CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. 1

SERVICE TAX APPEAL NO. 50420 OF 2015

[Arising out of the Order-in-Appeal No. 87 (SLM) ST/JPR-I/2014 dated 08/12/2014 passed by Commissioner (Appeals), Central Excise Commissionerate, Jaipur - I.]

M/s Raghuvar (India) Ltd., **...Appellant**
Durgapura Station Road, Durgapura,
Jaipur.

Versus

Commissioner, Central Excise Commissionerate, **...Respondent**
Jaipur.

APPEARANCE:

Ms. Surabhi Sinha, Advocate for the appellant.
Shri Rajeev 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. 51237/2022

DATE OF HEARING/DECISION : 22.12.2022

P.V. SUBBA RAO

M/s Raghuvar India Limited[1] filed this appeal to assail the order-in-appeal[2] dated 08.12.2014 passed by the Commissioner of Customs and Central Excise (Appeals), Jaipur, whereby he

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1 **appellant**
2 **impugned order**

upheld the order-in-original dated 16.08.2012 passed by the Assistant Commissioner and rejected the appellant's appeal.

2. The appellant provides service of transport of goods by road and is registered with the Service Tax Department and has been paying service tax. During audit of the records of the appellant it appeared that the appellant had been working as a consignment agent of various oil manufacturers and had been receiving commission for such services. Additionally, it appeared that the appellant was also receiving freight charges, loading and unloading expenses, postage and telecom charges etc. It appeared to the Department that these services of the appellant were classifiable under the head "Clearing and Forwarding Agent" service under Section 65 (105) (j) of the Finance Act, 1994 and the appellant was liable to pay service tax of Rs. 3,61,031/- for the period 2006-2009. It also appeared during audit that the appellant was liable to pay service tax on storage charges amounting to Rs. 38,872/-.

3. Learned Counsel for the appellant submits that the appellant is not disputing the service tax on the storage charges and are disputing only the service tax on clearing and forwarding agency service.

4. A show cause notice[3] dated 12.04.2011 covering the period 2006-2007 to 2008-2009 under the proviso to Section 73 (1) of the Finance Act, 1994 was issued to the appellant demanding the

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[3] **SCN**

service tax. It was also proposed in the SCN to impose penalties under Section 76, 77 and 78 of the Act. The appellant contested the demand both on merits and on limitation. However, the Adjudicating Authority, by order dated 16.08.2012, confirmed the demand along with interest, as proposed in the show cause notice and imposed penalties. This order was upheld by the Commissioner (Appeals) by the impugned order.

5. Learned Counsel for the appellant submitted as follows :-

(a) The entire demand in the show cause notice is hit by limitation as the demand has been issued after the expiry of one year and, hence, needs to be set aside. She submits that merely because during audit the alleged non- payment of service tax was discovered does not prove that there was any suppression on the part of the appellant, let alone suppression with intent to evade. All figures were duly reflected in their balance sheets which were examined by the audit party. She places reliance on the following case laws :-

(i) **Commissioner of Central Excise, Hyderabad** versus **Chemphar Drugs and Liniments**[4]

(ii) **Padmini Products** versus **Collector of Central Excise**[5]

(iii) **PVT Ltd.** versus **Commissioner of Service Tax, New Delhi**[6]

(b) The services of a consignment agent do not fall under the category of Clearing and Forwarding Agent service

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[4] **1989 (40) E.L.T. 276 (S.C.)**

[5] **1989 (43) E.L.T. 195**

[6] **2021 GSTL 435 (Del.)**

under Section 65 (105) (j). The appellant used to receive goods and forward the same to other parties on the instruction of the principal. The appellant was neither receiving any goods nor clearing them from its premises. Reliance was placed on the following case laws :-

(i) **Mahavir Generics** versus **CCCE, Bangalore**[7] which was overruled in **Medpro Pharma Pvt. Ltd.** versus **CCE, Chennai**[8]

(ii) Affirmed by Punjab and Haryana High Court in **CCE, Panchkula** versus **Kulcop Midicines (P) Ltd.**[9]

(iii) Affirmed by the Hon'ble Apex Court in **Commissioner** versus **Kulcip Medicines (P) Ltd.**[10]

(c) Without prejudice to the above arguments, even if the services of a consignment agent fall under the category of Clearing and Forwarding Agent services, divergent views existed during the period and, therefore, extended period of limitation could not be invoked as the appellant was under the bonafide belief that it was not liable to pay service tax ; and

(d) For the above said reasons penalties also should not be imposed even if the demand is upheld. Section 80 of the Act may be invoked to set aside the penalties.

6. Learned Authorized Representative for the Revenue supports the impugned order.

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[7] **2006 (STR) 276**
[8] **2006 (3) STR 355 (LB)**
[9] **2009 (14) STR 608**
[10] **2012 (25) STR J127 (S.C.)**

7. We have considered the submissions made by both the sides and perused the records.

8. We first proceed to decide on the question of limitation. The period of dispute is 2006-2007 to 2008-2009 and the show cause notice was issued on 12.04.2011. During the relevant period, the normal period of limitation was one year. The show cause notice was issued clearly beyond the period of one year and the proviso to section 73 (1) was involved. In this regard, it would be necessary to examine the relevant portion of Section 73, which reads as follows :-

> "**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".

9. As may be seen, the demand could only be raised within a period of one year from the date unless the short payment of

service tax was by reasons of (a) fraud or (b) collusion or (c) wilful mis-statement or (d) suppression of facts or (e) contravention of any of the provisions of Chapter V of the Finance Act or the rules made thereunder with intent to evade payment of service tax.

10. The reasons for invoking extended period of limitation in the show cause notice are in paragraph 8, which reads as follows:-

> "8. Whereas, the assessee has not paid service tax amounting to Rs. 3,99,903/- on the services provided during the period 2006-2009. **Had the audit not been conducted it would not have come to the knowledge of the department that the assessee has not deposited the service tax correctly. Therefore, it is clear that the assessee has willfully suppressed the value of taxable services** during the said period from the Department and thereby contravened the provisions of Section 67, 68 & 69 of the Finance Act, 1994 read with Rule 4 & 6 of the Service Tax Rules, 1994 with intent to evade payment of service tax. Therefore, for recovery of service tax not paid by the assessee, extended period under proviso to Section 73 (1) of the Finance Act, 1994 is invokable. The interest on the service tax amount not paid is also recoverable under Section 75 of the Finance Act, 1994".

11. The reason for invoking extended period of limitation given by the Assistant Commissioner in the order-in-original is as follows :-

> "**I find that, if the audit has not been conducted it would not have come to the knowledge of the department that the assessee had not deposited the service tax correctly. Therefore, the assessee had willfully suppressed the value of taxable services during the** said period from the Department. Therefore, extended period under proviso to Section 73 (1) of the Finance Act, 1994 for recovery of service tax, is correctly invokable and the same is recoverable with interest on the service tax amount not paid is also recoverable under Section 75 of the Finance Act, 1994."

12. The reasons for invoking extended period of limitation given by the Commissioner (Appeals) in the impugned order is as follows :-

> "**I also observe that if the audit of the unit had not been conducted it would not have come to the knowledge of the department that the appellant had not deposited the service tax correctly. Therefore, it is clear that the appellant had willfully suppressed the value of taxable services during the period from the** Department and therefore, extended period under proviso to Section 73 (1) of the Finance Act, 1994 for recovery of service tax, is invokable. Since extended period is invokable therefore penalty provisions also correctly applicable".

13. As may be seen neither the show cause notice nor the order-in-original or the order-in-appeal have established any of the five elements required under section 73 to invoke extended period of limitation. The only reason for invoking extended period of limitation was that "had the audit not being conducted escapement of service tax would not have to come to notice". Therefore, it was concluded that the appellant had willfully suppressed value of taxable services. Firstly, we find that detection of any escapement of service tax during audit is not a ground on which extended period of limitation as per section 73. Neither does the fact that the audit was conducted prove that the appellant suppressed, let alone willfully suppressed taxable services. On this ground itself, the demand invoking the extended period of limitation needs to be set aside.

14. Secondly, it is wrong to say that had the audit not being conducted the escapement of service tax would not have come to notice. Section 69 of the Finance Act, 1994 requires every person

who is liable to pay service tax to obtain registration which the appellant did. Section 70 requires every such person to self-assess the service tax due and to furnish returns to the Superintendent of Central Excise which the appellant did. The assessee is not an expert in taxation and may make mistakes in his assessment. The check against the self-assessment or no assessment of service tax by an assessee is under section 72 which reads as follows :-

> "**SECTION 72. Best judgment assessment** – If any person, liable to pay service tax, –
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> (a) fails to furnish the return under section 70;
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> **(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder.**
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> **the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment**".

15. As may be seen, if the assessee fails to furnish the returns or having made a return fails to assess the tax in accordance with the provisions of law, the Central Excise officer may require the assessee to produce such accounts, documents or other evidence as he may deem necessary and determine the same payable by the assessee or refundable to the assessee on the basis of such assessments. This is the responsibility of the Jurisdictional Superintendent of Central Excise with whom the return is filed. In this case, the entire basis on which the audit raised the objection

was in the books of accounts and documents of the appellant. The officer with whom the returns were filed could also have equally gone through the returns, called for the books and accounts and detected the alleged non-payment of service tax. If the audit detected escapement of service tax, it does not establish, in the factual matrix of this case, that the assessee has indulged in fraud or collusion or wilful mis-statement or suppression of facts or violation of legal praising with an intent to evade payment of service tax. It only establishes that the officer tasked with the best judgment assessment has not done his job. This cannot be the ground on which extended period of limitation can be invoked.

16. In view of the above, we find the entire demand is time barred and no reason whatsoever, as required to invoke the proviso to section 73, have been given in the show cause notice or in the order-in-original or in the impugned order. Consequently, the impugned order deserves to be set aside.

17. The appeal is allowed and the impugned order is set aside with consequential benefits, if any, to the appellant.

(Order dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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