CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70478 of 2022

(Arising out of Order-in-Appeal No.148-ST/Alld/2022 dated 13/07/2022 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s SR Services, ...**Appellant**

(Atlantis, S 20/51 B, Budh Vihar, Cantt. Varanasi-221002)

VERSUS

Commissioner of Central Excise &

CGST, Varanasi ....**Respondent**

(Maqbool Alam Road, Varanasi)

APPEARANCE:

None, for the Appellant
Shri A.K. Chaudhary, Authorised Representative for the Respondent

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

FINAL ORDER NO.70856/2024

DATE OF HEARING : 02 December, 2024
DATE OF DECISION : 02 December, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.148-ST/Alld/2022 dated 13/07/2022 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad. By the impugned order, Order-in-Original No. 163/ST/DIV/VNS/2021 dated 15.02.2022 holding as follows has been upheld:

ORDER

i. I, confirm the demand Service Tax (including applicable cess Rs.2,03,798 /- (Rupees two lacs three thousand seven hundreds and ninety eight Only) (including Ed. Cess, SHEC, SBC & KKC as applicable)and order for recovery of *the same under the provisions of provisio to Sub-Section (1) of Section 73 read with Section 73 (2) of Chapter V of the Finance Act, 1994 along with interest at appropriate rate under Section 75 of the Act.*

ii. I also impose a of the Rs. 10,000/- Rs. Ten Thousand Rupees only) upon the party under the provisions of Section 77(2) of the Finance Act, 1994 for having contravened the provisions of Section 70 of the Act read with Rule 7 of the Rules.

iii. I also impose a penalty of Rs. 2,03,798/-(Rupees two lacs three thousand seven hundreds and ninety eight Only) (including Ed. Cess, SHEC, SBC&KKC as applicable) upon under the provisions of Section 78 of the Finance Act, 1994 However, the party has the option to pay 25% of the penalty payable,-provided they pay the service tax, interest and penalties imposed, within a period of 30 days of receipt of this order.

2.1 Appellant is registered with the Department, and engaged in providing taxable services namely "Security Services/ Detective Services".

2.2 On the basis of third party CBDT- TDS/ITR data, it was revealed that during FY 2014-15 the appellant has received gross amount of Rs.2,14,47,686/- but did not pay the applicable service tax on the same. Appellant was requested to submit FORM 26AS, Balance Sheet,& ITR for the period FY 2014-15 to June -2017, in order to ascertain their exact tax liability.

2.3 The appellant has provided copy of Balance Sheet and Form 26AS for the F.Y 2014-15 to 2016-17. On scrutiny of the documents submitted by the appellant, it was observed that during the FY 2014-15 to 2016-17, the appellant has short paid service tax to the tune of Rs.2,03,798/-(including Cesses).

2.4 A Show Cause Notice dated 03.10.2019 was issued to the appellant,

- for demanding Service Tax (including Cesses) of Rs.2,03,798/-, under the proviso to Section 73(1) of the Act, along with interest under Sections 75;
- for imposition of penalty respectively & 78 of the Act;
- for imposition of penalty under Section 77 (2) of the Act, for contravention of provisions of Section 70 of the Act read with Rule 7 of the Service Tax Rules, 1994,

2.5 The show cause notice was adjudicated as per the order in original referred in para 1 above.

2.6 Aggrieved appellant filed the appeal before Commissioner (Appeal) which has been dismissed as per the impugned order.

2.7 Aggrieved appellant filed this appeal

3.1 None appeared for the appellant nor any request for adjournment has been received.

3.2 I have heard Shri A.K. Choudhary Authorised Representative for the revenue.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 I find that the issue is a very narrow compass as undisputedly appellant has paid the service tax in terms of Point of Taxation Rules. However, there is delay in payment of tax. The excerpts from the impugned order are reproduced below:-

"4.1 The appellant has contested that short payment of service tax amounting to Rs. 2,03,798/- in 2014-15 may be adjusted against the excess payments in 205-17 and 2016-17. I observe that the provision of adjustment of excess service paid with shortage of service tax in as below

> ***Rule 6 of Service Tax Rules 1994:***
>
> *(4A) Notwithstanding anything contained in sub-rule (4), where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid toward service tax liability for a month or quarter, as the case may be the assessee may adjust such excess amount paid by him against his*

service tax liability for the succeeding month or quarter, as the case may be.

(4B) The adjustment of excess amount paid, under sub-rule (4A), shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification.

4.2 From the above legal provision, it can be seen that rule for set off of excess service tax is only permissible when the appellant paid excess service tax first and later want to set-off with subsequent short paid. The law nowhere approves/ prescribes wherein an earlier short paid service tax can be set off with subsequent excess paid service tax. Therefore, I find no force in the contention of the appellant.

4.3 The appellant has contested that they have submitted almost all the Work. Orders/Agreements/Deed but same were not considered. I observe that in the instant case demand was raised for short payment of service tax amounting to Rs.. 2,03,798/- for the F.Y 2014-15 only. In the show cause notice dated 03.10.2019, it has been clearly mentioned in the Table-A & Table-B under Para No.7 that the appellant was not required to pay service tax on security services w.e.f 01.04.2015, therefore, demand has been raised for the F.Y 20 14-15 only after allowing benefit of partial reverse charge as provided under Notification No. 30/2012-ST dated 20.06.2012. Thus, I find no substance in the contention of the appellant that theadjudicating authority has not considered work orders/agreements/deed submitted by them

4.4 The appellant has contested that they have deposited service tax as & when the bill to the service receivers are realized and prepare account for income tax purposes on mercantile system of accounting. I observe that after introduction of Point of Taxation Rules,2011, the appellant *was required to pay service tax on issuance of bills. Therefore, they were required to pay service tax on invoices/bills issued during the F.Y 2014-15 even if payment has been received in the subsequent financial years. Thus, I find no force in the submission of the appellant."*

4.3 There cannot be any dispute that appellant could have paid the service tax payable at any time upto the due date and thereafter along with the interest at the prescribed rate after the due date. Part G of the ST-3 return provides for indicating payment of tax arrears and interest due thereon. Once the appellant do not discharge the tax liability by the due date the same become recoverable from him as tax arrears on the basis of the proceedings initiated in terms of Section 73 of the Finance Act, 1994, or appellant could have paid the same on his own ascertainment and inform the department. Observations made by the Commissioner (Appeal) by referring to Rule 6A are totally misdirected. Appellant has categorically taken this stand before the adjudicating authority and the First Appellate Authority. Both the authorities do not deny the fact of excess payment of tax during the financial year 2015-16 and 2016-17.

4.4 The claim made by the appellant that they have paid the tax during subsequent years needs to be accepted. However Commissioner (Appeal) has rightly observed that after the introduction of Point of Taxation Rules, 2011 the appellant was required to discharge the tax on accrual basis and not on receipt basis. Thus the due date for payment of tax is to be determined from the date of invoice and for any delay in payment of tax appellant will be liable to interest. Hon'ble Supreme Court in the case of Steel Authority of India Limited has held as follows:

"47. *Coming to Section 11AB, it came to be inserted by Act 33 of 1996. Thereafter, it was amended by Act 10 of 2000, Act 14 of 2001, Act 20 of 2002 and Act 49 of 2005. We have already extracted the relevant provisions of the said section. Section 11A must necessarily be read with Section 11AB. This is for the reason that interest under Section 11AB is premised upon the duty of excise not being* *levied or paid or short levied, short paid or erroneously refunded. Such duty is either determined under sub-section (2) of Section 11A or without such determination it being paid under Section 2B of Section 11A. In any of the circumstances, namely, non-levy, non-payment, short-levy and short-paid, any duty has been determined or paid as has been provided under Section 11A, necessarily the assessee becomes liable to pay interest from the first date of the month succeeding the month in which duty ought to have been paid.*

48. *The question which we are necessarily called upon to decide is when price is revised upward with retrospective effect and the excise duty on the same is paid immediately on a future date whether interest is payable under Section 11AB from the first day of the month succeeding the month in which the duty ought to have been paid under the Act. To keep the matter in focus, the exact question is which is the month in which the duty ought to have been paid.*

51. *The expression "the month in which the duty ought to have been paid" under this Act, when it is read alongwith Rule 8, which declares that the duty on the goods removed from the factory or warehouse during a month is to be paid on the 6th day of the following month would mean that the Legislature has understood the expression "the month in which the duty ought to have been paid" under the Act in the same sense as it is declared in Rule 8.*

52. *In this regard it is also pertinent to notice the finding in the order of the original authority that perusal of the Circular dated 1-7-2004 makes it unambiguously clear that the price was understood as provisional price. This belies quite clearly the case of the appellant that the price was final. Could the assessee in the light of the Circular even for a moment in the same breath contend that the assessee was unhesitatingly ready and able to determine the price and hence the value. We would think that it certainly* *presented a situation where the assessee should have resorted to Rule 7.*

53. *As we have already noted, SAIL has paid the differential duty of Rs. 142.78 crores even without waiting for any notice under Section 11A(1). The assessee volunteered and made payment in October 2006. We find merit in the finding by the authority that this is a case where therefore the payment made by the assessee is to be treated as one falling under Section 11A(2)(b). This meant also that there was no need for determination of the duty within the meaning of Section 11A(2)(a) or issuance of notice under Section 11A.*

59. *We are here concerned in these cases with one of the ingredients of assessment, namely, valuation. There is no dispute regarding the quantity removed. There is no issue relating to rate of duty. The dispute is relating to the correct value. To appreciate it better, let us take an example of an assessee who deliberately undervalues the goods which he removed. This results in assessee arriving at an amount which would not be the correct amount. He pays this incorrectly assessed amount. Would it be a case of short-levy or short payment? If short-levy is to be understood as confined to cases where the assessment is not the full assessment, taking into account the parameters involved correctly, namely, rate of duty, valuation and quantity it could be classified as a case of short-levy as one of the components of proper assessment namely, valuation has been incorrectly arrived at. The payment in such a case is made in terms of the incorrectly assessed figure. The payment matches the assessment. In fact, it is worthwhile to recall that under Rule 10 of 1944 Rules which we have adverted to, the expression "short-payment" is not used. Instead the words duty has not been paid in full, has been used. No doubt, in a case where in law though the amount which is paid is in harmony with the amount which is* *assessed, it is not the amount which ought to have been paid by the assessee. The absence of full payment of duty or short payment has indeed also in one sense taken place. In a case where there is an escalation clause goods are cleared on a provisional price. Consequently, the value is provisional. There is a subsequent escalation with retrospective effect. It will affect the valuation which was employed in the self-assessment by the assessee which would necessarily be provisional. Enhancement of the value will date back to the dates of removal in view of the retrospective operation. Admittedly the liability for payment of differential duty has arisen. Upon the true value, in a case of retrospective escalation of price though later agreed being received and consequential differential duty being admittedly payable, it would result in Section 11A read with Section 11AB applying.*

60. *It is true that the statutory authority has found it to be a case of short payment. In the notice issued claiming interest it is stated there is short-levy (see page 89 Vol. II SLP paper book). Proceeding on the basis that it is a case of short-levy, Section 11A read with Section 11AB is attracted and the interest clock ticks from the date as we have found namely as provided in Rule 8 read with Section 11AB. If the concept of short payment is stretched to include all amounts which ought to have been paid, it may also be treated as a case of short payment though juridically it may be true that it may strictly fall under short-levy.*

61. *While it may be true that interest cannot be demanded by way of damages or compensation and it is also further true that unless there is a substantive provision providing for payment of interest in a fiscal statute, interest cannot be demanded, we would think in the context of the Act and the Rules in question, under Section 11AB, particularly, when there is no dispute relating to liability to pay the differential duty and we notice that absence of dispute is a fair* *acknowledgement of the fact that the facts of the present cases are unlike the situation in MRF decision where the price was fixed at the time of removal, interest is payable as provided in Section 11AB and from the point of time indicated therein. But in these cases, the price was variable under the escalation clause which was very much within the knowledge of the assessee and the demand for interest is sustainable.*

62. *As far as the scope of the second explanation of Section 11A(2)(b) is concerned, it contemplates payment voluntarily by the assessee. It is without any notice being issued under Section 11A. There is also reference to liability on the part of the assessee to pay interest under Section 11A(2)(b), not only on the amount which is paid within the meaning of Section 11A(2)(b) but on any short payment as may be determined by the excise officer. This only means that payment can by an assessee of any of the four amounts with which we are more concerned namely, non-levy, non-payment, short-levy or short-payment. Since there is no notice under Section 11A and non-determination of the amount as such pursuant to which the amount is paid it may happen that there may be shortfall in the amount which is paid by the assessee in comparison to what the assessee is legally required to pay. The short payment which is therefore referred to in the second Explanation to Section 11A(2)(B) can only be the aforesaid short payment and it is not referring to the short payment of duty which was originally occasioned and which is the subject matter of Section 11A(2)(b) and Section 11AB.*

63. *We are of the view that the reasoning of this Court in the order referring the cases to us (to this Bench) that for the purpose of Section 11AB, the expression "ought to have been paid" would mean the time when the price was agreed upon by the seller and the buyer does not square with our understanding of the clear words used in Section 11AB and* *as the rules proclaim otherwise and it provides for the duty to be paid for every removal of goods on or before the 6th day of the succeeding month. Interpreting the words in the manner contemplated by the Bench which referred the matter would result in doing violence to the provisions of the Act and the Rules which we have interpreted. We have already noted that when an assessee in similar circumstances resorts to provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month "for which" the duty is determined. Duty and interest is not paid with reference to the month in which final assessment is made. In fact, any other interpretation placed on Rule 8 would not only be opposed to the plain meaning of the words used but also defeat the clear object underlining the provisions. It may be true that the differential duty becomes crystallised only after the escalation is finalized under the escalation clause but it is not a case where escalation is to have only prospective operation. It is to have retrospective operation admittedly. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said differential value that admittedly that differential duty is paid. We would think that while the principle that the value of the goods at the time of removal is to reign supreme, in a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the time of removal. The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal. Most significantly, Section 11A and Section 11AB as it stood at the relevant time did not provide read with the rules any other point of time when the amount of duty could be said to be payable and so equally the interest. We would concur with the views expressed in SKF case (supra) and International Auto (supra). We find no merit in the appeals. The appeals will stand dismissed."*

4.5 Thus in view of above appellant would be liable to pay interest for the period of delay in making the payment of service tax beyond the due date.

4.6 As I find appellant had discharged the tax liability and have also filed the ST-3 returns for the relevant period, the invocation of provisions of Section 77 and 78 for imposing the penalty on the appellant cannot be justified.

5.1 Appeal is partly allowed by setting aside the demand of service tax and the penalties imposed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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