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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70304 of 2022

(Arising out of Order-in-Appeal No.143-ST/APPL/LKO/2022 dated 02/03/2022 passed by Commissioner (Appeals) Central Excise & CGST, Lucknow)

Shri Ajay Kumar Agarwal, **.....Appellant**
(449/Near Rithara Mandir,
Bada Baazar, Khohabad, Firozabad)

VERSUS

Commissioner of Central Excise &

Service Tax, Agra **....Respondent**

(CGST Commissionerate, Agra)

<u>APPEARANCE:</u>

Shri S.P. Ojha, Consultant for the Appellant
Smt Chitra Srivastava, Authorised Representative for the Respondent

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

FINAL ORDER NO.70075/2025

DATE OF HEARING & DECISION : 11 February, 2025

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-in-Appeal No.143-ST/APPL/LKO/2022 dated 02/03/2022 passed by Commissioner (Appeals) Central Excise & CGST, Lucknow. By the impugned order, Commissioner (Appeals) has held as follows:-

> *"I have carefully gone through the case records. I find that the department had alleged short payment of service tax on the grounds that the appellant had failed to declare appropriate assessable value and there was considerable difference in the assessable value declared by the appellant in their ST returns and Form 26AS for the said period.*

The appellant on the other hand has refuted the allegations levelled by the department claiming that they had maintained all the statutory records and demand has not been raised with reference to any document that has been impressed. Also, they have contested that option of payment of penalty of 25% as the entire amount of tax, interest and penalty are paid within a period of one month was not provided to them.

First I take up the contention of the appellant in respect of invocation of extended period. In this regard, I find that Section 68 of the Finance Act, 1994 read ith Rule 6 of the Service Tax Rules, 1994 directs the assesse to pay service tax on the value of taxable service received during the calendar quarter/month. Also, Section 70 of the Finance Act, 1994 imposes the duty on the appellant to provide information in respect of self assessed and pay service tax due on the services provided. However, in the present case from the impugned order it is apparent that the appellant had declared both the assessable value and service tax liable to be paid by them as 'NIL' which construes and gives an impression that though the appellant is registered with the department but, for the disputed period is not engaged in providing any taxable service and hence, no service tax liability arises on the part of the appellant. The claim of the appellant of maintenance of appropriate records can only be accepted to the extent that they had maintained records and declared appropriate value before the Income Tax Department and not with this Department. If the information would not have been received by the adjudicating authority from the Income Tax Department then the incident of non payment of service tax of the appellant would have gone unnoticed causing loss to the Government exchequer. Thus, the case of the appellant is fit to be considered as one in which taxable value has been *suppressed which failed to provide any plausible reason for not invoking provisions of extended period of limitation.*

As regards the demand I find from the records that the original adjudicating authority has discussed in detail at Para 5 of the O-in-O the grounds of confirmation of the demand of Rs. 3,37,081/- and agreeing with same I do not wish to interfere with the same."

2.1 Appellant is engaged in rendering declared services.

2.2 As per the information received from the Income Tax Department, Appellant has received Rs.40,40,007/- for the period 2015-16 to 2017-18 (till June, 2017) whereas, from the ST-3 return for the same period it was observed that appellant failed to discharge service tax liability to the tune of Rs.5,98,381/- as detailed in table bellow:-

Financial Year	Value shown in 26AS	Value shown in ST-3 Returns	Highest Value among Column No.2, & 3	Rate of Service tax	Service Tax Payable
1	2	3	4	5	6
2015-16	1523953	N.A.	1523953	14.5	220973
2016-17	1086405	N.A.	1086405	15	162961
2017-18 (upto June'17)	1429649	N.A.	1429649	15	214447
Total	4040007	0	4040007		598381

2.3 Show cause notice dated 18.09.2020 was issued to the appellant asking them to show cause as to why-

"(i) Not paid/ short paid Service Tax amount of Rs.5,98,381/- (inclusive all cess) for the period 2015-16 to 2017-18 (upto June'17) as discussed above, should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act., 1994 read with Section 174 of the Central GST Act, 2017.

(ii) Interest on the amount as mentioned at (i) above, should not be charged and recovered under Section 75 of the Finance Act 1994 read with Section 174 of the Central GST Act, 2017

(iii) Penalty should not be imposed under Section 78 of the Finance Act, 1994 read with Section 174 of the Central GST Act, 2017 for failure to pay Service Tax during the relevant period suppressing the facts from the department

(iv) Penalty should not be imposed upon the party under Section 77 (1) (b) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in contravention of Rule 5 of the Service Tax Rules, 1994 in as much as the party has failed to maintain the prescribed records as discussed in the foregoing paras.

(v) Penalty should not be separately imposed upon the party under Section 77 (1) (c) (ii) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in as much as the party has failed to provide the documents respectively as called for by the Excise Office as discussed in the foregoing paras.

(vi) Penalty of Rs.50,000/- should not be demanded and recovered as per provisions of under Section 77 (2) of the Act (ibid) read with Section 174 of the CGST Act, 2017 in contravention of the provisions of Rule 7 of the Service Tax Rules, 1994."

2.4 This show cause notice was adjudicated as per Order-in-Original dated 13.04.2021 by holding as follows:-

"ORDER

(i) I confirm the service tax demand of Rs.3,37,081/- (inclusive of all cess) (Rs. three lacs thirty seven thousand and eighty one only) for the period and order to recover the same from the party under the proviso of Section 73 (1) of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017 as discussed above. I dropped differential amount of service tax

demand of Rs.2,61,300/- (Rs.5,98,381/- Rs.3,37,081/-), being over and above the actual dernand and not sustainable.

(ii) I order to recover the interest at applicable rate from the party on the above amount under Section 75 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017.

(iii) I impose penalty of Rs.3,37,081/- (inclusive of all cess) (Rs. three lacs thirty seven thousand and eighty one only) equal to the service tax amount ilable upon the party under Section 78 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017, as discussed above for suppression of facts and contravention of the provisions of the Finance Act (ibid) and rules made thereunder.

(iv) I refrain the penalty as proposed to impose upon the party under Section 77 (1) (c) (ii) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in reference to failure in providing the documents to the department as discussed above.

(v) I refrain the penalty as proposed to impose upon the party under Section 77 (1) (h) of the Finance Act. 1994 read with. Section 174 of the CGST Act, 2017 in reference to non-maintenance of records as prescribed under Rule 5 of the Service Tax Rules, 1994 as discussed above.

(vi) I impose the penalty of Rs.10,000/- (Rs. Ten thousand only) for contravention of provisions of Rule 7 of the Service Tax Rules, 1994 under Section 77 (2) of the Act (ibid) read with Section 174 of the CGST Act, 2017 as discussed."

2.5 Aggrieved appellant filed appeal before Commissioner (Appeals) which has been dismissed as per the impugned order referred in para-1 above.

2.6 Hence, this appeal.

3.1 I have heard the Shri S.P. Ojha, Learned Consultant appearing for the appellant and Smt Chitra Srivastava Authorized Representative appearing for the revenue.

3.2 Arguing for the appellant learned consultant submits that-

- There was a decision of this Tribunal in the case of M/s Kwality Ice Cream Company Vs CST-Service Tax, Delhi Final Order No.51096 of 2018 dated 23.03.2018 wherein following has been observed:-
    - *6. We find that the authorities below have included the fixed charges received by the appellant for providing the cold storage service, in the gross value of C&F Service and confirmed the Service Tax liability thereon. On perusal of the agreement entered into between the appellant and M/s HLL, we find that the service receiver M/s HLL cleared the goods from their factory through their own transporter and upon receipt of the goods in the godown, with the cold storage facility, the appellant's role started for handling those goods and forwarding the same to the destination/buyers, as per the instruction of the service receiver, M/s HLL. Thus, as per the scope of the contract, it is evident that the appellant had only provided the forwarding activities with regard to goods received from the service receiver M/s HLL. Since the appellant had not provided Clearing and Forwarding Services simultaneously, we are of view that the activities undertaken by the appellant, only for forwarding the goods, should not fall under the taxable category of C&F services. We find that Hon'ble Punjab & Haryana High Court in the case of Kulcip Medicines (P) Ltd.*

(Supra) has held that if one person has rendered services as Forwarding Agent, without rendering any service as Clearing Agent, he should not be termed as the C&F Agent. The relevant paragraph in the said judgment is extracted herein below:-

"11. The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or dis-injunctive sense. It appears to be fairly well settled that the context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgement of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. V CIT (1958) 34 ITR 368. By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent' without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The counsel for the revenue has not been able to bring on record any material to show the word 'and' should be construed as disjunctive. He has not shown any 'trade practice' which may lead to a necessary inference that service of one kind rendered by one is invariably considered to comprise both. No argument has been advanced before us by him to canvass that the legislature intention is discernible from the scheme of the statute or from any other relevant material. Therefore the word 'and' should be understood in a conjunctive sense. (See Maharaja Sir

Pateshwari Prasad Singh v. State of U.P.(1963) 50 ITR 731). In these circumstances if we read the word 'and' as 'or' then it would amount to doing violence to the simple language used by Legislature which cannot be imputed ignorance of English language. In that regard we place reliance on the judgement of Hon'ble the Supreme Court rendered in the case of Inayat Ali Khan v. State of U.P. (1971) 2 SCC 31 (Para 5) and para 6 of the judgement of Hon'ble the Supreme Court rendered in the case of Ape Belliss India Ltd v. Union of India (2001) 132 ELT 8. The observations of their Lordship reads thus:

"6........ A plain reading of the Section (sic Tariff Public Notice) clearly shows, as contended by Mr. Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e. The alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the allow steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel, then it would have been made clear by using the word "of" instead of the word "and"."

- As the services rendered by the appellant were for cold storage of the eatable products→exempted service and there is a commission agent for the sale of the goods by taking the turnover of the taxable service. He was under a bonafide belief, in view of above judgment no service tax was payable. Accordingly, we would not paid any service tax on the services provided.
- Revenue authorities have sought to club receipt against both the services to make this demand. However, as they entered into a belief that no tax was payable they there cannot be any intent to evade payment of service lead to

invocation of extended period of limitation as has been held by the Tribunal in the case of M/s Hari Har Engineering Works Vs Commissioner of Central Excise, Allahabad Final Order No.71207 of 2019 dated 24.06.2019.

- Appeal may be allowed.

3.3 Arguing for the revenue learned Authorized Representative reiterates the grounds recorded in the impugned orders.

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

4.2 I find that appellant have challenged the demand on the ground of limitation. It is their submission that they entertained a bonafide belief that no service tax was payable and the demand has been made on the basis of third party information received from the Income Tax Department. In para 5(vi) of the Order-in-Original, adjudicating authority has reproduced a chart for reconciliation of service tax liability which is reproduced bellow:-

Reconciliation of Service Tax Liability					
Sl. No.	Particulars	Financial Year 2015-16	Financial Year 2016-17	Financial Year 2017-18	Total
1	Receipts in relation to Chilling Charges (Rent) as shown in 26AS/	938710	792001	149850	1880561
2	Receipts in relation to Commission on sale as shown in 26AS/	585243	294404	0	879647
3	Total receipts as shown in Balance Sheet/ 26AS	1523953	1086405	149850	2760208
4	Less-Deduction of Amount due to damage of editable product of the owner as per B/L	67200	66312	0	133512
5	Actual Receipts inclusive of Service Tax	1456753	1020093	149850	2626696
6	Rate of Service Tax	14.50	15.00	15.00	
7	Actual Taxable Value	1272273	887037	130304	2289615
8	Component of Service Tax Amount in Colum No.5 Above	184480	133056	19546	337081
9	Total Receipts inclusive of Service	1456753	1020093	149850	2626696

	Tax (7+8)-5				
	Service Tax payable	184480	133056	19546	337081

4.3 From the chart reproduced above, it appears that appellant have received amounts which are much bellow the threshold limit as prescribed under Notification No.33 of 2012, whereby threshold limit of exemption was provided by 10 lakhs in relation to the services exempted from payment of service tax as per Notification No.33 of 2012 dated 20 June, 2012 in relation to eatable products.

4.4 I find that there is sufficient ground for the appellant to enter into a belief that no service tax was payable by them. It is also supported by the decision to belief is well founded on the basis of the decision of this Tribunal in the case of M/s Kwality Ice Cream Company (supra). I also find that the Tribunal in the case of M/s Hari Har Engineering Ltd. (supra) has held as follows:-

> *"We have noted that the learned Commissioner (Appeals) has held that extended period of limitation was applicable in the present case on the ground that appellant was required to do self assessment and they have failed in the same. After hearing both the sides, we note that the appellant was having a bonafide belief that since he was providing services to Indian Railways which is part of Government of India, the services are not liable to be charged under the levy of service tax particularly in terms of Sl. No.12 of Mega Notification No.25 of 2012-ST dated 20.06.2012. Therefore, we hold that extended period of limitation was not available to revenue for raising the present demand. Since the extended period of limitation is not available the penalty under Section 78 of Finance Act, 1994 was also not leviable to the appellant."*

4.5 In view of the decisions as above, I do not find any merits in the impugned order to the extent that it holds invocation with regards to extended period of limitation for making this demand, as this demand is based by limitation, so no penalty could have been imposed on the appellant.

4.6 In view of the above, impugned order is set aside.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp