CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 50735 of 2017

(Arising out of Order-in-Appeal No. ALW-EXCUS-O-I-O-COM-84/16-17 dated 24.01.2017 passed by the Commissioner, Central Excise Commissionerate, Block A, Surya Nagar, Alwar.)

M/s KBS Enterprises **...... Appellant**

VERSUS

Commissioner of Central Excise, Alwar (Raj.) **......Respondent**

APPEARANCE:

Ms. Kainaat, Advocate for the Appellant
Shri Harshvardhan, Authorized Representative of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 24.02.2023

FINAL ORDER NO. 50299/2023

JUSTICE DILIP GUPTA:

The order dated 24.01.2017 passed by the Commissioner confirming the demand of service tax by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act 1994[1] has been assailed in this appeal.

2. It transpires that the appellant during the period from 01.10.10 to 30.06.12 was awarded work orders by the Rajasthan Housing Board[2]. The appellant claims that since it constructed single independent residential unit, services tax was not paid by believing

1. the Finance Act
2. the Board

that it had not constructed a 'new residential complex' as defined under section 65(91)(a) of the Finance Act, which defines 'residential complex' to mean any complex comprising of a building or buildings having more than 12 residential units, a common order and any one or more facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. However, a show cause notice dated 16.03.2016 was issued to the appellant alleging that on the basis of third party information data for the financial year 2012-13 it came to the notice of the Department that the appellant was providing works contract service but had not paid service tax as a result of which the premises of the appellant was visited on 26.03.2015 by the Officers. Regarding the invocation of the extended period of limitation, paragraphs 10 and 11 of the show cause notice allege that the appellant had willfully suppressed material facts from the Department with intent to evade the payment of service tax. Paragraphs 10 and 11 are reproduced below:

> "10 . Whereas, as per records submitted by the assessee the liability of service tax has been calculated as detailed below:-

Period	**Gross value**	**Service Tax**	**Education Cess**	**SHE Cess**	**Total**
01.10.10 to 31.12.10	57044905	5704491	114090	57045	5875625
01.01.11 to 31.03.11	35635238	3563524	71270	35635	3670430
01.04.11 to 30.06.11	19185292	1918529	38371	19185	1976085
01.07.11 to 31.12.10	12945416	1294542	25891	12945	1333378
01.10.10 to 31.12.10	35029555	3502956	70059	35030	3608044
01.10.10 to 31.12.10	33529917	3352992	67060	33530	3453581
01.10.10 to 31.12.10	24282802	913936	58279	29139	3001354
Total	217653125	22250969	445019	222510	22918498

Whereas, section 68 of the Finance Act, 1994, read with Rule 6 of the Service Tax Rules, 1994, provides that "Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed" but it appears that the assessee has failed to pay service tax as detailed above, on the gross amount received on account of 'Works Contract Service'.

Hence, it appears that during the period from 01.10.2010 to 30.06.2012 the assessee have not paid service tax amounting to Rs. 2,2918,498/- (ST Rs. 22250969/-+ Edu. Cess Rs. 445019/-+S & HE Cess Rs. 222510/-)

11. Further, it appears that the assessee have not declared the value, i.e. the gross amount charged during the period from Oct 2010 to June 2012 in their ST-3 Returns, did not assess their true service tax liability, did not pay the same nor declared the same in their ST-3 Returns filed to the department from time to time. **It appears that the assessee had willfully suppressed the material facts from the department with intent to evade payment of service tax as stated above. Had the department not visited the assessee premises, the evasion of service tax would not have come to the knowledge of the department. Hence extended period of limitation under proviso to section 73(1) of the Finance Act, 1994 is invokable in the instant case for recovery of service tax** amounting to Rs. 2,29,18,498/-(including cess) for the period from 01.10.2010 to 30.06.2012 along with applicable interest under Section 75 of the Act. They also appear to be liable for penal action under 77 & 78 of the Finance Act, 1994 for contravening the provisions of sections 67, 68 & 70 of the Finance Act, 1994 read with read with Rule 2A of Service Tax (Determination of value) Rules, 2006 and Rule 6 & 7 of the Service Tax Rules, 1994 and for suppression of facts as the assessee have willfully and deliberately suppressed the fact with intent to evade payment of service tax."

(emphasis supplied)

3. The appellant filed a reply to the show cause notice asserting that it was not liable to pay service tax and in any case it had not suppressed any facts since it was not liable to pay service and so the extended period of limitation could not have been invoked in the facts and circumstances of the case.

4. The Commissioner, by dated 24.01.2017, confirmed the demand of service tax and in regard to the extended period of limitation recorded the following findings.

> **"47. As regards the allegation of suppression of facts, I find that there has been a deliberate act by the noticees to suppress the information in as much as they did not declared the value of services provided in their service tax return in the form ST-3 filed for the period from October 2010 to June 2012 and also did not pay service tax.** As per scheme of the law, the assessee is required to determine the classification of service and pay tax on self-assessment basis which they failed to do. This clearly proves that they deliberately indulged in suppression of facts with an intention to evade payment of service tax. In the case of Union of India v/s Rajasthan Spinning & Weaving Mills, the Hon'ble Supreme Court observed that in case the non-payment of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years. I also rely on the decision of the Tribunal in the case of Magnum International[3] in which it was held that non-filing of return itself is sufficient ground for invoking the extended period under section 73 of the Act. Non-payment of tax cannot be protected under the guise of bonafide mistake especially when the noticees never engaged in correspondence with the department to seek clarification or convey their stand on the taxability if their services were not taxable. Nor is ignorance of law an excuse or protections. Therefore, I hold that proviso to section 73(1) is applicable for recovery of service tax.

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3. 2008(11) STR 176

> **48. In has also been argued that the instant demand is recurring nature as the department has already issued and confirmed the demand for the same issue for the period from 01.04.07 to 30.9.2010, In this regard, it is settled law that once any order passed by the authority should be followed. The noticee was required to disclose the value of services provided to Rajasthan Housing Board for work contract in the periodical ST-3 returns and was required to pay service tax till the decision comes in their favour.** I find that the noticee have deliberately did not declared the value of service during the relevant period in their ST-3 return with intend to evade payment of service tax. **Had the information from the third party sources were not received and the officers of the department were not visited the office of the noticee, the evasion of service tax would remain undetected.** In view of above acts, I hold that provisions of extended period are rightly been invoked."
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> **(emphasis supplied)**

5. Ms. Kainaat, learned counsel for the appellant submitted that as the appellant had not constructed a 'new residential complex' or a part thereof, the demand under the works contract service could not have been confirmed. The learned counsel also submitted that the Commissioner committed an illegality in confirming the demand by invoking the extended period of limitation for the reason that in regard to the same allegations contained in the show cause notice dated 16.03.2016, a show cause notice dated 05.04.2011 had earlier been issued to the appellant for the period 01.04.2017 to 30.09.2010 and in this connection copy of the show cause notice dated 05.04.2011 has been placed. The submission is that if the Department was aware of the nature of the activities conducted by the appellant on 04.11.2011, the show cause notice for the subsequent period from

October 2010 to June 2012 could have been issued within the normal period of limitation and there was no reason for the Department to wait till 16.03.2016 to issue the show cause notice.

6. Shri Harshvardhan, learned authorized representative appearing for the Department has, however, supported the impugned order and has contended that from the work orders placed by the appellant it cannot be said that the appellant had not constructed a new residential complex. Learned authorized representative also submitted that as information was received from a third party and the inspection of the premises was carried out in 2015, it cannot be urged that the extended period of limitation was incorrectly invoked by the Department.

7. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

8. The submission made by the learned counsel for the appellant regarding the invocation of the extended period of limitation can be considered first, because if this issue is decided in favour of the appellant, it may not be necessary at all to examine the contentions raised by the appellant on merits.

9. To examine the contention advanced by the learned counsel for the appellant regarding the invocation of extended period of limitation, it would be necessary to refer to the earlier show cause notice dated 05.04.2011 that was issued to the appellant for the period from 01.04.2017 to 30.09.2010. The relevant portions of the said show cause notice are reproduced below:-

"**Whereas it appears that M/s K.B.S. Enterprises, Jaipur** (hereinafter referred to as "the assessee"/ "service provider" also) having Service Tax Registration No. AAIFK5727GST0Q1 under the category of 'Commercial Construction Services, Construction of Complex Services' & 'Works Contract Service' falling under clause- (25b), (30a) & (105) (zzzza) of Section 65 of Finance Act, 1994 **have not paid/short paid Service Tax** amounting to Rs. 2,94,65,846/- (ST Rs.2,86,07,617 /-+ Edu. Cess Rs 5,72,152 /-+S & HE Cess Rs. 2,86,076/-) **on the 'Construction of Complex services' & 'Works Contract Service' provided to Rajasthan Housing Board during the period from 1.4.07 to 30.9.2010 and thus contravened the provisions of section 66, 68 & 70 of the Finance Act, 1994 read with rule 6 & 7 of Service Tax Rules, 1994.**

7. Whereas, on going through the provisions of law, statement of Shri Sushil Kumar Sharma and scrutiny of works contracts in relation to construction of residential units, **it appears that all the contracts are covered under the category of "Works Contract Service". In some cases the contracts have been awarded for not more than 12 Nos. residential units to the assessee but still the same appears to be covered under the works contract service as per definition as the Rajasthan Housing Board awarded contracts in the schemes developed by them in different areas which have more than 12 residential units, common area, common facilities such as park, water supply etc. In these schemes, Rajasthan Housing Board awarded contracts to different contractors for completion of these schemes. These facts have also been admitted by Shri Sushil Kumar Sharma, Partner of the firm in his statement recorded on 01.03.2011.**

12. Whereas, as per records submitted by the assessee, Annexures (Annexure-A to Annexure-F) have been prepared for calculation of actual service tax liability upon them during the period from 01.04.2007 to 30.09.2010. As per annexure-'E', it appears that the assessee have short paid service tax amounting to Rs. 2,94,65,846/- (including Ed.Cess & SHE cess) during the said period. **It also appears that the said assessee have willfully and deliberately suppressed the fact with intent to evade payment of service tax by contravening the provisions of section 66, 68 & 70 of the Finance Act, 1994 read with Rule 6 & 7 of the Service Tax**

Rules 1994, in as much as they were suppressing their taxable value by not disclosing to the department, not paying the Service Tax due, mis-classifying the services so rendered and non filing ST-3 returns under proper services. Therefore, provisions related to extended period envisaged under proviso to section 73(1) of the Finance Act, 1994 are applicable in this case and mandatory penalty under section 78 of the Finance Act, 1994 gets attracted. **The assessee have not filed ST-3 returns under works contract services for the said period, therefore the assessee is liable for penalty under section 77 of the Finance Act, 1944."**

(emphasis supplied)

10. Having referred to the earlier show cause notice dated 05.04.2012, it would also be useful to refer to the relevant allegations made in the show cause notice dated 16.03.2016 that is involved in the present appeal.

"01. M/s K.B.S. Enterprises, Jaipur (hereinafter referred to as "the assessee" also) having Service Tax Registration No. AAIFK5727GST001 under the category of "Commercial Construction Services', 'Construction of Residential Complex Services' & 'Works Contract Service' falling under clause (25b), (30a) & (105) {zzzza) of section 65 of Finance Act, 1994 **appears to have evaded payment of service tax amounting** to Rs. 2,29,18,498/- (ST Rs. 22250969/-+ Edu. Cess Rs.445019/-+S & HE Cess Rs. 222510/-) on the **'Construction of Complex service' & 'Works Contract Service' provided to Rajasthan Housing Board during the period from 01.10.2010 to 30.06.2012 by contravening the provisions of sections 66, 68 & 70 of the Finance Act, 1994 read with rule 6 & 7 of Service Tax Rules, 1994 and Rule 2A of the Service Tax (Determination of Value) Rules, 2006 as per facts given below.**

04. Whereas based on third party information data for the financial year 2012-13 indicating that M/s K B S Enterprises, Jaipur is providing Works Contract Service have not paid service tax on receipt shown in their Income Tax Return, the business premises of M/s K B S Enterprises, situated at A-159, Shiksha Vihar, Ramnagariya Main Road, Jagatpura, Jaipur was visited on 26:3.2015 by the officers of Third Party Cell and hqrs Anti Evasion wing of the Central Excise Commissionerate, Jaipur. At the time of visit, no responsible person was found available at the business premises of M/s K B S Enterprises, Jaipur. Shri Balram Meena, partner of M/s K B S Enterprises was contacted telephonically who informed that he is out station and he assured to submit the requisite documents on the next working day. Shri Balram Meena, partner of M/s K B S Enterprises appeared in the office of Central Excise Commissioenrate, Jaipur on 27.3.2015 and submitted some of the contracts entered with Rajasthan Housing Board (RHB) for construction of houses, Balance Sheets, Form 26AS and Income tax returns for the period 2010-11 to 2013-14**(RUD-1).**

07. **Whereas, on going through the provisions of law, letters/documents submitted by the assessee and scrutiny of works contracts in relation to construction of residential units to RHB, it appears that all the contracts are covered under the category of "Works Contract Service". In some cases the contracts have been awarded for not more than 12 Nos, residential units to the assessee but still the same appears to be covered under the works contract service as per definition of 'Works Contract Service, as the Rajasthan Housing Board awarded contracts in the schemes developed by them in different areas which have more than 12 residential units, common area, common facilities such as park, water supply etc. In these schemes, Rajasthan Housing Board awarded contracts to different contractors for completion of these schemes. This fact has also been admitted by Shri Bal Ram Meena, Partner in his statement dated 08.02.2016 recorded under Section 14 the Central Excise Act, 1944 as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994."**

(emphasis supplied)

11. It is, therefore, more than apparent that even on 05.04.2012 the Department was aware of the nature of the activities carried out

by the appellant and, therefore, for the period from October 10 to June 12 there was no reason for the Department to wait till 16.03.2016 to issue show cause notice. The show cause notice could have been issued immediately after the returns were filed by the appellant for the period 2010 to 2012. In such circumstances the Department could not have taken shelter of the third party information, as it was possessed of all the information necessary for the said period. The Commissioner completely failed to appreciate this position and held that the invocation of the extended period of limitation was justified because the appellant had suppressed information in the service tax returns.

12. In such circumstances, the invocation of the extended period of limitation cannot be sustained and needs to be set aside and is set aside. As the entire demand is for the extended period of limitation, it would not be necessary to examine the issue on merits.

13. The impugned order dated 24.01.2017 passed by the Commissioner is, therefore, set aside and the appeal is allowed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Rekha