CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. 1

SERVICE TAX APPEAL NO. 52160 OF 2018

[Arising out of the Order-in-Original No. DL-GST-WEST-COM-10-17-18 dated 28/02/2018 passed by Commissioner of Goods and Service Tax, Delhi West, New Delhi.]

M/s Usha Fabs, **...Appellant**
484, Udyog Vihar, Phase – III,
Gurugram – 122 016.

Versus

Commissioner of Goods and Service Tax, Delhi West, **...Respondent**
Engineer India Limited Annexe Building,
5th Floor, Bhikaji Cama Place,
New Delhi.

APPEARANCE:
Shri R. Santhanam, Advocate for the appellant.
Shri Ravi Kapoor, Authorized Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51236/2022

DATE OF HEARING/DECISION : 16.12.2022

P.V. SUBBA RAO

M/s. Usha Fabs[1] filed this appeal to assail order in original[2] dated 28.02.2018 passed by the Commissioner of Goods and Service Tax, Delhi West and the operative part of the order is as follows:

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[1] **Appellant**
[2] **Impugned order**

"(i) I confirm the demand of service tax of Rs. 2,23,22,190/- (Rs. Two crores twenty three lakhs twenty two thousand one hundred and ninety rupees only) (including Education Cess & Secondary and Higher Education Cess) against M/s Usha Fabs, 43, West Avenue, Punjabi Bagh, New Delhi – 110 026 under sub-section (1) of Section 73, read with Sections 66B & 68 of the said Act.

(ii) I also confirm the demand of interest from M/s Usha Fabs under Section 75 of the Act from the due date till the date of actual deposit of the said amount as proposed at Sl. No. (i) on the above confirmed demand.

(iii) I impose a penalty of Rs. 2,23,22,190/- (Rs. Two crores twenty three lakhs twenty two thousand one hundred and ninety rupees only) under Section 78 of the Finance Act, 1994 for deliberately suppressing of facts with a premeditated intention of evading payment of service tax. The Noticee could, however avail the benefit of the proviso to Section 78, wherein, it has been laid down that if they deposit the entire amount of service tax along with interest within 30 days from the date of the communication of the Order, then the penalty amount under Section 78 shall be reduced to 25% provided the reduced penalty is also paid within the same time frame as specified above.

(iv) I refrain from imposing any penalty under Section 76 of the Act".

2. The appellant is registered with the department and provides taxable services viz., Renting of Immovable Property Service and Business Auxiliary Service. Its records for the period 2007-2008 to 2010-2011 were audited by a team of service tax Commissionerate and the team observed that while the appellant paid service tax on the amounts received as rent from M/s. Nokia Siemens Pvt. Ltd., it also had relations with an associated company M/s. Usha Fabs Pvt. Ltd.

3. The audit team found that the appellant had let out its premises in Gurgaon for commercial purposes to M/s. Usha Fabs Private Ltd. and was not collecting any rent for it. However, the appellant also let out a residential flat in Mussorie for Rs. 5,000/- per month to M/s. Usha Fabs Private Ltd. and it was being used

by the employees of the company for residential purposes. Further the audit team also found that M/s. Usha Fabs Private Ltd. had given advances of Rs. 97.01 lakhs, 143.90 lakhs and 103.19 lakhs during 2008-2009, 2009-2010 and 2010-2011 to the appellant on which service tax has to be paid as per Rule 3 of the Service Tax (Determination of Value) Rules, 2006.

4. Based on the above observations of the audit team, a Show Cause Notice[3] dated 18.10.2012 was issued to the appellant which culminated in the impugned order.

5. Learned counsel for the appellant submits that the entire basis of the demand is the allegation that the appellant had received advances from M/s. Usha Fabs Private Ltd. which is factually incorrect. In fact, the amounts mentioned in the SCN were advanced by the appellant to M/s. Usha Fabs Pvt. Ltd and not the other way round. The appellant is a proprietary firm of Smt. Usha Vaid who is also the director and the main share holder of M/s. Usha Fabs Pvt. Ltd. Therefore, she gave advances to promote the business of M/s. Usha Fabs Pvt. Ltd. He took us through the relevant balance sheets and ledgers and demonstrated that the amounts were, indeed advanced by the appellant and not received by it.

6. He submits that this fact was specifically mentioned in the appellant's reply dated 10.12.2012 to the SCN paragraph (v) of which reads as follows:

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[3] **SCN**

"(v) In this, para you have stated that the assessee had taken advances from M/s Usha Fab Pvt. Ltd. amounting to Rs. 97.01 lacs, Rs. 143.90 lacs and Rs. 103.19 lacs.

In this respect, this is to submit that the assessee has not taken the above amounts, but rather has **given** the above amounts to the company.

Therefore, your observation and application of rule 3 of Service Tax (Determination of Value) Rules, 2006 is not applicable at all".

7. He further submits that this submission in written reply as well as during the personal hearing was recorded in the impugned order as follows:

"14. The Noticee submitted the parawise reply to Show Cause Notice which is reproduced below :-

(i) For Para No. 2 of SCH

The Noticee has never given on rent any of its immovable properties or other assets, though some part of the property was used by the company. No entry has been passed in the books of accounts for receipt or receivable of any such rent".

PERSONAL HEARING

"Shri M.L. Mutneja, Chartered Accountant, Shri Amit Gogia, Accountant of the Company and Shri Rakesh Kr. Dhawan, Assistant of the Company appeared before me for personal hearing on 18.12.2017 in the instant case. Shri Mutneja referred to an earlier reply dated 10.12.2012 and his latest reply dated 08.12.2017 and submitted that Mrs. Usha Vaid, the Proprietor of the Company had never taken any amount from the Company and no entry of any service charges/rent had been posted in the books of a/c of the Company/Noticee as alleged by Audit. It was further submitted that, they had also submitted a Certificate from the auditor of the company certifying that the premises was owned by Mrs. Vaid and the Company had been using part of the premises no. 451 and 436. The Company had not paid any rent or any consideration in cash or kind for the above premises to Mrs. Usha Vaid. Hence, there was no question of payment of Service Tax".

8. He submits that after considering these submissions, the Commissioner has recorded in her findings, facts which are just the opposite of the truth as follows:

> "The Balance-sheets of the Noticee for the year 2008-2009, 2009-2010 and 2010-2011 prove that the Noticee had not taken advances from M/s Usha Fab Private Ltd. amounting to Rs. 97.01 lacs, Rs. 143.90 lacs and Rs. 103.19 lacs during the respective years and apart from that the Noticee also accepted the fact that M/s Usha Fabs Pvt. Ltd. was using that place for commercial purposes".

9. He, therefore, submits that the appeal needs to be allowed and the impugned order needs to be set aside with consequential reliefs.

10. Learned Authorized Representative supports the impugned order. However, on the specific facts regarding who gave advances to who, he agrees that the documents show that the appellant has given the indicated amounts as advances and has not received them.

11. We have considered the submissions on both sides and perused the records.

12. The entire case of the department is built by wrongly understanding the amounts advanced by the appellant to M/s. Usha Fabs Pvt. Ltd. as amounts received as advances by the appellant. A bare perusal of the documents presented before us including the ledgers brings out the correct facts. Audit team appears to have been confused between what is a credit and what is a debit and came to a conclusion that the amounts advanced by the appellant were amounts received by it.

13. The correct facts were presented by the appellant in reply to the SCN and also during the personal hearing as recorded in

the impugned order. However, while giving her findings, the Commissioner has recorded just the opposite as facts.

14. We, therefore, find that the entire case is built on a mistaken reading of the ledgers by the audit team and continued in the SCN. Even after the correct facts were presented, the demand was confirmed in the impugned order without giving any reasons. Once it is found as a fact that the appellant had given advances and not received them from M/s. Usha Fabs Pvt. Ltd., nothing survives in the impugned order.

15. The appeal is, therefore, allowed and the impugned order is set aside with consequential relief to the appellant.

(Order dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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