CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70429 of 2020

(Arising out of Order-in-Original No.15/COMMISSIONER/G.B. Nagar/2019-20 dated 09.01.2020 passed by Commissioner of Central Tax, Gautam Buddh Nagar)

M/s Prithvee Propmart Pvt. Ltd., **.....Appellant**
(S2, Plot No.52, Savitri Market, Sector-18, Noida)

VERSUS

Commissioner of Central Goods & Services Tax, Gautam Budh Nagar **....Respondent**
(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Abhinav Kalra, Chartered Accountant for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70143/2025

DATE OF HEARING : 03.12.2024
DATE OF PRONOUNCEMENT : 26.03.2025

P. K. CHOUDHARY:

The present appeal is directed against Order-in-Original No.15/Commr./G.B. Nagar/2019-20 dated 09.01.2020 passed by the Commissioner, CGST, G.B. Nagar.

2. Brief facts of the case are that M/s Prithvee Propmart Private Limited[1], is a private limited company having registered office at S-2 Plot No.52, Savitri Market, Sector-18, NOIDA registered under the Service tax vide registration No. AADCP8790NST001 for providing "Real Estate Agent Service" and as receiver of "Rent-a-Cab Service", "Legal Consultancy

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[1] Appellant

Service”. A team of Officers of Anti-Evasion cell visited the premises of the Appellant on 18.11.2014. During the course of investigation, the Appellant submitted the copies of ST-3 returns filed, Balance Sheets, Agreements etc. as asked for by the investigating team. Further, statements of Shri Shailendra Sharma, Assistant Vice President of the Appellant company, were also recorded. On the basis of the documents submitted and clarifications provided by the Appellant, the investigating team of the Service Tax Department found that service tax amounting to Rs.1,32,74,055/- was short paid for the period from February, 2014 to March, 2015. Further, the investigating team also computed the demand of service tax amounting to Rs.1,35,94,394/- on the basis of the difference in turnover reported in ST-3 returns and the turnover booked in the Balance Sheets/Final Account statements for the period from April, 2011 to March, 2015. Further, CENVAT credit amounting to Rs.1,07,124/- was alleged to be irregularly claimed. Also, demand of late fee of Rs.1,27,900/- for delayed submission of ST-3 Returns was raised. Subsequently, a Show Cause Notice[2] dated 24.10.2016 was issued to the Appellant demanding service tax on the above mentioned grounds along with interest under Section 75 and equivalent penalty under Section 78 of the Finance Act, 1994. The Appellant submitted their written reply to the aforementioned SCN. Ld. Commissioner, confirmed the demand, vide order dated 09.01.2020, of service tax amounting to Rs.1,32,74,055/- for the period from February, 2014 to March, 2015. Further, the demand of service tax raised on the basis of the difference in the turnover as per ST-3 Returns and as per Balance Sheet for the period from 2011-2012 to 2014-2015 was corrected and reduced to Rs.1,04,80,718/-. The demand of service tax under reverse charge was confirmed amounting to Rs.5,381/-. Further, the CENVAT credit alleged to be irregularly claimed by the Appellant was allowed partially and the demand in that respect was reduced to Rs.53,803/-. Additionally, service tax amounting to Rs.1,28,09,388/-

[2] SCN

deposited by the Appellant has been ordered to be appropriated against the demand of service tax confirmed by the Ld. Commissioner.

3. Being aggrieved by the impugned Order-in-Original, the Appellant has filed the present appeal before the Tribunal.

4. Shri Abhinav Kalra, learned Chartered Accountant appeared as counsel on behalf of the Appellant. He submitted that the Ld. Commissioner confirmed the demand on the basis of difference in the turnover reported in the Balance Sheet and ST-3 returns for the period from 2011-2012 to 2014-2015. He contended that the audit team of the Service Tax Department had already conducted the audit of the Appellant company till November, 2013 before the visit of the Officers of the Anti-Evasion team. He further contended that till the date of visit on 18.11.2014, all the Returns till 2013-2014 were duly filed. Only the Return for the period from April, 2014 to September, 2014 was not filed which was due on 14.11.2014. Further, the return for the period from October, 2014 to March, 2015 was due only on 25.04.2015 i.e. much after the date of visit of the Officers of the Anti-evasion team. He argued that the period for which the audit has already been conducted once could not be taken up again for investigation by a different team of the same Department. So, he pleaded that the instant set of proceedings merits to be set aside to the extent to the period till November, 2013 since the period till November, 2013 was already covered under audit and as such the details thereof have already been verified by the audit team.

5. Ld. Counsel on behalf of the Appellant further submitted that the service tax being a self-assessment taxation regime, the Appellant had already filed the returns and deposited the tax due as per the Appellant’s self-assessment till March, 2014 as on the date of visit. He contended that invoking the extended period of limitation of 5 years, when the audit team already audited the Books of Accounts and further, the ST-3 Returns having been

already filed, is not justified. He stated that the Returns for the period from 2011-2012 to March, 2014 were filed before the visit of the officers of the Anti-Evasion team on 18.11.2014. Therefore, the demand raised for the said period vide the SCN dated 24.10.2016 is largely hit by limitation.

6. Ld. Counsel for the Appellant also contested raising the demand on the basis of figures reported in Balance Sheet without any investigation. He stated that such demand would not be sustainable. In this regard, he placed reliance on the following decisions in support of his submissions:-

- **Synergy Audio Visual Workshop Pvt. Ltd. vs. CST, Bangalore; 2008-TIOL-809-CESTAT-BANG**;
- **TIL Ltd. v CST, Kolkata 2008-TIOL-181-CESTAT-KOL;**
- **H.P.L. Chemicals Ltd. Vs. CCE, Chandigarh 2006 (197) E.L.T. 324 (S.C.);**
- **Lord Krishna Real Infratech Pvt. Ltd.**

7. It was further submitted that the tax as payable under RCM, would be allowed as CENVAT Credit to the Appellant in terms of CENVAT Credit Rules, 2004[3]. As such, in that scenario, there would not be any loss to the Exchequer. He placed reliance on the following decisions:-

- **Dineshchandra R. Agarwal Infracon Pvt. Ltd. vs. CCE 2010 (18) S.T.R. 39 (Tri-Ahmd.)]-**
- **Caldery's India Refactories Ltd. vs. CCE (2014) 36 S.T.R. 102 (Tri- Mum).**

[3] CCR, 2004

- **Tatyasaheb KoreWarana S.S.K Ltd. vs. CCE (2015) 38 S.T.R. 575 (Tri-Mum).**

8. It was further submitted that all input services on which credit was disputed were genuinely used in providing output services.

Sr. No. of Table-J of SCN	Total Amount of Credit taken in Rs.	Name of Service	Purpose of the Service
5, 6, 9, 10 & 14	20,454/-	Hotel & Club Rent	Appellant company being in the business of Real Estate Agency have to organize business promotion meetings. The services of Hotels are procured for the purpose of business promotion events.
8	8,405/-	Rent of Building	Services received for company's business premises.
12	2,750	Air Ticket booking	Appellant company is engaged in the business of Real Estate Agency. Accordingly, the employees/directors of the Appellant company have to travel frequently for business promotion events, meetings, appearances before government authorities etc. The air travel services are procured solely for such business related travels.
13	15,223/-	Outdoor Catering Service	Appellant company being in the business of Real Estate Agency have to organize business promotion meetings. The Catering Services are procured solely for the purpose of such business promotion events.

9. Ld. Counsel of the Appellant contested imposition of penalty under Section 78 amounting to Rs.1,28,09,388/- during the course of investigation conducted by the service tax Department, before the issuance of any SCN in this respect. He placed reliance on:-

1. Mass Marketing & Advertising Services Pvt. Ltd. vs. CCE 2006 (3) S.T.R. 333 (Tri.-Ban.).

2. CCE vs. Chelpark Co. (P) Ltd. 2007 (216) E.L.T. 364 (Kar.).

3. Further in **CCE, Panchkula Vs. M/s. Krishna Cylinders [2015 (1) TMI 1197 - CESTAT NEW DELHI].**

10. Regarding imposition of personal penalty, Shri Abhinav Kalra, Counsel of the Appellant contended that the demand of service tax raised against the Appellant in the present matter is not sustainable. When the demand of service tax against the company is itself not sustainable, imposing penalty on the key personnel of the Appellant is not warranted.

11. Learned Authorized Representative of the Department Shri Santosh Kumar justified the impugned Order and prayed that the appeal filed by the Appellant, being devoid of any merits, may be dismissed.

12. Heard both the sides and perused the appeal records.

13. We find that there are six principal issues which are to be considered by us in this case:-

(i) Whether demand notice is justified under proviso to Section 73 when tax liabilities have already been accepted by the Appellant by filing ST-3 Returns;

(ii) Whether demand of Service Tax on the basis of figures of turnover in Balance Sheets is legally correct;

(iii) Whether demand of Service Tax on services covered under RCM is justified when the same is claimed as Cenvat credit by the Appellant;

(iv) Whether demand of inadmissible credit in respect of services, said not to be input services, is justified or not;

(v) Whether penalty under Section 78 is imposable, and

(vi) Whether personal penalty on Shri Shailendra Sharma, Asstt. Vice President is justified.

Issue No. (i) :

14. The undisputed facts are that all Service Tax Returns for the period October, 2014 to March, 2015 had already been filed though after due date but as there was provision under Section 70 of the Finance Act, 1994 that an assessee could file its return

even after due date, the late filing of Service Tax return does not have any effect on the self-assessed tax. Under Section 70 of the Finance Act, 1994, every assessee was required to self assess the tax due on services provided by him and was required to furnish returns in prescribed form. The Appellant had self-assessed its Service Tax liability in view of the provisions of Section 70 and had filed Service Tax returns due for intervening period before issuance of the SCN. The SCN even includes demand of Service Tax which was self-assessed by the Appellant and was informed to the Department before issuance of the SCN by filing ST-3 returns. It is a fact that some declared tax liabilities in ST-3 returns. As per provisions of Section 73(1B) of the Finance Act, 1994 which provides the circumstances in which notice of demand was not required to be issued is reproduced for understanding the issue in right perspective:-

> ***"(1B) Notwithstanding anything contained in sub-Section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-Section (1) of Section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in Section 87, without service of notice under sub-Section (1):"***

An in-depth reading of the above provisions reveals that where tax was self- assessed and returns were furnished, no notice of demand was required to be issued under Section 73(1). We further find that in the present case, tax was self- assessed and service tax liability was declared in returns as already admitted in the SCN as well as impugned order. So, issuance of SCN for recovery of self- assessed tax is patently unwarranted and legally incorrect. There should also be no demand of interest under Section 75. It is also found that the service tax liability declared in the ST-3 returns was deposited before issuance of SCN. As per provisions Section 73(3), if short levied or non-paid service tax deposited before issuance of the SCN, no notice under sub Section (1) of 73 in respect of the amount so paid was required to be issued.

Issue No. (ii):

15. We find that Shri Shailendra Sharma Assistant Vice President of the company of the Appellant stated in his statement recorded on 18.11.2014, that his company sold flats in its own account and of other Builders on commission basis. In the Balance Sheet, turnover was shown including sale value of flats sold in its own account. As per Section 66B of the Finance Act, 1994, service tax was chargeable on services only. Service was defined under Section 65B(44) as below:-

> *"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include— (a) an activity which constitutes merely,*
>
> *— (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner;*
>
> --------------"

It indicates that no service tax was chargeable on sale of flats by the Appellant in its own account. Service tax was payable only on the commission amount earned by the Appellant for sale of flats of other builders. The demand of service tax on the turnover shown in Balance Sheets is incorrect. Thus, demand of service tax on differential value, i.e., difference between figure of turnover shown in Balance Sheets and value of service declared in ST-3 is unjustified and is not sustainable. It is a settled legal position that demand raised on the basis of Balance Sheet or Form 26AS is not sustainable as held in **M/s Lord Krishna Real Infra P. Ltd., Final order No.70126/2019-CU(DB) dated 07.01.2019**. It has been held that by raising demand on the value shown in the Balance Sheets without any investigation, the Department had not discharged the onus on them. Following the ratio of the above decision, the demand raised on the figure of Balance Sheet is not sustainable.

Issue No.(iii):

16. As regards demand of service tax on services of categories of Manpower Recruitment/Supply Agencies services and legal consultancy services under reverse charge mechanism, we find that whatever service tax was paid thereon could have been taken back by the Appellant in the form of CENVAT credit as the Appellant was registered as service tax assessee and was eligible to avail credit on input services. The above services were undoubtedly input services for the Appellant. Thus, it is a case of revenue neutrality with no loss of revenue to the Exchequer. It is a settled law that in case of revenue neutrality, demand of any differential duty would not be sustainable. In this context, reliance is placed on the judgement of the Hon'ble Supreme Court in the case of **V.F. Commercial Vehicles Ltd., [2019 (31) G.S.T.L. J96 (S.C.)].** In the above case, the Hon'ble Supreme Court held that the demand of differential duty would not be sustainable as the same is available as rebate to the assessee. So, it is revenue neutrality case. Decision of the Hon'ble Supreme Court in the case of **Mahindra & Mahindra Ltd., [2019 (368) E.L.T. (A4) (S.C.)]** is also referred to. In this case the Court has enunciated that demand of differential duty is not sustainable on the ground of revenue neutrality in as much as differential duty would be available as credit to the assessee. In view of the above judgments, it is clear that demand in the present case is not sustainable.

Issue No.(iv):

17. As regards services which were found by the department to be not covered under the definition of input services, we refer to the definition of input and input services provided under Rule 2(l) of the Cenvat Credit Rules, 2004;

> *"(l) "input service" means any service,-*
>
> *(i) used by a provider of service for providing an output service; or*
>
> *(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, and includes services used in relation to setting*

up, modernization, renovation or repairs of a factory, premises of provider of output service or an offce relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;"

The above definition compasses in respect of service provider, all services used by provider of service for providing output services and also any activities relating to business. We examine each of service in respect of which credit was denied on the ground that they were not input services. We find that business of the Appellant to provide real estate agent services whereunder, as commonly known, they arranged customer's meeting, arranged their visits to location, provide free catering to customers and also used to visit abroad for promotional activities of its business. Therefore, any service for undertaking above said activities were covered in the definition of input services.

i. Hotel & Club Rent-Appellant company being in the business of Real Estate Agency have to organise business promotion meetings. The services of Hotels are procured for the purpose of business promotion events.

ii. Rent of Building-Services received for company's business premises.

iii. Air ticket booking-Appellant company is engaged in the business of Real Estate Agency. Accordingly, the employees/ directors of the Appellant company have to travel frequently for business promotion events, meetings, appearances before government authorities etc. The air travel services are procured solely for such business related travels.

iv. Outdoor Catering Service-Appellant company being in the business of Real Estate Agency have to organise business promotion meetings. The Catering services are procured solely for the purpose of such business promotion events.

In view of utilisation of aforesaid services, we hold that they were covered under the definition of input services and credit availed thereon would be admissible.

Issue No.(v):

18. As regard, imposition of equal penalty under Section 78 of the Finance Act, 1994, we find that it is imposable when any notice has been issued under sub Section 1 of Section 73 of the Finance Act, 1994. But in this case, as there was no requirement to issue notice under Section 73, the imposition of penalty under Section 78 is not warranted. In this regard, we find that the Tribunal in the case of Ms Mass Marketing and Advertisement Services Pvt. Ltd., [2006 (3) S.T.R. 333 (Tri.)] where it has been held that no penalty is imposable if service tax deposited before issuance of show cause notice. The same view has also been taken in the case of M/s Impress AD-ADIS and Displace [2006 (3) S.T.R. 386 (Tri.)] where it was held that no penalty is imposable if service tax is deposited before issuance of SCN.

Issue No.(vi):

19. As regards personal penalty on Shri Shailedra Sharma, Assistant Vice President of the company under Section 78A of the Finance Act, 1994, we refer to the provisions of Section 78A for proper appreciation :-

> *"SECTION 78A. Penalty for offences by director, etc., of company — Where a company has committed any of the following contraventions, namely :—*
> *(a) evasion of service tax; or*
> *(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or*
> *(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or*
> *(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due, then any director, manager, secretary or other officer of such company, who at the time of such contravention*

was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to one lakh rupees."

In the present case, evasion of service tax has not been established. There is no case of issuance of fake invoice or challan and also no case of wrong availment of credit. Nothing has been discussed that taxes were collected but not paid. Hence, no penalty is imposable.

20. As regard demand of late fee for filing ST-3 Returns late, beyond the due date, under Section 70 of the Finance Act, 1994, we refer to the relevant provision which is reproduced as below:-

"(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed."

A simple reading of the above abstract indicates that there are no provisions to raise any demand notice for late fees. It is provided that a Return can be filed with late fees of maximum amount of Rs.20,000/-. It does not prescribe that incase of non-payment of late fees any demand notice is required to be issued. Lack of any provision for issuing SCN for demand of late fee, we refrain to confirm any such demand.

21. Under the facts and circumstances of the case, as discussed above, we set aside the impugned Order-in-Original and allow the appeal filed by the Appellant with consequential relief, as per law.

(Order pronounced in open court on - **26.03.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

LKS