CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 86056 of 2016

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-0211-15-16 dated 25.01.2016 passed by Commissioner (Appeals-I), Central Excise, Pune.)

M/s Abhijit Logistics .....**Appellant**
A/12 Dwarka Paltinum, Indariyani Nagar,
Bhosari, Pune – 411 026.

VERSUS

Commissioner of Central Excise & Service Tax, Pune-I .....**Respondent**
ICE House, 41-A Sasson Road
Opposite Wadia College, Pune - I

Appearance:

Shri Anand Kulkarni, Advocate for the Appellant
Shri Nitin Ranjan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85154/2023

Date of Hearing: 07.02.2023
Date of Decision: 07.02.2023

PER : S.K. MOHANTY

This appeal is directed against the impugned order dated 25.01.2016 passed by the Commissioner (Appeals-I), Central Excise, Pune.

2. Briefly stated, the facts of the case are that the appellant herein is engaged in providing logistics support services to M/s. Tata Motors Ltd. Such services provided by the appellant are categorised as taxable service under the taxable head of "Business Support Service", defined under Section 65 and 65A of the Finance Act,

1994. The scope of work assigned to the appellant by the recipient of service M/s. Tata Motors Ltd. was for the provision of service of supplying the vehicles manufactured by them to the customers from the storage yard. As per the terms of the work order, the service recipient deducts some amount from the invoices raised by the appellant on account of late delivery, accidental expenses, theft of the goods etc. During the disputed period, the appellant had discharged the service tax liability from the net value of services received from the recipient of service. Short payment of tax was disputed by the Department on the ground that the appellant was required to pay the service tax on the value indicated in the invoices. While conducting audit under E.A. 2000, the officers of the service tax department has raised such objection and accordingly, initiated show cause proceedings against the appellant. The show cause notice dated 20.09.2012 was adjudicated by the original authority vide order dated 21.03.2014, wherein service tax demand of Rs.22,39,188/- along with interest was confirmed on the appellant. Besides, the said order has also invoked the proviso clause appended to Section 78 *ibid* for imposition of equal penalty on the appellant. Further, the adjudication order has imposed penalty under Section 77 *ibid*. On appeal against the said adjudication order, the learned Commissioner (Appeals) vide the impugned order dated 21.01.2016 has modified the original order, to the extent of setting aside the penalty imposed under Section 78 *ibid*. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

3. Learned Advocate appearing for the appellant submitted that the period in dispute is from 2008 to March 2011 and since the show cause notice was issued by the Department in September 2012, the same is clearly barred by limitation of time as per the provisions of Section 73 of the Finance Act, 1994. In this context, he submitted that there is no element of fraud, collusion, wilful mis-statement or suppression of facts etc., and in such an eventuality, the show cause notice can only be issued, seeking for recovery of the service tax amount within the period of one year from the relevant date. Thus, he submitted that since the notice was issued by invoking the extended period of limitation, the same is not sustainable under the law for effecting recoveries. He has relied

upon the impugned order, wherein the learned Commissioner (Appeals) has dropped the penalty imposed in the original order under Section 78 *ibid*. By referring to impugned order-in-appeal, he stated that since, Section 78 ibid dealing with the provisions of fraud, collusion, wilful mis-statement or suppression etc. have not been invoked in the impugned order, the period of limitation for issuance of the show cause notice should be confined to 1 year from the relevant date and the extended period cannot be invoked for initiation of the proceedings beyond such normal period.

4. On the other hand, learned Authorized Representative appearing for the Revenue submitted that under the era of self-assessment , the assesse is supposed to comply with the statutory provisions as per mandate provided in the statute as well as the manual designed for such purpose. Since the non-payment of service tax was not intimated by the appellant *suomotu* to the department and such discrepancy was noticed by the department subsequently, the extended period is rightly invokable for confirmation of the adjudged demands on the appellant.

5. Heard both sides and examined the case records.

6. Section 73 ibid deals with the provisions for recovery of service tax, that has not been levied or paid or has been short-levied or short-paid or erroneously refunded. The relevant provisions under section 73 are extracted herein below:-

> "(1) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within* [1]*[one year] from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*
>
> *PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-*
> *(a) fraud; or*
> *(b) collusion; or*
> *(c) wilful mis-statement; or*
> *(d) suppression of facts; or*

> *(e) Contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*
>
> *by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [1][one year], the words "five years" had been substituted."*

7. On reading of the above statutory provisions, it transpires that recovery of short-levied or non-levied or short-paid service tax amount within the normal period is the rule, in the eventuality of short-levy or short-payment of tax amount by the assessee. In other words, whatever may be the reason, if the service tax amount has not been paid by the assesse, the department is free to initiate proceedings under the main part of sub-section (1) of Section 73 *ibid* to recover of the service tax amount, which have been short-levied or non-levied etc. On the contrary, invocation of the proviso clause contained in Sub-Section (1) of Section 73 *ibid* is the exception, which can be sparingly invoked, only in the eventuality, of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter V of the Finance Act, 1994 or rules made there under, with intent to evade payment of the service tax. In such eventuality, instead of the period of one year, the show cause notice can be issued by invoking the extended period of limitation within the period of five years from the relevant date. In this case, it is an admitted fact on record that based on the books of accounts, maintained by the appellant, the officers of service tax department had conducted the audit and they have not disputed the authenticity or accuracy of records maintained by the appellant. Further, it is also an admitted fact on record that towards provision of the taxable service, the appellant had received lesser amount than that as shown in the invoices issued to the service recipient. Since, towards provision of the taxable service, the appellant had received the lesser amount, after adjustment of the aforementioned deductions, their tax liability is confined only to the amount, which was actually received for provision of the taxable service. Thus, under such circumstances, the charges of suppression etc. cannot be levelled against the appellant. Appreciating the facts and circumstances of the case, the

learned Commissioner (Appeals) has also modified the adjudication order-in-original, in setting aside the penalty imposed under Section 73 *ibid*. Thus under such circumstances, we are of the considered view that extended period of limitation cannot be invoked for recovery of the adjudged demands confirmed beyond the normal period of one year.

8. In view of the foregoing discussion, we do not find any merits in the impugned order, insofar as it has confirmed the service tax demand for extended period, beyond one year along with the interest and penalty under Section 77 *ibid* on the appellant. Therefore, by setting aside the same, the appeal is allowed in favour of the appellant.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member(Technical)

Sm.