

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70097 of 2022

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-1784-17-18, dated - 28/02/2018 passed by Commissioner (Appeals) CGST & Central Excise, Noida)

M/s Continental Chemical Limited

.....Appellant

(A-7, Sector-7,
Noida, Uttar Pradesh, 201301)

VERSUS

Commissioner, Central Excise, Noida

....Respondent

(C-56/42, Renu Tower, Sector 62, Noida-201301)

APPEARANCE:

Shri Brijesh Verma, Advocate for the Appellant
Smt. Chitra Srivastava, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70257/2025

DATE OF HEARING	:	05.05.2025
DATE OF DECISION	:	05.05.2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Appeal No. NOI-EXCUS-001-APP-1784-17-18, dated -28/02/2018 passed by Commissioner (Appeals) CGST & Central Excise, Noida. By the impugned order the Appeal filed by the Appellant against the Order-In-Original No.16/JC/ST/Noida/2020-21 dated 05.08.2020 has been partly allowed to the extent of setting aside the demand made on renting of immovable property service.

1.2 By the Order-In-Original dated 05.08.2020 following has been held:-

ORDER

(i) I confirm the demand of Service Tax (including Ed. Cess and S&H Ed. Cess) amounting to Rs.3,50,200/- (Rupees three lakh fifty thousand two hundred only) upon the party under Section 73(2) of the Finance Act, 1994 in respect of renting of immovable property services for the financial year 2010-11.

(ii) I confirm the demand of Service Tax (including Ed. Cess and S& H Ed. Cess) amounting to Rs.1,76,442/- (Rupees one lakh seventy six thousand four hundred forty two only) as proposed in the SCN for the period from April, 2010 to March, 2013 under reverse charge mechanism, upon the party under Section 73(2) of the Finance Act, 1994.

(ii) I order to charge and recover the interest on aforesaid confirmed demand of service tax of Rs.5,26,642/- (Rs.3,50,200/-+Rs.1,76,442/-) at the appropriate rates under provisions of Section 75 of the Finance Act, 1994.

(iv) I impose a penalty of Rs.5,26,642/- (Rupees five lakh twenty six thousand six hundred forty two only) upon the party under Section 78(1) of the Finance Act, 1994.

(v) I also impose a penalty of Rs.5,000/- (Rupees five thousand only) upon the party under Section 77(2) of the Finance Act, 1994 for not filing the ST-3 return properly by disclosing the all taxable services and value thereof.

2.1 The Appellant is having Service Tax Registration No. AAACC1412BSD002 and is engaged in providing of 'Renting of Immovable Property' service to their tenants.

2.2 During the course of Audit of records of the Appellant for the period from April 2010 to March 2013 it was observed that the Appellant has short paid service tax in respect of the rental income as indicated in their financial accounts in contravention of Section 66, 67, 68 & 70 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

2.3 It was also observed that party has paid Rs.15,84,374/- to foreign service provider on account of repair, maintenance, hosting charges and had suppressed and not paid service tax of Rs.1,76,442/- under reverse charge mechanism. A Show Cause

Notice dated **29.07.2015** was issued to the Appellant asking them to show cause as to why:-

"I- An amount of Service Tax (including Ed. Cess & SHEd. Cess) Rs. 3,50,200/-, being Service Tax short paid in respect of Rental income during the financial year 2010-11, should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994, along with the interest at appropriate rates on the said amount of Service Tax also appears to be recoverable from the party, under Section 75 of the said Act.

II- An amount of Service Tax (including Ed. Cess & SHEd. Cess) Rs. 1,76,442/-, being Service Tax short paid under Reverse Charge Mechanism in respect of payment made to foreign service provider during the period April, 2010 to March 2013, should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994, along with the interest at appropriate rates on the said amount of Service Tax also appears to be recoverable from the party, under Section 75 of the said Act.

III- Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994

IV- Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994."

2.4 The Show Cause Notice has been adjudicated by Order-In-Original dated 31.08.2016 confirming the above demands along with interest and penalties.

2.5 On appeal Commissioner (Appeals) has vide Order-In-Appeal No.NOI-EXCUS-001-APP-1784-17-18 dated 28.02.2018 remanded the matter to the Original Authority observing as follows:-

"3.I have considered the material available on record, relevant statutory provisions and the appellant's submissions at length. On the perusal of the Impugned orders. I find that the lower authority arrived at the conclusion that the appellant have not substantiated their claims regarding leased out premises and services received from foreign service provider. On this premise the adjudicating Authority observed that contention of the appellant were not

supported by evidence, and therefore, the demand raised was confirmed with imposition of penalty.

4. The appellant in the instant case have sought to consider the case on the basis of supporting documents submitted with the Appeal Memo. The appellant has also submitted copy of Civil Court Order with regard to dispute pertaining to leased out premises. The documents submitted by the Appellant require scrutiny of the Field Officers to verify its authenticity and current status. In view of the above, I therefore direct that the said document produced by the Appellant at the hearing stage be sent forthwith along with the case file to the concerned field formation for requisite verification at their."

2.6 In terms of the remand order the Order-In-Original dated 05.08.2020 has been passed again confirming the demand along with interest and penalties.

2.7 Aggrieved Appellant filed appeal to Commissioner (Appeals) which has been disposed of as per the impugned order. Aggrieved Appellant have filed this appeal.

3.0 Have heard Shri Brijesh Verma, Advocate for the Appellant and Smt. Chitra Srivastava, Authorized Representative for the Revenue.

4.1 The impugned order records the findings as follows:-

"12. Now coming to the 2nd issue, I find that vide show cause notice dated 22.7.2015 it was alleged that the appellant had paid Rs.15,84,374/- to foreign services provider on account of repair, maintenance, hosting charges but they had not paid the Service Tax (including Ed. Cess and S&H Ed. Cess) amounting to Rs.1,76,442/- due thereon during the period from April, 2010 to March, 2013 under reverse charge mechanism by way of suppressing the said taxable value and by contravening the provisions of Section 66(4), 67 & 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994. The said demand has been confirmed by the adjudicating authority by quoting the provisions of Section 66A of the Finance Act, 1994 (as applicable upto 30.6.2012) and by quoting provisions of Section 668 of the Finance Act, 1994 read with notification no. 30/2102-ST dated 20.6.2012 along with Rule 2(1)(d) (1) (G) of Service Tax Rules, 1994 (for the period from 1.7.2012). The main argument of the adjudicating authority is that in terms of the said rules, appellant is liable to pay

service tax in the present case since in the present case service provider is located in a non taxable territory and services are received by the appellant who is located in the taxable territory.

13. Regarding second Issue, I find that the appellant has, paid Rs.. 15,84,374/- to foreign service providers on account of repair, maintenance, hosting charges and had not shown them in ST-3 returns not paid due service tax liability. I find that in their reply, the appellant has submitted justification regarding host charges paid by them only, but nothing submitted in respect of repair & maintenance received by the appellant. On this issue, I am in agreement with the findings of the adjudicating authority and rightly observed that the appellant is liable to pay Service Tax of Rs.1,76,442/- leviable thereon under reverse charge mechanism in accordance with the provisions of Section 66A, 66B, 67 & 68(2) of the, Finance Act, 1994 read with Rule 6 & 2(1)(d) of the Service Tax Rules, 1994."

4.2 From the impugned order and the Show Cause Notice it is evident that the Appellant have paid certain amounts (Rs.15,84,374/-) to foreign service provider on account of repair, maintenance, hosting charges. However, no bifurcation with regards to the amount have been indicated and neither it is indicated that these amounts were paid to which service provider.

4.3 Interestingly, the impugned order holds that the Appellant has given justification regarding hosting charges paid by them but nothing is submitted on repair and maintenance received by them. The impugned order do not records any finding where such hosting charges would be levied to service tax. In absence the only conclusion which can be drawn is that in view of the Commissioner (Appeals) these charges could not be levied to service tax for the simple reason that he records that the justification given by the Appellant in respect of these charges. However, he upholds the demand made in this regard in *toto* without giving any bifurcation.

4.4 Be that as it may be, I find that the Show Cause Notice has been issued without any investigation or scrutiny of any

documents purely on the basis of the IAR. The texts of the Show Cause Notice is reproduced below:-

ANNEXURE-D
RECEIVED
30/9/15
@ 4.30 P.M.


Government of India

OFFICE OF THE COMMISSIONER
SERVICE TAX COMMISSIONERATE, C - 56/42, SECTOR - 62, NOIDA

C. No. V(15)Adj/ST/Noida/Continental /18/2015 3411 Dated: .07.2015
29/7/2015

DEMAND CUM NOTICE TO SHOW CAUSE

Whereas M/s Continental Chemical Ltd., C-7, Sector-7 Noida (hereinafter referred to as the party), having Service Tax registration No. AAACC1412BSD002, are engaged in providing the "Renting of Immovable Property" service to their tenants which is a taxable service defined under Section 65(90) (a) of the Finance Act, 1994 and as per provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, the service provider is required to pay the Service Tax due if any, self assessed by themselves for a calendar month, in the following month/quarter.

Whereas during the course of audit of records of the party conducted by the Internal Audit Party for the April'2010 to March'2013 (RUD-1) and on reconciliation of audited Balance Sheet (Financial statements)/Ledgers of the party vis-à-vis their ST-3 returns, it was observed that the party have shown a rental income of Rs 34,00,000/- in Financial Year 2010-11 but have suppressed the information in their ST-3 returns and not paid Service Tax of Rs.3,50,200/- (i. e. 34,00,00*10.3%) due thereon, which is contravention of Section 66, Section 67, Section 68 and Section 70 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

Whereas, further during the course of audit and scrutiny of audited Balance Sheet(Financial statements)/Ledgers of the party, it was observed that the party have paid Rs.15,84,374 /- to foreign services provider on account of repair, maintenance, hosting charges and have suppressed and not paid service tax of Rs.1,76,442/- under reverse charge mechanism, due thereon, which is contravention of Section 66(A), Section 67 and Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

Whereas it is evident from the above that the party had not paid due Service Tax amounting to Rs.3,50,200/- in the financial year 2010-11 by way of suppressing the taxable value Rs.34,00,00/- received by them on account of "Renting of Immovable Property" in contravention of Section 66; Section 67, Section 68 and Section 70 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

Whereas it is also evident from the above that the party had not paid due Service Tax amounting to Rs.1,76,442/- during period April' 2010 to March' 2013 by way of suppressing the taxable value Rs15,84,374/- under reverse charge mechanism in contravention of Section 66(A), Section 67 and Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

For Continental Chemicals Limited

Authorised Signatory

It appears that the party did so deliberately with intent to evade payment of Service Tax. Hence, the provisions of proviso to Section 73(1) of the Finance Act, 1994 for the extended period of limitation appears to be invocable and the short paid Service Tax, as detailed in above paras of this Show Cause Notice, appears to be recoverable from the party, along with interest at appropriate rate under Section 75 of the said Act. Further, since the party have short paid the Service Tax, applicable on them by reason of suppression of facts, and had the audit not been conducted, the facts would have never come to the knowledge of the department for the services provided by them to their clients and they have violated the provisions of Section 66, 67, 68 and 70 of the Finance Act, 1994. Hence they appear to liable for imposition of penalty under Section 78 of the Finance Act, 1994, as applicable during the relevant period of this case.

Now, therefore, the party are hereby required to show cause within 30 days of the receipt of this notice to the Joint Commissioner, Service Tax Commissionerate, Noida having office at C-56/42, Sector -62, Noida as to why :-

- I- An amount of Service Tax (including Ed. Cess & SHeD. Cess) Rs. 3,50,200/-, being Service Tax short paid in respect of Rental income during the financial year 2010-11, should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994, along with the interest at appropriate rates on the said amount of Service Tax also appears to be recoverable from the party, under Section 75 of the said Act.
- II- An amount of Service Tax (including Ed. Cess & SHeD. Cess) Rs. 1,76,442/-, being Service Tax short paid under Reverse Charge Mechanism in respect of payment made to foreign service provider during the period April, 2010 to March 2013, should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994, along with the interest at appropriate rates on the said amount of Service Tax also appears to be recoverable from the party, under Section 75 of the said Act.
- III- Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994
- IV- Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994.

The party are further required to produce all the evidences at the time of showing cause upon which they intend to rely in support of their defence and should also indicate in their written submission whether they wish to be heard in person before the case is adjudicated, failing which it would be construed that they do not wish to be heard in person.

If no cause is shown against the action proposed to be taken within 30 days from the date of receipt of this notice or they do not appear before the adjudicating authority when the case is posted for hearing, then it shall be construed that they do not have anything to state in their defence and the case will be decided *ex-parte* on the basis of evidences available on record, without any further notice/intimation to them.

For Continental Chemicals Limited


Authorised Signatory

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Reliance for issue of this notice is based on the documents mentioned in the enclosed list of relied upon documents. The legible copies of the essential relied upon documents mentioned in Annexure are enclosed and the same may be treated as integral part of this show cause notice.

This notice is issued without prejudice to any other action that may be or has already been initiated against either under the Finance Act, 1994 or Rules made there under or any other law for the time being in force and enforceable in India.

Encls: RUD -I (copy of IAR NO. 301/13-14)

**JOINT COMMISSIONER
SERVICE TAX COMMISSIONERATE
NOIDA**

To,

M/s Continental Chemical Ltd.
C-7, Sector-7 Noida

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित:-

1. उप/सहायक आयुक्त, सेवा कर, मंडल-I, नॉएडा ।
2. उप/सहायक आयुक्त(लेखा परीक्षा) सेवा कर नॉएडा ।
3. अधीक्षक, सेवा कर, रेंज-V, मंडल-I, नॉएडा को कारण बताओ नोटिस की पार्टी की मूल प्रति एवं समस्त सम्बंधित कागजों की प्रति के साथ इस आशय से प्रेषित है कि वह पार्टी की मूल प्रति एवं समस्त सम्बंधित दस्तावेजों की प्रति को प्राप्त कराकर सम्बंधित पावती की मूल प्रति इस कार्यालय को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित कर दे ।

अधीक्षक(न्याय निर्णय)

सेवा कर नॉएडा

For Continental Chemicals Limited

[Signature]
Authorised Signatory

4.5 The only RUD in the Show Cause Notice is copy of IAR No.301/13-14 and it fails to record with regards to any investigation subsequently made before issuance of the Show Cause Notice.

4.6 It has been constantly held by the Tribunal that a Show Cause Notice issued only on the basis of Audit objection has got no lax to stand upon. In case of Kirloskar Pneumatic Co. Ltd [2010 (254) E.L.T. 328 (Tri. – Mumbai)] following has been held:

3. Firstly, the show-cause notice was issued purely on the basis of audit objections without the necessary investigation which must precede action under Section 11A of the Act. In this connection, I may usefully refer to two decisions cited by the Counsel, viz., (i) Swastik Tin Works v. Collector - 1986 (25) E.L.T. 798 (Tri.); and (ii) Ram Steel Rolling and Forging Mills v. Commissioner - 2006 (204) E.L.T. 87 (Tri.-Mumbai). In the former case, one of the reasons stated by the Tribunal's Special Bench for holding the demand of duty to be unsustainable, was that the demand had been raised on the basis of audit objections and without investigations. In the latter case also, it was found that the demand of duty in question had been raised on the basis of audit objection and without gathering evidence by way of investigation. The internal auditors of the department are not investigators. They are rather fact-finding experts, whose practice it is to verify records and cull out the relevant facts. The department, has an investigating agency of its own, whose job is to book cases against suspects and gather the relevant facts by way of investigation including examination of witnesses. There is a clear distinction between the two jurisdictions. A show-cause notice under Section 11A(1) of the Central Excise Act and, for that matter, one under Section 28(1) of the Customs Act should result from the successful conclusion of investigations rather than from a mere report of an auditor. This is the settled law on the subject."

4.7 In case of Sharma Fabricators & Erectors Pvt. Ltd. [2017 (5) G.S.T.L. 96 (Tri. - All.)] fabricators following has been held:

5. Having considered the rival contentions and on perusal of record, we find that in the cases of both the Show Cause Notices dated 20-4-2009 & 13-10-2009 there is no whisper of examination of books of account maintained by M/s. Sharma to arrive at the value of consideration received by them. Surprisingly the draft audit report was the relied upon document. It may be worth mentioning here that the purpose of audit report is to point out any discrepancy to the notice for examination by the executive and it is the duty of executive to examine the records and examine the objection raised with reference to the records and facts of the case and take a view whether there is a sustainable case for issue of Show Cause Notice. Such vital aspects of framing of charges have been missing in the present case. The charges in the Show Cause Notice have to be on the basis of books of account and records maintained by the assessee and other admissible evidence. The books of account maintained by M/s. Sharma were not looked into for issue of above stated two Show Cause Notices. Therefore, the transactions recorded in the books of account cannot be held to be contrary to the facts. Therefore, we hold that the said Show Cause Notices are not sustainable. Since the said Show Cause Notices are not sustainable, appeal bearing No. ST/890/2010 filed by M/s. Sharma is allowed and appeal bearing No. ST/949/2010 filed by Revenue is dismissed. Miscellaneous Applications also stand disposed of. Cross Objection also disposed of.

This decision has been affirmed by the Hon'ble Allahabad High Court as reported at [2019 (22) G.S.T.L. J166 (All.)]

4.8 As the Show Cause Notice has been issued purely on the basis of Audit objection without any subsequent investigation made in the matter, I do not find any merit in the impugned

order where only part of the demand has been confirmed without even giving the breakup of what has been confirmed.

5.1 Accordingly, appeal filed by the Appellant is allowed.

(Operative part of the order is pronounced in open court)

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

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