CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 54385 OF 2015

[Arising out of the Order-in-Original No. UDZ-EXCUS-000-COM-0019-20-15-16 dated 20/08/2015 passed by The Commissioner, Central Excise Commissionerate, Udaipur (Rajasthan).]

M/s Kalya Constructions Private Limited ...Appellant
Near Amit Palace, Sukhadia Circle,
Bhilwara – 311 001 (Rajasthan).

Versus

The Commissioner, ...Respondent
Central Excise Commissionerate, Udaipur,
142-B, Sector – 11, Hiran Magri,
Udaipur (Rajasthan).

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APPEARANCE:

Shri Bipin Garg, Advocate, Ms. J. Kainaat, Advocate for the appellant.
Shri Harsh Vardhan, 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. 51550-51551/2023

DATE OF HEARING : 29.09.2023
DATE OF DECISION: 15.11.2023

P.V. SUBBA RAO

M/s. Kalya Constructions Private Limited.[1] filed this appeal to assail the order-in-original dated 24.08.2015 passed by the Commissioner of Central Excise, Udaipur whereby he decided two show cause notices[2] dated 12.05.2014 (covering the period 2012-2013) and 2013-2014 (upto August 2013) and 16.10.2014 (covering the period 2009-2010 to 2013-2014 upto August, 2013) and confirmed service tax demand under section 73 of the Finance Act[3], 1994 along with interest under section 75 and imposed penalties under section 77 and 78.

2. The appellants are registered with service tax and provide some taxable services namely Cargo Handling Services, Work Contract Service, Supply of Tangible Goods Service, Mining of Mineral Oil or Gas Service, etc. During the course of audit and scrutiny of the records of the assessee, it was noticed that it had provided mining services to two of its clients namely M/s Hi-Tech Rock, Chennai and M/s Madhucon Projects Limited, Hyderabad and had not paid service tax on these taxable services. The Superintendent of the Central Excise sent letters and followed them up with reminders. The assessee asserted in its reply that it had not provided any Mining Service and under these contracts and it had only provided transportation service and since the

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[1] **the Appellant**
[2] **SCN**
[3] **the Act**

freight for transportation did not exceed Rs. 1500/- per truck, it was exempted. Not agreeing with this assertion of the appellant, SCNs were issued which culminated in the impugned order. The contracts which the appellant had entered into with M/s Hi-Tech Rock and M/s Madhucon Projects Limited were examined in detail.

3. It showed that M/s Hi-Tech Rock and M/s Madhucon Projects Limited were awarded contracts for construction of roads by the concerned Government agencies. In order to make those roads, they needed rock aggregates. These companies also had quarries allotted to them from which the rock could be extracted. They, in turn, hired the appellant to blast the rocks from these quarries, load them into trucks and transport them to the site of the crusher. The crusher would crush the rocks/boulders into rock aggregates of the requisite size for use in the construction of roads. In question in this appeal is this service of blasting the rocks/boulders from the quarries, loading them into trucks and transporting them to the site of the crusher, which was rendered by the appellant. According to the Revenue, this service is mining service chargeable to service tax as per section 65 (105) (zzzy) of the Act and the appellant was required to pay service tax upto 2012. Further, according to the Revenue this service was not exempted from payment of service tax after 2012 when the negative list of services was introduced. Before 01.07.2012, only such services as were listed as taxable services under various

clauses of section 65 (105) were subject to service tax. From 01.07.2012 all services became taxable except those which are listed in the negative list. The period relevant to this appeal covers both the pre-negative list and the post-negative list period. The details are as follows :-

First Show Cause Notice dated 12.05.2014 (period 2012-13 to 2013-14) covering Services provided to M/s Hi-Tech Rock, Chennai

Financial Year	Normal Period of Limitation as per Section 73	Whether notice issued within normal or extended period
01.04.2012 to 27.05.2012	One year from the relevant date	Extended Period
28.05.2012 to 30.06.2012	18 Months from the relevant date – 25.07.2012	Extended Period
01.07.2012 to 31.12.2012	18 Months from the relevant date – 25.01.2013	Normal Period
01.01.2013 to 30.06.2013	18 Months from the relevant date – 25.07.2013	Normal Period
01.07.2013 to 31.08.2013	18 Months from the relevant date – 25.01.2014	Normal Period

Second Show Cause Notice dated 16.10.2014 (period 2009-2010 to August 2013) covering Services provided to M/s Madhucon Projects, Hyderabad

Financial Year	Normal Period of Limitation as per Section 73	Whether notice issued within normal or extended period
01.04.2009 to 30.06.2009	One year from the relevant date – 25.07.2009	Extended Period
01.07.2009 to 31.12.2009	One year from the relevant date – 25.01.2010	Extended Period
01.01.2010 to 30.06.2010	One year from the relevant date – 25.07.2010	Extended Period
01.07.2010 to 31.12.2010	One year from the relevant date – 25.01.2011	Extended Period

01.01.2011 to 30.06.2011	One year from the relevant date – 25.07.2011	Extended Period
01.07.2011 to 31.12.2011	One year from the relevant date – 25.01.2012	Extended Period
01.01.2012 to 27.05.2012	One year from the relevant date – 25.07.2012	Extended Period
28.05.2012 to 30.06.2012	18 Months from the relevant date – 25.07.2012	Extended Period
01.07.2012 to 31.12.2012	18 Months from the relevant date – 25.01.2013	Extended Period
01.01.2013 to 30.06.2013	18 Months from the relevant date – 25.07.2013	Normal Period
01.07.2013 to 31.08.2013	18 Months from the relevant date – 25.01.2014	Normal Period

4. On behalf of the appellant, learned counsel made the following submissions :-

(1) the appellant was awarded piece rate contracts by M/s Madhucon Projects Limited and Hi-Tech Rock Products for the twin activities of quarrying of rock boulders by drilling and blasting, loading boulders of the required size into tippers and transporting to construction of road site for crushing ;

(2) the essential nature of the activity in the present case is making and supply of boulders of specific mass size and the activities relating to drilling, blasting and other services are only activities incidental to such making and supply of boulders of specific mass size. This activity amounts to manufacture as per section 2 (f) of the Central Excise Act, 1944 and, therefore, no service tax can be levied on this activity ;

(3) even if the services are held to be rendered by the appellants, they are not classifiable under the category of "mining services" as no mining was involved and the boulders were extracted from quarries;

(4) quarrying of stone for use in road cannot be called mining under the definition of mining services under section 65 (105) (zzy) ;

(5) the appellant was earlier audited and the audit team had opined that the service rendered by it was Cargo Handling Service ;

(6) in terms of Notification No. 17/2005-ST dated 07.06.2005 excavation, removal of overburden or quarrying of whether rock or boulders fall under the category of site formation and clearance services. Therefore, the appellant was rendering site formation and clearance service it is exempted ;

(7) the appellant is not a Goods Transport Agency and, therefore, although the appellant was carrying the goods it was not liable to pay service tax under Goods Transport Agency Service also for the reason that the amount charged was upto Rs. 1500/- per truck, which was exempted by Notification No. 25/2012-ST ;

(8) even if it is held that the service tax is chargeable, cum-tax benefit may be given to the appellant ;

(9) the appellant had not willfully suppressed any material fact from the department and, therefore, extended period of limitation could not have been invoked and part of the demand is time barred ;

(10) the issue is one of interpretation of the provisions of the law and, therefore, extended period of limitation has wrongly been invoked ;

(11) As the appellant had not contravened any provisions of law, no penalty should have been imposed. Even if penalty is held to be imposable, it may be waived as the appellant as it had reasonable cause for failure.

5. On behalf of the Revenue, learned authorized representative made the following submissions:-

(1) the appellant's contention that it was manufacturing goods and, therefore, it was not liable to pay service tax is not correct. Excavation of stones from the mine or the quarry and further reducing their size does not amount to manufacture as has been held by the Supreme Court in the case of **Aman Marble Industries Pvt. Ltd.** versus **Collector of Central Excise, Jaipur**[4]. The relevant extract of the judgment is as follows :-

"4. In **Rajasthan State Electricity Board** versus **Associated Stone Industries and Anr.** - **JT 2000 (6) SC 522** such a question fell for consideration before this Court although in a different context, and this Court held as follows :

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[4] **2003 (157) E.L.T. 393 (S.C.)**

> "…This a part excavation of stones from a mine and thereafter cutting them and polishing them into slabs did not amount to manufacture of goods. The word "manufacture" generally and in the ordinary parlance in the absence of its definition in the Act should be understood to mean bringing to existence a new and different article having distinctive name, character or use after undergoing some transformation. When no new product as such comes into existence, there is no process of manufacture. The cutting and polishing stones into slabs is not a process of manufacture for obvious and simple reason that no new and distinct commercial product came into existence as the end product still remained stone and thus its original identity continued."

and this position was further reiterated as follows :

> "… It is not possible to accept that excavation of stones and thereafter cutting and polishing them into slabs resulted in any manufacture of goods."

(2) Therefore, appellant had rendered services which involved in blasting rock boulders from the quarry, transporting them to the crusher and further crushing them. CESTAT has consistently held in the following judgment that activities of this nature liable to be classifiable as Mining Services. The details are as follows :-

Sl. No.	**Order/Judgment Details**	**Relevant Paragraph**
1.	M. Ramakrishna Reddy **2008 (10) TMI 115 – CESTAT, BANGALORE**	10.1 & 10.2
2.	Vijay Leasing Company **2010 (12) TMI 782 – CESTAT, BANGALORE**	8
3.	Associated Soapstone Distributing Co. Pvt. Ltd. **2013 (11) TMI 1452 – CESTAT NEW DELHI**	5
4.	M/s Sadbhav Engineering Ltd. **2016 (2) TMI 873 – CESTAT AHMEDABAD**	6
5.	M/s Aravali Construction Company Pvt. Ltd. **2016 (8) TMI 675 – CESTAT, NEW DELHI**	4
6.	Hazaribagh Mining & Engineering P. Ltd. **2017 (49) S.T.R. 289 (Tri. – Kolkata)**	6.1
7.	M/s Teknomin Construction Ltd.	9 – 9.2

	2017 (4) TMI 704 – CESTAT NEW DELHI	
8.	Hind Metals & Industries Pvt. Ltd. **2018 (10) G.S.T.L. 547 (Tri. – Kolkata)**	6 & 7
9.	Hind Metals & Industries Pvt. Ltd. **2018 (12) G.S.T.L. J216 (S.C.)**	1 & 2
10.	M/s Prahlad Rai & Company **2017 (12) TMI 1380 – CESTAT NEW DELHI**	7, 8 & 10
11.	Tuli Construction Company **2019 (25) G.S.T.L. 43 (Tri. – Kolkata)**	10 & 11

(3) For the post-negative list period the adjudicating authority has rightly held that the impugned activities are chargeable to service tax in the post-negative list era for the reason that they were not covered under the negative list nor were they covered by any exemption notification.

(4) He further reiterated the findings of the adjudicating authority.

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

7. Before examining the merits of the case, we proceed to examine the question of invoking extended period of limitation. As per section 73 of the Act, demand of service tax not paid or short paid can be raised only within the normal period of limitation. However, extended period of limitation can be invoked, if the non-payment or short payment of service tax is on

account of fraud or collusion or willful statement or suppression of facts or violation of the provisions of the Act or Rules with an intent to evade payment of service tax. Evidently, fraud, collusion and willful statement have an in-built element of mens-rea. Without the intent being established, these cannot be alleged. As far as the suppression of facts is concerned, it has been held in a series of judicial pronouncements that since the words suppression is used along with words, such as, fraud, collusion and willful statement mere omission cannot be called suppression and intent has to be established. It has now well settled position of law. In **Pushpam Pharmaceuticals**, the Supreme Court held as follows :-

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

8. We now proceed to examine the reasons given for invoking extended period of limitation in the two SCNs. In the SCN dated 12.05.2014, the following reasons were given for invoking extended period of limitation :-

"5.1 Whereas the assessee has never disclosed the fact to the department that they were providing mining services to M/s Hi-Tech Rock Products and Aggregates Ltd., Chennai, but not discharged service tax liability on this account. It thus appears that the assessee had suppressed this fact from the department by not showing the taxable value of Rs. 7,04,23,098/- in ST-3 return for the relevant period with intend to evade the payment of service tax under Mining Service. The said evasion was only noticed during the course of thorough scrutiny of the records of the assessee by internal audit department. Had the audit not pointed out this fact, the assessee could have successfully evaded payment of the said amount of service tax. Therefore, extended period as provided under proviso to section 73 (1) of Finance Act, 1994 for recovery of service tax is invokable."

9. Similarly, in the SCN dated 16.10.2014, the following reasons were given for invoking extended period of limitation :

"7. whereas it appeared that the assessee never disclosed the fact to the department that they were providing Mining Services to M/s Madhucon Projects Limited, Hyderabad and not discharging service tax liability on this account. The assessee did not furnish the correct taxable value and service tax payable thereon in the ST-3 returns filed by them for the respective period and made falls declaration on Sl. No. 7 of the ST-3 returns pertaining to self-assessment memorandum regarding furnishing correct particulars in the returns as per the records and books maintained and also made falls declaration about payment of service tax correctly. Thus it appears that the assessee had suppressed this fact from the department by not showing the taxable value of Rs. 9,13,40,512/- in ST-3 return for the relevant period with intend to evade the payment of service tax under mining service. The said evasion was only notice during the course of thorough scrutiny of the records of the assessee by internal audit. Had the audit not pointed out this fact, the assessee could have exclusively evade payment of the said amount of service tax. Therefore, extended period as provided under section 73 (1) of the Finance Act, 1994 for recovery of service tax is invokable."

10. The two SCNs merely state that the appellant had not disclosed the value of the taxable services which it had rendered correctly in its ST-3 returns and, therefore, presume that the appellant had an intention to evade payment of service tax. There is not an iota of evidence in either of the SCN of this intent.

11. Both the SCNs further state that had the audit not conducted scrutiny of the records, the short paying the service tax would not have come to notice. It is a matter of fact that all the details were available in the records of the appellant. The appellant was required to furnish returns under section 70 with the Superintendent of Central Excise which it did. It is for the Superintendent to scrutinize the returns and ascertain if the service tax had been paid correctly or not. If the assessee either does not make the returns under section 70 or having made a return, fails to assess the tax in accordance with the provisions of Chapter or Rules made thereunder, the Superintendent of Central Excise can make the best judgment assessment under section 72. For this purpose, he may require the assessee to produce such accounts, documents or other evidence, as he may deem necessary. Such being the legal position, if some tax has escaped assessment which came to light later during audit, all it shows is that the Superintendent of Central Excise with whom the returns were filed had either not scrutinized the returns or having scrutinized then found no error in self-assessment but the audit found so much later. Had the Superintendent scrutinized the returns calling for whatever accounts or records were required, a demand could have been raised within the normal period of limitation. The fact that the alleged short payment came to light only during audit does not prove the intent to evade payment of service tax by the appellant, but it only proves that the Range Superintendent had not done his job properly. For these reasons,

we find that the demand for the extended period of limitation cannot be sustained. We, therefore, now proceed to examine the demands within the normal period of limitation as follows :-

Appeal No.	Period
ST/54386 of 2015	01.07.2012 to 31.08.2013
ST/54385 of 2015	01.01.2013 to 31.08.2013

Both these periods pertain to the post-negative list regime. We, therefore, now proceed to examine of provisions under which the appellant was put to notice in the two SCNs.

12. In the SCN dated 02.05.2014, the decision of the meeting of the Regional Advisory Committee held on 07.05.2014 circulated by letter dated 20.05.2014 was referred to and the demand was made under Mining Service as per section 65 (105) (zzy) of the Act. No reference whatsoever has been made to the legal provisions applicable in the post-negative list period, relevant for the period. Likewise, in the SCN dated 16.10.2015 also the demand was made on the services rendered by the appellant to M/s Madhucon Projects Limited under the head "Mining Services". No reference is made to the provisions of the post-negative list period.

13. In the impugned order, the Commissioner held that the services were liable to service tax under section 66B for the

period after 01.07.2012 for the reason that they were not specified in the negative list nor were there any exemption notification. Paragraph 47.3 of the impugned order is reproduced below :-

> "47.3 I also find that with effect from 01.07.2012, the regime of negative list of services has been introduced. In this list, the services which are found non-taxable by the Government has been specified in the negative list and remaining all others services have been found taxable if these are otherwise exempt through an exemption notification. In this case the services provided by the assessee are not specified in the negative list as well as no exemption notification has been issued, therefore, even after 01.07.2012, these services are liable to service tax under section 66B of the Finance Act 1994. I further find that in resp0ect of Show Cause Notice dated 17.10.2014, the assessee has claimed that for a part of the period of demand i.e. for the period from 01.07.2012 onwards with the introduction of negative list based regime of service tax, the provisions of Section 65 of the Finance Act, 1994 were made inapplicable vide Clause (A) of Section 143 of the Finance Act, 2012 read with Notification No. 20/2012-ST dated 05.06.2012 and, accordingly, the provisions regarding category-wise applicability of service tax were not in force and are no longer valid. Therefore, demand of service tax of Rs. 6,62,371/- on the receipts of Rs. 53,58,984/- for the period from 01.07.2012 onwards is without invoking proper provisions and thereby liable to be dropped. In this regard, I find that first of all the category of services and definition of services are still valid and these are to be determined accordingly and as per show cause notice, the assessee has been asked to deposit the service tax under the head of 'mining service'. Further, the demand of service tax has been made under the provisions of section 73 of the Finance Act 1994 which is the appropriate provision for demand of service tax. Thus, non-mentioning the provisions of negative list in the Show Cause Notice does not vitiate the demand of service tax which has not been paid by the assessee on the services which attract the levy of service tax".

14. From the above, it is evident that neither SCN has given any opportunity to the appellant to defend its case for the period after 01.07.2012. Both SCNs only proposed the demand under the head "Mining Services" for the period pre 01.07.2012 as well as period post 01.07.2012. As far as the demands for the period pre 01.07.2012 are concerned, we have already held that the

extended period of limitation was wrongly invoked in both the SCNs and, therefore, demand cannot be sustained. The legal provisions pertaining to the post 01.07.2012 have not been invoked and the appellant was not put to notice although the Commissioner has, in the impugned order, confirmed the demand on the ground that the services rendered by the appellant were not covered by the negative list.

15. It is a well settled legal principle that the adjudicating authority cannot travel beyond the SCN. Therefore, he could not have confirmed the demand under the provision after 01.07.2012. Under these circumstances, we find that the demand in the impugned order is not sustainable and needs to be set aside. Consequently, the demand of interest and the penalties imposed also need to be set aside.

16. Both appeals are allowed and the impugned order is set aside with the consequential relief to the appellant, if any.

(Order pronounced in open court on 15/11/2023.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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