

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51532 of 2017 [DB]

[Arising out of Order-in-Original No. 59/COMM/DDN/2017 dated 18.05.2017 passed by the Commissioner of Central Excise, Customs and Service Tax, Dehradun]

Retd. Col. Swarn Kumar Makin

11-Narinder Vihar, Ballupur Road,
Dehradun, Uttarakhand

...Appellant

VERSUS

**Commissioner of Central Goods
and Service Tax, Customs and
Central Excise, Dehradun**

E-Block, Nehru Colony,
Haridwar Road,
Dehradun, Uttarakhand - 248001

...Respondent

WITH

Service Tax Appeal No. 51533 of 2017 [DB]

[Arising out of Order-in-Original No. 59/COMM/DDN/2017 dated 18.05.2017 passed by the Commissioner of Central Excise, Customs and Service Tax, Dehradun]

Shri Anil Mohan Pokhriyal

Head Finance & Accounts,
11-Narinder Vihar, Ballupur Road,
Dehradun, Uttarakhand

...Appellant

VERSUS

**Commissioner of Central Goods
and Service Tax, Customs and
Central Excise, Dehradun**

E-Block, Nehru Colony,
Haridwar Road,
Dehradun, Uttarakhand - 248001

...Respondent

AND

Service Tax Appeal No. 51534 of 2017 [DB]

[Arising out of Order-in-Original No. 59/COMM/DDN/2017 dated 18.05.2017 passed by the Commissioner of Central Excise, Customs and Service Tax, Dehradun]

Makin Developers Private Limited

11-Narinder Vihar, Ballupur Road,
Dehradun, Uttarakhand

...Appellant

VERSUS

**Commissioner of Central Goods
and Service Tax, Customs and
Central Excise, Dehradun**

E-Block, Nehru Colony,
Haridwar Road,
Dehradun, Uttarakhand - 248001

...Respondent

APPEARANCE:

Shri Rajesh Gupta, Chartered Accountant for the Appellant
Shri Harshvardhan, Authorised Representative for the Respondent

**CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

DATE OF HEARING: 23.03.2023
DATE OF DECISION: **30.06.2023**

FINAL ORDER No. 50796-50798/2023

DR. RACHNA GUPTA

Present order disposes of three appeals arising out of same Show Cause Notice (SCN) and same Order-in-Original (O-I-O).

Facts relevant for the purpose are:

The appellant is a private limited company incorporated on 07.01.2008, having three directors. They are engaged in relation to Commercial and Industrial Construction Service. They are also engaged in providing Works Contracts Services. Based on an information about evasion of service tax by the appellant that the Dehradun Commissionerate conducted a search on 06.02.2016. Two Panchanamas of even date were prepared, statements of Directors as well Chartered Accountant, Shri Satnam Singh and also

of Head of Finance & Accounts, Shri Anil Mohan Pokhriyal were recorded. Based thereupon and upon the documents as that of ST-3 returns and balance sheets recovered during search that the difference in value declared by the party in ST-3 returns vis-à-vis the figures shown as 'Revenue from Operations', 'other income' and 'mobilization advance' was noticed. It was observed that for the Financial Year 2011-12 to 2013-14, ST-3 returns have been filed for the Construction of Commercial and Industrial Buildings, however, for the Financial Year 2014-15 returns have been filed for Works Contract Service. The department formed an opinion that the value taken as gross amount is in contravention of the provisions of Section 67 of the Finance Act, 1994 and also contrary to Service Tax (Determination of Value) Rules, 2006. Department was of the opinion that in terms of CBEC letter No. 334/1/2007-TRU dated 28.02.2007, the valuation method as suggested for works contract service in terms of Notification No. 24/12-ST dated 06.06.2012 would have been applicable for computing value even for Construction of Industrial and Commercial Services. With respect to the service tax liability of the Financial Year 2014-15 qua rendering Works Contract Services, department formed the opinion that the abatement has also been wrongly claimed. Service tax would have been calculated in terms of Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006 instead of Rule 2A(i).

2. Based on these observations that a show cause notice bearing No. 10671 dated 07.10.2016 was served tabulating all the alleged differences and proposing that value of providing Works Contract Service should have been determined under Rule 2A(ii) of Service

Tax (Determination of Value) Rules, 2006. Service tax of Rs.3,92,92,143/- was proposed to be recovered for Financial Year 2011-12 to 2014-15 along with the amount of Rs.35,24,760/- as was already deposited vide challan dated 20.04.2016 proposed to be appropriated. In addition an interest of Rs.22,20,599/- was proposed to be recovered along with the interest of Rs.17,70,636/- on the service tax liability on mobilization advance received during the impugned period with proposed appropriation of Rs.2,81,190/- as was already deposited vide challan dated 18.02.2016. Service Tax of Rs.5,15,000/- on mobilization advance was also proposed to be recovered along with the proportionate interest and the appropriated penalties. The said proposal was partly accepted vide Order-in-Original No. 59/2017 dated 18.05.2017. The demand of service tax amounting to Rs.3,11,43,404/- was dropped. The demand of interest on mobilization advance to the tune of Rs.11,13,182/- was also dropped. The penalty of Rs.1,00,000/- was imposed upon the Managing Director of the appellant under Section 78A of the Finance Act and that of Rs.50,000/- was imposed upon Head Finance & Accounts of the appellant namely Shri Anil Mohan Pokhriyal. No penalty was imposed upon the Chartered Accountant, Shri Satnam Singh. Still being aggrieved the present appeals have been filed.

3. We have heard Shri Rajesh Gupta, learned Chartered Accountant for the appellant and Shri Harshvardhan, Authorized Representative for the department.

4. Learned Counsel for the appellant has mentioned that the appeals filed by Shri Anil Mohan Pokhriyal (Appeal No. 51533 of 2017) and by Retd. Col. Swarn Kumar Makin (Appeal No. 51532 of 2017) have a very narrow scope of setting aside the penalty as has been imposed upon both those appellants. Even for the third appeal by the company, one of the prayer is for setting aside penalty. It is mentioned that the company had regularly been audited during years prior to the year in question and nothing incriminating was found against the company. It is submitted that Shri Anil Mohan Pokhriyal has duly submitted while replying to the queries that there is no discrepancy as is alleged in the company's record. All the documents were made available to the investigating team. Nothing incriminatory was found against Shri Anil Mohan Pokhriyal nor even against Retd. Col. Swarn Kumar Makin. But the submissions have not been considered by the adjudicating authority and the penalty has been imposed without any fault of the directors and even on the company penalty has wrongly been imposed. The order of imposition of penalty is accordingly prayed to be set aside.

4.1 On behalf of company, M/s. Makin Developers Pvt. Ltd., also it is impressed upon that they were registered with the department since 08.08.08 under the category of 'Construction Services, other than residential complex'. They stated that three audits of their services were conducted by the Departmental Officers for the period 2008 to 2012, April, 2012 to March, 2014 and April, 2014 to March, 2015 on 10.11.12, 08-09.09.14 and 06-08.04.16, respectively. It was stated that the Departmental Officers had scrutinized their records/returns for the aforesaid period and no

objection regarding the manner of valuation or other issues as alleged in the impugned notice dated 07.10.16 was ever raised by them. Thus, there was no ground with the department for invoking the extended period of limitation by alleging suppression of facts etc. as all facts were already known to the Department. Reliance was placed upon **CCE, Bangalore Vs Pragathi Concrete Products Pvt. Ltd. reported as 2015 (322) ELT 819 (SC)** to plead that the Apex Court too had ruled that allegations of suppression cannot be made when a unit has been audited several times.

4.2 As regards to classification of main service of the company, it was stated that they had taken registration under 'Construction services other than residential complex' and were paying the service tax after claiming abatement of 67% from gross value and the same was neither objected by the jurisdictional range authorities nor by the visiting departmental audit teams. Accordingly, it was wrong on the part of the Department now to propose classification of the services rendered upto 30.06.12 under 'Works Contract Services'. Further, for the period 01.07.12 onwards, it was pleaded that the classification of services was done away with and Rule 2A of the Valuation Rule was amended to prescribe the manner of determining the value of the service portion involved in certain services where transfer in property of goods was involved.

4.3 It is also submitted that the value of property in goods transferred in execution of a contract could not be determined by

them because they were executing multiple works at a given time and in some cases more than one site was located in the same city. In these circumstances, there was always possibility of material issued to one site being transferred to another and vice versa which causes difficulty in maintaining site wise record of the material consumed. On the issue of denying exemption on the services rendered to M/s. ICFAI by M/s. Makin Developers, treating it as 'commercial training or coaching centre', the services rendered by them stand exempted as the building constructed by them was not for purpose of commerce or industry. With these submissions even company also prayed for setting aside not only the penalties imposed but also the demand confirmed. Appeals are accordingly prayed to be allowed.

5. Per contra learned DR has mentioned that the adjudicating authority has been meticulous and absolutely reasonable while passing the order under challenge in this appeal. Major portion of demand has already been dropped by the adjudicating authority itself. It has been observed, in several words, that the appellant did not disclose the quantum of taxable services rendered by them during the period specified in the impugned notice. It was only during the course of investigation that the true facts could be brought to light. Hence the case has been held to be that of deliberate and willful suppression of facts when correct details were not filed in their returns. In these circumstances, the imposition of penalty cannot be questioned.

5.1 With respect to demand of service tax from M/s Makin Developers Pvt. Ltd., it is mentioned that prior to the Negative List Regime i.e. 01.07.12, the service of Works Contract Service was defined under erstwhile Section 65(105) (zzzza) of the Finance Act, 1994 w.e.f. 01.07.07 and the service of Construction Services other than residential complex, including commercial/industrial buildings or civil structure was defined under erstwhile Section 65(105) (zzq) of the Finance Act, 1994. Accordingly, services rendered by the party during the impugned period, falling under the category of Commercial or Industrial Construction Service and Works Contract Service are liable to service tax prior to 01.07.2012 as well as after that date. Learned DR further submitted that from all the documents/records resumed during the search on 06.02.2016 and subsequently submitted by the party, it appears that the party has suppressed the turnover while calculating the service tax liability in order to evade the service tax actually payable by them. Further, to calculate the proper service tax liability as per Rule 2A(i) of Service Tax (Determination of Value) Rules, 2006, the figures in respect of works contract, cost of material consumed and sales tax, though were readily available, still the said rule was not followed. With these submissions learned DR has prayed for dismissal of all three appeals.

6. Having heard the rival contentions.

7. The common issue to be adjudicated in three of these appeals is about the imposition of penalty upon the Director of appellant's company, Retd. Col. Swarn Kumar Makin and upon Head of Finance

and Accounts of the appellants' company Shri Anil Mohan Pokhriyal and upon the company itself. It has been submitted on behalf of the appellants that company was regularly audited without any objections as taken in impugned SCN. It has nowhere been denied by the department. There is no denial about regular filing of regular ST-3 returns. In light of these admissions we hold that based on the subsequent audit, the objection which could be raised during previous audit, SCN cannot be issued that too after invoking extended period of limitation. We draw our support from the decision of this Tribunal in the case of **Aditya College of Competitive Exam Vs. C.C.E., Visakhapatnam reported as 2009 (16) S.T.R. 154 (Tri.-Bang.)** and the decision of Hon'ble Apex Court also in the case of **Pahwa Chemicals Private Limited Vs. Commissioner of C.Ex. Delhi reported as 2005 (189) E.L.T. 257 (S.C.)**. Once present is not the case of suppression of facts neither the extended period could be invoked while issuing SCN nor can the penalty be imposed on assessee and/or its representative/in charge. The SCN is therefore held to be barred by time. We draw our support from the decision of Hon'ble Apex Court in the case of **Collector of Central Excise Vs. Chemphar Drugs & Liniments reported as 1989 (40) E.L.T. 276 (S.C.)**, wherein it was held that extended period is applicable only when something positive other than mere inaction or failure on part of the assessee is proved. There has to be the evidence about conscious and deliberate withholding of information on part of the assessee. I observe that such evidence is missing in this case, therefore, not sustainable.

8. We further observe that Shri Anil Mohan Pokhriyal, admittedly, is not the Director of the company, he was a senior employee acting on the mandate of the directors. Otherwise also except his own statement, there is no incriminating evidence against him to prove that he had willfully suppressed the facts with an intention to evade the payment. He being the employee, question of him being the beneficiary of alleged evasion does not at all arise. Once there is absence of motive, in the light of criminal jurisprudence, *mens rea* cannot be attributed. The only statement of Shri Anil Mohan Pokhriyal is that he acknowledged certain differences in contractual income as were shown in the balance sheet then those as were shown in the gross amount of ST-3 returns and that he stated the same to be the fault of the Chartered Accountant.

9. Perusal of the order under challenge shows that no penalty has been imposed upon the Chartered Accountant. Despite the findings against him in Para 18.2 of the show cause notice and despite observing that Shri Anil Mohan Pokhriyal had joined the company in the month of March, 2012 only. Despite these observations the statement of Shri Satnam Singh dated 06.06.2012 informing that he had stopped doing the work of service tax after December, 2012 has been considered without any evidence for the same and despite the cogent admission of Shri Satnam Singh that he only used to finalise the accounts of the appellant company as its auditor but on the mandate of Retd. Col. Swarn Kumar Makin one of the Director of the appellant. Thus it becomes clear that the adjudicating authority has been unreasonable while imposing

penalty on Shri Anil Mohan Pokhriyal. Similarly there appears no evidence of any positive act on part of Retd. Col. Swarn Kumar Makin and even of the company that there was any intentional *mala fide* suppression. Except that there is uncorroborated statement of auditor Shri Satnam Singh, same cannot be looked into especially when the penalty on the said auditor of appellant company was done away. Penalties upon Shri Anil Mohan Pokhriyal and Retd. Col. Swarn Kumar Makin and on the company are held as liable to be set aside. The order under challenge is held as liable to be set aside on this score only.

10. Coming to the merits, otherwise, of the case we observe that the adjudicating authority itself has observed that with the introduction of the category of works contract an umbrella was created to bring within its ambit not only works contracts pertaining to Industrial or Commercial Construction Services but also those pertaining to Erection, Commissioning or Installation Services of plant or machinery, installation of electrical and electronic devices, plumbing/drain laying, fire proofing, waterproofing construction of new residential complex etc. However, all along the period upto 30.06.12 the basic service under which they were earlier classifiable too existed. Thus, the relevant service i.e. 'Commercial or Industrial Construction' too was in existence till 30.06.12 and the party was classifying it as such in their ST-3 returns. Abatement is also held to have been rightly availed. Also that the SCN had proposed a demand running into crores but the original adjudicating authority after appreciating and accepting the contentions of the appellant has held that options of Rule 2A of Service Tax

(Determination of Value) Rules, 2006 lies with the assessee and department cannot force the assessee to calculate in accordance of one of the said option. Based on these findings that major portion of demand of interest even on mobilization advance has also been dropped. Despite these findings still some demand under challenge with interest and penalty has been confirmed. In the light of the fact that department raised the demand based on compelling appellant for one option calculate despite that other available options were to be adopted as per choice of assessee and that never earlier any such objection was raised, we hold that the demand confirmed along with interest & penalties against M/s. Makin Developers Pvt. Ltd. is liable to be set aside.

11. In the light of entire above discussion, the SCN is held time-barred. Findings of adjudicating authority are held unreasonable. Hence, the orders under challenge confirming demand with interest against company and imposing penalty on company, its director and its financial head are hereby set aside. Consequent thereto, three of the appeals stand allowed.

[Order pronounced in the open Court on **30.06.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)