CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 1

Service Tax Appeal No. 55818 of 2014

[Arising out of Order-in-Original No. JAI-EXCUS-001-COM-2014-15 dated 24.07.2014 passed by the Commissioner, Central Excise Commissionerate, Jaipur]

M/s Paharia Construction Co., **Appellant**
9, Rajiv Colony, Police Academy Road
Naya Khera, Jaipur (Rajasthan)

Versus

The Commissioner, Central Excise, **Respondent**
Commissionerate-I
NCR Building, Statue Circle, C Scheme, Jaipur

Appearance

Present for the Appellant : Ms. Ashmita Nayak, Advocate

Present for the Respondent: Shri R K Manjhi, Authorised Representative

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: 08/11/2019

FINAL ORDER NO. 51587/2019

JUSTICE DILIP GUPTA:

1. The appeal seeks the quashing of the order dated 24 July, 2014 passed by the Commissioner of Central Excise, Jaipur[1] by which the demand of service tax has been confirmed with penalty and interest. The period of dispute is from 1 April, 2007 upto 30 June, 2013.

2. The Appellant as a sub-contractor claims to have carried out certain works under a Work Order issued by M/s Zuberi Engineering Jaipur[2]. A Show Cause Notice dated 18 April, 2013 was issued to the appellant mentioning therein that during the course of the audit of the records of the

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1. **The commissioner**
2. **ZEC**

Appellant, it was observed that it had provided services to ZEC as a sub-contractor but had neither filed the ST-3 Returns nor paid service tax. The extended period of limitation was also invoked stating that the assessee had not deposited the applicable service tax wilfully and suppressed the facts deliberately with an intention to evade payment of service tax.

3. The Appellant claims to have filed a reply dated 1 July, 2014 to the aforesaid Show Cause Notice, which according to the Appellant was received in the office of the Central Excise, Commissionerate on 2 July, 2014 bearing receipt no. 4624. The Commissioner in the impugned order has, however, observed that the Appellant did not file any reply despite repeated opportunities either upto 15 June, 2014 or upto the date of the order.

4. The Commissioner concluded that the Appellant was liable to pay service tax as a sub-contractor and in regard to the extended period of limitation observed that there was a deliberate act by the Appellant to suppress the taxable value and material facts from the Department with an intent to evade the payment of service tax, which fact came to the notice of the Department only when the inquiry was initiated.

5. Ms. Ashmita Nayak, learned Counsel appearing for the Appellant has submitted that the question of law as to whether a sub-contractor is liable to pay service tax, even if the main contractor has discharged the service tax liability on the activity undertaken by the sub-contractor in pursuance of a contract, has now been resolved by a Larger Bench of this Tribunal in **Commissioner of Central Excise vs. Melange Developers Private Limited**[3]**,** but in the facts and circumstances of the case, the Department

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3. Service Tax Appeal No. 50399 of 2014 decided on 23 May, 2019

was not justified in invoking the extended period of limitation. Learned Counsel also pointed out that the Commissioner was not justified in observing that the Appellant had not filed a reply to the Show Cause Notice because the reply to the Show Cause Notice was actually filed in the office of the Commissioner of Central Excise on 2 July, 2019, as is clear from the endorsement made on the copy of the notice which has been enclosed with the Appeal. In regard to the extended period of limitation, learned Counsel pointed out that in the first instance an audit for the period September, 2006 to March, 2010 was conducted by Internal Auditors of the Department on 13 and 14 September, 2010 and an Internal Audit report was issued on 14 December, 2010 incorporating audit paragraphs relating to non payment of service tax on the value of work as per the TDS certificates. The Show Cause Notice was, however, issued to the Appellant on 18 April, 2013 after more than two years and four months. Learned Counsel for the Appellant also pointed out that there were conflicting decisions of the Tribunal as to whether a sub-contractor is liable to pay service tax and it is only when the Larger Bench decision came on 23 May, 2019 that this issue was resolved and it was held that a sub contractor has to pay service tax. Learned Counsel pointed out that the Appellant was under a bonafide belief that a sub-contractor was not liable to pay service tax and that is why the Appellant did not pay the service tax. Learned Counsel submitted that in such circumstances it cannot be alleged that the Appellant had wilfully suppressed material facts with an intent to evade payment of service tax.

6. Shri R K Manjhi, Learned Authorised Representative of the Department has, however, submitted that the conduct of the party clearly depicts that it had suppressed material facts with an intent to evade payment of service

tax for the reason that even a reply to the Show Cause Notice was not filed despite repeated opportunities having been granted to the Appellant.

7. The submissions advanced by the parties have been considered.

8. Before, examining the contentions of the parties regarding invocation of the extended period of limitation, it would be necessary to examine as to whether the Appellant had submitted a reply to the Show Cause Notice.

9. The Show Cause Notice dated 18 April, 2013 requires the Appellant to submit a reply with documents within thirty days of the receipt of the notice. The impugned order mentions that letters dated 15 April, 2014, 30 April, 2014 and 23 May, 2014 were sent to the Appellant to submit replies by 29 April, 2014, 15 May, 2014 and 4 June, 2014 respectively, but no reply was submitted by 15 June, 2014 or till the date the order was passed. According to the Appellant a letter dated 13 May, 2014 was sent seeking extension of time upto 15 June, 2014. Thereafter, another letter 6 June, 2014 was submitted seeking extension time upto 25 June, 2014 and ultimately the reply dated 1 July, 2014 was submitted on 2 July, 2014 as would be clear from the endorsement bearing receipt no. 4624 made on the copy of the reply on 2 July, 2014. The impugned order is dated 24 July, 2014. It appears that the reply submitted in the office could not be placed before the Commissioner at the time the order was passed.

10. The only issue that requires consideration in this Appeal is as to whether the Department was justified in invoking the extended period of limitation because the matter on merits as to whether a sub contractor is liable to pay service tax on the activity undertaken by a sub-contractor in pursuance of a contract has been decided by a Larger Bench of the Tribunal in **M/s Melange Developers Limited** in favour of the Department.

11. Section 73 of the Finance Act, 1994[4] deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded. The provision as it stood in 2007 provides that where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the Central Excise Officer may within one year from the relevant date, serve notice on the person chargeable with the service tax requiring him to show cause why he should not pay the amount specified in the notice. The proviso, however, seeks to extend the period upto five years if the conditions specified in the proviso are satisfied. The relevant portion of Section 73 with the first proviso is as it stood in 2007 reproduced below:

> **SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.**—
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> (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :
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> **Provided** that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—
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> (a) fraud; or
> (b) collusion; or
> (c) wilful 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,
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> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.
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> **Explanation**.—Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of thirty months or five years, as the case may be.

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4. the Act

12. The Show Cause Notice gives the following reasons for invoking the extended period of limitation:

a. The assessee failed to discharge its duty and responsibility under the said provision in as much as, it had neither taken registration nor disclosed service tax liability by filing the returns within the prescribed time with the appropriate authority nor deposited the applicable service tax; and
b. It appears that the assessee had not deposited the applicable service tax wilfully and suppressed the facts deliberately by not filing the service tax returns within the prescribed time limit with an intent to evade payment of service tax.

13. In reply, the Appellant stated:

a. The audit of records of service tax for the period September, 2006 to March, 2010 was conducted by the Internal Audit of the Department on 13 and 14 September, 2010 and internal audit report was issued on 14 December, 2010 incorporating audit paragraph relating to non-payment of service tax amounting to Rs. 59,79,115/- on the value of work received as per TDS certificates. The Show Cause Notice was, however, issued on 18 April, 2013 i.e. after more than two years after issue of internal audit report on 14 December, 2010.

14. The impugned order accepts the case of the Department for invoking the extended period of limitation and the relevant portion of the order is as follows:

> 41. **As regards the allegation of suppression of facts, I find that there has been a deliberate act by the noticee to suppress the taxable value and material facts from the department and not paying the service tax on entire consideration received by them for providing such services to the various recipients during December, 2007 to June, 2012 as discussed above.** I observed that the noticee did not comply with the provisions of service tax law by not declaring the facts to the department and suppressed their value of taxable services. **They have done so with intent to evade payment of service tax, which came into notice of the department only on initiating enquiry.** Had the department officers not initiated the enquiry/investigation, the noticee would have been escaped from payment of the service tax, education cess and secondary & higher education cess.
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> ....
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> Further non payment of tax cannot be protected under the guise of bonafide mistake especially when the noticee never engaged in correspondence with the department to seek clarification or convey their standon the taxability if their services were not taxable. Under identical circumstances the invocation of extended period was upheld by the Hon'ble CESTAT in the case of Instrumentation Ltd. [2011(23) STR 221.T] . **As regards the argument of the noticee that audit has also been conducted by the department but never raised the such issue, I rely the judgment of Hon'ble CESTAT in case of Chemfab Alkalis Ltd. vs CCE Pondicheery [2010 (251) ELT 264. Tri-Chennai] wherein it was held**: "It cannot be a case of anybody that since all the excisable units are being audited by the department from time to time, the extended period of limitation will not apply in respect of any unit. Such an interpretation would render the relevant legal provisions regarding application of extended period of time totally redundant and hence cannot be accepted". Therefore, the proviso to Section 73 (1) is squarely applicable for recovery of service tax in the instant case.
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> **(Emphasis supplied)**

15. It needs to be noted that prior to the decision of the Larger Bench of the Tribunal on 23 May, 2019 **in M/s Melange Developers Private Limited,** there were conflicting decisions of the Tribunal regarding liability of a sub-contractor to pay service tax. Such being the position, it cannot be said that the Appellant had suppressed the material facts from the Department with an intent to evade the payment of duty of service tax. This

view finds support from the decision of the Supreme Court in **Continental Foundation Joint Venture vs. Commissioner of Central Excise**[5] wherein it was observed;

> "11. Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act."

16. In **Binjrajka Steel Tubes Limited vs. Commissioner of Central Excise, Hyderabad-III**[6]**,** the submission regarding audit note was also examined to determine whether the Department was justified in invoking the extended period of limitation. The Tribunal held that in such a situation the Department cannot invoke the of extended period of limitation and the relevant paragraph of the order is reproduced below;

> "7. Coming to limitation, the audit of appellant was conducted in 9/2003 and audit note also is issued on 31-1-2005. The quantifying the collection charges collected in 2003-04 as amounting to Rs. 31,69,437/- and having directed JRO to verify the issue in detail and take necessary action to safeguard the revenue, department cannot then take its own sweet time to issue notice on 29.9.2007 i.e., after a lapse of more than four years of the audit. We, therefore, are of the view that appellant does have a case on the issue of limitation, and that SCN and hence the demand revised

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5. 2007(216) ELT 177(SC)
6. 2016 (324) ELT 302(Tri.-Hyd)

> in the impugned order is time-barred except for the normal period of demand immediately preceding the date of service of Show Cause Notice. For the same reasons, the penalty imposed under Rule 25 is also set aside."

17. The audit of records of Appellant for the period September, 2006 to March, 2010 was conducted by the Internal Audit of the Department on 13 and 14 September, 2010 and an Internal Audit Report was issued on 14 December, 2010 incorporating audit paragraphs relating to non payment of service tax. The Show Cause Notice was, however, issued on 18 April, 2013 after period of two years and four months of the issuance of the Internal Audit Report. It cannot, therefore, be said that the facts had been suppressed with intention to avoid payment of tax.

18. The Mumbai Bench of the Tribunal in **Gammon India Limited vs. Commissioner of Central Excise, Goa**[7] dealt with this issue and observed that where a Show Cause Notice was issued in September, 1989 even though the Appellant therein had supplied information to the Department in August, 1987, the notice was barred by limitation. The Civil Appeal filed by the Department before the Supreme Court was dismissed on 1 May, 2002. In the instant case, the Department kept quiet for over two years and four months before issuing of the Show Cause Notice.

19. We are, therefore, satisfied that the Department was not justified in invoking the extended period of limitation. The demand of service tax, imposition of penalty and interest for any period beyond the period of one year prescribed under Section 73 of the Act, therefore, cannot be sustained. In such circumstances, the matter needs to be remitted to the Commissioner

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7. 2002 (146) ELT 173(Tri.-Mumbai)

to determine the service tax liability and the imposition of penalty and interest if any, within the normal period prescribed at the relevant time. The issue as to whether penalty or interest should also be imposed for the normal period shall be determined after giving an opportunity of hearing to the Appellant.

20. The impugned order dated 24 July, 2014 is set aside to the extent indicated above and the Appeal is also allowed to this extent.

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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