CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70332 of 2024

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-425-23-24 dated 15.12.2023 passed by Commissioner (Appeals) CGST, Noida)

M/s ATN Infratech Pvt. Ltd., ...Appellant
(305, 3rd Floor, K-11, Sector-18, Noida)

VERSUS

Commissioner of Central Excise &
CGST, Noida ....Respondent
(6th Floor, C-232-A/2, GST Bhawan,
Sector-48, Noida)

WITH

Service Tax Appeal No.70333 of 2024

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-251 & 252-23-24 dated 11.09.2023 passed by Commissioner (Appeals) CGST, Noida)

M/s ATN Infratech Pvt. Ltd., ...Appellant
(305, 3rd Floor, K-11, Sector-18, Noida)

VERSUS

Commissioner of Central Excise &
CGST, Noida ....Respondent
(4th Floor, C-232-A/2 to 232A/3,
IRCON Building, Sector-48, Noida-201305)

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 NOs.- 70144-70145/2025

DATE OF HEARING : 03.12.2024
DATE OF PRONOUNCEMENT : 26.03.2025

P. K. CHOUDHARY:

Since the issue in both the appeals is common hence both the appeals are taken up together for hearing and disposal.

ST/70332/2024:

2. This appeal is directed against Order-in-Appeal No. NOI/EXCUS/001/APP/425/23-24 dated 15.12.2023 passed by the Commissioner, CGST (Appeals), Noida.

3. Briefly stated, the facts of the case are that the Appellant was registered with Central Excise as Service Tax assessee vide Service Tax Registration No. AAICA3030DSD001 for providing taxable services. Information was received from Income Tax department regarding the turnover of the company for the financial years 2014-15, 2015-16 & 2016-17. Comparisons from value of services declared in ST-3 Returns for the same period revealed that the company has suppressed the value in ST-3 Returns for the year 2014-15. The turnover as informed by Income Tax *viz-a-viz* value declared in ST-3 Returns for 2014-15 is as under:-

Financial year	Gross receipts i.e. turnover declared in ITR	Value of services declared in ST-3 Returns	Difference between value of services as per ITR and value of services as per ST-3 Returns	Service Tax payable on the differential value
2014-15	6,30,03,671/-	3,31,77,999/-	2,98,25,672/-	36,86,453/-

4. It was, therefore, observed that the Appellant failed to declare the correct value of services provided by him in the statutory Returns. The Appellant deliberately suppressed the facts of the correct value of services with intent to evade payment of Service Tax. Therefore, the differential amount of Service Tax was required to be recovered under proviso to Section 73(1) of the Finance Act, 1994 by invoking extended period.

5. Alleging the above stated facts, a show cause notice[1] dated 30.12.2020 was issued to the Appellant demanding Service Tax of Rs.36,86,453/- under proviso to Section 73 of the Finance Act, 1994 along with interest and equal penalty. Penalty was also proposed under Section 77(1)(c) of the Finance Act, 1994. The case was adjudicated vide Order-in-Original dated 28.02.2023 by the Assistant Commissioner, CGST, Commissionerate Noida thereby demand alongwith interest was confirmed. Penalty under Section 78 as proposed in the SCN was imposed. Penalty of Rs.10,000/- was also imposed under Section 77(1)(c) of the Finance Act, 1994. Being aggrieved with the above Order, the Appellant filed appeal before the Commissioner (Appeals), who vide the impugned Order-in-Appeal set aside an amount of Rs.21,05,043/- on the ground of limitation and confirmed demand of Rs.15,81,460/- alongwith interest and upheld equal penalty under Section 78. Penalty imposed under Section 77(1)(c) was upheld.

6. The Appellant filed the instant appeal against the impugned Order-in-Appeal.

ST/70333/2024:

7. Order-in-Original No.277/DC/ST-TPI/CGST/DIV-V/NOIDA/2022-2023 dated 24.03.2023 passed by Deputy Commissioner, CGST Division-V, Noida.

Financial Year & rate of Service Tax	Value Difference between Sale of Services as per ITR and Services provided as per STR	Service Tax due calculated on value difference reflected in column 'd'(on higher tax rate)
1	5	6
2015-16 (14%, 14.5%)	24734537/-	3586508/-
2016-17 (15%)	0.00	0.00
Total	24734537/-	3586508/-

Similarly vide Order-in-Original No.278/DC/ST-TPI/CGST/DIV-V/NOIDA/2022-2023 dated 24.03.2023 by the same authority against inoperative PAN based Service Tax Registration

[1] SCN

No.AAICA3030DSD002 for the same year confirmed the same demand again. SCNs dated 26.03.2021/30.03.2021 were issued proposing a demand of Service Tax of Rs.35,86,508/-. The SCN also proposed imposition of penalties under Section 77(1)(c) and 78 of the Finance Act, 1994. Vide the Order-in-Original the demand of Rs.35,86,508/- as proposed in the SCN was confirmed alongwith interest and penalty of Rs.35,86,508/- was imposed under Section 78 and Rs.10,000/- under Section 77(1)(c) of the Finance Act, 1994 read with Section 142, 173 and 174 of the Central Goods & Services Tax Act, 2017. Learned Commissioner (Appeals) vide the impugned Order-in-Appeal passed the following order:-

(i) I uphold Order-in-Original No.277/DC/ST-TPI/CGST/DIV-V/NOIDA/2022-2023 dated 24.03.2023. However, I modify the amount of Service Tax payable by the appellant to Rs.31,32,321/- which is recoverable from them with interest at appropriate rate.

(ii) I reduce the amount of penalty imposed on them under Section 78 of the Finance Act, 1994 to Rs.31,32,321/-.

(iii) I set aside penalty of Rs.10,000/- imposed on the appellant under Section 77(1)(c) of the Finance Act, 1994.

(iv) I set aside the Order-in-Original No.278/DC/ST-TPI/CGST/DIV-V/NOIDA/2022-2023 dated 24.03.2023.

Appeals filed by the Appellant are disposed of accordingly."

Now the Appellant has filed the present appeal before the Tribunal.

8. Shri Abhinav Kalra, learned Chartered Accountant argued the case on behalf of the Appellant. He submitted that the Appellant was working as a Real Estate Agent for M/s Amrapali Group of Companies during 2014-15. The Appellant issued invoices for an amount of Rs.6,30,03,671/- to Amrapali Group of Companies on account of Real Estate Agent Services but the entire amount turned into bad dept as M/s Amrapali Group became bankrupt and dispensed with its business activities. He further submitted that under the category of real estate agent service, the Appellant helped M/s Amrapali Group of Companies in selling flats and other construction to various customers. He

further submitted that due to bankruptcy, constructed flats or proposed construction of flats could not be sold out. So, the Learned Counsel pleaded that services proposed to be provided were not completed. Hence, payments were not received. He further submitted that this fact can be verified from the Balance Sheet and other financial statements of the Appellant for the F. Y. 2015-16. Learned Counsel of the Appellant further submitted that service tax was payable when it was provided for a consideration. As in the present case, no consideration flowed to the Appellant, service tax is not chargeable at all.

9. It was further submitted by the Learned Counsel that the Department raised the demand merely on the basis of figures declared in ITR without any investigation to verify correctness of the taxable value. No statement was recorded by the Department to ascertain the nature of service rendered by the Appellant. He submitted that without any investigation, the Department alleged suppression of facts on the Appellant. The Department has issued SCN demanding Service Tax of Rs.36,86,453/- on an imaginary value of Rs.2,98,25,672/-. He emphatically argued that no demand can be raised merely on the basis of figures of ITR which is a settled legal position as per different judicial decisions. He relied upon the Tribunal's decision in the case of Sharma Fabricators P. Ltd., [2017(5)GSTN(96)(T)] and in the case of M/s Lord Krishna Real Infra Pvt. Ltd., Final order No.70126/2019-CU(DB) dated 07.01.2019. Learned Counsel for the Appellant also claimed cum-tax benefit in terms of Section 67(2) of the Finance Act, 1994. He also contested imposition of penalty under Section 78 and 77(1)(c) of the Finance Act, 1994.

10. Shri Santosh Kumar learned Authorized Representative for the Department submitted that Service Tax liability came into existence immediately on issuing invoice. He therefore, contended that the order passed by the Appellate Authority is legal and sustainable.

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

12. We have also perused different documents available on records. We find that the bone of contention in this case is whether service tax would be charged simply on the basis of invoices issued or after completion of services. We find that the Appellant was providing "Real Estate Agent Service". In the Service Tax Act which came into effect, after introduction of negative list concept, with effect from 01.07.2012, there was no definition of *real estate agent*. However, prior to negative list regime, *real estate agent* was defined under Section 65 (88) of the Finance Act, 1994 as a person who was engaged in rendering any service in relation to sale, purchase, leasing or renting of real estate. In common trade parlance also, *real estate agent* means a person who works with clients to help them buy, sale or rent real estate. It shows that service under the category of real estate agent service is completed when actual sale or purchase or rent of real estate had taken place. I further find that invoice under the Service Tax Rules, 1994, as provided in Rule 4(A), is required to be issued after completion of the service. The provisions of issuing invoices are as under:-

> "*(1) Every person providing taxable service[, not later than [thirty] days from the date of [completion] of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, shall issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect such taxable service provided or [agreed]to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely* :-"

13. A careful reading of the above provision reveals that invoice is required to be issued within 30 days after completion of the service or on receipt of payment towards value of taxable service. The important issue in this case is to ascertain whether the invoices were issued by the Appellant after completion of service or not. In this context, we find that due to business closure of Amrapali Group of Companies, activities of sale, purchase could not take place. So, invoices issued by the Appellant cannot be treated proper invoice in terms of Rule 4(A)

of the Service Tax Rules, 1994. For issuance of invoice, completion of service is an essential condition, which has visibly not taken place in this case. So, we are of the considered view that no service tax is chargeable on the basis of invoice which was issued before completion of work. We, further find that as per Section 65(44), *service* means any activity carried out by a person for another person. In this case no activity was carried out because of the fact that the business of service recipient was closed. As per Section 66(B) of the Finance Act, 1994, service tax was chargeable on the value of services. As there was no service, service tax was not chargeable on the Appellant. In this regard, reliance is placed on the decision of the Tribunal in the case of Credence Property Developers Pvt. Ltd., [2023 (71) GSTN 294 (T)]. In this case, advance was taken by the builder from the customers for purchase of flat but the same could not be materialized. The Department of service tax issued demand of service tax on such advance which was subsequently refunded to customers. The Tribunal held that in such a situation when service was not rendered, no service tax can be charged. Following the above decision, we hold that the demand confirmed vide impugned Order-in-Appeal is not sustainable.

14. We, further find that when no demand is sustainable, imposition of any type of penalty is improper and unwarranted.

15. In view of the above discussions, both the appeals filed by the Appellant are allowed, 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