale of tickets conducted on behalf of AASL), AIL has not discharged the service tax liability. In the light of the observations of the statutory auditors, We are not convinced with the argument taken by appellants that service tax was not paid on the basis of bona fide belief that service tax was not payable. Consequently, we are concluding that Revenue is entitled to invoke the extended period of limitation in this case."

4.9 In view of the discussions as above, we do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Order pronounced in open court on-24 October, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp