CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70033 of 2026

(Arising out of Order-in-Appeal No.91/ST/APPL/Alld/2025 dated 26/06/2025 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s Nidhi Pathak, **.....Appellant**
(D-47/198, Ramapura,
Godauliya, Varanasi-221004)

VERSUS

Commissioner of Central Excise &
CGST, Allahabad **....Respondent**
(38, MG Marg, Civil Lines, Allahabad-211001)

<u>APPEARANCE:</u>

Request for adjournment, for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70058/2026

DATE OF HEARING	:	04 February, 2026
DATE OF DECISION	:	04 February, 2026

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-in-Appeal No.91/ST/APPL/Alld/2025 dated 26/06/2025 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad. By the impugned order, Commissioner (Appeals), has upheld the Order-in-Original No 164/ST/DIV/VNS/2023-24 dated 31.03.2024 wherein following has been held:-

"Order

(i) I confirm the demand of Service Tax amounting to Rs. 1,58,963/-(Rs. One Lakh Fifty Eight Thousand Nine Hundred Sixty Three Only) (including applicable cesses) against the party under the provisions of

Section 73(1) of the Finance Act, 1994 alongwith recovery of due interest at appropriate rate on confirmed amount, under Section 75 of the Act, ibid.

(ii) I also impose a penalty of Rs. 10,000/- (Ten Thousand only) upon the party under Section 77(1) (a) of the Finance Act, 1994 for contravention of the provisions of Section 69 of the Act read with Rule 4 of the Service Tax Act, 1994.

(iii) I also impose a penalty of Rs. 10,000/- (Ten Thousand only) upon the party under Section 77(1) (c) (1), 77(1) (c) (ii) and Section 77(1) (c) (iii) of Chapter V of the Finance Act, 1994.

(iv) I also impose a penalty of Rs. 10,000/- (Ten Thousand only) upon the party under Section, 77(2) of the Finance Act, 1994 for having contravened the provisions of Section 70 of the Act read with Rule 7 of the Act, 1994.

(v) *I also impose a penalty Rs. 1,58,963/-(Rs. One Lakh Fifty Eight Thousand Nine Hundred Sixty Three Only) upon the party under the provisions of Section 78 of the Finance Act, 1994. However, the Party has the option to pay 25% of the penalty payable, provided they pay the Service Tax, interest and penalty, imposed within a period of 30 days of receipt of this order."*

2.1 On the basis of information received from the Income Tax Department that during the Financial Year 2016-17 appellant having PAN No.AMNPP5272G, who was not registered with the Service Tax Department, have received consideration of Rs.10,59,750/- against the sale of services.

2.2 Enquiries were initiated and the appellant vide letters dated 19.05.2021, 08.06.2021, 28.06.2021 & summon dated 01.09.2021 was asked to provide details of services rendered by the appellant to their clients, copy of balance sheet, Income Tax Returns with computation sheet, details of service tax deposited, copies of bills and invoices and copy of form 26AS for the period 2016-17 to June, 2017. Appellant did not respond.

2.3 Accordingly, on the basis of available documents, tax liability was calculated on the appellant as detailed in table below:-

F.Y.	Gross Receipts as per ITR	Rate of S.Tax	S. Tax payable
2016-17	10,59,750/-	15%	1,58,963/-

2.4 Show cause notice dated 20.10.2021 was issued to the appellant asking them to show cause as to why:-

(i) Service Tax amounting to Rs.1,58,963/-(Rs. One Lakh Fifty Eight Thousand Nine Hundred Sixty Three Only) (including applicable cesses) not paid during the period should not be demanded and recovered from them under Section 73 (1) of the Finance Act, 1994 along with interest at appropriate rate under Section 75 of the said Act ibid.

(ii) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994 as amended, for suppression of facts with intent to evade the payment of Service Tax.

(iii) Penalty should not be imposed upon them under Section 77(1) (c) (1), 77(1) (c) (ii), and 77(1) (c) (iii), of Chapter V of the Finance Act, 1994 for not furnishing information and not producing documents.

(iv) Penalty should not be imposed upon them under Section 77(2) of the Finance Act, 1994 for violation of Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 by not filing the ST-3 Returns to the department.

(v) *Penalty should not be imposed under Section 69 of the Finance Act, 1994 read with Rule 4 of erstwhile Service Tax Rules, 1994 in as much as they have failed to take Service Tax Registration by the departments."*

2.5 The said show cause notice was adjudicated as per the Order-in-Original dated 31.03.2024 referred in para 1 above.

2.6 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been dismissed as per the impugned order.

2.7 Aggrieved appellant have filed this appeal.

3.1 When the matter was called, it was informed that Counsel for the appellant has filed an application for adjournment, however, I find that the issue is a very narrow compass and can be considered even in absence of the Counsel.

3.2 I have heard Shri Santosh Kumar learned Authorized Representative appearing for the revenue, who reiterates the findings recorded in the orders of the lower authorities.

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

4.2 For upholding Order-in-Original, impugned order records as follows:-

> *"5.3 After going carefully through the facts of the case on the basis of documents/records available on the case file, I find that the Adjudicating Authority has not decided the case on merits due to want of documentary evidences as the appellant neither appeared nor produced any documents. It was observed by the Adjudicating Authority that the appellant did not cooperate with the department. The Adjudicating Authority has decided the case ex-parte and confirmed the demand only on the basis of the figures provided by the CBDT determining the services rendered by the appellant as taxable.*
>
> *5.4 I find that at the appellate stage the appellant in her written statement has submitted that she is running a service centre for eating joint/mess during the period 2016-17 and is entitled for service tax exemption in view of Entry No 19 of Notification No. 25/2012-ST dated 20.06.2012. In support she has submitted the copy of ITR, Balance Sheet and few sample of invoices for the relevant period. The appellant has requested that without prejudice*

to other facts she is entitled for threshold exemption in terms of notification no. 33/2012-ST dated 20.6.2012.

5.5 The documents provided by the appellant does not specifically reveal that the services provided by him relates to mess/restaurant. I find that the appellant has considerably failed to connect the link with the support of all adequate documentary evidences which could corroborate the exact nature of services provided by him.

I find that w.e.f 01.07.2012, Section 65B(44) of the Act defines "service" means any activity carried out by a person for another for consideration, and includes a declared service.

Also, as per section 65B(51) of the Act, "taxable service" means any service on which service tax is leviable under section 66B of the Act. Further, as per section 668 of the Act states that there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

In view of above, w.e.f 01.07.2012, all "services", including declared services under Section 66E but excluding those specified in Negative list under section 66D of the Act. are leviable to service tax unless exempted by a notification issued under the Act.

Now, while applying the above provisions to the facts of the instant case, I find that the party has provided taxable services during the period in question.

If once it has been established by the department that the appellant has provided taxable services, the onus to prove that the consideration received is outside the purview of service tax entirely falls on the appellant. The appellant has failed to prove with the support of documentary *evidences that the consideration received by him is exempted from service tax. Hence, I am of the view that the appellant is liable for payment of service tax without any benefit of exemption against the consideration received by her.*

5.6 Now coming to the issue of threshold exemption, I note that the appellant has submitted that otherwise she is entitled for threshold exemption in view of Notification No. 33/2012-ST dated 20.06.2012 as there receipts are below Rs.10 lakhs during the preceding financial year. In support she has submitted the copy of Balance Sheet and I'TR for the relevant period. However, I find that the appellant has not followed the prescribed route of law under Finance Act, 1994 and rules made thereunder thereby not applying for registration while value of services provided by her during the year 2016-17 reached at prescribed limits. Further the conditions attached with threshold exemption notification are not verifiable at this stage. Accordingly, I am not inclined to provide any such benefit to the appellant.

6.0 In view of foregoing, I reject the appeal filed by the appellant and hold the impugned order to be legal and proper. The appeal is accordingly disposed of in above terms."

4.3 From the impugned order it is evidence that Commissioner (Appeals) has while deciding the appeal clearly noted that case was decided by the Original Authority due to want of document as the appellant neither appeared nor produced any documents alongwith their appeal memo, contrary to the above finding appellant have produced letter dated 01.06.2021 and 10.06.2021 by which appellant responded the first letter written by the Range Officer at the time of inquiry. Further, they have produced a copy of letter dated 18.11.2021 by which they have submitted defense reply to the show cause notice. The said letters are reproduced below:-

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Dated 10.06.2021

To,

The Superintendent

CGST & Central Excise,

Range South, Division-Varanasi

Varanasi.

Sir,

Ref: Your C.No.IV(18)R-South/Nidhi/16-17/579/2021/745 dated 19.05.2021

Sub: Non-payment of Service Tax for the financial year 2016-17 in case of

Shri Nidhi Pathak,D 47/198, Ramapura, Godowlia, Varanasi (UP) -reg:

DIN: 20210553Y40000666A77

PAN: AMNPP5272G

In reference to your aforesaid letter, the assessee submits as under :

1. That the enquiry has been initiated on the basis of 26AS. In this connection, it is to be submitted that during the relevant year, the assessee was running a service centre for eating joint/mess and receipt therefrom was exempt as enlisted at serial No. 19 of the vide mega exemption notification No.25/2012-Service Tax date 20.06.2012, a copy of which is enclosed herewith for ready reference **(Annexure-1).**
2. As required the following information/documents are enclosed :

   (a) Form 26AS for financial year 2016-17(A.Y.2017-18) **(Annexure-2).**
   (b) Copies of P & L account and Balance Sheet for financial year 2016-17 (A Y 2017-18) **(Annexure-3).**
   (c) No agreement has been entered into as the assessee has its own medical establishment.
   (d) VAT return is not applicable.

Hope that the above will satisfy your enquiry and the enquiry will be settled at your kind end

Enc: As above.

Yours faithfully,

Nidhi Pathak

(Nidhi Pathak)

Assessee

Dated. 18.11.2021

To,

The Assistant Commissioner,

CGST & Central Excise

Division- Varanasi

9, Maqbool Alam Road Beside Aaykar Bhawan

VARANASI-221002.

Sir,

Ref: Your SCN-C.No.V(30)ST/Dem/VNS/Pathak/922/2021/3024

Dated 7/20.10.2021

Sub: Defense Reply to SCN in case of M/S Sri Nidhi Pathak, D 47/198, Ramapura, Godauliya, Varanasi-221001 for the period Financial Year 2016-17

DIN:20210053ZY000000BE1A

PAN:AMNPP5272G

Kindly refer to the SCN under reference. We hereby file the Defense Reply to the SCN as under :

1. That the assessee was running a service centre for eating joint/mess during the financial year 2016-17 and receipt therefrom was exempt as enlisted at serial No. 19 of the vide mega exemption notification No.25/2012-Service Tax date 20.06.2012, a copy of which is enclosed herewith for ready reference **(Annexure-1).**
2. That on the basis of CBDT-TDS/ITR based third party data for the above financial year 2016-17 the enquiries for scrutiny and verification for service tax liability were started by the Superintendent, Range-South, Division-Varanasi vide letter C.No. C.No.IV(18)R-South/Nidhi/16-17/579/2021/745 dated 19.05.2021 were duly complied by the assessee vide his reply dated 10.06.2021 which was duly handed over in the office of the Superintendent. A photo copy of the reply dated 10,06.2021 is enclosed for reference**(Annexure-2).**
3. That as stated in para 3.1 of SCN it is incorrect to say that the assessee has not filed any details called for by the Range Superintendent. The assessee filed form 26AS and P & L account and

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Balance Sheet for the year under consideration and claimed that the business receipts were exempt as enlisted at serial No. 19 of the vide mega exemption notification No.25/2012-Service Tax date 20.06.2012 but the same has not been rebutted in Show Cause Notice (SCN). Hence the SCN is defective and is not well founded in law.

4. That the Noticee had a proper license from appropriate local authority to run canteen , a copy of which is enclosed herewith for your kind perusal in support of source of receipts declared in income tax return during the year under consideration.

5. That the Show Cause Notice is beyond jurisdiction. The Noticee relies on a decision of the Central Excise & Service Tax Appellate Tribunal (CESTAT), given in the case of Alpha Management Consultants P. Ltd Vs Commissioner of Service Tax (2007(6) STR 181 **(ANNEXURE-3)** wherein it has been held that service tax cannot be recovered based on the returns shown in the ITR. The appeal filed by the Service Tax Department before the Karnataka High Court against the Tribunal's decision was dismissed on the ground of maintainability. The assessee approached the Hon'ble Supreme Court. The Supreme Court dismissed the civil appeal filed by the Commissioner of Service Tax. Thus the SCN issued based on ITR only is not maintainable as settled by the Hon'ble Supreme Court. The issue also finds support from latest decision of Bombay High Court in case of Amrish Rameshchandra Shah Vs Union of India & Ors, in Writ Petition (L) No.2103 of 2021.

6. In a letter to all principal chief commissioners and commissioners, the CBIC said that demand notices should not be issued, just because ITR-TDS and service tax amounts are different.
"A reconciliation statement has to be sought from the taxpayer on the difference and whether the service income earned by them for the corresponding period is attributable to any negative list services specified in Section 66D of the Finance Act," it said.
"All chief commissioners and commissioners may sensitize the field formations to issue demand notices after due diligence and verification,
The impugned Show Cause Notice deserves to be dropped in view of the above administrative instruction and in legal perspective also.

7. That the Show Cause Notice has sought to invoke the extended period of limitation on the ground that the appellant had suppressed the material facts with intention to evade payment of duty/tax. <u>It shall not be out of place to mention here that w.e.f. 28.05.2012, Section 73(1) of the Finance Act, 1994, has been amended, to the effect that the show cause notice can be issued within a period of eighteen months from the relevant date, being the due date of filing of the return. That this period of eighteen months is applicable for the show causes to be issued for the period after 28.05.2012.</u>It is also

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submitted that the we have never suppressed or misrepresented any fact relating to the non payment of service tax from the Department. The Noticee was under abona *fide* belief that no Service tax is payable being exempt as enlisted at serial No. 13 of the vide mega exemption notification No.25/2012-Service Tax date 20.06.2012, hence there was no intention to evade tax. Therefore, proposed penalty U/s 78 of Finance Act cannot be confirmed by extending period U/s 80 of Finance Act 1994.

8. It is also submitted before your goodself that Penalties under Section 77(1)(a) and 77(1)(c) of the Finance Act 1994 are also not attracted due non-liability of service upon the assessee.

9. Section 78 of the Finance Act reads as under:

"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of

(a) fraud; or

(b) collusion; or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:";

Provided that where such service tax as determined under sub-section (2) of section 73, and the interest payable thereon under section 75, is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the service tax so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the service tax as reduced or increased, as the case may be, shall be taken into account : Provided also that in case where the service tax determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of service tax so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of communication of the order by which such increase in service tax takes effect.

Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply."

From a bare reading of the above provisions it appears that the basic prerequisite for imposition of penalty under the above provisions is existence of fraud, collusion, willful mis-statement, suppression of fact or contravention of the provisions with intent to evade duty. In the instant case, the SCN has failed to bring out any instance or evidence which even hints towards assessee's intention to evade tax, fraud, willful mis-statement, collusion or suppression of fact.

It may be seen that section 80 starts with a *non obstante* clause i.e. the said section has over-riding precedence over the provisions contained in Section 76, 77 or 78. Further, the terms used in section 80 are mandatory, as is clear from the word 'shall' employed therein. Therefore, there is no discretion with the authorities while applying the provisions of Section 80, and they are under an obligation not to impose penalty if the assessee proves that there was reasonable cause for any failure referred to in sections 76, 77 and 78.

The above view finds support from the decision of the Larger Bench of CESTAT in the matter of *ETA Engineering Ltd. vs. CCE, Chennai* 2006 (3) STR 429 (LB) wherein it was held that where the assessee is under a *bona fide* doubt regarding their activity being covered by Service Tax, no penalty is imposable in terms of Section 80 of the Finance Act, 1994. Relevant portion of the decision is extracted below for ease of reference:

"9. ………… Since they were under the bona fide doubt regarding their activity whether covered by service tax or not, therefore, there was a reasonable cause on their part in not depositing the service tax in time. Therefore, we are of the view that notwithstanding anything contained in Sections 77 of the Finance Act, 1994, the appellants are entitled for the benefit of Section 80 of the Finance Act and accordingly, we hold that no penalty should be imposed on the appellants. Accordingly, we set aside the penalties imposed under Sections77 and allow their appeal to this extent."

PRAYER

In fact of the above provisions of law and several judicial pronouncements of the Tribunal and High Courts, the show cause notice for confirming the demand, interest and penalties may kindly be vacated.

Enc: As above

Yours faithfully,

Nidhi Pathak

(Nidhi Pathak)

NOTICEE

4.4 It is also observed that this fact was brought to the notice of the Commissioner (Appeals) also who even after noting the above has recorded a finding that appellant has failed to provide information. Even if he was of the opinion that the Adjudicating Authority has decided for want of documents and other information, the documents were available before him, he could have either taken cognizance of the same and decided on the basis of those or remanded the matter back to the Original Authority for fresh consideration.

4.5 Be that as it may be, I observe that as per letter dated 10.06.2021 is that she is engaged in providing mess services or running a running a service center and her receipts are exempt from payment of service tax as per entry no.19 of the Notification No.25/2012-ST dated 20.06.2012. The said entry no. 19 of the Notification No.25/2012-ST dated 20.06.2012 is reproduced below:-

> *"19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year."*

4.6 Before Commissioner (Appeals) sample invoices etc. were also placed, however, without taking cognizance of the same he went to uphold the Order-in-Original by stating that appellant has failed to establish the nature of services provided by her.

4.7 As the services provided by the appellant are exempt from payment of service tax as per the bonafide belief entertained by her, she was not required to take registration or file any service tax return to the department; I do not find any merit in the approach adopted by the lower authorities.

4.7 I also observe that the show cause notice has been issued invoking the extended period of limitation which in the present case was not called far. Demand should also fall on the ground of limitation.

4.8 In alternate, appellant has submitted that her turnover during the financial year was below the threshold exemption limit as her turnover was below Rs.10 lakhs in the previous year. She produced relevant documents for the same. On perusal of the documents I observe that the claim made by the appellant is justified and the impugned order also rejects the same on a flimsy ground that appellant has not followed the due procedure. I do not find any merits in the same.

4.9 Accordingly, I do not find any merits in the impugned order and the same is set aside.

4.10 In view of the above, as I do not find any merits in the demand made, I also do not find any merits in the penalties imposed upon the appellant.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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