CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 53215 Of 2018

[Arising out of Order-in-original No. 12/COMMR/DEHRADUN/2018 DATED 21.03.2018 passed by the Commissioner of Central Goods and Service Tax, Dehradun Uttarakhand]

M/s Tewari Enterprises **: Appellant**
House No.-27, Nagla, Bareilly
Road, Rudrapur, U.S. Nagar
Uttarakhand

Vs

Commissioner of Central Goods Service Tax, Central Excise **: Respondent**
Nehru Colony, Haridwar
Road, Dehradun Uttarakhand

APPEARANCE:
Shri R.M. Sexena, Advocate for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Respondent

CORAM :

HON'BLE Dr. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 56061/2024

Date of Hearing:02.04.2024

Date of Decision:26.07.2024

HEMAMBIKA R. PRIYA

The present appeal is directed against the impugned order dated 21.03.2018 passed by the Commissioner of Central Goods and Service Tax, Dehradun Uttarakhand wherein the demand of Rs. 2,21,40,531/-

was confirmed for the period April 2011-March, 2015 along with interest and penalty.

2. The brief facts of the case are that the M/s Tewari Enterprises (hereinafter referred to as appellant) is engaged in providing Manpower Recruitment and Supply Agency Services to its clients. The officers of Directorate General of Central Excise Intelligence, Regional Unit Dehradun searched the premises of the appellant. On scrutiny of the copies of the ST-3 returns along with the 26AS/Balance Sheet of respective years, the department noted that the gross receipts indicated by the appellant in their ST-3 returns were substantially lower that the amounts shown in 26AS statement. During the investigations, the appellant deposited an amount of Rs. 45,00,000/-. The department issued the show cause notice dated 20.02.2017 alleging that the appellant had not paid the due amount of service tax on manpower recruitment and supply service, and it was also alleged that the appellant had collected the service tax amount from their clients and did not deposit the same in the Government exchequer. The Commissioner, vide the impugned order confirmed demand of Rs. 2,21,40,531/-, interest as per section 75 of the Finance Act, 1994 along with penalty of Rs 10,000/- and Rs. 89,400/- under Section 77 of the Finance Act, 1994 and also imposed penalty of Rs. 2.21,40,531/-under Section 78 of the Finance Act, 1994. Being aggrieved of the aforesaid order-in-Original, the appellant is preferring this appeal.

3. The Learned Counsel to the appellant submitted that the SCN alleges suppression of facts whereas none of the other ingredients of proviso to section 73(1) viz., fraud, collusion, wilful misstatement, or contravention of any of the provisions of chapter V or of the rules made thereunder with intent to evade payment of service tax, has been alleged in the SCN. However, the adjudicating authority has given a finding that- "…the appellant also tried to suppress the value of taxable services realized by them in their respective ST-3 returns. Therefore, I observe that in the present case contravention of the provisions of Finance Act' 1994 and the rules made thereunder as alleged in the notice to show cause has been committed by the party with the sole intent to evade payment of service tax by suppressing the vital facts from the department knowingly and willingly. …" Ingredient of proviso to section 73(1) of the Finance Act, 1994, namely, contravention of the provisions of the Act and rules made thereunder with intent to evade payment of tax' has not been alleged in the SCN but the adjudicating authority has given finding that contravention of the provisions of the Act and rules existed in the present case. The Learned Counsel contended that the finding was erroneous and amounted to making a new case against the appellant at the adjudication stage since there was no such allegation in the SCN. The demand of tax confirmed for the extended period of limitation on the basis of the said ingredient, was not sustainable and is liable to be a set aside.

3.1. The learned counsel further submitted that the adjudicating authority had held that the appellant had suppressed the value of taxable services realized by them in their respective ST-3 returns. He contended that this finding of 'suppression of facts' is erroneous in as much the Delhi High Court in the case **Hotchand Jawaharmall v. UOI 1983 (14) ELT 2197 (Del.)** has held that misdeclaration of value in the bill of entry (in that case) was a misstatement of facts. Further, the Hon'ble Supreme Court, in the case **Collector of Customs, Calcutta v. Tin plate co. of India Ltd. 1996 (87) ELT 589 (S.C.)** has held that suppression envisages a deliberate and conscious omission to state a fact with the intention of deriving wrongful gain. Therefore, there could be 'misstatement of facts' in the facts and circumstances of the case, not any suppression of facts. But no finding of 'mis-statement of facts', has been given in the impugned order. Hence, the extended period of five years cannot be invoked for recovery of tax.

3.2. The ld counsel further contended that the normal period of limitation under Section 73 of the Finance Act, 1994 was 18 months up to 13.05.2016, which was changed to 30 months w.e.f. 14.05.2016. Hon'ble Apex Court, in the case of **UOI v. Uttam Steels Ltd**. **2015 (319) ELT 598 (S.C.)** has held that where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued right. Therefore, demand for any period that had become time-barred as on

13.05.2016 under the old provision of 18 months, could not be revived by the new provision of 30 months which came into effect on 14.05.2016. He further submitted that out of the demand confirmed in the order, the demand up to Sept., 2014 is time barred. The only demand that survives is for the period 01.10.2014 to 31.03.2015, against which the appellant had deposited Service tax amounting to Rs. 45,00,000/-. There being no suppression of facts and there being no finding of 'misstatement of facts', in the order-in-original, penalty under Section 78 was also not imposable. He also stated that the due date for filing ST-3 return for the period April-September 2011 was 25.10.2011 and for including the said period in the five year's extended period, the demand should have been issued prior to 25.10.2016, whereas the show cause notice in the present was issued on 20.02.2017. Therefore, the demand for the period April-September 2011 is time barred. In support of his contention, he relied upon the decision of this Tribunal in the case of **M/s Right Resources Management Service vs. Commissioner of Central Goods, Service Tax, Central Excise, Dehradun vide Final Order No. 51467-51468/2023 dated 30.10.2023.**

3.3. Ld. Counsel further stated that the imposition of penalty under section 77(1)(c)(iii) of the Finance Act for 447 days x Rs. 200 = Rs. 89,400/- for alleged failure of the appellant to –(i) appear on three dates for appearance against summons, and (ii) produce desired documents, is erroneous in as much as the 3 summons were issued for 3 different dates for producing documents. The documents generated at appellant's end had already been submitted to the department and the appellant was neither in possession of Forms 26AS nor were they generated by the appellant nor was the appellant under any obligation to submit such documents to the department. Moreover, contravention with reference to non-compliance of summons could have continued for delay only and, consequently, necessitating issue of summons each time when one summons was not complied with. Penalty imposed under section 77(1)(c)(iii) of the Act ibid. was erroneous and arbitrary. As regards imposition of penalty under section 78 ibid., ld. Counsel submitted that the finding in the order regarding 'suppression of facts' and 'contravention of the provisions of Act and rules with intent to evade tax' being erroneous and incorrect, penalty under section 78 is not imposable. In any case, the transaction having been declared in the specified records, i.e., Balance Sheets, the penalty cannot be more than 50% of the tax not paid.

3.4. In view of the above submissions, he prayed that the impugned order may be set aside and appeal of the appellant may be allowed.

4. The Ld. Authorized Representative for the Department reiterated the findings in the impugned order and submitted that there is a huge difference in the taxable value shown by the appellant in their ST-3 returns vis-à-vis value of taxable services realized as calculated from 26AS statement and as shown in the Balance Sheet. He submitted that the appellant had failed to co-operate with the department during the

course of investigation and failed to respond to the communications and summons issued by the department from time to time and the department was forced to collect the proof of evasion of service tax by the party from third party sources such as Income Tax Department. He further contended that the appellant had failed to respond to show cause notice and nor did the appellant appear for personal hearings granted to them, which also proves beyond doubt that the appellant has nothing to say their defence and they are in admittance of the charges levelled against them in the impugned show cause notice. The aforesaid non-co-operative attitude of appellant clearly shows their utter disrespect to the law of the land and their evasive nature.

4.1 The ld. AR further contended that during the period in question though the appellant was charging and collecting service tax from their clients but deliberately, intentionally and with a malafide intent failed to deposit the same to the government exchequer. Therefore, the contravention of the provisions of Finance Act' 1994 and Rules made there under as alleged in the notice to show cause, have been correctly invoked. As regards the imposition of penalty under section 78, the ld. AR stated that the adjudicating authority has observed that the appellant knowingly and wilfully failed to discharge their service tax liabilities correctly, suppressing the value of taxable services. The adjudicating authority has rightly imposed the penalty under section 78, citing the party's intent to evade service tax. Furthermore, a penalty under section 77(1)(c) is imposed due to the party's non-compliance with summons issued under section 14 of the Central Excise Act. The penalty of Rs.89,400/- is applied from 30.11.2015 to 20.2.2017, covering the period when the party was required to present themselves before the investigation officer. In the light of above, the ld. AR prayed that the Appeal may please be dismissed.

5. We have heard the arguments of both sides and perused the records. It is not disputed that the appellant is engaged in providing taxable services of "manpower recruitment and supply agency service" and were registered vide Service Tax Registration No. AEUPT9935KST001.

5.1 We note that prior to July 1, 2012, Manpower Recruitment or Supply Agency was defined under Section 65(68) of the Act and was exigible to service tax as under Section 65(105)(k) of the Finance Act 1994, which is reproduced as under:

> *"Section 65(68) of the Finance Act with effect from May16, 2008 provides as under:*
>
> *Manpower Recruitment or Supply Agency means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person.*
>
> *Section 65(105) (k) of the Finance Act with effect from May 16,2008 provides as under: Taxable service means any service provided or to be provided to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;*
>
> *Explanation. For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate"*
>
> **With effect from July 1, 2012,** Section 65(68) and Section 65(105)(k) were rescinded and new definition of supply of Manpower

inserted under Rule 2(1) (g) of the Service Tax Rules, 1994 ("the STR"), which is reproduced here in below:

"Supply of Manpower means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control."

5.2 As per the legal provisions prior to 1.7.2012, we note that the liability to pay the entire service tax was on the service provider. However, vide notification No. 30/2012 dated 20.06.2012, the service tax liability was shared (25%/75%) in case if any individual or HUF or partnership firm is providing supply of manpower service for any purpose to business entity registered as a body corporate. The adjudicating authority has held that the Form 26 AS/Balance Sheets of the appellant, as obtained from the Income Tax department indicate that during the period 2011-12 to 2014-2015, the appellant was engaged in providing the said taxable services. We find that there is no contrary evidence that has been submitted before us by the appellant to hold otherwise. We also note that there is a vast difference in the taxable value shown by the party in their ST-3 returns vis-à-vis value of taxable services realized as calculated from 26AS statement and as shown in the Balance Sheet, which has not been satisfactorily explained by the appellant before the adjudicating authority. We also note that despite several opportunities, the appellant failed to produce appear before the adjudicating authority and nor did the appellant file any written submissions or respond to summons. We also note that the Department has not conjured the figures from nothing, infact have culled the figures from the statements of the appellant available with the Income Tax department. We note that the Department has relied on the 26AS statement which is a statement that provides details of any amount deducted as Tax Deducted at Source (TDS) or Tax Collected at Source (TCS) from various sources of income of a taxpayer. This statement gives a consolidated record of every tax-related information associated with a PAN. Therefore, the veracity of the statement cannot be doubted.

5.3 We further observe that it has been mostly contended by the ld. counsel to the appellant that the demand for the extended period is not sustainable as there was no intent to evade tax. At the outset, we are unable to accept the contention of the ld. counsel that the show cause notice refers to suppression and not mis-statement of facts. Therefore, the said findings in the impugned order is illegal. We are unable to accept his contention. Even if we have to accept the ld. counsel’s contention, we note that mere non-mention of Rule in the show cause notice does not vitiate the show cause notice as has been held by the Hon'ble Apex Court in the case of ***J.K. Steel Ltd. vs. Union of India [1970 AIR 1173]***. In these circumstances, we do not find any merit in the contention of the ld. counsel that there is no finding on mis-statement of facts in the impugned order.

5.4 Further, we once again note that the appellant did not submit any of the documents sought by the revenue authorities, despite several letters, summons etc. It is also on record that the appellant did not submit any reply to the show cause notice, nor did the appellant appear for hearing when opportunities were given to them. In the absence of any response from the appellant, the Adjudicating Authority has proceeded to consider the matter with the evidences available before him, which cannot be faulted. Suppression of material facts is a serious matter which have severe consequences. It is on record that the appellant did not respond to summons, letters and failed to file any written submissions not did they appear for personal hearing. Thus, there was no effort by the appellant to clarify or submit any documentary evidence to contradict the allegation of the department. We note that the Department has relied on the 26AS statement which gives a consolidated record of every tax-related information associated with a PAN. Therefore, the veracity of the 26AS statement cannot be doubted. This statement clearly establishes that the appellant was actively providing the said service during the relevant period, as is evident as tax on his income has been collected/deducted at source by his service recipient. This was not declared in the ST-3 returns by the appellant. It has been argued before us that the appellant calculated his service tax liability and paid Rs 45 lakh and has stated that he continued to pay tax on a regular basis. This clearly establishes that the appellant was aware of his tax liability and chose not to pay his tax correctly. In this context, we note that the Courts have consistently held that the parties seeking relief must approach the court with clean hands and disclose all material facts that may affect the decision. In the case of **Harbans Lal Vs**

Mohinder Lal & Others, the Hon'ble High Court of Jammu & Kashmir, on 14.01.2020, held as follows:-

> "15. That apart, the petitioner/plaintiff as rightly observed by the appellate Court is, prima facie, guilty of suppression of material fact about the filing of earlier suit and its fate, in the present suit. A party seeking discretionary relief has to approach the Court with clean hands and it is required to disclose all material facts which may one way or the other affect the decision. The suppression of material facts itself is a sufficient ground to decline the discretionary relief of injunction. Suppression of material facts from the Court itself is a ground for declining to exercise discretion and grant equitable relief of injunction."

5.4.1 The appellant has not submitted any evidence to the contrary before this Tribunal, nor did he avail the opportunity available before the adjudicating authority, hence, the contention of the appellant that the impugned order is illegal cannot be accepted.

5.5 We also note that the impugned order has held that the appellant suppressed the value of taxable services realized by them while filing the respective ST-3 returns. This is established by the fact that the appellant, immediately on being questioned calculated and paid his tax liability on his own. This was done only once investigations was initiated by the department. This clearly establishes the intent of the appellant. We observe that payment of service tax is governed by Section 68 of the Act, and the liability to pay service tax is cast on every person providing the taxable service to any person. Section 70 casts the liability on the person liable to pay service tax, to assess the tax due and furnish return. The charge of service tax under section 66 is on the value of taxable services as enumerated in Section 65(105). The person liable to pay the tax is governed by Section 68 and such person who is liable to pay service tax under Section 68 is also liable to get himself registered under Section 69 read with the Rules and such person that is the person liable to pay service tax must also assess the tax and file Return under Section 70, as prescribed in the Rules. In the instant case, we note that the appellant did not cooperate with the investigations, failed to submit any documents to substantiate his claim and did not disclose the actual value of taxable services provided by him in the ST-3 returns filed by him. This clearly establishes his intent to evade his liability to pay service tax. Thereafter to appeal to this forum alleging that the demand was time barred, and the finding of suppression of facts was erroneous cannot be accepted. Learned Counsel relied on the Hon'ble Delhi High Court's decision in the case of **M/s Hotchand Jawaharmall vs UOI & Others [1983(14) ELT 2197(Del)]** to emphasise his point. We find that the Hon'ble High Court has held that as follows:

> "5. ………..This is clear admission on the part of petitioner that they had knowledge that the goods were being supplied by a party in Japan. This fact is stated in the invoice of the Easter Traders. Therefore, the knowledge of the Japanese party can be directly imputed to Eastern Traders. It can be fairly inferred that

the petitioner had the knowledge of the transaction between various parties in question and had also the knowledge of the price of the goods shown in the sale notes and invoices from Messrs M. Teramoto & Co. and Messrs Kaysons Corporation of Japan. I have no hesitation in holding that the statement as regards the value made by the petitioner was a mis-statement."

We note that in the instant case, the appellant had failed to declare the correct value in the ST-3 returns, and the adjudicating authority has held that there was suppression of the assessable value. Once, there is evidence of provision of service by the appellant, which is not reflected in the ST-3 returns, mis-statement is established. The above judgment relied upon by the ld counsel squarely covers the instant case. Therefore, we are of the opinion that the appellant has not placed the correct facts before us. In this context, we note that the Apex Court in **S.P. Chengalvaraya Naidu vs. Jagannath [AIR 1994 SC 853]** elucidated that the Courts of law are meant for imparting justice between the parties. One, who comes to the Court, must come with clean hands. The Court was constrained to note that more often than not, process of the Court is abused by property grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. It would be appropriate to refer to the case of **M/s Ramjas Foundation v. Union of India & others (2010) 14 SCC 38** wherein the Apex Court removed the misconception that these principles are only applicable to Writs & SLPs before the Apex Court &

the High Courts. The Phrase 'but also to the cases instituted in others courts and judicial forums' in the said judgment specifically lays down that the principle that it is obligatory for an appellant to approach any court or judicial forum with clean hands or face the ire of the courts / judicial forum. In the instant case, the appellant has not submitted any evidence in support of his contention. It is on record that the appellant has failed his returns without correctly assessing his liability. Such action by the appellant clearly seeks of malafide intention to evade tax. Thereafter to plead on technicalities is unacceptable.

6 We now take up the arguments relating to the extended period. It has been held in the impugned order that as per the chronology of events, during the period in question, the appellant had failed to discharge his liability correctly, as well as suppressed the value of the taxable services realized by them in the ST-3 returns filed by them. In this context, we note that the Apex Court in the case of **M/s Usha Rectifier Corp. Ltd vs CCE [2011(263) ELT 655 (SC)]** held that extended period is invokable for notices where the information has been taken by the Department from the Balance Sheet. There are other decisions of the Hon'ble Apex Court in this regard viz., **M/s Box & carton India Pvt Ltd. Vs Commissioner [2010(255) ELT A13 (SC)], M/s Modipon Fibre Company vs CCE [2007 (218) ELT (8)]** wherein the Court gave a ruling to the effect that suppression is not about making a false declaration but also about not declaring what should be declared. In view of the said rulings, we have no hesitation

in holding that the extended period was rightly upheld by the adjudicating authority.

7. As regards penalty, we uphold the penalties imposed under Section 77(1)(c)(ii), 77(1)(c)(iii) and Section 78 of the Act.

8. In view of the above discussions, we find no infirmity in the impugned order, and uphold the same. Consequently, the appeal stands dismissed.

(Order pronounced in the open Court on 26.07.2024)

(Dr. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R.PRIYA)
MEMBER (TECHNICAL)

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