CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

Service Tax Appeal N.70427 of 2023

(Arising out of Order-in-Appeal No.218-ST/APPL/LKO/2022 dated 28/03/2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

M/s M. S. Developers **.....Appellant**
(C-56, Sector-I, Aliganj, Lucknow-226024)

VERSUS

Commissioner, CGST & Central Excise Lucknow

....Respondent

(7-A, Ashok Marg, Lucknow-226001)

APPEARANCE:

Absent for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.-70186/2025

DATE OF HEARING : 16.04.2025
DATE OF DECISION : 17.04.2025

SANJIV SRIVASTAVA:

This appeal is directed against the Order-In-Appeal No. 218-ST/APPL/LKO/2022 dated 28/03/2022 of the Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow. By the impugned order Commissioner (Appeals) has modified Order-In-Original dated 01.02.2021 of Additional Commissioner, CGST Lucknow holding as follows:-

"ORDER

a. I confirm the demand of Service Tax amounting to Rs. 78,79,420/- (Rupees Seventy Eight Lakh Seventy Nine Thousand Four Hundred Twenty Only) (including cess) on the party under the proviso to Sub Section (1) of Section 73 *of the Finance Act, 1994, read with Section 174 of the CGST Act, 2017.*

b. I confirm the demand of interest at the appropriate rate under Section 75 of the Finance Act, 1994 against the party.

c. I impose penalty of Rs. 78,79,420/- (Rupees Seventy Eight Lakh Seventy Nine Thousand Four Hundred Twenty Only) (including cess) (Rupees Two Crores Eighty Four Lakhs Seventy Two Thousands Eight Hundred Thirty Nine only), upon the party under Section 78 of the Finance Act, 1994, read with Section 174 of the CGST Act, 2017. The party has an option to pay penalty @ 25% of the amount of service tax as determined above, alongwith interest and reduced penalty within a period of 30 days of the date of receipt of order.

d. I also impose penalty of Rs. 10000/-(Rupes ten thousand only) upon the party under Section 77(1)(c) of the Finance Act, 1994, read with Section 174 of the CGST Act, 2017.

e. I also impose penalty of Rs. 10000/-(Rupes ten thousand only) upon the party under Section 77(1)(d) of the Finance Act, 1994, read with Section 174 of the CGST Act, 2017."

2.1 The Appellant is registered with the Service Tax Authorities for providing services under the category of 'Real Estate Agent Service' and 'Business Auxiliary Service'.

2.2 On the basis of intelligence that Appellant was not paying the due service tax in respect of the services provided Appellant was asked to provide documents/information in respect of their service tax compliance but the same was not provided by them. They were summoned vide summons dated 09.02.2017, 27.07.2017, 08.01.2018 & 05.07.2018 to appear and submit the documents in respect of service tax compliance. However, they failed to appear and produce the documents.

2.3 26AS statement of the Appellant was procured from other sources for the year 2013-14, 2014-15 & 2015-16. On examination of the said statement it was observed that Appellant had received huge amount against the taxable services provided during the period. However, their Service Tax Return (ST-3) for this period obtained from SS portal did not reflect these amounts as the gross receipt. Accordingly, Revenue was of the view that Appellant short paid service tax as detailed below:-

Financial Year	Total Value as per 26AS	Value as per ST-3	Difference Taxable Value	Service Tax @ Rate	Service Tax
2013-14	60664145	455970	60208175	12.36%	7441,730
2014-15	2874591	0	2874591	12.36%	355299
2015-16*	568205	0	568205	14.50%	82390
				Total	7879420

2.4 By invoking the extended period of limitation a Show Cause Notice dated 17.10.2018 was issued to the Appellant asking them to show cause as to why:-

a. Service Tax amounting to Rs. 78,79,420/- (Rupees Seventy Eight Lakh Seventy Nine Thousand Four Hundred Twenty Only) (including Ed. Cess, H.Ed.Cess, SBC & KKC as applicable) due upon them for the period from April 2013 to March'2016 should not be demanded and recovered under proviso of Section 73(1) & 73(A) of the Act read with Section 173, 174 & 142 of Central Goods & Services Tax Act, 2017 (hereinafter referred as "CGST Act").

b. Interest due thereon at the applicable rate should not be demanded and recovered from them under Section 75 & 73B of the Act read with Section 173, 174 & 142 of CGST Act on the amount of Service Tax short paid.

c. Penalty should not be imposed upon them under Section 78 of the Act for non-payment of due Service Tax by suppressing the value of taxable services with intent to evade the payment of Service Tax from the department read with Section 173 & 174 of CGST Act.

d. Penalty should not be imposed upon them under Section 77(1)(c) of the Act read with Section 173 & 174 of CGST Act for failure to furnish the full information & records as desired by the department.

e. Penalty should not be imposed upon them under Section 77(1)(d) of the Act read with Section 173 & 174 of CGST Act for failure to pay service tax electronically to the department.

2.5 The Show Cause Notice has been adjudicated as per the Order-In-Original referred in Para 01 above.

2.6 Aggrieved Appellant filed an appeal before the Commissioner (Appeal) which has been disposed of as per the impugned order.

2.7 Aggrieved by the impugned order Appellant have filed this Appeal.

3.1 Matter has been listed on 11.03.2025, 28.03.2025 & 16.04.2025. None appeared on 11.03.2025 and today. Matter was adjourned for today on the basis of the written request received from the Appellant on 28.03.2025.

3.2 As the matter has been listed for sufficient number of times no further adjournment could have been allowed in terms of Section 35C(1) of the Central Excise Act, 1994. The same is reproduced below:-

> *[(1A) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]*

3.3 Learned Authorized Representative reiterates the finding recorded in the impugned order.

4.1 Matter has been taken up for consideration after hearing the learned Authorized Representative for the Revenue and on the basis of the records avilable.

4.2 The impugned order records as follows:-

> *I have carefully examined the MOU dated 03.06.2010 entered into between M/s Ansal Properties & Infrastructure Ltd. and the appellant. In terms this MOU, the appellant was required to provide services of Land purchase to M/s Ansal Properties, who was to pay commission @ Rs.1,00,000/- per acre to the appellant for providing the aforesaid service. The appellant submitted that similar MOU was also signed by them with M/s Sputnik Realtors Pvt. Ltd. They agreed to discharge Service tax liability on this commission amount during the relevant period and there is no dispute with respect to this issue.*

As per Profit & Loss Account of the appellant for F.Y. 2013-14, Commission income/other income' is reflected as Rs 72,18,790/- and in F.Y. 2014-15, 'Commission income' is mentioned as Rs.18,603/-. On going through the said MOU as well as the sample bills raised by the appellant in this regard, I find that they charged the commission amount only and no Service tax was charged by them. Thus, I am of the opinion that the above mentioned commission amount was inclusive of Service tax and the appellant was eligible for benefit of cum-tax value in terms of Section 67(2) of the Finance act, 1994. Hence, the appellant was liable to pay Service tax amounting to Rs.7,96,139/-after extending the benefit of cum-tax value against which the appellant had eady deposited Service tax of Rs.56,358/ as per ST 3 return. As such, the peliant is required to pay differential Service tax of Rs.7,39,781/- along with interest and mandatory penalty equal to this amount of Service tax under Section 78 of the Act, ibid.

..

Since penalty has already been imposed upon the appellant under section 78 of the Act, as mentioned above, I vacate the penalty imposed upon them under Section 77(1)(c) and Section 77(1)(d) of the Act.

The impugned order is modified to the above extent. The appeal filed by the appellant is disposed of accordingly.

4.3 The Appellant have in their Appeal not challenged the demand confirmed against them. The only challenged is to the penalty imposed under Section 78. The ground of appeal mentioned in the appeal memo are as under:-

a. No contumacious conduct or deliberate violation of statute has been alleged in the show cause notice. Hence penalty under section 78 of finance act, 1994 is not sustainable.

b. None of the ingredients of Section 78 is present. Hence penalty imposed under Section 78 of Finance Act, 1994 is not sustainable.

c. Burden to prove the applicability of Section 78 of Finance Act, 1994 is on the Department but the Department has miserably failed to prove the presence of any of the ingredient of Section 78.

4.4 And the prayer made in the appeal is as follows:-

PRAYER:

Appellants accordingly most respectfully pray that;

(I) Appeal be allowed by setting aside the impugned Order-In-Appeal No. 218-ST/APPL/LKO/2022 dated 28.03.2022 to the extent upholding the imposed penalty of Rs. 7,39,781/- under Section 78 of the Finance Act, 1994.

(II) Appeal be allowed by setting aside the impugned Order-In- Original No. 07/ADC/LKO/2020-21 dated 01.02.2021 passed by the Additional Commissioner, Central Excise & Service Tax, Lucknow.

(III) Make any other order which this Hon'ble Court may deem fit and proper in the circumstances of the case.

4.5 In the present case I observe that the Appellant had collected the amounts in terms of the MOU signed between them and M/s Ansal Properties & M/s Sputnik Realtors Pvt. Ltd. with respect to the commission per acre to be paid to them. The fact about these amounts being collected by them was never disclosed by them to the Revenue Authorities or in their ST-3 Returns. Thereby they suppressed the value of taxable services being provided by them with a intent to evade payment of tax. From the impugned order it is evident that Appellant was aware that tax was due in respect the said amount and they agreed to discharge service tax liability of this amount during the relevant period. There is no dispute with regards to the amount of service tax demanded from the Appellant. The Appellant do not dispute the same. That being so by not reflecting these tax liabilities in their ST-3 Return Appellant have deliberately knowingly suppressed the relevant facts from the Revenue Authorities with intent to evade payment of tax. Thus their cannot be any dispute with regards to the penalties imposed upon them under Section 78 in terms of decision of Hon’ble Supreme Court in the case of **UOI V/s Rajasthan Spinning & Weaving Mills reported at 2009 (238) E.L.T. 3 (S.C.).**

4.6 However, I find that Section 78(2) of the Finance Act, 1994 provides as follows:-

(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) of section 73, then the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.

4.7 While this option to pay 25% of the amount confirmed was extended in Order-In-Original the same has not been extended in the impugned order by the Commissioner (Appeals) whereby major amount of demand has been dropped (demand confirmed by Order-In-Original is Rs.78,79,420/-and by Order-In-Appeal is only Rs.7,96,139/-) it was thus necessary for the Commissioner (Appeals) but have specifically extended this benefit of payment of penalty at 25% of the tax short paid in terms of this provisions.

4.8 Ahmedabad bench has in the case of Kalpesh Founders & Engineers-2009 (248) E. L. T. 354 (Tri.-Ahmd.) has held as under:-

"5. Admittedly, the Original Adjudicating Authority had vacated the show cause notice in its totality. The demand of duty was increased and penalty was imposed by Commissioner (Appeals) vide his impugned order. However, the appellate authority never gave any option to the assessee to deposit the dues along with 25% of penalty within a period of thirty days from the receipt of his order. Provisos were the subject matter of consideration of their own lordships of Punjab and Haryana Court in the case of Commissioner of Central Excise, Rohtan v. JR Fabrics Pvt. Ltd. reported in 2009 (238) E.L.T. 209 (P & H) . After taking note of the Hon'ble Supreme Court's judgment in the case of Dharmendra Textile Processors, it was observed that when the Adjudicating Authority as also Commissioner (Appeals) acted illegally and contrary to the first Proviso to Section 11AC of the Act, and no option to pay penalty of 25% within 30 days was given to the assessee the fault lies

with the authorities and not with the assessee. As such the Hon'ble Delhi High Court's decision in the case of Malbro Appliances Pvt. Ltd. reported in 2007 (208) E.L.T. 503 (Del.) = 2007 (5) S.T.R. 256 (Del.) and KP Pouches Pvt. Ltd. judgment reported in 2008 (228) E.L.T. 31 (Delhi) was concurred with.

6. In view of the above discussion I enhance the penalty equal to the duty confirmed against the respondents. However, in view of the Provisos to Section 11AC and the Hon'ble High Court's judgments referred supra, I give an option to the assessee to deposit the entire dues along with 25% of penalty within a period of thirty days of communication of the present order, in which case the penalty shall stand restricted to 25% of the duty amount. Revenue's appeal is disposed off in above terms."

The Appeals of the Revenue against this Tribunal decision have been dismissed by the Hon'ble High Court [2015 (320) E.L.T. A119 (Guj.)] and by Hon'ble Supreme Court [2017 (349) E.L.T. A87 (S.C.)] .

4.8 I extend the same benefit in terms of this Section to the Appellant for payment of entire amount of tax with interest and 25% penalty within 30 days of the receipt of this order.

5.1 To the extent indicated in Para 4.8, appeal is disposed of.

(Pronounced in open court on 17.04.2025)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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