CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 55971 OF 2013

[Arising out of the Order-in-Original No. 197/ST/PKJ/CCE/Adj./2012 dated 20/11/2012 passed by Commissioner of Central Excise Adjudicating, New Delhi – 110 002.]

M/s Sanjay Chugh, **...Appellant**
M-1, Malviya Nagar,
New Delhi.

Versus

Commissioner of Central Excise (Adjn.), **...Respondent**
Room No. 109, Central Revenue Building, I.P. Estate,
New Delhi – 110 002.

APPEARANCE:

Shri Prashant Shukla, Advocate, Shri Prem Ranjan, Advocate for the appellant.
Shri Prashant Kumar Sinha, 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. 55484/2024

DATE OF HEARING : 09.10.2023
DATE OF DECISION: 08.04.2024

P.V. SUBBA RAO

M/s. Sanjay Chugh[1] filed this appeal to assail the order-in-original dated 20.11.2012[2] passed by the Commissioner (Adjudication) whereby he confirmed the demand of Rs. 1,39,45,355/- and imposed penalty of equivalent amount under

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1. **Appellant**
2. **Impugned order**

section 78 of the Finance Act, 1994[3] and also imposed penalty of Rs. 5,000/- under section 77 of the Finance Act.

2. The appellant holds service tax registration and was engaged in providing erection, commissioning or installation service, and management, maintenance or repair service to various clients including to the Delhi Jal Board[4]. Investigation was initiated against the appellant by the S&I Branch of Division II of the Commissionerate. ST-2 Certificate, ST-3 returns, TR-6 challans, balance sheets and profit and loss account of the appellant for the period 2005-2006 to 2009-2010 were called for by the officers. On scrutiny of these documents, it was found that the appellant was providing construction services and other taxable services, such as, replacing of old and damaged water lines, repair of damaged sewage lines, etc. It was also found that the appellant had given on rent immovable property to be used as a hostel. Accordingly, a show cause notice[5] was issued to the appellant proposing to recover service tax under three heads as follows :-

(a) Management, maintenance or repair service under section 65 (105) (zzg) read with section 65 (64) – Rs. 1,28,72,584/- ;

(b) renting of immovable property service under section 65 (105) (zzzz) – Rs. 8,33,522/- ;

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3. Finance Act
4. DJB
5. SCN

(c) supply of tangible goods service under section 65 (105) (zzzj) – Rs. 2,39,249/-.

Total – Rs. 1,39,45,355/-

3. These proposals in the SCN were confirmed by the impugned order-in-original and penalties were imposed under sections 77 and 78. Aggrieved, the appellant filed this appeal.

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

(a) The appellant is an approved contractor of DJB which is a statutory body responsible for supply and distribution of drinking water and also for collection treatment and disposal of domestic sewage in Delhi. The appellant had obtained registration under the category of "commercial or industrial construction service", but had not paid service tax on the services rendered to DJB because laying or replacement of pipelines is not taxable because DJB is a non-commercial Government;

(b) The Commissioner wrongly classified the service of laying and repair of pipelines for water and sewage as management, maintenance or repair service and confirmed the demand of Rs. 1,28,72,584/- ;

(c) The SCN did not propose demand under the head of "management, maintenance or repair service" and it was not open for the Commissioner to confirm the demand under this head without putting the appellant to notice. In doing so, he went beyond the scope of SCN.

(d) The Commissioner wrongly classified the appellant's services under management, maintenance or repair services based on a single activity i.e. maintenance of sewage pipes during rainy season. These services have nothing to do with the laying of pipelines for fresh water but the Commissioner erroneously clubbed all these services under MMR services. Laying of pipelines is in the nature of construction service and would have been taxable under the head of commercial, industrial construction service and would have been taxable under the head of commercial, industrial construction service, but it is not taxable for the reason that the services were rendered to a non-commercial entity namely DJB. Therefore, the demand on this account needs to be dropped.

(e) The appellant had rented out his residential house as student hostel. Renting of building for the purpose of residence including hostel was not taxable under renting of immovable property service under section 65 (105) (zzzz).

(f) The appellant had received hiring charges on which the Commissioner confirmed the demand under the category of supply of tangible goods service. It is not correct for Commissioner to have confirmed the demand without establishing that "supply of tangible goods service" was rendered.

(g) Extended period of limitation was wrongly invoked in this case as the appellant had no intention to evade payment of tax. Some portion of the demand pertains to the period beyond 5 years and, therefore, cannot be sustained for that reason. The appeal may be allowed and the impugned order may be set aside.

5. Learned authorized representative for the Revenue vehemently supports the impugned order. He submits that he calls for no interference.

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

7. We now proceed to decide the issues. It is not in dispute that the appellant had not paid service tax, and did not disclose the rendering of these services in its ST returns. Therefore, the department called for various records of the appellant and culled out the information and determined the tax liability as per the best judgment assessment under section 72 of the Finance Act, 1994. This section reads as follows :-

"72. Best judgment assessment. — If —

(a) any person fails to make the return required by any notice given under sub-section (2) of section 70 and has not made a

> return or a revised return under sub-section (3) of that section, or
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> (b) any person having made a return fails to comply with all the terms of a notice issued under sub-section (1) of section 71, or
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> (c) the Central Excise Officer is not satisfied with the correctness or the completeness of the accounts of the assessee,
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> the Central Excise Officer, after taking into account all the relevant material which he has gathered, shall, by an order in writing, 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".

8. The appellant does not dispute that it had rendered the services as indicated in the impugned order. It only disputes their classification and taxability.

9. As far as the demand under the head "management, maintenance or repair services" is concerned, this demand is on the pipes laid down by the appellant for DJB for water supply and sewage. Laying of pipelines or part thereof or maintaining such pipelines clearly falls under the head "commercial or industrial construction service" provided the service recipient is a commercial organization or the service was rendered it for a commercial purpose. DJB is a statutory body of the Delhi Government with the mandate to supply water and maintain sewage lines. Clearly, these are not commercial activities nor is DJB a commercial entity. Therefore, the services rendered by the

appellant to DJB cannot be charged to service tax. The impugned order has clearly erred in confirming the demand under management, maintenance or repair service. The demand of Rs. 1,28,72,584/- under this head needs to be set aside and we do so.

10. As far as the "renting of immovable property service" is concerned, we find that renting of immovable property was chargeable to service tax under section 65 (105) (zzzz) during the relevant period except where such renting of property was for residential purposes. According to the appellant itself, it had rented its property to run a hostel and it had not rented it to somebody to stay. What is taxable under section 65 (105) (zzzz) is a service rendered by any person by renting of immovable property or any other service in relation to such renting for use in the course of or for furtherance of business or commerce. Clearly, renting of the property for running a hostel is a commercial activity, therefore, the amount received for such renting was clearly exigible to service tax under section 65 (105) (zzzz). The demand of Rs. 8,33,522/-, therefore, needs to be upheld and we do so.

11. Balance sheets of the appellant and its income tax returns showed that the appellant had received hiring charges. It had not paid service tax on the amounts which were received for such hiring. Therefore, a demand of Rs. 2,39,249/- is made under the head "supply of tangible goods service" under section 65 (105)

(zzzj). The appellant does not dispute that it received the hiring charges nor does it indicate what goods it had supplied and on what terms and to whom. All that the appellant is saying is that since the department is not able to establish that it had rendered "supply on tangible goods service" service tax cannot be fastened on it. We find this argument rather strange. It was the responsibility of the appellant to disclose full facts before the investigating officers, the adjudicating authority and before us regarding the nature of the goods which it had supplied, the terms and conditions, etc. In the absence of specific information, the best that can be done by the Departmental officers is the best judgment assessment. In our considered view, when hiring charges were received by the appellant and the appellant neither disclosed what it had supplied nor the contracts to establish if the supply falls under the category of "supply of tangible goods service" or otherwise, it was fair on the part of the adjudicating authority to presume that the receipts on this count were for "supply of tangible goods" chargeable to service tax under section 65 (105) (zzzj). The demand on this count needs to be upheld and we do so.

12. The appellant also contended that the demand for the period 01.04.2005 to 30.09.2005 was beyond the period of 5 years from the date of SCN and, hence, could not be sustained. A perusal of the table in paragraph 11 of the impugned order shows that during this period (beyond five years) the only demand was under the head of "management, maintenance or repair service",

which we have already set aside on merits. Consequently, the claim of the appellant that part of the demand is beyond 5 years is irrelevant.

13. The appellant also contended that extended period of limitation was wrongly invoked and the demand could have been made only within the normal period of limitation as Revenue has not brought on record any evidence that the appellant had intention to evade payment of service tax. We do not agree with this contention. Had the appellant been filing service tax returns giving all the details of the services rendered by it, as required, the case would have been different. In this case, the information had to be gathered from various records and the service tax had to be assessed based on best judgment assessment. In respect of certain receipts, such as, the hiring charges, the appellant did not disclose as to what was given on hire by it and on what terms. The appellant cannot profit from its own actions and inactions by not disclosing the information. Similarly, the appellant did not disclose that it was renting of immovable property to be used as a hostel, which was clearly a commercial activity. Under these circumstances, we find that the department was justified in invoking extended period of limitation of 5 years. For the same reason, the department is also correct in imposing the penalty under section 78.

14. In view of the above, the appeal is partly allowed and the impugned order is modified to the extent of setting aside the

demand of Rs. 1,28,72,584/- under the head "management, maintenance or repair service" along with interest on such amount and upholding the rest of the demand with interest. The amounts of penalty under section 78 also stands reduced proportionately.

15. The appeal is partly allowed and the impugned order is modified to the extent indicated above.

(Order pronounced in open court on 08/04/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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