CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 53578 OF 2015

[Arising out of the Order-in-Original No. 7/ST/SVS/DL-III/2015 dated 19/06/2015 passed by The Principal Commissioner, Service Tax Commissionerate, Delhi – III, New Delhi – 110 003.]

Commissioner, **...Appellant**
Service Tax Commissionerate,
Delhi – III, 7th Floor, Block No. 11,
CGO Complex, Lodhi Road,
New Delhi – 110 003.

Versus

M/s CBM Industries Limited, **...Respondent**
45, 1st Floor, Community Centre,
Naraina, Phase – I,
Delhi – 110 028.

APPEARANCE:

Shri Rajeev Kapoor, Authorized Representative for the Department
Shri Alok Yadav, Advocate, Shri Nilotpal Shyam, Advocate, Ms. Tejas Mishra, Advocate for the respondent.

WITH
SERVICE TAX APPEAL NO. 50228 OF 2016

[Arising out of the Order-in-Original No. 07/ST/SVS/DL-III/2015 dated 19/06/2015 passed by The Commissioner of Service Tax Commissionerate, Delhi – III, New Delhi – 110 003.]

M/s CBM Industries Limited, **...Appellant**
45, 1st Floor, Community Centre,
Naraina, Phase – I,
Delhi – 110 028.

Versus

The Commissioner of **...Respondent**
Service Tax Commissionerate,
Delhi – III, 7th Floor, Block No. 11,
CGO Complex, Lodhi Road,
New Delhi – 110 003.

APPEARANCE:

Shri Alok Yadav, Shri Nilotpal Shyam and Ms. Tejas Mishra, Advocates 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. 55485-55486/2024

DATE OF HEARING : 09.10.2023
DATE OF DECISION: 08.04.2024

P.V. SUBBA RAO

These two appeals have been filed by the Revenue and M/s CBM Industries Limited[1] assailing the order-in-original dated 19.06.2015 passed by the Commissioner of Service Tax, Delhi – III, whereby he decided the proposals made in the show cause notice[2] dated 23.04.2014 covering the period 2008-2009 to 2012-2013. The SCN demanded service tax of Rs. 36,30,35,965/- on seven different grounds and also proposed to impose penalties under section 77 and 78 of the Finance Act, 1994[3]. By the impugned order, the Commissioner confirmed the demand of Rs. 91,91,814/- and imposed penalties under sections 77 and 78 of the Finance Act. He dropped the remaining part of the demand.

2. Revenue is aggrieved by the fact that the Commissioner dropped part of the demand while the assessee is aggrieved by the confirmation of demand of Rs. 44,49,868/- on the services which it rendered by preparing and putting up signages at roads

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1. **Assessee**
2. **SCN**
3. **Finance Act**

and airports. The assessee is not contesting the remaining part of the demand confirmed by the impugned order which pertains to the Cenvat credit, which was irregularly availed by the assessee.

3. The assessee is also contesting the invocation of the extended period of limitation for raising the demand on the ground that none of the five factors essential for invoking extended period of limitation namely fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with an intent to evade payment of duty was present. According to the assessee, penalty under section 78 could also not have been imposed on the assessee for the same reason because these very elements were necessary to impose penalty under section 78.

4. We have considered the submissions advanced on behalf of Revenue and the assessee and perused the records.

5. During the relevant period, the normal period of limitation for invoking a demand was 18 months. Demand could be raised during the extended period of limitation of five years if one of the five aggravating factors were present namely : (a) fraud; (b) collusion ; (c) willful mis-statement; (d) suppression of fact or (e) violation of the Acts or Rules made with intent to evade payment of service tax. The SCN shows that the appellant was registered with the Service Tax Department, but on receiving information that the appellant had rendered some services and had not paid service tax correctly, the ST-3 returns, annual financial reports

and details of work done, payments/construction material received free of cost, etc. were sought from the assessee, analyzed and the SCN was issued. The reasons for invoking extended period of limitation given in the SCN was as follows :-

> "21. Whereas it has discussed in length herein above, it was obligatory on the part of the noticee to comply with the provisions of the said act and file the necessary returns, in the form of ST-3, with respect to correct declaration of their actual incomes whether taxable or exempted, as per the provisions of Finance Act, 1994 and Service Tax Rules, which till date the noticee had not followed. Further, it appears that the noticee suppressed the real taxable value on which the service tax should have been paid by them in the case of M/s IOCL, and further, willfully mis-stated the facts to the department, in respect of the Cenvat credit taken and utilized for their KALA-AMB factory for the years 2008-09 to 2009-10 which was not available to them as per the provisions of Service Tax and Cenvat credit rules as amended. But the noticee in an intent to evade the payment of correct service tax and to escape the full reversal of Cenvat credit, tried to hide the facts from the department as already mentioned in the foregoing paragraphs. Thus, it shows of their malafide and willful intention of misleading the department on the above counts, which, it appears, renders them liable for appropriate penalty under the provisions of section 78 of the Finance Act, 1994 as amended".

6. On the same ground, penalty was also proposed to be imposed under section 78. The assessee had contested the invocation of extended period of limitation, before the Commissioner. The Commissioner held in the impugned order that the appellant suppressed facts but did not say that they were suppressed with an intent to evade payment of service tax.

He further held "even otherwise, it is possible to invoke extended period in the case of service tax even in situation where there is no intent to evade payment of tax. Even if it is presumed that the noticee has not contravened any provision with intent to evade payment of service tax, yet has failed to comply with the obligations cast upon by the legislature. There is no requirement that there should be suppression with intent to evade. Mere suppression is adequate for the purpose of the recovery of tax for the extended period as well as for imposing penalty".

7. Learned counsel for the assessee vehemently opposed the above finding on the ground that it is contrary to the settled legal position that extended period of limitation can be invoked only if there was suppression of facts with an intent to evade payment of service tax or violation of Act or Rules with an intent to evade payment of service tax.

8. Learned authorized representative for the Revenue supports the impugned order on this aspect of invoking extended period of limitation and imposition of penalty under section 78.

9. We have considered the submissions of both sides on this issue.

10. It is a well settled legal position that although every service tax assessee operates under self-assessment, extended period of limitation cannot be invoked unless one of the five elements essential for invoking extended period of limitation is established.

It is also a well settled legal position that suppression of facts does not mean mere omission but the suppression with an intent to evade. Admittedly, the Commissioner invoked extended period of limitation and imposed penalties under section 78 under the wrong understanding of law that the intent to evade is not necessary to invoke extended period of limitation and to impose penalty under section 78. Therefore, the entire demand beyond the normal period of limitation of 18 months during the relevant period cannot be sustained and needs to be set aside regardless of the merits of the case.

11. For the same reason, the penalty imposed under section 78 also needs to be set aside.

12. We now proceed to examine the demands on merits. There are, in all demands on seven grounds as follows :-

(a) Service tax of Rs. 17,15,134/- on renting of immovable property service which has been dropped by the Commissioner and there is no appeal by either side on this ground. Thus, the issue has attained finality.

(b) Service tax of Rs. 1,28,46,824/- on the gross receipts in respect of the contract for supply, erection, commissioning and installation of retail visual identity signages elements which has been dropped by the Commissioner and there is no appeal by either side. Thus, this issue has attained finality.

(c) Service tax of Rs. 1,01,390/- on the service provided to M/s Indra Systems India Pvt. Ltd. and M/s Poonam Hasija Neha Hasija by the appellant was dropped by the Commissioner after calculating the amount of service tax payable and allowing payment of abatement of 60%/67% towards the material from the gross receipts. Revenue is aggrieved by this dropping of demand.

(d) Service tax of Rs. 2,28,73,103/- on the receipts towards works related to signages at roads and airports was partially dropped and partially confirmed to the extent of Rs. 44,49,868/-. Both sides are aggrieved by this decision. The assessee is aggrieved by the confirmation of part of the demand and Revenue is aggrieved by dropping of part of the demand.

(e) Demand of service tax of Rs. 32,07,57,568/- on the sales declared in the balance sheet. This demand was dropped by the Commissioner holding that this entire receipt was from sales. Revenue is aggrieved by the dropping of this demand on the ground that the Commissioner accepted the claim of the assessee that these receipts were towards sale of goods without sufficient documentary evidence to support the claim.

(f) Recovery of Cenvat credit of Rs. 47,37,237/-, which was confirmed by the Commissioner and there is no appeal by either side on this issue. Thus, the issue has attained finality.

(g) Service tax of Rs. 4,709/- under reverse charge mechanism for legal and professional services confirmed by the Commissioner and there is no appeal by either side on this issue. This issue has also attained finality.

13. We now proceed to decide on merits each of the contested demands.

14. Demand of service tax amounting to Rs. 1,01,390/- on the services provided to M/s Indra Systems India Pvt. Ltd. and M/s Poonam Hasija Neha Hasija was dropped by the Commissioner giving an abatement towards the cost of the material from the gross receipts. According to the Revenue, in respect of two purchase orders the assessee had raised invoices separately for the service portion and the goods portion and paid VAT on the cost of the goods and service tax on the service portion. In respect of the third order which was for erection of foundation, wherein cost of material and value portion were not separable, the assessee had taken abatement of 60% under the Service Tax Valuation Rules. The reasoning given by the adjudicating authority in the impugned order is, according to the Revenue, inconsistent with the calculations in the SCN because the SCN alleged that the entire amount in case of M/s Indra Systems was on account of pure service contract.

15. We find that in paragraph A.3 of the impugned order, the Commissioner recorded that there were three purchase orders and after examining the purchase orders came to the conclusion

that the appellant had correctly claimed abatement of 60% towards the value of the goods and promptly discharged the service tax liability. Therefore, he dropped the demand. Revenue is only aggrieved by the fact that his findings were not the same as the allegations in the SCN. The Commissioner was correct in considering both the allegations in the SCN and also the submissions made by the assessee in defence and arriving at a conclusion. Nothing is in the appeal by the Revenue to substantiate that the Commissioner had either not read the contracts or read them wrongly. We, therefore, find no reason to interfere with the findings of the Commissioner and reject the Revenue's appeal on this ground.

16. Demand of service tax of Rs. 44,49,868/- which was confirmed out of the demand of Rs. 2,28,73,103/- proposed in the SCN towards the signboards installed by the assessee on the roads and airports. Revenue is aggrieved that the Commissioner dropped part of the demand when the assessee itself had admitted taxable amount of Rs. 6,03,93,579/- on this count and had applied under the VCES Scheme. We had asked Revenue to supply copies of the documents related to the VCES Scheme so that this contention could be examined. Learned authorized representative has placed on record a letter dated 06.10.2023 from the Assistant Commissioner confirming that neither the VCES application nor any documents could be found despite sincere and rigorous efforts. In view of this, we are not willing to entertain the Revenue's appeal on this ground because the very

basis was that some declaration was made under the VCES which declaration is not available at all.

17. The assessee is aggrieved by the confirmation of this demand to the extent of Rs. 44,49,868/-. According to the assessee the signages were installed by the assessee at roads and, therefore, they should be considered as part of roads. The assessee relies on the definition of road as per OECD in support. According to the assessee, therefore, the signages should be treated as part of road. Consequently, the works contract for installing the signages should be treated works contract for construction of roads which is not exigible to service tax.

18. We find that service tax has to be levied as per the Finance Act, 1994 and the definitions therein and as per the common understanding in India. OECD stands for organization for Economic Corporation and Development which is a group of some developed countries. Their laws or regulations or guidelines do not form law in India just as Indian laws do not apply in those countries. In works contract service, the exception for payment of service tax is made for work related to construction of roads and it cannot be extended to other things, such as, road signages. We, therefore, find that the assessee’s appeal on this ground needs to be rejected and the impugned order should be upheld.

19. Demand of service tax amounting to Rs. 32,07,57,568/- on the sales declared in the balance sheet was dropped by the

Commissioner holding that this income was entirely from sales receipts. Revenue is aggrieved by this finding on the ground that this observation was based solely on the claim of the assessee without any certification by an independent Chartered Accountant. According to the Revenue this finding of the Commissioner is erroneous. However, in Revenue's appeal, we find no document whatsoever to support its contention that these receipts were on account of rendering taxable services. If the Commissioner found, based on the balance sheets and the records that these receipts were towards sale of goods, his finding deserves to be accepted in the absence of any contrary evidence. It needs to be pointed out that for service tax to be levied three things are essential namely : (a) the service provider must provide a service to the service recipient; (b) the service so provided must be a taxable service during the relevant period; and (c) a consideration must have been received for providing the taxable service. Unless all these three elements are established, no service tax can be charged. Merely because any amount has been received in the accounts of any person, service tax cannot be charged unless the amounts so received were a consideration for providing taxable services. The burden of proving any fact rests on the person whose case fails, if no evidence is presented by either side. In the case of SCNs, if no evidence is presented by either side, the allegations in the SCN fail and, therefore, it is for the Revenue to provide evidence that taxable services were rendered and consideration has been received. There is nothing in the appeal of the Revenue to establish that the amount received were not for sale of goods, but were received for providing the taxable services. In view of the above, the appeal by the Revenue on this count also needs to be rejected.

20. In view of the above, both appeals are disposed of, as below :

(a) Revenue’s Service Tax Appeal No. 53578 of 2015 is dismissed.

(b) The assessee’s Service Tax Appeal No. 50228 of 2016 is rejected on merits, but is upheld on the question of invoking extended period of limitation. Therefore, demand of service tax on works related to signages on roads and airports is upheld only within the normal period of limitation. The demand for the extended period of limitation is set aside. The penalty imposed under section 78 is also set aside.

21. Both appeals are disposed of and the matter is remanded to the Commissioner for the limited purpose of calculation of the amount of service tax within the normal period, as above.

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

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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