CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70516 of 2016

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-036-15-16 dated 12.02.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

M/s Shyam Construction, **.....Appellant**
(1281, Bairi Akbarpur, Indira Nagar, Kanpur,
A Unit of M/s New Mount Trading & Investment Company Ltd.,
26, Jawahar Lal Nehru Road, 2nd Floor, Suite No.22, Kolkata)

VERSUS

Commissioner of Customs, Central Excise &
Service Tax, Kanpur **....Respondent**
(117/7, Sarvodaya Nagar, Kanpur-208005)

WITH

Service Tax Appeal No.70517 of 2016

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-036-15-16 dated 12.02.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

Shri Vidup Agrahari, Director **.....Appellant**
(1281, Bairi Akbarpur, Indira Nagar, Kanpur,
A Unit of M/s New Mount Trading & Investment Company Ltd.,
26, Jawahar Lal Nehru Road, 2nd Floor, Suite No.22, Kolkata)

VERSUS

Commissioner of Customs, Central Excise &
Service Tax, Kanpur **....Respondent**
(117/7, Sarvodaya Nagar, Kanpur-208005)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant
Shri Manish Raj, 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.- 70262-70263/2025

DATE OF HEARING : 02.12.2024
DATE OF PRONOUNCEMENT : 09.05.2025

P. K. CHOUDHARY:

These two appeals are filed by the Appellant's Company i.e. M/s Shyam Construction and its director Shri Vidup Agrahari. Both the appeals are arising out of Order-in-Original No.KNP-EXCUS-000-COM-036-15-16 dated 12.02.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur. The Appellant No.1 Shyam Construction, a private limited company is engaged in providing service of construction of residential complexes.

2. The facts of the case in brief are that a team of officers of DGCEI searched the office of M/s Shyam Construction documents were resumed as detailed in panchnama dated 19.03.2013 and statement of Shri Sujeet Banerjee, Project Manager and Shri Abhishek Mishra, Assistant Manager (Sales & Marketing) were also recorded. Statement of Shri Vidup Agrahari was recorded on 26.03.2013. Subsequently show cause notice[1] dated 26.02.2015 was issued proposing as under:-

"19. Now, therefore M/s Shyam Construction, 1281, Bairi Akbarpur, Indira Nagar, Kanpur (a unit of M/s New Mount Trading and Investment Company Limited, 26, Jawahar Lal Nehru Road, 2nd Floor, Suite No.22, Kolkata) are hereby called upon to Show Cause to the Commissioner of Central Excise and Service Tax, 117/7, Sarvodaya Nagar, Kanpur within thirty (30) days of the receipt of this notice, as to why:-

(i) Service Tax amounting to ₹1,11,03,818, Education Cess amounting to ₹2,22,075 & Secondary and Higher Education Cess amounting to ₹1,11,039 (Total ₹1,14,36,933 Rupees one crore fourteen lakhs thirty six thousand nine hundred and thirty three only) not paid by them should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994; and the

[1] SCN

amount of ₹10,00,000 already deposited by them on 28.03.2013 towards service tax liability should not be appropriated towards confirmed dues;

(ii) Interest at the appropriate rate should not be charged and recovered from them under Section 75 of the Finance Act, 1994;

(iii) Penalty under Section 76, 77 and 78 of Finance Act, 1994 should not be imposed upon them.

20. Shri Vidup Agrahari, Director of M/s New Mount Trading & Investment Co. Ltd., Kolkata (Unit: M/s Shyam Constructions, Kanpur), is hereby called upon to show cause to the Commissioner of Central Excise and Service Tax, 117/7 Sarvodaya Nagar, Kanpur-208005, within thirty days of the receipt of this notice, as to why penalty may not be imposed upon him under section 78A of the Finance Act, 1994."

3. Vide the impugned Order-in-Original the demand of service tax as proposed in the SCN has been confirmed and amount of Rs.10,00,000/- already deposited by the Appellant has been appropriated. Penalty of equal amount under Section 78 has been imposed and penalty of Rs.10,000/- on each under Sections 77(1)(a), 77(1)(b) & 77(1)(d) imposed. Penalty of Rs.1,00,000/- has been imposed upon Shri Vidup Agrahari, Director. Hence the present appeals before the Tribunal.

4. We find that the Tribunal vide Final Order No.71498-71499/2019 dated 31.07.2019 had dismissed both the appeals for none prosecution. Subsequently the Appellants filed Applications for Restoration of appeals and vide Miscellaneous Order No.70125-70126/2023 dated 21.11.2023, the prayer for restoration of appeals was allowed and appeals were restored to its original numbers.

5. The Revenue in the present case has confirmed a demand of Service Tax of Rs.1,14,36,933/- along with interest and penalty under Section 78 of Finance Act, 1994 based on five main allegations/issues :-

- Non-payment of service tax of Rs.52,43,416/- on the alleged provision of Preferential Location or External or Internal Development of Complex Service by the Appellant.
- Non-payment of service tax on Club Construction cost received by Appellant under the head '’Club or Association Service’.
- Short payment of tax based on difference in tax payable on receipt basis and as per the Point of Taxation Rules, 2011[2].
- Non-payment of tax on cash recovered which was allegedly collected from customers over and above the Agreement cost
- Non-payment of tax collected from customers on account of cancelled bookings of flats which was not refunded.

6. Now, we take up the first issue of demand of service tax of Rs.52,43,416/- under the head ‘Preferential Location or External or Internal Development of Complex Service’ on the amount of advances received from the prospective buyers.

7. The impugned Order has confirmed the demand on the allegation that the Appellants were charging additional cost from customers for providing preferential locations while buying flats and as such the same would be taxable under the head of ‘Preferential Location or External or Internal Development of Complex Service’ under Section 65(105)(zzzzu) of Finance Act, 1994.

8. The Adjudicating Authority has relied upon the statement of Shri Vidup Agrahari, Director of Appellant’s company to allege that three types of Preferential Location Charges[3] were collected from the customers. It is alleged that such PLC were separate and additional charges for providing an extra benefit of a preferential location. The Adjudicating Authority alleges that the separate mentioning of PLC in the payment plan denotes that such charges were separate and additional to the construction cost received from buyers and there was no need to bifurcate costs otherwise. It is further contended by the Revenue that w.e.f. 01.07.2012, such activity of providing preferential location

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[2] POT Rules, 2011
[3] PLC

remained taxable and was not exempted under any notification. Further, It is contended that on account of providing preferential location being a separate service, it cannot be equated with construction services and the benefit of abatement under Notification No.01/2006 dated 01.03.2006 and Notification No.26/2012 dated 20.06.2012 would not be available to the Appellant.

9. On the contrary, the Appellants had in its appeal contended that no extra or additional services were being provided to the buyers, nor was there any receipt of additional income on its account. The Appellant has relied on Section 65(105)(zzzzu) and the Circular No.334/1/2010-TRU dated 26.02.2010 in this regard to contend that unlike in the present case, only when an additional service of preferential location is provided and a corresponding additional and over the Agreement consideration is received will the same be taxable under Section 65(105)(zzzzu). In this regard, the Appellants have also provided copies of Agreement with the buyers to show that no additional facility was provided and the original price of flats automatically included the cost of location.

10. The Appellants further contends that after the advent of negative list regime in 30.06.2012, the concept of PLC was omitted and the concerned activity can only be considered taxable as a part of Construction service. Consequently, it was argued that such service would be a bundled service of construction as per clause (3) of Section 66F of Finance Act, 1994. With regard to mentioning of PLC in the cost bifurcation provided to buyers, the Appellant contends that such bifurcation is merely an internal calculation provided to buyers for the sake of transparency and convenience and does not constitute an additional cost.

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

12. It is an established fact that the Appellants have paid service tax on such amount received for preferential location after taking the benefit of abatement, by considering the same to be a part of construction service. Thus, the issue to be

decided is whether such activity is a separate service taxable under Section 65(105)(zzzzu) and whether the benefit of abatement will be available to the Appellant. Before going into the intricacies of the matter, we would like to refer to the provisions as under: -

Section 65 (105) (zzzzu) of the Finance Act, 1994 –

"Taxable service" means any service provided or to be provided to a buyer, by a builder of a residential complex, or a commercial complex, or any other person authorized by such builder, for providing preferential location or development of such complex but does not include services covered under sub-clauses (zzg), (zzq), (zzzh) and in relation to parking place.

Explanation.– For the purposes of this sub-clause, "preferential location" means any location having extra advantage which attracts extra payment over and above the basic sale price. [Section 65(105)(zzzzu)]."

Department's Circular vide D.O.F. No.334/1/2010-TRU, dated 26-2-2010 –

"Construction of '8.1 commercial or industrial structures was brought under service tax net in 2004 while construction of residential complexes became a taxable service in 2005. The scope of the existing services includes construction, completion and finishing, repairs, alterations, renovation or restoration of complexes. It has been reported that in addition to these activities, the builders of residential or commercial complexes provide other facilities and charge separately for them and these charges do not form part of the taxable value for charging tax on construction. These facilities include,-

(a) prime/preferential location charges for allotting a flat/commercial space according to the choice of the buyer;

……………………………………..

Since these 8.2 charges are in the nature of service provided by the builder to the buyer of the property over and above the construction service, such charges are being brought under the new service. Charges for providing parking space have been specifically excluded from the scope of this service. Development charges, to the extent they are paid to State Government or local bodies, will be would be excluded from the taxable value levy. Further, any service provided by Resident Welfare Associations or Cooperative Group Housing Societies consisting of residents/owners as their members would not be taxable under this service."

Section 66F (3) (a) of the Finance Act, 1994 –

"Principles of interpretation of specified descriptions of services or bundled services. —

(1)Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.

Where a service is (2) capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

Subject to the (3) provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :—

if various elements of such service are naturally bundled in the (a) ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

if various elements of such service are not naturally bundled in (b) the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation. — For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision *of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.*'

13. On perusal of the above provisions and Circular, we find that for an activity to be taxable under the head 'Preferential Location or External or Internal Development of Complex Service', following conditions must be satisfied: –

- There should be provision of a specific location.
- Such location must be more advantageous than a general location.
- A consideration must be charged from buyer for the said location.
- Such provision of preferential location must be over and above the original transaction of construction service.
- Such consideration must be separate and additional to the consideration received for construction service.

14. In the present case, on perusal of the agreements with buyers provided by the Appellant, we observe that the entire services provided by the Appellant form a single transaction. A single Agreement was done for the sale of flats/units, and preferential location charges (if any) were a part of the cost of such unit. No separate charges were collected for the preferential location distinct from the original agreement. Similarly, the preferential location was a part of the transaction of construction service, and no separate service was provided over and above the Agreement.

15. We also find that w.e.f. 01.07.2012, as per Section 66F(3)(a) of the Finance Act, 1994; if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle services, it's essential character. It is our view that such preferential location is at most an element of the

construction services and is naturally bundled with the essential character remaining that of a construction service.

16. The fact that such PLC was separately mentioned in the bifurcation of cost provided to customer is immaterial. A bifurcation of cost by its very definition refers to a breakdown of the entire cost based on various elements. It does not imply that such costs were separate and in addition to the original agreement cost. Therefore, we find that the Adjudicating Authority has erred in holding that the Appellants were providing a separate service under the head of 'Preferential Location or External or Internal Development of Complex Service'.

17. The Appellant has relied upon an Order of this Bench in the case of M/s Vipul IT Infrasoft Pvt. Ltd. Vs. Commissioner, Service Tax, Noida [Final Order No.70506/2024]. The relevant paras of this Order are reproduced as below: –

> *"14. We take notice that service tax law was revamped w.e.f. 01.07.2012 by bringing in various changes. We also take notice of the TRU/CBEC letter dt. 20.02.2010 regarding the scope of valuation of taxable amount in respect of residential complex service, which was introduced in the year, 2010. With effect from 01.07.2012, Section 66F have been added to the Finance Act, which deals with classification of service in case of bundled services. Section 66 F (1) provides that - unless otherwise specified, reference to a service (hereinafter referred to as main service) shall not include – reference to a service which is used for providing main service. Further, where a service is capable of differential treatment for any purposes based on its description, the most specific description shall be preferred over a general description. Further, sub section 3 provides - the taxability of a bundled service shall be determined, if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service, which give such bundle its essential character.*

Section 66F shall prevail over any clarification etc. given by the CBEC/ TRU, prior to 01.07.2012.

15. From the facts on record and on perusal of the RUDs, we find that although the Appellant may have prepared a price list showing preferential location charges, car parking charges etc. separately, but it is evident from the buyer-agreements (sample buyer agreement produced at the time of hearing), that the Appellant have charged the negotiated sales price per sq. ft. and in addition have charged IFMS and EDC/IDC per sq. ft. basis. In addition, there is power back up charges in some of the cases. Evidently, we find that Revenue have calculated preferential location charges, IFMS charges, EDC/IDC, power back up charges based on the price list. We find that there is no such mention in the buyer agreement, nor there is any amount collected towards such heads in the books of accounts maintained by the Appellant, as is evident from their balance sheet/ P&L account/ trial balance. Thus, we hold that service tax is not payable on such hypothetical calculation, there being no actual consideration towards these, which is an admitted fact. We hold that service tax levied in this manner based on the price list is wrong, when there is no actual receipt of consideration under these heads.

16. Inasmuch as the issue stands decided, we find no reason to take a different view. Accordingly demand on the said account is set aside, alongwith setting aside of penalty. Appeal filed by the Appellant is allowed with consequential relief if any, as per law."

18. We observe that in light of the similar facts and circumstances, the ratio laid down in the above Order is squarely applicable to the facts of the present case. Similarly, reliance is also placed on the Order of this Bench in the case of M/s SJP Infracon Limited Vs. Commissioner of Central Excise & Service Tax, Noida [Appeal No. ST/70343/2018] in this respect, wherein

it was held that amounts like preferential location charges included in the total construction cost are to be considered as a bundled service of construction and cannot be held to be taxable under separate heads for the sake of disallowing benefit of abatement to taxpayers.

19. Thus, we set aside the demand of service tax of Rs.52,43,416/- confirmed in the impugned Order under the head of 'Preferential Location or External or Internal Development of Complex Service'.

20. Now, we move on to the second issue of demand of service tax of Rs.11,27,850/- under the head 'Club or Association Service' on the allegation that the Appellant collected Club membership fees from their customers.

21. The Appellant in the instant case collected a fixed amount of Rs.50,000/- per flat from its customers in lieu of providing certain facilities, such as swimming pool, restaurant, departmental store etc. in the residential complex. The Adjudicating Authority alleges that such fixed amount is collected as fess form customers for facilities like Club house, swimming pool, departmental store etc. which will be provided in the future. The amount is to be considered a composite payment towards the cost of construction of said facilities and subsequent use of such facilities.

22. The Appellant has in its appeal contended that such amount of Rs.50,000/- per flats collected from customers is a share of the cost of construction of club, which is a part of the construction of complex service provided by the Appellant. Such amount is not in lieu of any club member ship fees and no service or facilities are being provided to the customers by a club or association. Consequently, it is contended that such amount would not be subject to service tax under the head 'Club or Association Service'. It is further contended that such amount received for construction cost is a part of construction and hence the Appellant will be eligible to benefit of abatement under Notification No.01/2006 dated 01.03.2006 and Notification No.26/2012 dated 20.06.2012.

23. We have perused through the contentions raised on both sides, the evidences brought on record as well as the arguments made by the Authorized Representatives. It is an established fact that the Appellant has paid service tax on such amount received for construction cost of concerned facilities after taking the benefit of abatement, by considering the same to be a part of construction service. Thus, the issue to be decided is whether such activity is a separate service taxable under the head of 'Club or Association Service' and as such whether the benefit of abatement will be available to the Appellant. Before going into the intricacies of the matter, we would like to refer to the provision being referred by the parties :-

Section 65 (105) (zzze) of the Finance Act, 1994 –

> *"Taxable services means any service provided or to be provided to its members or any other person by any Club or Association,* ***in relation to provision of services, facilities or advantages*** *for a subscription or any other amount"*

Section 65 (25aa) of the Finance Act, 1994 –

> *"Section 65 (25aa) "club or association" means any person or body of persons providing services, facilities or advantages, primarily to its members, for a subscription or any other amount, but does not include —*
>
> *(i) any body established or constituted by or under any l aw for the time being in force; or*
>
> *(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or*
>
> *(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or*
>
> *(iv) any person or body of persons associated with press or media;"*

24. On a perusal of the above provision, we find that for an activity to fall under the head 'Club or Association Service' under Section 65(105)(zzze), it must satisfy the following conditions :–

- It must be provided by a club or association to its members.
- It must be in relation to certain facilities, services or advantages provided to members
- It must be for a consideration in the form of subscription or any other amount.

25. In the present case, the Appellant is collecting an amount of Rs.50,000/- from its buyers towards cost of construction of club and associated facilities. We find that since no club or association is in existence in the relevant period, the question of any service being provided by a club or association does not even arise. The concerned amount is merely a cost of construction, which will naturally be a part of the taxable value of construction services provided by the Appellant. Consequently, the Appellant would be entitled to avail the benefit of abatement as provided under Notification No.01/2006 dated 01.03.2006 and Notification No.26/2012 dated 20.06.2012.

26. We do not find any merit in the contention of the Adjudicating Authority stating that such club construction cost is nothing more than club membership fees. Since the club is not even in existence, such demand based on an assumption without any basis is bad in law.

27. We would like to refer to the Order of this Bench in the case of M/s SJP Infracon Limited Vs. Commissioner of Central Excise & Service Tax, Noida [Appeal No. ST/70343/2018-CU{DB} dated 19.11.2018] in this respect, wherein it was held that amounts like club building charges included in the total construction cost are to be considered as a bundled service of construction and cannot be held to be taxable under separate heads for the sake of disallowing benefit of abatement to

taxpayers. We find that the ratio laid down in the above judgement is squarely applicable herein.

28. Thus, we set aside the demand of Rs.11,27,850/- confirmed in the impugned Order under the head of 'Club or Association Service'.

29. Next, we consider the issue of demand of service tax of Rs.25,65,993/- based on the POT Rules, 2011. The Appellant in the present case has calculated and paid service tax on receipt basis. The Adjudicating Authority contends that as per Rule 3 of the Point of Taxation Rules, 2011; service tax is payable on due basis, irrespective of when the amount is received by the Appellant. Consequently, the Adjudicating Authority has confirmed the demand on differential amount not considered by party for payment of service tax.

30. The Appellant has admitted the fact that the service tax was calculated and paid by it on receipt basis instead of due basis. It has been contended that interest on such late payment of service tax has been duly paid by the Appellant and a computation of the same is provided with the appeal.

31. We have gone through the computation provided by the Appellant and heard the arguments made by both the parties. We find that it is an admitted and undisputed fact that tax was calculated and paid by the Appellant on receipt basis. We also find that as per Rule 3 of the POT Rules, 2011; the service tax ought to have been paid on due basis.

32. However, since tax has actually been paid by the Appellant, the only liability that may arise is of interest. On a perusal of the computation provided by the Appellant, we find that tax has been duly paid by the Appellant on the entire taxable amount on due basis. Further, interest on late payment of tax has also been deposited. We could not find any differential amount on which service tax has not been paid as claimed by the Adjudicating Authority. We observe that the tax on such alleged differential amount has also been paid by the Appellant subsequently on the date of receipt along with the interest, and

the same has not been taken into account by the Adjudicating Authority.

33. The Adjudicating Authority has disregarded the payment of tax and interest by the Appellant in favour of unilaterally confirming demand under the Point of taxation Rules. We do not find any merit in this approach. The Point of Taxation Rules is a procedural requirement, the final aim of which is to ensure timely and correct payment of tax. Since tax has been eventually and correctly paid by the Appellant, and interest has been deposited in lieu of any late payment, we do not find any reason to sustain the demand. Such demand would amount to double taxation and hence cannot be sustained.

34. The learned Authorized Representative of the Appellant has referred to an Order of this Bench in the case of M/s Ganpati Infrastructure Development Company Ltd. Vs. Commissioner of Central Excise & Service Tax, Agra [ST Appeal No.70774 of 2016], wherein it was held that where payment of service tax has been made on receipt basis, demanding service tax on due basis again would amount to double taxation. In such case, the taxpayers would only be liable to pay interest from the due date as determined under the POT Rules, 2011.

35. The above Order squarely applies to the present case and we find no reasons to deviate from the same. Accordingly, the demand of Rs.25,65,993/- is set aside.

36. Further, we move onto the demand of service tax of Rs.24,40,589/- on cash receipts alleged to have been received by the Appellant form its buyers over and above the Agreement cost. During the course of the search of the Appellant’s premises, certain loose paper records were resumed which have been provided as RUD-22 and RUD-43 in the SCN. It is observed that such records mention certain entries with certain amounts under the head ‘INTT’.

37. It is the contention of the Adjudicating Authority that said amounts denote cash received by the Appellant from various buyers over and above the terms of the Agreement. It has been alleged that such entries were not entered by the Appellant in its

books of account in pursuance of a clandestine removal of goods/services. On the topic of whether such amount denotes a notional calculation of interest as highlighted by the term 'INTT", the Adjudicating Authority contends that no explanation, calculation methodology or evidence has been brought on record by the Appellant to prove that such amounts refer to notional calculation of interest. Consequently, the Adjudicating Authority contends that it is reasonable to believe that such entries refer to cash received over and above the agreement terms, denoting a clandestine removal of goods/services. We note that the Adjudicating Authority has in this regard placed reliance on the judgement of the Hon'ble Supreme Court in the case of Collector of Customs Vs. D. Bhoormull [1983 (13) E.L.T. 1546 (SC)] to contend that there is no need for absolute proof for establishing clandestine removal and merely proving it to the extent of balance of probabilities is enough. A few judgements of the Tribunal have also been quoted by the Adjudicating Authority in this regard.

38. On the other hand, the Appellant contends that no such cash as alleged has been received by them over and above the terms of agreement. The Appellant in its appeal has contended that based on the term 'INTT" mentioned in the loose records, such amount may denote a notional calculation of interest. However, it is argued that on account of change in accounting and managerial personnel, proper clarification of such record cannot be provided. It is further contended that such loose sheets is not a part of the Appellant's books of accounts, and hence cannot be relied upon. Further, the Appellant contends that the burden of proving their allegation of receiving of cash and clandestine removal is on the Department and no evidence has been brought by the Department in this regard.

39. The Appellant in their Additional Submission have reiterated the Department's failure to prove their allegation and have relied on the following case laws:–

The Tribunal in the case of M/s. Makers Castings Private Ltd. Vs. Commissioner of CGST & CX, Jamshedpur Commissionerate [Excise Appeal No.75409 of 2020]:–

> *"16. We find that the argument of the learned Commissioner is not correct. It is not for the appellant-noticees to disprove the clandestine removal and evasion. It is for the investigating agency to gather evidence and it is for the adjudicating authority to appreciate the evidence and confirm the demand of tax. We find that as submitted by the appellants, charge of suppression of production and clandestine removal is a serious charge which is required to be established by production of sufficient tangible and positive corroborative evidence of clandestine manufacture and clearance and not merely on the basis of inferences and assumptions.*
>
> *22. As per our discussion above, we find that the standard of proof in taxation cases is different from criminal offences. It is now settled principle that cases of this nature need not be proved with mathematical precision. At the same time, a single piece of evidence cannot be accepted to encompass the whole gamut of transactions. A word of caution must be added here that while the principle of preponderance probability demands us to believe that under the given facts and circumstances, the alleged tax evasion must have occurred. However, the principle ends here. Issues like quantification of duty evaded, requires concrete reliable dependable data. Reliance on principle of preponderance of probability, no way confers a License to demand duty on the basis of assumptions/presumptions/ vague imputations.*
>
> *25. We are of the considered opinion that in the absence of any corroborative evidence, it would be difficult to uphold the charges levelled on assumption and presumption. Hon'ble Supreme Court held in Oudh Sugar Mills vs. Union of India -1978 (2) ELT 517 findings based on such*

> *assumption and presumption without any tangible evidence, is vitiated by error of law.*
>
> *26. In the result, we set aside the impugned order allow all the appeals, with consequential relief, if any, as per law."*

The Tribunal in the case of Attitude Alloys (P) Ltd. V/s Commissioner of Central Excise, Bhubaneswar-II [Excise Appeal Nos. 517-519 of 2011(Tri. Kol)] decided as follows:–

> *"12.8. Section 65B of Evidence Act is pari materia with Section 36B of the Central Excise Act, 1944. From the above observation of the Hon'ble Apex Court, we find that unless the conditions of Section 65B(2) of the Evidence Act, which is parimateria with Section 36B(4) of the Central Excise Act are complied with, no reliance can be placed on any computer printouts . Admittedly, the procedure set out in Section 36B has not been followed in this case. Thus, following the judgement of the Hon'ble Apex Court and the other decisions cited above, we hold that the data resumed from the computer print out alone cannot be relied upon to demand duty, without any corroborating evidence.*
>
> *16.3. In the instant case we find that the investigation has not brought in any corroborative evidence to substantiate the allegation of clandestine removal. In view of the above findings, we hold that the investigation has failed to establish the alleged clandestine clearance of goods by the Appellants and hence the demands confirmed in the impugned order are not sustainable."*

The Appellant has further relied on the order of this Bench in the case of Super Cassettes Industries Ltd. Vs. Commissioner of C. EX. Noida [2017 (347) E.L.T. 145]. The relevant paras are reproduced for ready reference:-

> ***"4.*** *The learned Counsel for the appellants contended that in the entire investigation there has been no admission, by any of the functionaries that the data available on the said loose slips indicated the clandestine*

clearances of dutiable goods without payment of duty. There is no admission on behalf of any of the customers that they have ever received any goods cleared clandestinely, without payment of duty. The presumption that the figures on the loose slips were one hundredth of the actual figures is only a presumption, and there is no evidence on record to indicate that the data given on the loose slips was related to clearances of clandestine goods. He further submitted that if the department had impression that the data on the loose sheets was related to the clearances of the goods manufactured by them then they should have tallied the data with duty paid goods and goods manufactured by them which were not attracting duty and even after that verification if the data did not tally then there was reason for the department to make allegation that the data relates to clearances of goods without payment of duty in a clandestine manner. This exercise has not been done and it was only presumed that the data available on loose sheets was indicating the value of the goods cleared clandestinely. The show cause notice issued on the basis of presumption is not sustainable in law and therefore, the appeals may be allowed.

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6. *We have carefully taken into consideration the rival contentions. We have also gone through the statements and the various Annexures enclosed to the show cause notice. We find that in none of the statements there was any admission that the data recorded on the loose sheets, was related to the value of the goods cleared clandestinely. There is force in the argument of the learned Counsel for the appellants that department did not compare the data with the data related to clearances of goods on which duty was paid and the goods manufactured by them which did not attract duty. We, therefore, find that the show cause notice is based on presumption. Therefore, we hold that the subject of show cause notice dated 13-8-2004 is not sustainable. In view of the above, we set aside the impugned Order-in-Original and allow all the four appeals. The appellant shall be entitled to consequential relief, if any.”*

40. We have perused the rival contentions, the evidences brought on record, the arguments as well as the various case

laws relied on by both parties. We find pertinent to mention the following facts with respect to this allegation:–

- That a few loose sheets of paper were recovered during search of appellant's premises.
- That such sheets denote certain entries, with certain amounts written under the head 'INTT'.
- That no other indication is present on the sheet or on any other evidence proving that such amounts refer to cash received.
- No excess cash or any prominent traces of such excess cash have been found from the appellant.
- No cross verification has been done from third parties regarding payment of cash to appellant.
- No proper explanation has been provided by appellant with respect to such loose paper.
- No evidence has been brought on record from either the appellant or the Department to prove their contentions.

41. We observe that as per the judgements relied upon by Appellants, in case of allegation of clandestine removal on the basis of loose papers, it is the burden of Department to prove that there is a chain of events which show that there was such clandestine removal. The linking of such lose paper to the Appellant is the Department's responsibility. We also take into account the judgements of this Bench in the two cases mentioned below, in a similar set of circumstances :–

The judgement of this Bench in the case of M/s Shree Radhey Radhey Ispat Pvt. Ltd. Vs. Commissioner, Central Excise, Lucknow [Excise Appeal No.50407 of 2015], wherein it was held that :–

> *"25. It is a well settled law that resumption of loose slips or private records resumed from the third party, or statements recorded behind the back of the Appellant cannot be made the basis of confirming demand on the*

Appellants unless the same are proved to be linked to the Appellant. Further, even it is assumed such entries existed, but that does not prove that the Appellant in fact made any such higher amount of payment in absence of any corroborative evidence."

42. The judgement of this Bench in the case of Commissioner of Central Goods & Service Tax, Meerut Vs. M/s B. N. Viz. And Others [Service Tax Appeal No.70285 of 2019], wherein it was held that :–

"4.4 We find that the Commissioner (Appeals) has decided the matter before him by holding that there are no corroborative evidences available on record to establish the case made out against the Respondent on the basis of second set of data retrieved. In absence of any such averment, we do not find any merits in this appeal. It is incorrect to say that the judgment relied upon by Commissioner (Appeals) while deciding the appeal, were in respect of the goods and not in respect of services. It is the ratio decidendi, which Commissioner (Appeals) has followed, which is reproduced below:

"Though the confessionals statement may be the starting point of investigations but in view of the other evidence available on record and in the absence of the other evidence indicating. clandestine removal, the same cannot be made the sole basis for deciding against the assessee. To the same effect is the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax v. Dhingra Metal Works 2010-TIOL-693-HC-DEL-IT laying down that though an admission is extremely important piece of evidence, it cannot be said to be conclusive."

4.3 Accordingly, we do not find any infirmity in the order of the Commissioner (Appeals) to this extent.

5.1 Appeal filed by the revenue is dismissed. Cross Objection also gets disposed of."

43. On a careful reading of such case laws, we find that the burden of proof lies on the Revenue with respect to the following aspects :–

- That such entries refer to cash received
- That such entries are legitimate, i.e. are substantiated with other evidence
- That cash has actually been received by Appellant from any of its buyers.

44. We find that it is the minimum requirement to prove the above mentioned aspects for there to be a basis chain of events which may potentially indicate clandestine removal by Appellant. However, no evidence has been brought on record by Revenue. We note that no cross-verification has been done by the Revenue with the buyers to determine whether any cash was paid by them to the Appellant. We do not find any merit in the Adjudicating Authority's contention that since no evidence has been brought on by Appellant; such entries refer to cash received for clandestine removal. Tax payer cannot be expected to provide justification for any loose sheet of paper which is not a part of its books of account in absence of any credible evidence supporting the legitimacy of such paper. We find that the Adjudicating Authority has failed to establish even a proper reasoned chain of events based on any evidence which may lead to a believable probability of receiving cash in excess of agreement. Accordingly, we are of the view that the allegation of receiving cash by Appellant over and above the agreement cannot be sustained. Thus, we set aside the demand of Rs.24,40,589/- confirmed in impugned Order.

45. Finally, we move on to the issue of demand of Rs.59,085/- based on the allegation that such amount pertains to service tax collected by the Appellant from its customers which retained in cases of transferred/cancelled bookings and was neither refunded o the customers nor paid to the Government. We find that no explanation or reasoning has been provided with respect to this issue in the appeal memo. We observe that Appellant in

its Additional Submission has accepted such demand and has stated that such amount along with applicable interest has already been paid. A copy of Challan has been brought on record before us in this regard.

46. Accordingly, we hold that such payment made be adjusted towards the same. Thus, the demand confirmed is set aside.

47. We observe that the Adjudicating Authority has placed repeated emphasis in the impugned Order on the alleged lack of evidence on part of the Appellant to prove the non-taxability of concerned activities/transactions. We find it necessary to state that burden of proof with respect to allegation of taxability of a transaction lies upon the Revenue.

48. The Finance Act, 1994 does not provide for any provision wherein the burden of proof with respect to alleged taxability of a transaction is on the taxpayer. Unless and until the taxpayer claims the benefit of an exemption notification (in which case the burden of proving the applicability of such notification is on the taxpayer), the burden of proving that a particular transaction falls under the taxable service is on the Revenue.

49. Since the allegation of taxability of a transaction is made by the Revenue in the first place, according to Sections 101 & 103 of Evidence Act, 1872 (corresponding to Sections 104 & 106 of Bhartitya Sakhshya Adhiniyam, 2024); burden of proving the same shall lie on the Revenue. Especially for the period before the Negative list regime, where only those transactions which were specifically mentioned in the Finance Act were taxable, the burden of proving the same would remain on the Revenue.

50. We observe that the throughout the impugned Order, the Adjudicating Authority has denied the Appellant's contentions and confirmed demand based on an alleged lack of evidence. Irrespective of the un-sustainability of the demand as discusses in the above paragraphs, we find that the burden of proving the taxability was on the Revenue and the same has not been discharged. No documentary evidence has been brought on record by the Revenue to support its allegations.

51. In view of the same, we are of the view that the entire demand confirmed in the impugned Order based on unsubstantiated allegations by contending lack of evidence on part of Appellant is to be set aside.

52. Thus, on a thorough perusal of the impugned Order and SCN, the appeal, Additional Submission and evidences brought on record, we are of the view that the demand confirmed in impugned Order is erroneous and is to be set aside.

53. Since the demand does not sustain on merits, the question of imposition of penalties does not arise. In view of the above discussions, both the appeals filed by the Appellants are allowed with consequential relief, as per law after setting aside the impugned order.

(Order pronounced in open court on - **09.05.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

LKS