CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI-110066

PRINCIPAL BENCH –COURT NO. 1V

Service Tax Appeal No. 50779 of 2019 - DB

(Arising out of Order-in-Original No. 3/2019-ST dated 28.1.2019 passed by the Pr. Addl. Director General (Adj.), DGGSTI New Delhi)

Gurubani Security Private Limited **Appellant**
Plot No. 196, AWHO Colony,
Sector-A, Gautam Enclave,
Secunderabad (Telangana)

Versus

Pr. Addl. Director General (Adj.), **Respondent**
DGGSTI, New Delhi
West Block-VIII,
Wing No. 6, 2nd Floor,
R.K. Puram, New Delhi

And
Service Tax Appeal No. 50780 of 2019

(Arising out of Order-in-Original No. 3/2019-ST dated 28.1.2019 passed by the Pr. Addl. Director General (Adj.), DGGSTI New Delhi)

Shri J.S. Kalsi – Director **Appellant**
Gurubani Security Private Limited
Plot No. 196, AWHO Colony,
Sector-A, Gautam Enclave,
Secunderabad (Telangana)

Versus

Pr. Addl. Director General (Adj.), **Respondent**
DGGSTI, New Delhi
West Block-VIII,
Wing No. 6, 2nd Floor,
R.K. Puram, New Delhi

<u>Appearance :</u>

Present for the Appellant: Shri Sudhir Malhotra, Advocate &
Shri A.S. Hasija, Advocate
Present for the Respondent: Shri Sanjay Jain, DR

CORAM: **Hon'ble Mr. Bijay Kumar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Date of Hearing: 04/07/2019
Date of Decision:01/08/2019

Final Order No. 50958-50959/2019

Per: Bijay Kumar :

These appeals have been filed against the Order-in-Original No. 3/2019-ST dated 28.1.2019 passed by the adjudicating authority against the appellants. In the impugned order, the learned adjudicating authority has confirmed a service tax demand of Rs. 6,01,52,251/- under the provisions of Section 73(2) of Finance Act, 1994 (hereinafter referred to as Act) and appropriated amount of Rs. 96,00,000/- paid during the investigation along with imposition of penalty to the extent of Rs. 3,67,15,046/- under the provisions of Section 78 of the Act along with interest as applicable under Section 75 of the Act. Shri J.S. Kalsi, Director of the appellant company has also been imposed a penalty of Rs. 1,00,000/- under the provisions of Section 78 of the Act. Being aggrieved with the said order, the appellants are before us in this appeal.

2. The brief facts of the case is that the appellants is engaged in providing of various services namely security services, manpower supply services along with other for which they are registered with the Service Tax Department vide registration No. AABCG3272GST001. Acting on the intelligence that the appellant are not paying the appropriate service tax even after collecting from the various clients, search was conducted at the corporate office of the appellant on 5.3.2014. During the search number of documents related to the activities undertaken by the appellant were resumed. Some of the documents were also resumed from the residence of another appellant, Shri J.S. Kalsi, the Director of

appellant company. During the search, Shri Kalsi, who was present at the time of search accepted that they have collected service tax from their clients but failed to deposit the same in the government exchequer. He deposited a sum of Rs. 25 lakhs voluntarily and promised to pay the remaining amount in due course.

3. On going through the various documents such as bill cum receipt register and ledger account of the various clients it appeared that the appellant had been providing services to some of the educational institutes viz. Indian Institute of Technology, Patna; National Institute of Electronics and Information Technology; Calicut; Central University of Rajasthan, Ajmer; Central Arid Zone Research Institute, Jodhpur; National Institute of Technology, Agartala; Indian Institute of Management, Kozhikode etc. It also appeared that the appellant have collected service tax from these institutes even after introduction of negative list which exempted the services to such educational institute as per Notification No. 25/2012-ST dated 20.6.2012 with effect from 1.7.2012. Various other statements were recorded from the other appellant, Shri J.S. Kalsi, who subsequently also agreed that the company has merged with another company and would be clearing the service tax dues at the earliest. Subsequently, following payments were made

Challan dated 4.4.2014	-	Rs. 2 lakhs
Challan dated 7.4.2014	-	Rs. 3 lakhs
Challan dated 8.4.2014	-	Rs. 1 lakh
Challan dated 1.9.2014	-	Rs. 5 lakhs
Challan dated 7.10.2014	-	Rs. 20 lakhs

These payments were made towards the liability of service tax. After completion of investigation, a show cause notice dated 14.10.2014 was issued to the appellant which culminated into the impugned order.

4. Learned Advocate on behalf of the appellant submitted that the liability for the appellant is computed to Rs. 1,21,17,655/- out of which Rs. 20,87,891/- has already been discharged by the appellant and the same has been paid along with the interest. It was also submitted that this amount has been computed after claiming deductions made towards the salary and wages and contribution towards the provident fund, employees state insurance fund etc. while computing the gross amount. The service tax has been demanded on gross amount received without excluding salary and statutory contributions, such as which is not permissible both prior and after 1.7.2012. He places reliance on the provisions contained under Section 67 of the Act which is for the provision of **such services** provided or to be provided. Reliance was placed on the decision of Hon'ble Delhi High Court in the case of **Intercontinental Consultants and Technocrats Pvt. Ltd. Vs. Union of India – 2013 (29) STR 9 (Del.)** which has been affirmed by the Supreme Court 2018 (10) STR 401 (SC). As per learned Advocate, the inclusion of salary, wages and statutory contribution towards ESI and PF is required to be deducted from the total amount collected by the appellant for purpose of calculation of gross amount, the gross amount in terms of Section 67 of the Act. It was also submitted that after introduction of

negative list of services under the Act with effect from 1.7.2012 a specified provision has been made in Section 65b(44) where amount towards the service of employee to the employer in case of or in relation to employment are not includible towards the consideration and, therefore, service tax has been incorrectly demanded on the gross amount. The similar provision existed ever prior to 1.7.2012. Learned Advocate further submitted that during the period 2009-2010 to 2013-2014 (up to February, 2014), the appellant has paid service tax of Rs. 1,38,25,969/- on gross receipt of Rs. 73,71,87,437/-. The appellant paid service tax to the extent of Rs. 20,87,891/- as against Rs. 11,13,24,545/- received from the educational institute. The appellant has collected service tax of Rs. 1,21,17,655/- from the educational institute and already paid service tax to Rs. 20,87,891/- as per ST-3 returns and the remaining amount has also been paid by the appellant. The learned adjudicating authority has erred in imposing penalty under Section 78 of the Finance Act on the ground that a show cause notice not invoked the provisions of Section 73A of the Act and hence imposition of penalty is in the show cause notice. It was also submitted that the provisions of Section 78 of the Act are not applicable in case where service tax has been collected which is not chargeable and not deposited to the Government exchequer. In this regard, reliance was placed on the decision of Hon'ble Punjab & Haryana High Court in case of **Ajay Kumar Gupta Vs. CESTAT – 2015 (39) STR 736 (P&H),** wherein it is held that once the assessee was not liable to pay under provisions of 68 of the Act, the penalty is not imposable under Section 76 of the Act. Further, penalty under 78 of Act also pertained to penalty for suppressing of value of the taxable services. Once the service tax was not leviable under Section 68 of the Act and the liability was only to deposit service tax under Section 73A(2) of Act ibid which has been done after delay, but due to the service being not taxable at the relevant time when the invoices were issued the case would not fall under the provisions of Section 78 of the Act for invoking penalty. Learned Advocate also pleaded that since the issue involved the interpretation of law the extended period of limitation is not invocable. Learned Advocate also submitted that this is a case where the learned adjudicating authority would have given the benefit of Section 80 of the Act which was valid up to 13.5.2015. As the appellant has a bona fide belief that the salary, wages and statutory EPF, ESI etc. is not required to be included for arriving at the gross amount charged for the purpose of payment of service tax. Finally, it was submitted by learned Advocate that no penalty imposable on the Director of the Company, the Appellant No. 2 as the company has also suffered penalty. Reliance was placed on the decision of Hon'ble CESTAT in the case of **Globe Rexine Pvt. Ltd. Vs. CCE - 2006 (203) ELT 362 (Tri.- Chennai).**

5. On the other hand, learned Authorised Representative has submitted that the amount such as salary and wages, EPF and ESI contribution is required to be added for the purpose of calculation of gross amount under Rule 67 of the Act and, therefore, the impugned order is correct and legal. Learned Authorised Representative places reliance on the decision of **GDA Security Pvt. Ltd. Vs. Union of India, Security Agencies Association**

Vs. Union of India – 2012 (28) STR 3 (Ker.) and this Tribunal in the case of Neeru Jaiswal. In all these cases, it has been held that the contribution towards EPF, ESI and the wages and salaries are required to be included in the gross amount for the purpose of payment of service tax under Section 67 of the Act.

6. We have gone through the submissions made by both sides and perused the case record.

7. The issue to be decided is as to whether the appellant who has collected the service tax from various educational institute, which exempt from the payment of service tax in terms of the notification No. 25/2012 after 1.7.2012 and prior to that and also as to whether the contribution towards EPF, ESI, salary and wages are required to be deducted from the gross amount charged for purpose of payment of service tax by the appellant. In this regard, we find that it will be appropriate to reproduce the provisions of Section 67 both prior to 1.7.2012 and with effect from 1.7.2012 which is reproduced as under;

> "**Prior to 1.7.2012**
>
> **67. Valuation of taxable services for charging service tax**
>
> (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,-
>
> (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
>
> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
>
> (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed

Explanation.-For the purposes of this section,-

"consideration" includes- any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value:

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [2][book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

W.e.f. 1.7.2012

Section 67. Valuation of taxable service for charging service tax

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
- (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
- (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-section (1), (2) and (3), the value shall be determined in such manner as may be prescribed

Explanation – for the purposes of this section, -

(a) "Consideration" includes any amount that is payable for the taxable services provided or to be provided;
(b) * * *
(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

8. Similarly, the provisions of 65(B)44 of Finance Act with effect from 1.7.2012 which is relevant is also reproduced as under:

"Section 65B(44)

"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include"

(a) An activity which constitutes merely,-
(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or
(iii) a transaction in money or actionable claim;"

9. The appellant is engaged in providing the services of manpower recruitment and supply services which has been brought into service tax net with effect from 2.7.1997 vide Section 85(68) read with 65(105)(k) of the Act.

10. It is on record that the appellant has provided the services of manpower supply and security agency to various educational institutes and has been collected service tax during the relevant period i.e. from 2009 to Feb. 2014. The appellant has agreed to the fact that they have not deposited the service tax collected from the educational institute which was not required to be collected in terms of the exemption notification mentioned above. As far as the

contribution made towards EPF, ESI and salary, the same stand settled in favour of the appellant in view of the decision of Hon'ble High Court of Allahabad and Tribunal decision in case of **Security Guards Board for Greater Bombay and Thane District Vs. Commissioner of Central Excise, Thane – 2017 (51) STR 51 (Tri-Mumbai).** The relevant portion of the two judgments is extracted as under :

> "9. In view of above, the contributions made towards EPF and ESI are not liable to be included for the computation of gross amount under Section 67(1) of the Act. We also find that the similar issue had been come up for consideration before this Tribunal in case of **Young Brothers Transporters and Contractors Vs. CCE, Meerut-I - 2017 (6) G.S.T.L. 513 (Tri. - Del.),** wherein it is held that employer contribution towards PF, EPF, ESI into Central Govt. account is not required to be included for the purpose of a computation of gross amount for discharge of service tax liability. Paragraph 6 of the order which is relevant is reproduced as under:
>
> > "**6.** The Employees Provident Fund & Miscellaneous Provisions Act, 1952 and the Employees State Insurance Act, 1948 created the liability upon the principal employer to contribute to the respective funds, an amount equal to employees contribution. Thus, in compliance of the said provisions, the service receiver M/s. HNGIL had contributed to such funds, the amount towards the workmen deployed by the appellant. The fact is not under dispute that such contributed amount was never given by such service receiver to the appellant. Thus, the gross value for the computation of service tax liability in the hands of the appellant will not take into consideration the amount of contribution made by the service receiver M/s. HNGIL directly into the respective heads of account. Therefore, in our considered view, service tax demand cannot be confirmed on the employer's contributed amount towards P.F., E.P.F. and E.S.I.
>
> In this order the decision of Hon'ble Tribunal in case of Neerv Jaisawal was also considered, which is referred in the impugned order and held to be inapplicable. In this regard, we also find that the Hon'ble Allahabad High Court in the case of Security Services Vs. Union of India 16 (399) in Civil Writ Petition No. 437 of 1998 held that **the respondent shall be entitled to charge service tax on the gross except after giving the abatement in respect of statutory levy and the tax is and if the same as the direct relation with the services rendered by the client and charged specifically in the bill.**
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> 10. As far as the abatement towards deduction of wages and salaries paid to the personal employees by the appellant is concerned, the same is covered by the decision of Mumbai Bench of this Tribunal in case of **Security Guards for Greater Bom. & Thane Dist. Vs.**

CCE, Thane-II - 2017 (51) STR 51 (Tri.-Mum.), wherein it is held that wages and allowance including salary and administrative charge collected from its client is excludible from the gross value of taxable service in terms of Section 67 of the Act. The relevant paragraph of order is reproduced hereinafter:

> **"4.1** Further, under section 6 of the Maharashtra Private Security Guards (Regulation of Employment & Welfare) Act, 1981, following has been provided :-
>
> **Disbursement of wages and other allowances "31. to registered Security Guards of the Board. -** The wage and other allowances payable to the registered Security Guards of the Board every month by the registered principal employer shall be remitted by the registered principal employers by cheque to Secretary, of the Board, within such time after the end of the month, as may be specified by the Board. The Secretary thereupon shall arrange to disburse the wages and other dues, if any to the registered Security Guards of the Board on specified days every month subject to deductions, if any, recoverable from them under the Scheme; Provided that the Board may, if it thinks fit, and subject to such conditions as may be laid down by it, allow a registered principal employer to pay directly to the Security Guards the wages and other allowances after making such deductions as may be authorized and recoverable from them under the Scheme, within such time and in such manner as may be specified by the Board."
>
> From the above clause, it is apparent that the wages and allowances are collected by the Board as an Agency for payment to the concerned persons/authorities. Therefore, the wages and allowances are excludible from the value of service tax. Thus, the taxable value for the purpose of levy needs to exclude these charges. The demand is modified to that extent."

Following the same, we are of the view that the demand confirmed by the impugned order is required to be re-quantified after giving abatement towards the salary and wages and the contribution made towards EPF and ESI. We also find in this case the appellant is collected service tax which was not required to be collected by him which is unconditionally exempted in terms of Notification No. 25/2012. In the circumstances, we find that the entire amount of the duty of service tax collected is required to be deposited with service tax, department which appears to have been done in terms of the submissions made on behalf of the appellant. Regarding the imposition of penalty, we find that the same is settled in favour of appellant by the decision of Hon'ble Punjab & Haryana High Court in the case of **Ajay Kumar Gupta** (supra). We also find that the decision of Hon'ble Delhi High Court in case of **Intercontinental Consultants** (supra) has held that for arriving at the gross amount to be charged under Section 67 of the Act, only **<u>such amount</u>** is required to be included which is attributable towards the services rendered by the appellant, any other element, which is reimbursable in nature, is not required to be included for the purpose of computation of assessable value under Section 67 of the Act, as this decision has been upheld by the Supreme Court, we are of the view that the various statutory deduction the payment made towards salary and wages are, therefore, required to be deducted from the total amount charged by the appellant from the service recipient for the rendition of the service. Thus, the charges attributable to the service element can only to be considered in the gross amount charged. It is, therefore, held that the demand, as confirmed in the impugned order, is required to be re-worked out in view of the findings as indicated above. We also hold that in the given circumstances that there is no justification of imposition of penalty on the appellant. Accordingly, we set aside the impugned orders and allow the appeals by way of remand for limited purpose of computation of service tax demand in terms of this order as held hereinabove.

(Pronounced in open Court on 1.8.2019)

(Rachna Gupta) Member (Judicial)	(Bijay Kumar) Member (Technical)