

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

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85294 of 2021

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-044-2020-21 dated 30.09.2020 passed by Principal Commissioner (Appeal-II), Central Tax, Pune.)

Vishal Buildcon

S. No.1A, F-Building, Office No.2
Mantri Market, Hadapsar
Pune – 411 028.

.....Appellants

VERSUS

**Commissioner of CGST & Central Excise
Pune-II**

GST Bhavan, 41/A, Sasson Road
Pune - 411 001.

.....Respondent

Appearance:

Shri Prateek Jha, Advocate for the Appellants

Shri S.B.P. Sinha, 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/85268/2024

Date of Hearing: 07.11.2023

Date of Decision: 06.03.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Vishal Buildcon (herein after, referred to as 'the appellants'), assailing the Order-in-Appeal No. PUN-CT-APPII-000-044-2020-21 dated 30.09.2020 (herein after, referred to as 'the impugned order') passed by the learned Principal Commissioner (Appeal-II), Central Tax, Pune.

2. Briefly stated, the facts of the case are that the appellants herein is a proprietary firm engaged in construction of residential complexes, works contract etc. and for the purpose of providing taxable services they have registered with the jurisdictional service tax authorities. During verification of the data provided by third party i.e., Income Tax Department in the form

of 26AS statement, it was observed that the appellants have shown income as per ITR/TDS for the year 2012-2013 as Rs. 6,36,27,376/- whereas value of services on which service tax is payable as per Max-ST3 returns is shown as Rs. 5,61,14,132/-, thereby resulting in difference of Rs. 69,35,707/- on which service tax has not been paid. According by the Department had issued Show Cause Notice (SCN) demanding service tax on differential value of Rs. 69,35,707/- under Section 73(1) of the Finance Act, 1994 along with interest and proposing penalties under Section 70, 77 and 78 *ibid*. The said SCN was adjudicated by original authority in confirming the adjudged demands along with interest, fine/late fees and imposed penalties under Sections 73 and 75 *ibid*, vide Order-in-Original No. CGST/PUNE-II/JC/026/2019-20 dated 16.10.2019 which was received by the appellants on 30.10.2019. Being aggrieved with the above order, the appellants have preferred an appeal before the Principal Commissioner (Appeals) by filing an application on 17.03.2020 i.e., four months and seventeen days after receipt of the said original order dated 16.10.2019. On the basis of the legal provisions under Section 85(3A) *ibid*, providing for a time limit of two months for filing appeal before the Principal Commissioner (Appeals), with a further period of one month extendable in a situation where there was sufficient cause to show that the appellants was prevented from presenting such appeal, the Principal Commissioner (Appeals) found that the appeal was filed beyond the maximum three months' time, and hence dismissed it as being hit by limitation of time bar vide impugned order dated 30.09.2020. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate for the appellants contends that there was genuine and reasonable cause for delay in filing the appeal before the Principal Commissioner (Appeals). The appellants had handed over the original order to his consultant for filing an appeal; however as he did not receive the papers for signature from his consultant in time, he had enquired about the status of filing this appeal before the Principal Commissioner (Appeals). Due to the consultant's inability to file an appeal within the time limit, the appellants took back the original order from him and has engaged some other consultant who had advised him to get the appeal filed immediately within the stipulated two months. However the process of preparation of appeal papers had taken some more time and the appeal could ultimately be filed on 17.03.2020 having a delay of 18 days beyond the permissible time

limit of three months. It was also prayed by the learned Advocate that the original order suffered from many defects such as calculation of the value of works contract, as the appellants have not defaulted in making payment of service tax chargeable as per law. He further submitted that in fact, the accounts of the appellants have been duly audited by the Pune-III, Service Tax Cell, Group-I audit officers covering the period July, 2010 to March, 2014, and the differential amount of service tax demanded have been fully paid by the appellants, in compliance with the Audit Report No.ST/104/2014-15, which has also been discussed in the MCM meeting held on 28.08.2014 and such tax payments have been accepted and the objections raised by the Department was closed. The learned Advocate pleaded that the during the proceedings before the authorities below, they had explained the situation that there was ambiguity in calculation of taxable turnover for the purpose of ST-3 returns, and when the records were audited by the Department, the correct amount of taxable value of services were identified and they have paid service tax accordingly. However these facts have not been considered by the authorities below, on the merits of the case. The show cause proceedings have simply demanded the service tax on the basis of highest difference between the value of services declared in the ITR for income tax purpose and the value of services indicated in ST-3 returns filed, without considering the explanations offered by the appellants. Thus he claimed that the appellants did not contravene any of the legal provision.

3.2 In support of their stand, the learned Advocate had relied upon the following decisions of the Tribunal and the judgement of the Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *Jagdish Ispat Pvt. Ltd. Vs. The Commissioner, Raipur* – Final Order No. 51670/2019 (Tri.- Delhi)

(ii) *Yapp India Automotive Systems Pvt. Ltd. Vs. C.C.E. & S.T, Pune-I* – Final Order No. A/86775/2018 (Tri.-Mumbai)

(iii) *Banshidhar Sewbhagovan & Company Vs. Collector of Central Excise* - 1990 (50) E.L.T. 192 (S.C.)

4. Learned Authorised Representative (AR) reiterated the findings made by the Principal Commissioner of CGST & Central Excise (Appeal-II) in the impugned order and submitted that as the appeal was filed beyond the time limit prescribed under Section 85(3A) of the Finance Act, 1994, without going into the merits of the case, he dismissed the appeal filed by the

appellants on limitation by relying on the decision of the Hon'ble Supreme Court in *Singh Enterprises Vs. Commissioner of C. Ex., Jamshedpur* - 2008 (221) E.L.T. 163 (S.C.)

5. We have heard both sides and perused the case records and the written paper books submitted in this regard.

6.1. The issue involved herein is to decide whether the appellants prayer for condoning the delay in filing of the appeal by the appellants before the Principal Commissioner of CGST & Central Excise (Appeal-II) can be entertained and whether the case merits consideration of the Tribunal for directing the authorities below for fresh adjudication of the case on merits.

6.2. The relevant legal provisions under which appeal can be filed before the appellate authorities and the procedure in appeal under the Finance Act, 1994 and under the Central Excise Act, 1944, as applicable to the matters relating to service tax, are extracted and given below:

"Finance Act, 1994

Appeals to the Commissioner of Central Excise (Appeals).

85. (1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter, made before the date on which the Finance Bill, 2012 receives the assent of the President:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months :

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).

Appeals to Appellate Tribunal.

86. (1) Save as otherwise provided herein, an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order:

XX XX XX XX XX

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (1) or sub-section (3) or sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

XX XX XX XX XX

(7) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944)."

and

"Central Excise Act, 1944

Procedure in appeal.

35A. (1) The Commissioner(Appeals) shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Commissioner(Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner(Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) The Commissioner(Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against :

Orders of Appellate Tribunal.

35C. (1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed.

XX XX XX XX XX

(4) Save as provided in the National Tax Tribunal Act, 2005, orders passed by the Appellate Tribunal on appeal shall be final."

6.3 From plain reading of the above legal provisions, it transpires that for the period relating to the present case in hand i.e., subsequent to amendment introduced through the Finance Bill, 2012, the Commissioner

(Appeals) in an appeal filed before him could consider a case for hearing and determination of the appeal for passing an order, if the same is filed within a period of two months from the date of receipt of the order-in-original. Further, if a case has been made out showing that there was sufficient cause by which the appellant was prevented from filing an appeal within a period of two months, he may allow it to be presented within a further period of one month. Thus, the maximum period within which the Commissioner (Appeals) can entertain an appeal before him is three months. As in the present case the appeal has been filed by the appellants beyond the prescribed maximum period of three months, there is no legal provision under which the same could be obtained by the Commissioner (Appeals).

6.4 We find that the Hon'ble Supreme Court in the case of *Singh Enterprises* (supra), even though dismissed the appeal filed by the party, however had held that the Commissioner of Central Excise (Appeals) and the Tribunal being creatures of Statute are vested with the jurisdiction to condone the delay beyond the permissible as provided under the respective Statute. Further, it was also held that there cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps, and it has to be decided on merits of the case after taking note of the peculiar background facts of each of the case. The relevant paragraphs of the above judgement is extracted below:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

9. *Learned counsel for the appellant has emphasized on certain decisions, more particularly, I.T.C.'s case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.*

10. *Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs."*

6.5 We also find that the Hon'ble Supreme Court in the case of *Banshidhar Sewbhagovan & Co. (supra)*, had held that the appellant cannot be penalised for the default of the counsel. The relevant paragraph of the above judgement is extracted below:

"3. The order of the Tribunal in question was one refusing to restore an appeal dismissed in default. It does appear that there was some negligence on behalf of the counsel who appeared before the Tribunal but we do not think that the appellant should be penalised for the default of the counsel. We set aside the order of the Tribunal and restore the appeals before it, being Appeal Nos. E.1282/83-D and 1542/83-D."

6.6 It is a well settled principle that the statute must be read as a whole in its context to understand its true meaning and intent. When the question arises as to the meaning of a certain provision in the statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. This statement of rule was adopted by the Honourable Supreme Court in the case of *Poppatlal Shah vs The State Of Madras, Union Of India & Others* - 1953 AIR 274; 1953 SCR 677 as well as in the case of *Union of India Vs. Elphinstone Spinning & Weaving Co. Ltd. & Ors.* - AIR 2001 SC 724. The relevant portion of the said judgement of Hon'ble Court in *Elphinstone supra*, is extracted below:

"It is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word phrase or sentence is to be considered in the light of the general purpose and object of the statute."

Thus, we are of the considered view that when an issue had not been examined in detail by the original authority, and when such matter was preferred in an appeal before the Commissioner (Appeals), in case if such appeal is filed beyond the time limit provided in law, and the first appellate authority is unable to entertain the appeal on account of time-bar, the course of option available to the person aggrieved is to appeal before the next appellate authority i.e., the Tribunal in this case, who could consider such a case in terms of the legal provisions of the respective Acts and pass such order as it thinks fit, in confirming, modifying or annulling the decision or order appealed against or refer the case back to the authority which passed such order or direct for fresh adjudication of the case.

6.7 In this context, we are of the considered view that in the factual matrix of the case, where the mis-match of the figures of 'sales receipts' taken from Form 26AS statement relevant to income tax purpose with the value of taxable services for payment of service tax, requires detailed examination of the facts of the case along with various documents relevant to the issue by the original authority. We further note that when the details furnished by the appellants such as Audit Report No.ST/104/2014-15 of the department providing 'Sales reconciliation' after perusal of records maintained by the appellants, which was duly approved by the Commissioner in MCM meeting held on 28.04.2014; service tax payments made during 2012-2013 for Rs.9,49,818/-; Balance sheet; profit and loss account etc. have not been taken into consideration. It is also important to note that principles of natural justice has not been observed by the original authority as no efforts were taken by authorities below for reconciliation of the figures obtained from third party/income tax department with taxable value as per the Finance Act, 1994, for arriving at the service tax liable to be paid to the government and avoided such an exercise, by simply stating that ST-3 returns data is not available, and by ignoring the details provided by the appellants.

6.8 We further find that in similar matter the Co-ordinate Bench of this Tribunal in the case of *Haiko Logistics India Pvt. Ltd. Vs. Commissioner of Service Tax – Delhi-III* – (2023) 13 Centax 79 (Tri.-Del.) have held that no demand of service tax can sustain merely on the basis of the difference in figures in ST-3 and Form 26AS as there is difference in the methodology in preparing both the records and Form No. 26AS is not a statutory document

for determining the taxable turnover under the service tax law. The relevant paragraphs of the above order is extracted below:

"Demand of service tax on difference in figure in ST-3 and Form 26AS (Department Appeal)

28. *With regard to non-payment of service tax on the difference in value in Form 26AS and ST-3 returns, the finding recorded by the Commissioner is as follows:*

- (i) A certificate from an independent Chartered Accountant has been submitted wherein it has been certified that the entire income and TDS, as reflected in Form 26AS, has been duly considered as part of audited financial year 2014-15 prepared by the appellant and that the income reflected in form 26AS forms part of the revenue figure of Profit & Loss account and has duly been recorded in the books of account. Since demand has been raised on the basis of the differences in balance sheet and ST-3 (gross income vis-à-vis the income on which service tax paid in ST-3 returns), the second demand on the basis of the reconciliation of the same with ST- 3 Returns filed by the appellant shall not be proper and correct as it would be superfluous and would lead to duplication of demand. Thus, demand is not sustainable.*

29. *The department has challenged the dropping of demand contending that the failed to appreciate the importance of Form 26AS in assessing the service tax liability. It has been repeatedly held that no demand can sustain merely on the basis of the difference in figures in ST-3 and Form 26AS as there is difference in the methodology in preparing both the records and Form No. 26AS is not a statutory document for determining the taxable turnover under the service tax provision. In this connection reliance can be placed on the decisions of the Tribunal in Quest Engineers & Consultant Pvt. Ltd. v. Commissioner, Central Goods & Service Tax and Central Excise 2021 (10) TMI 96- CESTAT Allahabad and Krishna Construction Co. v. C.C.E. & S.T.-Bhavnagar 2022 (8) TMI 644- CESTAT Ahmedabad.*

30. *Regarding the extended period of limitation, the Commissioner observed that the infractions came to the knowledge of the department only during scrutiny and under self-assessment regime it was necessary for the appellant to make full disclosure in the ST-3 returns. Thus, failing to file the ST-3 returns properly infers mala fide intent to evade tax and so the extended period of limitation would be invokable and interest would be recoverable, and penalty imposable under section 78 of the Finance Act. In view of the aforesaid discussion, it would not be necessary to examine whether the extended period of limitation could be invoked in regard to the first show cause notice dated 10-10-2014.*

31. *Thus, Service Tax Appeal No. 52935 of 2016 and Service Tax Appeal No. 53001 of 2018 filed by the appellant deserve to be allowed and are allowed. The impugned orders to the extent they have been assailed in these two appeals are set aside. Service Tax Appeal No. 53022 of 2018 filed by the department deserves to be dismissed and is dismissed."*

7. In the backdrop of the factual matrix of the present case, we find that there are no strong grounds to hold that the appellants did not pay service tax in respect of the differential amount demanded in the show cause proceedings, owing to the reason that the Audit Report No.ST/104/2014-15 of the Department determining the service tax liability of the appellants after verification of the records relating to the period July, 2010 to March, 2014, have been duly paid by the appellants and the same has been accepted by the Department.

8.1 We further note that the CBIC had issued Instructions dated 26.10.2021 on the subject of indiscrete show cause notices issued by the service tax authorities based on the difference in ITR-TDS data and service tax returns, by directing the field formations that they should issue such SCN only after proper verification. Extract of the relevant instruction is given below:

"Representations have been received from various trade bodies and associations regarding instances of indiscriminate issuance of demand notices by the field formations on the basis of ITR-TDS data received from Income Tax Department.

In this regard, the undersigned is directed to inform that CBIC vide instructions dated April 01, 2021 and April 23, 2021 issued vide F.No.137/472020-ST, has directed the field formations that while analysing ITR-TDS data received from Income Tax, a reconciliation statement has to be sought from the taxpayer for the difference and whether the service income earned by them for the corresponding period is attributable to any of the negative list services specified in Section 66D of the Finance Act, 1994 or exempt from payment of Service Tax, due to any reason. It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.

It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee."

8.2 In the instant case, we find that the merits of the case have not been examined by the authorities below and by the Principal Commissioner (Appeals), as he had rejected the appeal filed by the appellants only on the basis of limitation of time. Thus we are of the considered view, that the ends of justice would be met, if the case of the appellants was examined on merits by allowing the case to be heard by the original authority in fresh adjudication of the case, by taking into account all the relevant facts and by following the legal provisions of the Finance Act, 1994.

8.3 In view of the foregoing discussions, we remand the case for *de novo* consideration of this case by the original authority in fresh adjudication of the case, after taking additional evidence and documents to be submitted by the appellants, if any. Needless to say that written submission and documents to be filed by the appellants should be taken on record and sufficient opportunity for personal hearing should be given to the appellants, before an order is passed in fresh adjudication.

9. Therefore, by setting aside the impugned order dated 30.09.2020, we remand the case to the original authority of the Central GST & Central Excise, Pune-II Commissionerate, Pune for *de novo* fresh adjudication of the case.

(Order pronounced in open court on 06.03.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha