IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No.ST/70274/2018-CU[DB]

(Arising out of Order-in-Original No. 14/Commissioner/ST/Noida/2017-18 dated 22/12/2017passed by Commissioner of Central Goods & Service Tax, Noida)

M/s Lord Krishna Real Infra Private Ltd., **Appellant**

Vs.

Commissioner of Customs, C.E. & S.T., Noida **Respondent**

Appearance:

Shri Abhinav Kalra, Chartered Accountant for Appellant
Shri Pawan Kumar Singh, Supdt(AR), for Respondent

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 27/12/2018
Date of Decision : 27/12/2018

FINAL ORDER NO-**70126 / 2019**

Per: Anil G. Shakkarwar

The present appeal is directed against Order-in-Original No. 14/Commissioner/ST/Noida/2017-18 dated 22/12/2017 passed by Commissioner of Central Goods & Service Tax, Noida.

2. Brief facts of the case are that the appellants were providing taxable services falling under the category of "Real State Agent Service". Officers of Anti-evasion Branch of Commissionerate, Noida visited the business premises of

appellant on 21.11.2014 and carried out certain investigations. After carrying out the said investigations on the basis of information obtained from form 26AS filed under Income Tax Act, 1961 for the year 2012-13 to 2014-15, appellants were issued with a show cause notice dated 05.10.2016 demanding service tax of Rs.8,07,86,168/- for the aforesaid period with a proposal to appropriate amount of Rs.3,52,71,055/- paid by the appellant. Further, there were proposals for imposition of penalty. On contest, the said show cause notice was adjudicated through impugned Order-in-Original where the service tax demand was confirmed and proposed amount was appropriated. The appellant was imposed with equal penalty under Section 78 of Finance Act, 1994 and some other penalties were also imposed. Aggrieved by the said order, appellant is before this Tribunal.

3. Heard the learned Chartered Accountant Shri Abhinav Kalra on behalf of the appellant. He has submitted that there are two issues involved in the appeal. One is confirmation of demand of service tax and other is admissibility of Cenvat credit of around Rs.2.15 crores to the appellant. The submissions of learned Chartered Accountant on the above two issues are as follows:-

(A) <u>Demand Wrongly Confirmed on the basis of Form 26 AS of the appellant</u>

- The appellant submitted that the appellant had during the course of audit, duly submitted all the details that were asked for by the audit team of the service tax department for the period under appeal. Subsequently, on the scrutiny of the records of the appellant the audit team confirmed the demand of service tax to the tune of INR 1,65,31,159/-. For the same period however, the Ld. Commissioner has confirmed the demand amounting to INR 8,07,86,168/- on the basis of the figures recorded in 26AS.

The appellant submitted that 26AS generated under the provisions of the Income Tax Act consists of all the payments received by the appellant during the period under investigation. While computing the service tax liability on the basis of the 26AS the Ld. Commissioner never asked for an explanation from the appellant about the nature of payments recorded in the same. There may be cases where the service tax w.r.t. a particular payment recorded in 26AS would have been deposited in the previous year since service tax was payable on accrual basis while the same is reflected in 26AS on receipt basis. In such a scenario, service tax on same amount would be charged twice. Further, there may also be a case where on any particular payment TDS was deducted but the same was not liable to service tax as per the provisions of Finance Act 1994. Therefore, the contentions of the Ld. Commissioner that every payment that is recorded in 26AS is service income and hence liable to service tax, is baseless and lacks merit. The appellant relied on the following decisions of the appellate authorities in support of their contentions:

- **Synergy Audio Visual Workshop Pvt. Ltd. v CST, Bangalore; 2008-TIOL-809-CESTAT-BANG;** The Tribunal in this case following its earlier decision held that service tax payment cannot be confirmed on the basis of the amount shown in income-tax return and balance sheet or profit and loss account.

- **Alpha Management Consultants Pvt. Ltd. v. CST Bangalore-2007-TIOL-386-CESTAT-BANG/2007(6) STR 181(Tri.-Bang) [para 4.1]** – in this case it was held that Service Tax cannot be recovered based on the returns shown in the Income Tax Returns, as the provisions of Income Tax requires declaration of amounts still due from the debtors, while in the case of Service Tax, the same has to be paid when recoveries are made.

  Under the law burden is on the Department to prove that assessee/ person is liable to pay service tax and said burden cannot be shifted on the Appellant. In the present case, the revenue even after audit and thereafter search and seizure, failed to prove/ adduce any evidence that the Appellant is liable to pay tax of Rs. 8,07,86,168/- .

- **Sharma Fabricators & Erectors Pvt Ltd Vs CCE Allahabad,- 2017(5) GSTL 96- Tri-Allahabad-** in this case it was held that:
  Based on presumptions and third party information - Allegation of mis declaration of assessable value and short payment of Service Tax on basis of TDS Certificate issued by assessee's clients - Assessee disputing issuance of SCN without examination of books of account maintained by assessee-Said Show Cause Notices not sustainable.

(B) That the Ld. Commissioner has grossly erred in not giving the benefit of CENVAT credit available with the appellant while computing the demand of the service tax.

The appellant hereby submitted that the appellant had claimed CENVAT Credit amounting to INR 2,21,35,916/- during the period under investigation. The said amount of CENVAT credit duly meets all the requirements of eligible CENVAT credit as prescribed under the CENVAT Credit Rules 2004. Further, the appellant had submitted the details of the CENVAT credit available with them during the period under investigation to the audit team of the service tax department. The audit officers verified all the details and concluded that

CENVAT Credit of only an amount of INR 6,38,024/- is disallowed in terms of the CENVAT Credit Rules 2004. The same fact is on records.

The appellant submitted that the Ld. Commissioner in the impugned order in original under appeals had held that the appellant did not provide the original documentary evidences to verify the CENVAT credit, although copies of the same were provided and concluded that the merely because of the same reason the CENVAT credit was inadmissible ignoring the fact that the CENVAT credit pertaining to the said period has already been adjudged as eligible by the audit officer of the service tax department. The Ld. Commissioner has nowhere in the impugned order in original under appeals or in the show cause notice issued in the present matter, challenged the CENVAT credit on grounds of legal eligibility of the same, which means that had the original invoices been presented to the Ld. Commissioner, 100% CENVAT Credit would have been allowed.

Despite of all the details having been provided to and verified by the audit officers during the course of audit, wr.t. the CENVAT credit available, the Ld. Commissioner has not given the benefit of the same while computing the demand of service tax in the instant matter. In this scenario, the demand of service tax to the extent of INR 2,21,35,916/- relating to the amount of CENVAT credit claimed by the appellant but the benefit of which has not be granted by the Ld. Commissioner, should be allowed to sustain.

4. Heard the learned A.R. who has supported the impugned order.

5. After hearing both the sides and on perusal of record, we find that impugned show cause notice was issued solely on the basis of information obtained from Income Tax Authorities in the form 26AS for the financial year 2012-13

to 2014-15. For the sake of ready reference, para-15 and para-27 of the said show cause notice are reproduced bellow:-

> "15. Whereas, the above mentioned Form 26AS for the Financial year 2012-13, 2013-14 and 2014-15 as obtained from Income Tax Department show the Commission amounts credited to the party and amounts of the TDS deducted by the service receivers of the Party in the respective financial years. On the basis of the said 26AS statement the liability of M/s Lord Krishna Real Infra Pvt. Ltd. from 2012-13 to 2014-15 has been calculated which is detailed in the following chart:-

Financial year	**Gross receipt as per the Form 26AS received from income tax authority (RS.)**	**Service Tax payable @ 12.36% (Rs.)**
2012-13	428356417	52944853
2013-14	181936628	22487367
2014-15	43316726	5353947
TOTAL	**653609771**	**80786168**

27. Now, therefore, M/s Lord Krishna Real Infra Pvt. Ltd. 206-208, JOP Plaza, Sector-18, Noida, are required to show cause to the Commissioner, Service Tax Commissionerate, Noida within 30 days of the receipt of this show cause notice as to why:-

(i) The service tax amounting to Rs.8,07,86,168/- including Ed. Cess and S & H Ed. Cess for the period from 2012-13 to 2014-15 should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act, 1994 and the already deposited service tax Rs.3,52,71,055/- should not be appropriated against their above service tax liability.

(ii) Interest should not be demanded under Section 75 of the Act on the amount of Service Tax, from the date due and not paid by the party.

(iii) Penalties should not be imposed upon them under Section 78 of the Finance Act, 1994 for suppressing the taxable value and for contravention of the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

(iv) Penalty under Section 70 should not be recovered from them for late filing of the service tax teturn of the period mentioned in the Table –B above.

(v) Penalty should not be imposed upon Shri Arvind Singh S/o Shri Babu Singh, Managing Director of M/s Lord Krishna Real Infra Pvt. Ltd. under Section 78A of the Finance Act, 1994 for willful nonpayment of Service Tax due to the government in a manner as prescribed under Rule 6 of the Service Tax Rules, 1994 read with the Section 68 (1) of the Finance Act, 1994."

We also note that there were no other record of the appellant which were taken into consideration for entertaining a prima-facie view that appellant was required to pay short paid service tax of around Rs.8 crores for the said period than the information that was available in returns in the form 26AS. In this regard we note that this Tribunal had an occasion to examine sustainability of demand raised only on the basis of form 26AS. It was held by this Tribunal in the case of Sharma Fabricators Pvt. Ltd. Vs Commissioner of Central Excise, Allahabad reported at 2017 (5) GSTL 96 (Tri.-All.) as follows:-

"3.*Heard the ld. Counsel for M/s. Sharma he has basically argued that the said Show Cause Notices were not issued by examining the books of account maintained by M/s. Sharma. The Show Cause Notices were based on the presumptions and third party information. He has argued that even when the payments were not made by the clients but the clients booked the expenditure in their books of account they were required to pay the related tax deducted at source to the exchequer and issue a certificate of TDS and incorporate the same in the return called 26AS filed with the Income Tax Authorities and such information cannot be the basis for arrival of the consideration received by the service provider. He has submitted that both the Show Cause Notices were issued without examining the books of account maintained by M/s. Sharma and were issued on the basis of presumptions about the consideration received by M/s. Sharma. The considerations taken into account for issue of Show Cause Notices was in no way near to the actual consideration received by M/s. Sharma during the relevant period which should be the basis for arriving at the assessable value. He has stated that they had elaborated before the Original Authority various reasons for discrepancies in the figures arrived at presuming the considerations received by M/s. Sharma on the basis of such TDS Certificates and the figures in the returns. He has further relied upon this Tribunal's Final Order in the case of Alpa Management Consultants P. Ltd. v. Commissioner of Service Tax, Bangalore reported in 2007 (6) S.T.R. 181 (Tri. - Bangalore). He submitted that this Tribunal in the said case has held that demands, solely based on the income-tax returns for liability of Service Tax under Finance Act, 1994 is not sustainable. In respect of appeal filed by Revenue ld. counsel for M/s. Sharma has contended that the grounds of appeal are travelling beyond the Show Cause Notice and therefore that is not sustainable. He has further elaborated that cargo handling was brought in as ground by Revenue in the appeal filed by Revenue whereas that issue*

was not at all dealt with in the Show Cause Notices dated 20-4-2009 & 13-10-2009.

4.*Heard the ld. DR, who has presented the grounds of appeal in appeal filed by Revenue.*

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 abovestated 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."*

From the record it is very clear that none of the records of appellant were taken into consideration for framing of charges that appellant had short paid service tax to the tune of around Rs.8 crores and the said charges

were framed only on the basis of information in the form 26AS. We further note that the audit report as explained by the Chartered Accountant for appellant found that Cenvat credit to the tune of Rs.6,38,024/- was inadmissible to the appellant out of total Cenvat credit of Rs.2,21,35,916/- whereas the learned Original Authority has disallowed the same only on the basis that original documents were not produced before him. We accept the claim by the appellant that original documents were seen by the audit party visited by the appellant and such evidence was not taken into consideration by the Original Authority. The learned Original Authority was required to follow the principles of natural justice and direct the appellant to produce the original documents on the basis of which Cenvat credit was availed by the appellant, in case he had doubt about the availability of original documents with the appellant. The order of Original Authority presuming that the appellant did not have original documents is not sustainable in respect of availment of Cenvat credit. Further, there was no proposal in the said show cause notice to deny said Cenvat credit. Further, we find that on the basis of form 26AS return filed under Income Tax Act without examining any other records of the appellant. Charges of short payment of service tax to the tune of Rs.8 crores were made against the appellant. It was possible for Revenue to know the

transactions between other parties & appellant from form 26AS. Revenue could have investigated into the nature of such transactions & should have established that the said transactions were in respect of provision of said service. Then alone the charges of short payment of Service Tax would have sustained. We find that Final Order of this Tribunal in the case of Sharma Fabricators Pvt. Ltd. (supra) is squarely applicable in the present case. We, therefore, hold that Revenue did not discharge its burden to prove short payment of service tax. We also hold that the said show cause notice dated 05.10.2016 is not sustainable.

6. We, therefore, set aside the impugned order and allow the appeal.

(Pronounced in Court)

(Anil G. Shakkarwar)
Member (Technical)

(Ashok Jindal)
Member (Judicial)

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