CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70280 of 2020

(Arising out of Order-In-Original No. 07-PRCOMMR-ST-NOIDA-2020-21, dated-05/06/2020 passed by Commissioner, CGST, Noida)

M/s SBL Construction Pvt. Ltd. **.....Appellant**
(E-170, Sector-63,
Noida, U.P. 201301)

VERSUS

Commissioner, Central Tax, Noida **....Respondent**
(C-56/42, Renu Tower, Sector-62, Noida)

AND

Service Tax Appeal No.70281 of 2020

(Arising out of Order-In-Original No. 07-PRCOMMR-ST-NOIDA-2020-21, dated-05/06/2020 passed by Commissioner, CGST, Noida)

Bhagirath Singh, MD **.....Appellant**
(M/s SBL Construction Pvt. Ltd.
E-170, Sector-63,
Noida, U.P. 201301)

VERSUS

Commissioner, Central Tax, Noida **....Respondent**
(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Raghvendra Sharma, Advocate 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.-70868-70869/2024

DATE OF HEARING : 21.11.2024
DATE OF DECISION : 21.11.2024

SANJIV SRIVASTAVA:

This Appeal is directed against the Order-In-Original No. 07-PRCOMMR-ST-NOIDA-2020-21, dated-05/06/2020 passed by Commissioner, CGST, Noida. By the impugned order following has been held:

ORDER

(i) I hereby confirm the demand of the service tax amounting to Rs. 3,13,63,988/- (Rupees Three Crores Thirteen Lakhs Sixty Three Thousand Nine Hundred Eighty Eight only) and order to recover this amount from M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) under Section 73(2) of the Finance Act, 1994, I also order to appropriate the amount of Rs. 6,01,657/- [Rs. Six Lakhs One Thousand Six Hundred Fifty Seven only] deposited by the party against the above said confirmed demand as discussed supra.

(ii) I also confirm the demand of the service tax amounting to Rs. 55,61,7231- (Rupees Fifty Five Lakhs Sixty One Thousand Seven Hundred Twenty Three only) and order to recover this amount from M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) under Section 73(2) of the Finance Act, 1994. I also order to appropriate the amount of Rs. 55,43,675/- [Rupees Fifty Five Lakhs Forty Three Thousand Six Hundred Seventy Five only] as deposited by the party against the above said confirmed demand as discussed supra.

(ill) I also confirm the demand of the service tax amounting to Rs. 56,43,160/- (Rupees Fifty Six Lakhs Forty Three Thousand One Hundred Sixty only) against M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) under Section 73(2) of the Finance Act, 1994. Since, the same i.e. Rs. 56,43,160/- has got been deposited from the party, I order to appropriate it against the above said confirmed demand as discussed supra.

(iv) I drop the service tax demand of Rs. 1,49,30,240/- as discussed supra.

(v) I confirm the demand of due interest on the amount of tax confirmed as at the para (i), (ii) & (iii) above, and order to recover the same from M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) above, under Section 75 of the Finance Act, 1994 as discussed supra.

(vi) I impose penalty of Rs.4,25,68,871 /- (Rupees Four Crores Twenty five Lakhs Sixty Eight Thousand Eight Hundred Seventy One only) [Rs. 3,13,63,988 + Rs. 55,61,723 + Rs. 56,43,160] upon M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) and order to recover from them under Section 78 of

the Finance Act, 1994 on the amount of tax confirmed above as discussed supra.

(vii) I also impose a penalty of Rs. 1,00,000/- (Rs. One Lakh only) on Shri Bhagirath Singh, Managing Director of M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida, Distt. Gautam Buddha Nagar (U.P.) and order to recover it under Section 78 A (a) of the Finance Act, 1994, as discussed supra."

2.1 The Appellant No.1 is engaged in providing taxable services classifiable under the category of 'Construction of Residential Complex' and 'Works Contract Services' to various clients and the Appellant No.2 is the Managing Director of the Appellant No.1 in-charge of and responsible for conduct of business of the Company.

2.2 During the course of Audit of records of M/s Aadi Best Consortium (P) Ltd. one of the client of the Appellant, it was observed that they have provided free of cost material during the year 2013-14 amounting to Rs.23,80,19,074/- to the Appellant and while discharging the Service Tax liability Appellant excluded the value of such free supplied material for determining the taxable value of the short paid service tax.

2.3 Further investigations were undertaken and it was observed that Appellant No.1 is engaged as works contract under construction service and supply of man power service.

2.4 On the basis of the information supplied by the Appellant it was observed that by non-inclusion of the value of free of cost material supplied by their client, Appellant had for the period 2012-13 to 2014-15 short paid service tax to the tune of Rs.1,49,30,240/-.

2.5 Further on examination of Form 26AS and balance-sheet for the period from 2010-11 to 2014-15 and there reconciliation with the ST3 Return filed year wise it was observed that the Appellant has short paid service tax detailed below:-

Year	26AS	Balance sheet	ST-3	ST Paid	Difference in S. value	ST to be demanded	Remarks

2010-11	13,85,63,707	12,56,75,971	12,48,69,695	1,28,61,581	8,06,276	NIL	As Sundry ledger shows more amount than the differential amount
2011-12	**24,24,36,658**	**25,48,86,160**	**20,06,53,817**	**2,06,67,344**	**5,42,32,343**	**55,85,931**	

Service Tax to be Computed on the basis of amount shown in 26AS which is higher than the Balance sheet amount:-

Year	Balance sheet	Amount shown in 26AS		Value shown in ST - 3 Plus ST paid	Difference (value including Service tax)	Taxable Value	Service Tax payable
2012-13	309,213,050	Res. Com. Const.	280,905,493	274,726,681	6,178,812	5,499,121	679,691
		Work Contract	70,220,989	49,414,919	20,806,070	19,853,120	952,950
		Total	**351,126,482**	**324,141,600**	**26,984,882**	**24,016,449**	**163,241**
2013-14	457,354,946	Res. Com. Const.	228,833,132	121,363,514	107,469,618	95,647,577	11,822,041
		Work Contract (Adi Best)	161,443,253	153,520,736	7,922,517	7,559,654	362,863
		Work Contract (IVRCL)	104,136,770	-	104,136,770	Exempted	-
		Work Contract (ECCIL)	598,356	-	598,356	Exempted	-
		Total	**495,011,511**	**274,884,250**	**220,127,261**	**10,320,723**	**12,184,904**
2014-15	600,914,083	Res. Com. Const.	143,734,581	36,362,461	107,372,120	95,560,805	11,811,315
		Work Contract (Adi Best)	127,621,172	124,363,713	3,257,459	3,108,262	149,197
		Work Contract (IVRCL)	368,008,532	-	368,008,532	Exempted	-
		Total	**63,93,64,285**	**16,07,26,174**	**47,86,38,111**	**9,86,69,067**	**1,19,60,512**
						Total	3,13,63,988

2.6 During the course of investigation and inquiry Appellant paid certain amounts which they claim could be appropriated against the demand made:-

S.No.	Issue	Period	ST to be demanded along with interest	Amount to be appropriated
1	Non-inclusion of FOC material in total amount charged	2012-13 to 2014-15	1,49,30,240	Nil

2	Short payment of S. Tax	2011-12 to 2014-15	3,13,63,988	6,01,657
3	Delayed payment of S. Tax	Oct.' 2014 to Mar.' 2015	56,43,160	56,43,160
4	Under RCM	Jul. 2012 to Mar. '2015	55,61,723	55,43,675
	Total:-		**5,74,99,111**	**1,17,88,492**

2.7 Alleging suppression for invoking extended period of limitation a Show Cause Notice dated 16.05.2016 was issued to the Appellant asking them to show cause as to why:-

(i) Service Tax, amounting to Rs. 5,74,99,111.00 [Rupees Five Crores Seventyfour Lacs Ninetynine thousand One hundred and Eleven only] should not be demanded & recovered from themin terms of proviso to Section 73(1) of the Finance Act 1994 and Rs. 1,17,88,492.00, deposited by them in this respect should not be appropriated against the above demand,

(ii) Interest at appropriate rate should not be recovered from them under section 75 of the Act, ibid for not depositing the above said service tax in prescribed time period.

(iii) Penalty should not be imposed upon them under section 78 of the Act ibid for suppressing the taxable value and contravention of the provisions of Section 68 of the Act, ibid read withRule 6 of the Rules, ibid.

(iv) Penalty should not be imposed upon Shri Bhagirath Singh, Managing Director of M/s SBL Construction (P) Ltd., E-170, Sector-63, Noida Distt. Gautam Buddha Nagar under section 78A of the Act ibid for knowingly concerned with the above detailed contravention of the company amounting to the contraventions mentioned at sub-section (a) & (d) of section 78A of the said Act.

2.8 The Show Cause Notice have been adjudicated as per the impugned Order-In-Original mentioned at Para 1 above. Aggrieved Appellants have filed these Appeals.

3.1 We have heard Shri Raghvendra Sharma for the Appellant and Shri Santosh Kumar, Authorized Representative for the Respondent.

3.2 Arguing for the Appellant learned counsel submits that:

- the demand for the period 2010-11 to 2013-14 is time barred as Show Cause Notice was issued on 29.05.2016 as extended period as per proviso to Section 73(1) of the Finance Act is not available as the records of the Appellant were regularly audited. Service Tax Audit for the period from February 2014 to March 2014 was concluded on 26.05.2014 without any objections. Reliance is placed on the decision of the Tribunal in the case of:
    - **K N International Ltd. [Final Order No.70038/2024 dated 30.01.2024 in Service Tax Appeal No.70695 of 2016],**
    - **J M Manpower & Security Pvt. Ltd. [Final Order No.70037 of 2024 in Service Tax Appeal No.70394 of 2023]**.
    - **GD Goenka Pvt. Ltd. [Final Order No.51088 of 2023 in Service Tax Appeal No.51787 of 2022]**
- Since the ingredients invoking extended period are not available the demand made by invoking extended period cannot be sustained.
- Demand made for delayed payment of service tax overlaps with the demand made by invoking extended period. They have already discharged this amount and sought appropriation of the same. The demand made on the basis of Form 26AS should have been reduced by the overlapping amount.
- For the period 2011-12 to 2014 there is no mismatch in the figures of Form 26AS and those indicated in ST3 Returns.
- The demand of interest and penalty imposed under Section 78 cannot be justified as extended period could not have been invoked, penalty could not have been imposed upon the Appellant.

- The Appellant has deposited the interest of Rs.24,98,649/- on *bona fide* delayed payment of tax which happened due to financial crunch and penalty of Rs.18,200/- before issuance of Show Cause Notice the same has not been taken into consideration while adjudicating the case.
- The adjudication order itself is time barred as have been asked much after the period of 01 year as per Sub-Section (4B) of Section 73 of the Finance Act which provides that proceedings should be complied within one year.

3.3 Authorized Representative for the Revenue has reiterated the findings recorded in the impugned order.

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

4.2 For confirming the demands impugned order records as follows:-

> *"5.1. I have carefully considered the facts of the case and the written defense replies submitted by the party. I have also taken into consideration the submissions made during the course of personal hearing held on 11.09.2019 and legal status concerning the period of dispute. I find that the following issues are to be decided in the present case: -*
>
> *(1) Whether, the party was liable to include the value of free of cost material provided by the service recipient Mis Aadi Best Consortium (P) Ltd, and to pay the differential service tax amounting to Rs. 1,49,30,240/- under the 'Works Contract Service' for the period 2012-13 to 2014-15;*
>
> *(ii) Whether, the party has short paid the service tax of Rs. 3,13,63,988/- as reconciled from the Balance Sheet, 26AS & the ST-3 returns for the period 2011-12 to 2014-15;*
>
> *(iii) Whether, the party has not paid service tax of Rs. 55,61,723/- under the reverse charge mechanism for the period Jul, 2012 to Mar, 2015;*
>
> *(iv) Whether, the party has delayed payment of service tax of Rs. 56,43,160/-7-for the period Oct, 2014 to Mar, 2015,*
>
> *5.2. <u>VALUE OF FOC MATERIAL NOT INCLUDED IN THE TAXABLE VALUE-</u>*

5.2.1. It has been alleged in the show cause notice that, the party has not paid due Service Tax, amounting to Rs. 1,49,30,240/- during the period 2012-13 to 2014-15 by way of non-inclusion of value of FOC material supplied by the service receiver M/s Aadi Best Consortium (P) Ltd. while arriving at the total amount charged by them and paid the service tax on forty percent of the said amount resulting thereby the short payment of Service Tax.

5.2.2 The party in their defense has submitted that, M/s Aadi Best Consortium (P) Ltd has not supplied the figures of FOC material to them and as such they could not include the value of FOC material in the Total Taxable Value. The party has also submitted that the service tax on FOC material is not liable to be included in the taxable value in view of the larger bench, Principal Bench, CESTAT, New Delhi in the case of Bhayana Builders (P) Ltd. Vs Commissioner of Service Tax, Delhi [2013(32) STR49(Tri. LB)).

5.2.3. I find that in the case of M/s Bhayana Builders (P) Ltd Vs Commissioner of S. Tax, Delhi, the CESTAT (LB) Delhi in their Interim Order No. ST/394-417/2013-Cus (DB), dated 6- 9-2013 has clarified as under: -

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"16. In conclusion we answer the reference as follows:

(a) The value of goods and materials supplied free of cost by a service recipient to the provider of the taxableconstruction service, being neither monetary or non-monetary consideration paid by or flowing from the servicerecipient, accruing to the benefit of service provider, would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act, 1994; and

(b) Value of free supplies by service recipient do not comprise the gross amount charged under Notification No. 15/2004-S.T., including the Explanation thereto as Introduced by Notification No. 4/2005-S.T."

I find that, the larger bench of Hon'ble CESTAT, Delhi in their Orderdated 06.09.2013 has clarified that, the value of goods and materials supplied free of cost by as service recipient to the provider of the taxable construction service would be outside the taxable value or the gross amount charged. The above decision has also been upheld by the Apex Court on

19.02.2018 [2018 (10) G.S.T.L. 118 (S.C.)]. The relevant para of the order is as under: -

> *"21. For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue."*

In view of the above decisions, I do not find it legitimate to confirm the demand against the party to the tune of Rs. 1,49,30,240/- as the subject issue has attained finality.

5.3. SHORT PAYMENT OF SERVICE TAX OF RS. 3,13,63,988/--

5.3.1. It has been alleged that, on examination of the Form 26AS & Balance sheets for the period 2010-11 to 2014-15 vis-a-vis the ST-3 returns filed, year-wise, it found that, the party has short paid of service tax during the period of demand. However, the party has denied the allegations. They submitted that, the department had computed the differential service tax liability between Balance sheet/26AS and ST-3 returns for the period 2012-13 to 2014-15 on the basis of the amount of 26AS and Balance Sheet whichever is higher. However, they (the party) had already provided the reconciliation statement reconciling the figures as shown in 26AS, Balance sheet and ST-3 returns which is having no difference liable for service tax.

5.3.2. I find that, the service tax has been computed on the basis of the difference of amount between 26AS, the respective balance sheets, whichever is higher and the ST-3 returns, for the years 2011-12, 2012-13, 2013-14 & 2014-15-

Year	Balance sheet	26AS	Value in ST-3	Difference value (Cum tax)	Taxable value	Service Tax payable
11-12	25,48,86,160	24,24,36,658	20,06,53,817	5,42,32,343	5,42,32,343	55,85,931
12-13	30,92,13,050	35,11,26,482	32,41,41,600	2,69,84,882	2,40,16,449	16,32,641
13-14	45,73,54,946	49,50,11,511	27,48,84,250	22,01,27,261	10,32,07,231	1,21,84,904
14-15	60,09,14,083	63,93,64,285	16,07,26,174	47,86,38,111	9,86,69,067	1,19,60,512
					G. Total	**3,13,63,998**

5.3.3. The demand for the year 2014-15 has been raised in the show cause notice as under –

Year	Balance sheet	Amount shows in 26AS		Value show in ST-3 inclusive of service tax	Difference value (including S. Tax)	Taxable value	Service Tax payable
2014-	60,09,14	Res. Com. Const.	14,37,34,581	3,63,62,461	10,73,72,120	9,55,60,805	1,18,11,315

15	,083	Work contract (Adi Best)	12,76,21,172	12,43,63,713	32,57,459	31,08,262	1,49,197
		Work Contract (IVRCL)	36,80,08,532	0	36,80,08,532	Exempted	0
		Total	63,93,64,285	16,07,26,174	47,86,38,111	9,86,69,067	1,19,60,512

Out of the total consideration amounting to Rs. 63,93,64,285/- as per 26AS, the amount of Rs. 36,80,08,832/- has been deducted being the exempted services provided to M/s IVRCL and the remaining amount of Rs. 27,13,55,753/- was alleged to be taxable in the show cause notice. Out of this amount of Rs. 27,13,55,753/-, the party has shown the amount of Rs. 16,07,26,174/- in their ST-3 returns for the respective period and paid service tax. However, the demand has been raised on the differential amount of Rs. 11,06,29,579/- by treating it as cum tax value.

5.3.4. The party in their defense reply dated 19.06.2017 has not discussed the demand for the year 2011-12 to 2013.14 on merits and contested on the issue of time bar only. However, they submitted an annexure for the finance year 2014-15 as under: -

Description	*Amount in Rs.*
Turn Over as per Balance Sheet	*60,09,14,083*
Amount received as per 26AS	*63,93,64,285*
Amount shown in ST-3	*60,09,14,083*

The party has also submitted that, the amount of Rs. 1,88,82,445/- was related to exempted service which were not considered while computing the service tax. Further, they submitted that, the amount of Rs. 1,95,67,757/- has been taken into account however, the bills against such consideration were raised in 2015-16.

5.3.5. I find that, the party has not provided any documentary evidence in support of their submission that the amount of Rs. 1,88,82,445/- has been received against the exempted services provided by them. Similarly, for the amount of Rs. 1,95,67,757/-, the party has submitted that, the bills were raised in 2015-16 however, the TDS has been deducted in 2014-15 but no supporting documentary evidence has been produced before me for consideration.

5.3.6. The demand has been raised for the amount of Rs. 11,06,29,579/-, however, the party has provided the details for the amount of Rs. 3,84,50,202/- only and that too without any legal support.

In view of above and the provisions of extended period applicable in the instant case as discussed in subsequent paras, I confirm the demand of service tax of Rs. 3,13,63,988/- against the party on the difference of amount between the 26AS or the respective *balance sheets (whichever is higher) with the respective ST-3 returns, during the period of demand on which they were liable to pay service tax.*

I find that, the party has deposited an amount of Rs. 6,01,657/- during the course of investigation. I find it legitimate to appropriate this amount against the confirmed demand of Rs. 64,44,817/-

5.4. SHORT PAYMENT OF Rs. 56,43,160/- for the period October, 2014 to Mar, 2015-

It has been alleged that, the party has not deposited the Service Tax for the period October, 2014 to March, 2015 amounting to Rs.56,43,160/- on or before due date. The same amount has been got deposited during the investigation and subsequently, they shown in ST-3 return of 2nd half-year of 2014-15.

I confirm the above said demand of Rs. 56,43,160/- and as the party has deposited the same, I appropriate it against the demand.

5.5. NONPAYMENT OF SERVICE TAX OF RS. 55,61,723/- UNDER REVERSE CHARGE MACHANICS -

It has been alleged in the show cause notice that, the party being a private limited company, i.e. a body corporate is, liable to pay 75% of Service Tax (under RCM) in respect of the supply of man power services when provided or agreed to be provided by anyindividual, HUF or partnership firm in view of the S. No. 8 of the Notification No. 30/2012 dated 20.06.2012 as amended. In this respect, the party have provided the ledgers of Petty contractors for the period from 01.07.2012 to 31.03.2015 on the basis of which their liability under RCM has been computed as under-

Period	*Amount paid*	*Taxable value@ 75%*	*ST Payable*
2014-15	*5,99,97,008*	*4,49,97,756*	*55,61,723*

As is evident from the above that during financial year 2014-15, the party neither deposited Service Tax payable under RCM amounting to Rs. 55,61,723/- nor shown it in their respective ST-3 returns. However, during investigation of the case, the party have deposited total Rs.55,43,675/- in this regard but did not deposit any interest.

However, the party in their defense reply has stated that, they could not deposit the RCM in 2014-15 due to financial crunch and the facts were correctly informed to the department during investigation itself. However afterwards they have paid the *entire service tax on RCM and filed the revised return in Dec 2015. There is no suppression of RCM value in this regard and the amount in ST-3 return (14-15 only) could not be shown due to pending payments.*

I find that, the party has not deposited the service tax under reverse charge mechanism for the year 2014-15 till the investigation started. The facts were revealed during the investigations of party's records and the amount of Rs. 55,43,675/- got deposited from the party against their total liability of Rs. 55,61,723/-. The party has not deposited their entire RCM liability along with interest so far.

In view of above, I confirm the service tax liability of the party of Rs. 55,61,723/- under reverse charge mechanism for the manpower services received by them under the Notification No. 30/2012-S.T. dated 20.06.2012.

I find that, the party has deposited the service tax of Rs. 55,43,675/- against their reverse charge mechanism liability for the year 2014-15 during the course of investigation. I find it legitimate to adjust the said amount against their RCM liability."

4.3 The Appellant have in fact have not challenged the impugned order on merits of the demand but are challenging the same on the grounds of computation and limitation. From the impugned order it is observed that the Adjudicating Authority has dropped the demand of Rs.1,45,30,240/ which was made in respect of free of cost material received by them for providing the taxable services. Remaining amounts have been confirmed and amount of tax paid have been appropriated. The Appellant do not dispute for the period 2014-15 demand made in respect of delayed payment of service tax and on man power supply received of Rs.55,43,675/- which they had already discharged. They are disputing only the demand made on account of mismatch in Form 26AS to the balance sheet vis-à-vis ST-3 Return for the period 2011-12 to 2014-15 and they have disputed the demand on the ground of invocation of extended period of limitation. We find that in the present case Appellant have been audited during the relevant period and had been filing the ST-3 Returns duly. They have also produced a letter dated 04.02.2015 whereby it has been certified that for the period from April to January 2013 after audit there is no pending demand. The said letter is reproduced below:-

कार्यालय आयुक्त, सेवाकर आयुक्तालय नोयडा

(1) ऑ.प. /आईएआर/CAAP/SBZ/08/13 189 दिनांक 04.2.15

5/2/15

उप/सहायक आयुक्त,
सेवाकर,
मण्डल III नोयडा।

'सैटलमेन्ट सर्टिफिकेट'

महोदय,

विषय मैसर्स SBZ Constructions 41. E-110, SBL Tower Sector-63, Noida.

की आन्तरिक लेखा परिक्षा का सैटलमेन्ट सर्टिफिकेट जारी करने के सन्दर्भ में।

उपरोक्त इकाई की डी. ए. आर. सं. 273/2012-13 एफ. ए. आर. सं.- -
अवधि अप्रैल 2010 से जनवरी 2013 तक के संबन्ध में सूचित किया जाता है, कि अब इस मामले मे कोई राजस्व सम्मिलित नहीं है। अतः प्रश्नगत डी. ए. आर./एफ. ए. आर. का सैटलमेन्ट (निपटारा) कर दिया गया है। उल्लेखनीय है कि यह निपटारा केवल इस (प्रश्नगत) डी. ए. आर./एफ. ए. आर. के संबंध में है। अतः 'सैटलमेन्ट सर्टिफिकेट' रिकार्ड हेतु आपके कार्यालय को प्रेषित है।

भवदीय

-Sd-

अधीक्षक (लेखा परीक्षा)
सेवाकर आयुक्तालय
नोयडा

प्रतिलिपि अधीक्षक, सेवा कर रेन्ज - 14 मंण्डल - III नोयडा
को सूचनार्थ एंव आवश्यक कार्यवाही हेतु प्रेषित है।

5/02/15
अधीक्षक (लेखा परीक्षा)
सेवाकर आयुक्तालय
नोयडा

2. Annual report for the Financial Year 2011-12 & 012-13. Income Tax return along with Company's internal audit report.
3. Copy of ST-1 & ST-2.
4. ST-3 returns filed for the period April'2012 to March'2013.
5. Month wise/ date wise payment of service tax for the proposed audit period.
6. Copy of list of records filed under Rule 5(2) of the Service Tax Rules, 1994.
7. Copy of tax audit report, if any.
8. Vendor/ service wise details of cenvat credit taken for the proposed audit period.
9. List of Show Cause Notice(s) issued, if any and their present status.
10. Contract, MOU, Agreement with principals, Clients, other group companies or any other persons to whom any services is provided/ received.
11. Details of AGUP Audit, Cases booked by DGCEI/ AE, Details of SCN, if any along

The officers concerned of the company may be specifically instructed to extend necessary assistance to the Audit party in carrying out the audit. The name of the officer, who will coordinate the work, may be intimated to the audit group along with their Mobile no & email.id. Request for postponement of audit cannot be entertained except exceptional circumstances. You may also provide the soft copy of the above information on the e-mail at (ms.pverma67@rediffmail.Com)

Yours Sincerely,
24/03/2014
Superintendent (Audit Group XII)
Customs, C. Excise & S. Tax,
Noida.
Contact No. (1) 8800684329
(2)09457331385
Email: ms.pverma67@rediffmail. Com

Conducted audit for the period Feb'2013 to March'2014.
26/05/2014.
(Pushpendra Verma)
Supdt. (Audit)
Group-XII. Noida.

4.4 It has been held by the Tribunal in the case of J. M Manpower & Security Pvt. Ltd. [Final Order No.70037 of 2024 dated 30.01.2024in Service Tax Appeal No.70394 of 2023] this bench observed as follows::-

> *"17. 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 Sheet 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).*
>
> *18. We find that extended period of limitation cannot be invoked solely on audit queries and objections as held in*

Larsen & Toubro (supra) and Chemix Oil (supra). We find that the Appellant is a Private Limited Company and therefore the Profit/Loss Account and Balance Sheet is a public document accessible from Registrar of Companies website. Therefore, no suppression can be alleged to invoke the extended period as held in Hindalco Industries Ltd. (supra), Kirloskar Oil Engines Ltd. (supra), Rajaram Maize Products (supra) and Luit Developers (supra). It is our considered view that mere non- payment of tax will not sustain the allegation of suppression of facts for invoking extended period as nothing has been shown which points towards any omission or commission by the Appellant which shows the intention to evade tax as held by MP Laghu Udyog Ltd. (supra). We find that the Department has not adduced any positive evidence to show malafide intention for evasion of service tax and therefore extended period is erroneously invoked as held in Pushpam Pharmaceuticals Limited (supra) and Continental Foundation Joint Venture Holding (supra)."

4.5 In the case of M/s K. N. International Ltd. [Final Order No.70038 of 2024 dated 30.01.2024in Service Tax Appeal No.70695 of 2016] Tribunal has held as under:-

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.*

4.6 Further in the case of M/s GD Goenka Pvt. Ltd. [Final Order No.51088 of 2023 in Service Tax Appeal No.51787 of 2012] Delhi bench held as under:-

12. Section 73 provides for recovery of service tax not levied, not paid, short levied, short paid or erroneously refunded. The provisions of this section apply mutatis mutandis to irregularly availed CENVAT credit recoverable under Rule 14 of CCR. This section permits invoking extended period of limitation to raise a demand on the following grounds:
a) Fraud; or
b) Collusion; or
c) Wilful misstatement; or
d) Suppression of facts; or
e) Violation of the Act or Rules with an intent to evade payment.

13. There is no other ground on which the extended period of limitation can be invoked. Evidently, fraud, collusion, wilful misstatement and violation of Act or Rules with an intent all have the mens rea built into them and without the mens rea, they cannot be invoked. Suppression of facts has also been held through a series of judicial pronouncements to mean not mere omission but an act of suppression with an intent. In other words, without an intent being established, extended period of limitation cannot be invoked. In Pushpam pharmaceuticals company vs Collector of Central Excise Mumbai [1995 (78) E.L.T. 401 (S.C.)], the Supreme Court examined Section 11A of the Central Excise Act, 1944 which was worded similar to Section 73 of the Finance Act, 1994 and held as follows:

> *"4. Section 11A empowers the Department to reopen proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such*

> *strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

14. In this appeal, the case of the Revenue is that the appellant had wilfully and deliberately suppressed the fact that it had availed ineligible CENVAT credit on input services. The position of the appellant was at the time of self-assessment and, during the adjudication proceedings and is before us that it is entitled to the CENVAT credit. Thus, we find that it is a case of difference of opinion between the appellant and the Revenue. The appellant held a different view about the eligibility of CENVAT credit than the Revenue. Naturally, the appellant self-assessed duty and paid service tax as per its view. Such a self-assessment, cannot, by any stretch of imagination, be termed deliberate and wilful suppression of facts.

15. Another reason given in the SCN for invoking extended period of limitation was that the appellant had deposited the disputed amount of service tax during audit but later disputed it which shows the appellant's intent to wilfully and deliberately suppress the facts. This reasoning of the Revenue cannot be accepted because there is nothing in the law which requires the assessee to accept the views of the audit or of the Revenue. There is nothing in the law by which an inference of intent to evade can be drawn if the assessee does not agree with the audit. It also does not matter if the assessee deposited the disputed amount as service tax during audit and later disputed it. Often, during audit or investigation, the assessee deposits some or all of the disputed amounts and later, on consideration or after seeking legal opinion, disputes the liability and seeks a notice or an adjudication order. This does not prove any intent to evade or deliberate or wilful suppression of facts.

16. Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under self-assessment and hence had an obligation to assess service tax correctly and take only eligible CENVAT credit and if it does not do so, it amounts to suppression of facts with an intent to evade and violation of Act or Rules with an intent to evade. We do not find any *force in this argument because every assessee operates under self-assessment and is required to self-assess and pay service tax and file returns. If some tax escapes assessment, section 73 provides for a SCN to be issued within the normal period of limitation. This provision will be rendered otiose if alleged incorrect self-assessment itself is held to establish wilful suppression with an intent to evade. To invoke extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed simply because the assessee is operating under self-assessment.*

17. The argument that the appellant had not disclosed in its returns that it was availing and using ineligible CENVAT credit also deserves to be rejected. The appellant cannot be faulted for not disclosing anything which it is not required to disclose. Form ST-3 in which the appellant is required to file the returns does not require details of the invoices or inputs or input services on which it availed CENVAT credit and the appellant is not required to and hence did not provide the details of the CENVAT Credit taken. It also needs to be pointed out that the Returns are filed online and therefore, it is also not possible to provide any details which are not part of the returns. If the format of ST-3 Returns is deficient in design and does not seek the details which the assessing officers may require to scrutinise them, the appellant cannot be faulted because as an assessee, the appellant neither makes the Rules nor designs the format of the Returns. So long as the assessee files the returns in the formats honestly as per its self assessment, its obligation is discharged.

18. Another ground for invoking extended period of limitation is that the appellant had not sought any clarification from the department. We find that there is neither any provision in the law nor any obligation on the assessee to seek any clarification. It was held by the High Court of Delhi in paragraph 32 of Mahanagar Telephone Nigam Ltd. vs. Union of India & Ors. [2023-TIOL-407-DELHI HIGH COURT] as follows:

> *" 32. As noted above, the impugned show cause notice discloses that the respondents had faulted MTNL for not approaching the service tax authorities for clarification. The respondents have surmised that this would have been the normal course for any person acting with common prudence. However, it is apparent from the statements of various employees of MTNL that MTNL did not believe that the amount of compensation was chargeable to service tax and therefore, there was no requirement for seeking clarifications. Further, there is no provision in the*

> *Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious."*

Therefore, there is no force in this ground also.

19. It has also been pointed out that but for the audit, the allegedly irregularly availed CENVAT credit would not have come to light. It is incorrect to say that but for the audit, the alleged irregular availment of CENVAT credit would not have come to light. It is undisputed that the appellant has been self-assessing service tax and filing ST-3 Returns. Unlike the officers, the assessee is not an expert in taxation and can only be expected to pay service tax and file returns as per its understanding of the law. The remedy against any potential wrong assessment of service tax by the assessee is the scrutiny of the Return and best judgment assessment by the Central Excise Officer under section 72. This section reads as follows:

> *"72. Best judgment assessment. If any person, liable to pay service tax,— (a) fails to furnish the return under section 70; (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."*

20. Thus, 'the central excise officer' has an obligation to make his best judgment if either the assessee fails to furnish the return or, having filed the return, fails to assess tax in accordance with the Act and Rules. To determine if the assessee had failed to correctly assess the service tax, the central excise officer has to scrutinize the returns. Thus, although all assessees self-assess tax, the responsibility of taking action if they do not assess and pay the tax correctly squarely rests on the central excise officer, i.e., the officer with whom the Returns are filed. For this purpose, the officer may require the assessee to produce accounts, documents and other evidence he may deem necessary. Thus, in the *scheme of the Finance Act, 1994, the officer has been given wide powers to call for information and has been entrusted the responsibility of making the correct assessment as per his best judgment. If the officer fails to scrutinise the returns and make the best judgment assessment and some tax escapes assessment which is discovered after the normal period of limitation is over, the responsibility for such loss of Revenue rests squarely on the shoulders of the officer. It is incorrect to say that had the audit not been conducted, the allegedly ineligible CENVAT credit would not have come to light. It would have come to light if the central excise officer had discharged his responsibility under section 72.*

21. This legal position that the primary responsibility for ***ensuring that correct amount of service tax is paid rests on the officer even in a regime of self-assessment was clarified by the Central Board of Excise and Customs****[CBEC] in its Manual for Scrutiny of Service Tax Returns the relevant portion of which is as follows:*

> *1.2.1A The importance of scrutiny of returns was also highlighted by Dr. Kelkar in his report on Indirect Taxation [Report of the Task Force on Indirect Taxation 2002, Central Board of Excise and Service Tax, Government of India.] . The observation made in the context of Central Excise but also found to be relevant to Service Tax is reproduced below:*
>
> > *It is the view that assessment should be the primary function of the Central Excise Officers. Selfassessment on the part of the taxpayer is only a facility and cannot and must not be treated as a dilution of the statutory responsibility of the Central Excise Officers in ensuring correctness of duty payment. No doubt, audit and anti-evasion have their roles to play, but assessment or confirmation of assessment should remain the primary responsibility of the Central Excise Officers.* ***(emphasis supplied)***

22. Therefore, to say that had the audit not been conducted, the incorrect availment of CENVAT credit would not have come to light is neither legally correct nor is it consistent with the CBEC's own instructions to its officers.

4.7 In view of decisions as above, we find merits in the submissions made by the Appellant against invoking period extended period of limitation for computing this demand.

4.8 In the absence of any challenge to the merits of the case demand for normal period of limitation is upheld subject to re-computation of the same after taking into account the submissions made on account of duplication with the observation as above.

4.9 Thus demand of Rs.3,13,63,988/- on the ground of mismatch in Form 26AS, balance sheet & ST-3 Return is remanded to the Original Authority for re-computation.

4.10 In respect of other demands Appellant have admitted the same and have discharged the liability and the amounts deposited has been appropriated against these liabilities. As these amounts were paid even before the issuance of the show cause notice the entire proceedings against these amounts are contrary to expressed provisions in the Section 73 of the Finance Act, 1994. Thus the penalties imposed in respect of these demands are set aside.

4.11 As demands are being set aside penalty on Appellant No.1 & Appellant No.2 are also set aside.

5.1 Appeal of Appellant No.1 is partly allowed and matter is remanded back to the Original Authority as indicated in Para – 4.9 above; and

5.2 Appeal of Appellant No.2 is allowed.

5.3 As the matter is quite old to be decided within 03 months of the receipt of this order in remand proceedings.

(Operative part of the order pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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