CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No.II

Service Tax Appeal No.70805 of 2024

(Arising out of Order-in-Appeal No.520-ST/APPL/LKO/2024 dated 30/08/2024 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Lucknow)

Shri Devendra Kumar Pandey, **....Appellant**

(651, Civil Lines, Etawah-206001)

VERSUS

Commissioner of Central Excise &

CGST, Agra **....Respondent**

(113/4, Sanjay Place, Agra-282002)

APPEARANCE:

Ms Stuti Saggi, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

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

FINAL ORDER NO.70766/2025

DATE OF HEARING : 19 August, 2025
DATE OF PRONOUNCEMENT : 31 October, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.520-ST/APPL/LKO/2024 dated 30/08/2024 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Lucknow. By the impugned order following has been held:-

"5.7 I set aside the penalty imposed upon the appellant under Section 77(1)() 77(1)(b) and 77(2) of the Finance Act, 1994, In the light of discussions made in the foregoing paras, the impugned order is modified as above extent and the appeal is disposed of accordingly."

1.2 By the Order-in-Original No.15/Demand/ST/AC-FZD/2023-24 dated 27.04.2023, Original Authority has held as follows:-

"ORDER

(i) I confirm the Service Tax demand of Rs.65,168/- (Rupees Sixty five thousand one hundred sixty eighty only) (inclusive of all cess) upon the party under the proviso of

Section 73 (1) of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017 as discussed above.

The demand of service tax of Rs.1,44,999/- (Rupees One lakh forty four thousand nine hundred ninety nine only) being over and above from the actual demand is not sustainable and is dropped, as discussed earlier.

(ii). I order to recover the interest at applicable rate from the party on the confirmed amount under Section 75 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017.

(iii). I impose penalty of Rs.65,168/- (Rupees Sixty five thousand one hundred sixty eighty only) equal to the Service Tax amount liable upon the party under Section 78 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017, as discussed above for suppression of facts and contravention of the provisions of the Finance Act (ibid) and rules made thereunder. However, an option is given to party under sub Section (1) (ii) of Section 78 of the Finance Act, 1994 that if the Service Tax along with interest is deposited within thirty days of communication of this order, the amount of penalty liable to be paid by the party shall be twenty five percent of the Service Tax so determined in the order. Provided that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period,

(iv) I refrain from imposing penalty upon the Noticee under Section 77(a) of the Finance Act. 1994 read with Section 174 of the CGST Act, 2017, in reference to failure registered themselves under Service Tax as discussed above, being not sustainable.

(v). I impose the penalty of Rs. 10,000/- (Rupees Ten thousand only) upon the party under Section 77(1)(c)(ii) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in reference to failure in providing the

information/ documents to the department as discussed above.

(vi) I impose the penalty of Rs. 10,000/- (Rupees Ten thousand only) upon the party under Section 77(1)(b) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in reference to failure to maintain the prescribed records, as discussed above.

(vii) I impose the late fee/ penalty of Rs 40,000/- (Rupees Forty thousand only) upon the party under Section 77(2) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in reference to failure to file prescribed periodical returns, as discussed above."

2.1 Appellant was registered with Service Tax Department for providing taxable services.

2.2 On the basis of information received from the Income Tax Department, it was observed that appellant had during the period 2015-16 received an amount of Rs.14,49,434/- in lieu of services rendered and TDS had been deducted on the amount in their Form 26AS. On comparison of the figures with the ST-3 following was observed:-

Financial Year	Value shown in Sale of Service in ITR from CBDT Data (In Rs)	Value shown in ST-3 Returns (In Rs)	Highest Value among Column No.2,3 & 4(In Rs)	Rate of Service tax	Service Tax Payable (In Rs)	S Tax paid as shown ST-3 (In Rs)
1	3	4	5	6	7	8
2015-16	14,49,434/-	Nil	14,49,434/-	14.5	2,10,167/-	Nil

2.3 It was also observed that appellant had not filed ST-3 return during the period from April, 2015 to September, 2015 and October, 2015 to March, 2016 whereby they were liable for penalty under Section 77 (2) of the Finance Act, 1994 as detailed in table below:-

S. No.	Period of Half-Year	Last date for submitting the ST- 3Return	Date of actual submission of the ST- 3 Return	Penalty U/S 77(2) of the Act (ibid) in Rs.
1	April'15 to Sept.'15	25.10.15	Not filed	20000/-
2	Oct.'15 to March'16	29.04.16	Not filed	20000/-

2.4 A show cause notice dated 19.04.2021 was issued asking them to show cause as to why-

"(i) An amount (Gross) of Rs. 14,49,434/- received by the party from their client during the financial years from

2015-16, In lieu of providing the services of 'Declared Services should not be treated as the total value of taxable services.

(ii). Not paid/ short paid Service Tax amount of Rs.2,10,167/-(inclusive all cess) for the period 2015-16 as discussed above, should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act, 1994 read with Section 174 of the Central GST Act, 2017.

(iii). Interest on the amount as mentioned at (ii) above should not be charged and recovered under Section 75 of the Finance Act 1994 read with Section 174 of the CGST Act, 2017.

(iv). Penalty should not be imposed under Section 78 of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 for failure to pay Service Tax during the relevant period suppressing the facts from the department. However, a option is being given to party under the proviso (i) (1) of Section 78 of the Finance Act, 1994 that if the Service Tax along with Interest is paid within a period of thirty days from the receipt of Show Cause Notice issued under the proviso to sub section (1) of Section 73 of the Finance, Act, 1998, the penalty payable shall be fifteen per cent of such Service Tat and proceedings in respect of such service tax, Interest and penalty shall be deemed to be concluded.

(v) Penalty should not be separately imposed upon the party under Section 77(a) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 in as much as the party has failed to obtain the service tax registration in contravention of Rued of the Service Tax Rules, 1904 reed with Section 60 of the Finance Act, 1004 as discussed in the fore going paras.

(vi) Penalty should not be separately imposed upon the party under Section 77 (1) loss of the Finance Act, 1904 read with Section 174 of the CGST Act, 2017 in as much as the party has failed to provide the documents respectively

as called for by the Excise Office as discussed in the foregoing paras.

(vii). Penalty should not be imposed upon the party under Section 77(1)(b) of the Finance Act 1994 read with Section 174 of the CGST Act, 2017 in contravention of Rule 5 of the Service Tax Rules, 1994 in as much as the party has failed to maintain the prescribed records as discussed in the fore going paras.

(vii). Penalty of Rs.40,000/- should not be demanded and recovered as per provisions of under Section 77(2) of the Act(ibid) read with Section 174 of the CGST Act, 2017 in contravention of the provisions of Rule 7 of the Service Tax Rules."

2.5 The said show cause notice was adjudicated as per the Order-in-Original dated 27.04.2023 referred in para 1.2 above.

2.6 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been disposed of as per the impugned order referred in para-1 above.

2.7 Aggrieved appellant have filed this appeal.

3.1 I have heard Ms Stuti Saggi learned Counsel appearing for the appellant and Shri A.K. Choudhary learned Authorised Representative appearing for the revenue.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records the findings as follows:-

"5.1 I have carefully gone through the case records. I find that the department. has alleged non-payment of service tax by the appellant on the grounds that the appellant had failed to discharge their due service tax liability by not ling statutory returns and declaring the table assessable value therein. The appellant however, has contested the demand of service tax on the grounds that the appellant is a surveyor and he has raised bills showing separate entries of fee for service and reimbursement amount. If this amount is removed from the amount received by the appellant, then their gross receipts are below Rs 10 lacs making them eligible for Small Scale Industries Exemption.

5.2 I find that, in the impugned order the adjudicating authority has already extended the SSI Exemption benefit to the appellant and dropped the demand amounting to Rs. 1,44,999/- and confirmed the demand on the amount over and above rupees Ten lakhs resulting in net service tax liability of Rs. 65,168/-alongwith applicable interest and penalty.

5.3 As regards to the contention of the appellant that the reimbursable expenses are not liable to be covered under sub rule (v) and (ix) of Rule 611) of Service Tax Determination of Value) Rules, 2006, but the same are covered under Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006, I find that the statutory provisions relating to inchision in or exclusion from value of certain expenditure or costs from the assessable value for the purpose of computing service tax liability has been provided under Rule 5 of the Service Tax Determination of Value Rules, 2006 which stipulates that:-

(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service Explanation For the removal of doubts, it is hereby clarified that for the value of the telecommunication service shall be the gross amount paid by the person, to whom telecommunication service is actually provided.

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely:-

(i) the sensor provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured.

(ii) *the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service:*

(iii) *the recipient of service is liable to make payment to the third party.*

(iv) *the recipient of service authorities the service provider to make payment on his behalf;*

(v) *the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party,*

(vi) *the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*

(vii) *the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*

(viii) *the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*

Explanation 1. For the purposes of sub- rule (2), "pure agent" means a person who-

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service,

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

The above statutory provision makes it amply clear that the service provider and recipient should have entered into an agreement that the service provider will be acting as Pure Agent to incur expenditure or costs in the course for providing taxable service and should not have used such services. The appellant has failed to bring any documentary evidence to establish the same.

5.4 Further, the Hon'ble Apex Court in Civil Appeal No. 2013 of 2014 in the matter of Union of India & Anr. Vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. while deciding the issue of inclusion of reimbursement of openditure or cost incurred by the service provider for the period prior to 14th May 2015 has noted the stand of Advocate, appearing on behalf of the respondent ie M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. in their order which is as follows:-

> *"16) Mr. J.K. Mittal, Advocate, appeared for M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. He argued with emphasis that the impugned judgment of the High Court was perfectly in tune with legal position and did not call for any interference. At the outset, he pointed out that the Parliament has again amended Section 67 of the Act by the Finance Act, 2015 w.e.f. May 14, 2015. By this amendment, explanation has been added which now lays down that consideration includes the reimbursement of expenditure or cost incurred by the service provider. Taking clue therefrom, he developed the argument that for the first time, w.e.f. May 14, 2015, reimbursement of expenditure or cost incurred by the service provider gets included under the expression 'consideration', which legal regime did not prevail prior to May 14, 2015."*

In the light of the statutory provisions and the order of the Hon'ble Supreme Court I do not find any force in the contention of the appellant that they had acted as Pure Agent in respect of the reimbursement while rendering the services, but, on the contrary, that the expenditure or *costs are incurred by the appellant in the course of providing taxable service, thus, should be treated as the consideration for the taxable service provided and the same has been correctly included in the value for the purpose of charging service tax on the said service.*

5.5 In light of preceding paras, I confirm the demand of service tax of Rs. 65,168/- under Section 73(1) of the Finance Act, 1994 read with Section 174 of CGST Act, 2017 along with interest under Section 75 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017 and 1 impose penalty under Section 78 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017."

4.3 Appellant is not contesting that for providing services by him are taxable services, his only submission is that for providing these services they have raised bills showing separate entries for fees of service and reimbursable amount. This reimbursable amount should be removed while determining the liability of the threshold exemption limit of Rs.10 lakhs. The Original Authority himself has admitted that the benefit of threshold exemption limit would be available to the appellant. If the value of reimbursable expenses is removed from the gross value then the entire value of service will be less than the threshold exemption limit.

4.4 After examining the provisions of Rule 5 (1) of Service Tax (Determination of Value) Rules, 2006 impugned order concluded that these values could not have been excluded itself in the present case after the amendments were made in Rule 5, subsequent to the decision of Hon'ble Supreme Court in the case of M/s Intercontinental Consultants and Technocrats Pvt. Ltd. After amendment made these expenses could not have been deducted from the gross value for determination of eligibility of threshold exemption limit. Accordingly, on the merits of the case, I do not find any merit in the challenge made to the demand.

4.5 However, I do not find any finding with regards to the facts of suppression with intent to evade payment of taxes in the impugned order. The only finding recorded in para 5.5 which is reproduced above that appellant who have gross turnover of services of only Rs.14,49,434/- would not be so well conversant with the provisions of service tax law and would have entertained a bonafide belief in this regard that the fees charge was within the threshold exemption limit. Such bonafide belief could not have been excluded from the facts of the present case. Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. [2013 (288) ELT 161 (SC)] has held as follows:-

> *"**21.** The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim :*
>
> *"The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus., dated 3-6-1997"*
>
> ***22.** We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. Black's Law Dictionary, Sixth Edition (pp 1599) defines "willful" in the following manner :-*
>
> *"Willful. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…*
>
> *An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done…"*
>
> ***23.** In the present case, from the evidence adduced by the appellant, one will draw an inference of bona fide conduct in favour of the appellant. The appellant laboured*

under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the bona fide conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach.

24. *Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar & Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."*

25. *Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In*

Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :

"21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period

> *from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....” (Emphasis supplied)*
>
> ***26.** Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant.”*

4.6 Though I find the demand merits but the same cannot be upheld on the ground of limitation and extended period of limitation would not have been invoked in the present case.

4.7 In view of the above discussions and findings, the impugned order is set aside.

5.1 Appeal is allowed.

(Order pronounced in open court on- 31 October, 2025)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Akp