

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH

**Service Tax Miscellaneous Application No. 85565 of 2019
Service Tax Miscellaneous Application No. 86076 of 2022**

(On behalf of Appellant)

In

Service Tax Appeal No. 87800 of 2017

(Arising out of Order-in-Original No. 38-39/ST-VII/CD/2016 dated 15.11.2016 passed by the Commissioner of Service Tax, Mumbai - VII.)

M/s. Man Infraconstruction Limited
12th Floor, Krushal Commercial Towers,
GM Road, Chembur (West)
Mumbai – 400 089

.....Appellant

VERSUS

Commissioner of CGST, Mumbai East
9th Floor, Lotus, Parel, Lotus Infocentre,
Near Parel Station, Parel (East)
Mumbai – 400 012

.....Respondent

APPEARANCE:

Shri J.H. Motwani, Advocate for the Appellant

Shri Nitin M. Tagade, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 86069/2023

Date of Hearing: 30.05.2023

Date of Decision: 05.07.2023

PER: DR. SUVENDU KUMAR PATI

Legality of the order passed by the Commissioner of Service Tax, Mumbai-VII confirming duty demand under Section 73, interest

under Section 75 and penalties under Section 76, 77 & 78 of the Finance Act, 1994 for the period between 2010 and 2014 made through two show-cause notices dated 30.01.2014 and 15.04.2015 issued on the basis of audit report on the sole ground of mismatch between Service Tax returns and financial statements of the Appellant company is assailed in this appeal.

2. Fact of the Appellant's case, in brief, is that it has been engaged in the business of construction of infrastructure projects like roads, bridges, ports etc. and construction of residential as well as commercial premises, having Service Tax registration and it has been filing periodic returns. Audit was conducted in the Appellant's company by the Service Tax auditors for the financial year 2009-10 to 2010-11 and in complete disregard of Appellant's contentions, final audit report dated 13.04.2014 was issued alleging short payment of Service Tax of Rs.14,52,71,013/- by the Appellant and demand was accordingly made by the Respondent-Department on the basis of allegedly erroneous independent reconciliation statement of Service Tax returns and financial statements prepared by the Auditors. *Vide* show-cause notice dated 30.01.2014 demand for financial year 2009 to 2011 for the above referred amount was made alongwith proposal for recovery with applicable interest and penalties under various Sections of the Finance Act, 1994. Likewise for the years 2012 to 2014 CERA audit was conducted and a proposal for recovery of additional Service Tax to the tune of Rs.44,30,08,042/-

alongwith interest and penalties were also made on the similar ground through show-cause notice dated 15.04.2015. Appellant contested both the demands but the Commissioner of Service Tax, Mumbai-VII *vide* his above referred order had confirmed the duty demand, interest and penalties that is being assailed in this appeal.

3. During the course of hearing it has been noticed that two miscellaneous applications were filed for acceptance of additional piece of documentary evidence obtained from the Respondent-Department by the Appellant through RTI applications and the same has been accepted as additional pieces of documentary evidence on 30.05.2023 as they are in the nature of public documents and were initially sought by the Commissioner to pass the order under challenge in this appeal without placing reliance on it in his order.

4. Learned Counsel for the Appellant Mr. J.H. Motwani submitted that after the common Order-in-Original was passed, it had come to their knowledge that an internal verification report, in detail, was sought from the jurisdictional Assistant Commissioner, that was submitted by the Assistant Commissioner after examining the documents submitted by the Appellant during course of hearing by the Adjudicating Authority namely the Commissioner for which while filing the appeal they also had sought for copy of the internal audit report that should have formed the basis of the order passed by the Commissioner but in complete disregard of the reconciliation data

submitted by the Appellant and the internal audit report of the Assistant Commissioner, learned Commissioner had passed his order confirming demand etc. He further submitted that learned Commissioner also had ignored the CBIC Circular/Instruction No. 137/472020-ST dated 01.04.2021 and 23.04.2021 as well as instruction dated 26.10.2021 that clearly indicated that in case of mismatch between reconciliation statement and ITR-TDS data received from the Income Tax Department, a reconciliation statement has to be sought from the tax payer for the difference and demand notice may not be issued indiscriminately based on the difference between ITR/taxable value and taxable value of the Service Tax returns. Further, he reiterated that internal report submitted by the departmental authority not only indicated that Appellant had provided clarification to every allegations made in the audit report but also it had exhibited the fact that Appellant had submitted all relevant documents before the order had been passed. In citing judgement of the Hon'ble High Court of Calcutta reported in *2000 (125) ELT 328 (Cal.)* in the case of *Assistant Collector of Customs Vs. Soorajmull Nagarmull*, he further argued that if certificate/reports were withheld, the only inference that can be drawn is that they were deliberately withheld so as to deprive the party to establish his/her contention which is not a judicial act and, therefore, it would lead to the conclusion that the finding was not *bona fide* and should be regarded as *mala fide*. He rest his argument is stating that internal report was withheld from the Appellant that

had denied fair try to the Appellant in violation of natural justice, to which effect also he placed his reliance on the decision of the Hon'ble Apex Court passed in the case of *Reliance Industries Limited Vs. SEBI (Criminal Appeal No. 1167 of 2022)* on which score alone the appeal should be remanded back to the Adjudicating Authority for a fair adjudication upon re-examination of their own internal audit reports and documents.

5. In response to such submissions, learned Authorised Representative for the Respondent-Department Mr. Nitin Tagade made his submission in support of the reasoning and rationality of the order passed by the Commissioner but fairly conceded that internal audit reports, which are annexed to the miscellaneous applications, were not apparently taken into consideration by the Commissioner while passing his order.

6. We have perused the case record *vis. a vis.* submissions made by the adversaries. As could be noticed from the miscellaneous application and its annexed documents, reconciliation statements were submitted *vide* letter dated 26.12.2014 and 17.05.2015 alongwith several documents and internal audit report was also submitted by the Assistant Commissioner of Service Tax, Division-II, Mumbai on dated 04.11.2016 to the Commissioner who passed the order on dated 15.11.2016 i.e. almost 12 days after receipt of the said report but neither he considered the reports nor given a chance

of hearing to the Appellant to examine the reports received by him through an internal enquiry. There is also a comparative analysis made in a tabular form by the Appellant and produced here that speaks about the gist of findings available in the internal report and the observations made by the Commissioner in his impugned order on each and every disputed points. *Prima facie* it appears that there is substance in the contention made by the Appellant that internal examination report, called for and received by the Commissioner, was favouring the stand taken by the Appellant but without delving into detail of each aspects dealt in the report and attempting to compare the same, that would mount to conducting further enquiry at the Appellate stage, we consider it appropriate to remand the matter back for re-adjudication as Appellant was not provided with an opportunity to defend its case by the Commissioner and not provided with copies of the said report and in complete disregard of the same the order was passed contrary to the observation made by the Hon'ble Supreme Court and Hon'ble High Court of Calcutta as referred above. Hence the order.

THE ORDER

7. The appeal is allowed by way of remand for a *de novo* adjudication on the basis of additional documentary evidence obtained through RTI and causing such further enquiry as the Commissioner may deem fit and proper. Accordingly, the order passed by the Commissioner of Service Tax, Mumbai - VII *vide*

Order-in-Original No. 38-39/ST-VII/CD/2016 dated 15.11.2016 is hereby set aside. Matter being quite old, the Commissioner is expected to complete the adjudication process within 4 months of receipt of this order and the Appellant herein, as is duty bound, shall participate in the proceeding upon notice. Miscellaneous applications are also disposed of.

(Order pronounced in the open court on 05.07.2023)

(Dr. Suwendu Kumar Pati)
Member (Judicial)

(Anil G. Shakkwar)
Member (Technical)

Prasad