CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. 5

Service Tax Appeal No. 86585 of 2022

(Arising out of Order-in-Appeal No. DL/220/Appeal Thane/BW/2021-22 dated 20.01.2022 passed by the Commissioner of CGST & Central Excise (Appeals), Thane, Mumbai)

Jagdish Prasad Nathulal Gupta **Appellant**
Om Shiv CHS, 1/A, S.V. Road,
Manpada – Thane 400 607.

Vs.

Commissioner of CGST, Bhiwandi **Respondent**
12th Floor, Lotus Infocentre,
Near Parel Station,
Parel (E), Mumbai 400 012.

Appearance:

Shri Anurag Mishra, Advocate with Ms. Sanya Bhatia, C.A., for the Appellant
Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 30.04.2024
Date of Decision: 10.06.2024

FINAL ORDER NO. 85568/2024

PER: ANIL G. SHAKKARWAR

Brief facts of the case are that the appellant is registered with Service Tax Department and has been filing ST-3 returns. Appellant was issued with a show cause notice dated 24.04.2019. It was stated in the said show cause notice that on verification of data received by Revenue in respect of income tax return filed by the appellant, it was noticed that for the period from October 2013 to March 2014, appellant has shown income of Rs.4,76,94,641/- in the income tax return and has shown a turnover of Rs.22,30,590/- in the ST-3 returns filed by them for the said period. Therefore, on the differential amount of Rs.4,54,64,051/-, service tax of Rs.56,19,357/- @ 12.36% was short paid by the appellant. Therefore, by invoking proviso to sub-section (1) of Section 73 of Finance Act, 1994 for extended period of limitation, appellant was called upon to show cause as to why short paid service tax amounting to Rs.56,19,357/- should not be recovered from them. Appellant was also called upon to show cause as to why they should not pay interest on the said short paid service tax and why they should not be imposed with penalty under Section 78 of Finance Act, 1994. At the end of the show cause notice, there is no list of documents based on which the said show cause notice was relied upon. Appellant vide letter dated 17.09.2020 submitted copy of balance sheet, profit and loss account and copies of ST-3 returns filed for the period from April 2013 to March 2014. Appellant submitted their reply dated 04.02.2021 to the said show cause notice along with copy of sale/purchase sample bills, copy of party ledgers, copy of 26AS statement, copy of contract agreement for the work undertaken and reconciliation statement of amounts which were not liable to service tax. The said show cause notice was adjudicated through order-in-original dated 26.03.2021 issued on 13.04.2021. Through the said order, original authority confirmed the demand of service tax of Rs.38,49,561/- and imposed penalty of equal amount under Section 78 of Finance Act, 1994 and ordered the appellant to pay interest on the confirmed service tax. Aggrieved by the said order, appellant preferred appeal before Commissioner (Appeals). Learned Commissioner (Appeals) through impugned order-in-appeal dated 20.01.2022 rejected the appeal filed before him. Aggrieved by the said order, appellant is before this Tribunal.

2. Heard the learned counsel for the appellant. Learned counsel for the appellant has submitted that the entire demand raised in the subject show cause notice is based on the difference between the amount of services rendered as reflected in ST-3 returns and the figure of income in the income tax return and submitted that the entire demand is presumptive. He has further submitted that it is well settled principle of law that corroborative evidence to prove charges of demand of service tax is essential and that except the figure shown in income tax return, nothing has been relied upon to prove that the appellant

has provided services which were liable for payment of service tax. Learned counsel for the appellant has submitted that as all required documents like sale & purchase summary, copy of the sale & purchase sample bills, reconciliation statement of amount not liable to service tax, copies of balance sheet, profit and loss account and copies of ST-3 returns were submitted and the same were not taken into consideration and as a result, the process of adjudication has not taken place. He has relied on Master Circular No. 1053/02/2017-CX dated 10.03.2017 which was issued by the Department of Revenue (Central Board of Excise and Customs) much before the issue of subject show cause notice, wherein in para 2.6 of the said circular, it has been instructed to the departmental officers that facts and evidence needed to prove the allegations should be discussed in the show cause notice so as to arrive at the charges of omission and commission against the noticee and that there was a need to clearly spell out the charges against the noticee in the show cause notice. He has submitted that the present show cause notice is issued in violation of the said instructions. He has further submitted that there are standing instructions for pre-consultation with the appellant by the officers of Revenue before issue of show cause notice and the said procedure was also not followed. He has relied on following precedent decisions of this Tribunal:-

a. Umesh Tilak Yadav (2024) 159 taxmann.com 336 (Mumbai-CESTAT)

b. Commissioner vs. Modern Road Makers Pvt. Ltd. (Appeal No. ST/86984/2021)

c. Principal Commissioner vs. SBI Life Insurance Co. Ltd. [2024] 159 taxmann.com 168.

d. Lord Krishna Real Infra Pvt. Ltd. 2019 (2) TMI 1563 – CESTAT All.

e. Sharma Fabricators & Erectors P Ltd. 2017 (7) TMI 168 – CESTAT All.

f. Kush Construction 2019 (5) TMI 1248 – CESTAT All.

Learned counsel has submitted that it is no more *res integra* that only on the basis of difference between figures reflected in ST-3 return and the income reflected in income tax return, demand of service tax on differential value cannot be determined unless the assessee's records are scrutinized and on the basis of the activities of the assesse unless it is established that a particular consideration was received for providing service and the same was not covered in ST-3 return, demand cannot be raised. He has submitted that since the show cause notice is not sustainable, appeal should be allowed. Further, he has also submitted that the demand is barred by limitation since Revenue could not establish any of the ingredients for invocation of extended period nor Revenue could establish intention to evade payment of service tax.

3. Heard the learned AR. He has supported the impugned order.

4. We have carefully gone through the record of the case, submissions made and relied upon case laws. There are three issues for determination by us –

A. Whether for determination of service tax not levied or not paid under the provisions of Section 73 of Finance Act, 1994, it is essential to determine the value of taxable services for charging service tax as provided under Section 67 of the said Act.

B. Whether the value of taxable services for charging service tax is properly determined during the proceedings of this case.

C. Whether the impugned order is sustainable in law or whether any part of the said impugned order is not sustainable.

We take up the issues one by one.

5. For determination of the issue at A above, we note that charging Section 66B of Finance Act, 1994 provides for levy of service tax at 14% on the value of service. Section 67 of

Finance Act, 1994 provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall be the consideration in money charged by the service provider. Therefore, it is primarily important to determine the value on which service tax shall be levied as a specific percentage and such value should be the value of taxable service. Clause (44) of Section 65B of Finance Act, 1994 has provided for definition of service and it has elaborately dealt with a list of activities which shall not be included in such definition. Further, Section 66D of Finance Act, 1994 has provided for negative list of services where the activities covered by such negative list do not qualify to be a taxable service. Therefore, it is clear that while determining value of taxable service under Section 67 *ibid*, such aspect as to the activities which are covered by negative list and activities which are mentioned in the definition of service as those which are not covered by such definition becomes important. Therefore, we come to a conclusion that for arriving at amount of service tax not paid or not levied arriving at correct value of taxable service which has not suffered service tax needs to be determined as the first step.

6. Now we will examine the second issue at B above. We note that without examination of any of the records of the appellant on the basis of data received from outside source, Revenue has come to a conclusion that taxable value of Rs.4,54,64,051/- for the period from October 2013 to March 2014 has not been subjected to payment of service tax. In the said show cause notice, no evidence has been brought forward to establish that the said taxable value of Rs.4,54,64,051/- is consideration received for providing service. We examine further the charges levelled as stated above are sustainable or not. We will examine them with reference to the precedent decisions of this Tribunal relied upon by learned counsel for the appellant. For the sake of ready reference, we reproduce below para 4 of final order of this Tribunal in the case of Umesh Tilak Yadav reported at [2024] 159 taxmann.com 336 – CESTAT MUMBAI:-

"4. We have carefully gone through the record of the case and submissions made. The demand was raised invoking the provisions of sub-section (1) of Section 73 of Finance Act, 1994. The said provision of Finance Act empowers Revenue for recovery of service tax which has not been levied or which has not been paid or which has not been short levied or which has not been short paid or which has been erroneously refunded. Therefore, the first step for Revenue is to establish that a specific amount to be demanded through show cause notice by invoking the said provision is service tax either not paid or short paid or not levied or short levied. Therefore, it is essential to establish that the value on which such service tax is calculated is the value under Section 67 and the same is derived from the consideration received by the appellant out of the activity which has to satisfy definition of service under sub-section (44) of Section 65B of Finance Act, 1994. Such type of examination of the facts and arriving at the prima facie view that the appellant had received the consideration by providing service is missing in the show cause notice. We, therefore, hold that the said show cause notice dated 26.06.2020 is not sustainable in law."

We also reproduce below para 5 and 6 of final order of this Tribunal in the case of Commissioner vs. Modern Road Makers Pvt. Ltd. passed in service tax appeal No. 86984 of 2021 through final order No. 86160/2023 dated 28.07.2023:-

"5. We have carefully gone through the record of the case and submissions made. Right at the outset we have examined the show cause notice. The show cause notice dated 16.04.2019 states that the same is enclosed with two annexures. Annexure-I is work sheet. The work sheet states the turnover of the respondent for the year 2013-14 as reflected in income tax return and turnover reflected in ST-3 return as nil and the difference between the two turnovers and service tax @ 12.36% on the said difference. Annexure-II is a letter dated 25.10.2018 issued by Superintendent (Data Cell) presuming that the respondent has shorted reported turnover in their ST-3 return to the extent of difference stated in Annexure-I. The entire show cause notice nowhere examines as to on what account the

turnover has taken place. The said show cause notice was issued without examining the activity of the respondent and without examining the reason for difference in turnover reported in income tax return and ST-3 return. It was presumed in the show cause notice that the entire turnover reported in income tax return was on account of provision of taxable service and by calculating 12.36% of that turnover, service tax demand was raised. The fundamentals of prosecution such as framing charges on the basis of admissible evidence is absent in issue of show cause notice. The basic of any proceeding is to frame charges on the basis of assessee's record and establish that the assesse has short paid calculated and pre-determined amount of service tax and then issue them a show cause notice calling for their explanation as to why the stated amount of service tax should not be recovered from them. The burden of proof is on Revenue to establish that the alleged service tax was short paid by the assesse. Unless such burden of proof is discharged by Revenue, such show cause notice cannot sustain. The preset show cause notice is totally presumptive. Further, the difference in turnover in ST-3 return and income tax return could be on account of non-taxable businesses. So, unless Revenue examines the reasons for the difference, it cannot demand service tax blindly on the basis of difference in the turnover reflected in the two statutory returns. This Tribunal has time and again held as follows:-

a) In the case of Lord Krishna Real Infra Pvt. Ltd. [2019 (2) TMI 1563 – CESTAT ALLAHABAD], it was held as follows:-

"Further, we find that on the basis of form 26AS return filed under Income Tax Act without examining any other records of the appellant, charges of short payment of service tax to the tune of 8 crores were made against the appellant. It was possible for Revenue to know the transactions between other parties & appellant from form 26AS. Revenue could have investigated into the nature of such transactions & should have established that the said transactions were in respect of provision of said service. Then alone the charges of short payment of Service Tax would have sustained. We find that Final

Order of this Tribunal in the case of Sharma Fabricators Pvt. Ltd. (supra) is squarely applicable in the present case. We, therefore, hold that Revenue did not discharge its burden to prove short payment of service tax. We also hold that the said show cause notice dated 05.10.2016 is not sustainable."

b) In the case of, Sharma Fabricators & Erectors Pvt. Ltd. [2017 (7) TMI 168 – CESTAT ALLAHABAD], it was held as follows:-

"Surprisingly the draft audit report was the relied upon document. It may be worth mentioning here that the purpose of audit report is to point out any discrepancy to the notice for examination by the executive and it is the duty of executive to examine the records and examine the objection raised with reference to the records and facts of the case and take a view whether there is a sustainable case for issue of Show Cause Notice. Such vital aspects of framing of charges have been missing in the present case. The charges in the Show Cause Notice have to be on the basis of books of account and records maintained by the assessee and other admissible evidence. The books of account maintained by M/s Sharma were not looked into for issue of above stated two Show Cause Notices. Therefore, the transactions recorded in the books of account cannot be held to be contrary to the facts. Therefore, we hold that the said Show Cause Notices are not sustainable. Since the said Show Couse Notices are not sustainable, appeal bearing No.ST/890/2010 filed by M/s Sharma is allowed and appeal bearing No. ST/949/2010 filed by Revenue is dismissed. Miscellaneous Applications are also stand disposed of. Cross Objection also disposed of."

C) In the case of Kush Constructions [2019 (5) TMI 1248 – CESTAT ALLAHABAD], it was held as follows:-

"After hearing both the sides duly represented by Shri A.K. Singh authorized representative of the appellant on behalf of the appellant and Shri Shiv Pratap Singh learned A.R. on behalf of the Revenue, we note that through impugned order service tax of Rs.93,000/- was confirmed alongwith equal penalty. On

perusal of record, we note that the appellants were registered with the Service Tax Department and also they were filing ST-3 returns. Revenue has compared the figures reflected in the ST-3 returns and those reflected in Form 26AS filed in respect of the appellant as required under the provisions of Income Tax Act, 1961. We note that without further examining the reasons for difference in two, Revenue has raised the demand on the basis of difference between the two. We note that Revenue cannot raise the demand on the basis of such difference without examining the reasons for said difference and without establishing that the entire amount received by the appellant as reflected in said returns in the Form 26AS being consideration for services provided and without examining whether the difference was because of any exemption or abatement, since it is not legal to presume that the entire differential amount was on account of consideration for providing services. We, therefore, do not find the said show cause notice to be sustainable. In view of the same, we set aside the impugned order and allow the appeal."

6. We, therefore, hold that the present show cause notice is totally presumptive. Therefore, we do not find any infirmity in the order-in-original to the extent that the demand of service tax of Rs.292,86,63,640/- is dropped by the original authority. Insofar as the confirmation of demand of service tax of Rs.87,676/- and its equal penalty are concerned and interests on the same are concerned, we set them aside for the reason that the show cause notice is not sustainable. We, however, do not interfere in the dropping of the demand of service tax of Rs.292,86,63,640/- by the Commissioner while setting aside the remaining part of the impugned order."

Further we reproduce below para 7, 8 and 9 of final order of this Tribunal in the case of Principal Commissioner vs. SBI Life Insurance Co. Ltd. reported at [2024] 159 taxmann.com 168 (Mumbai – CESTAT):-

"7. In view of our observation as above and having regard to the findings of the Commissioner noted above, which speak a lot about the defects in the Show-cause notice that has formed the

foundation of this proceedings, we have got no hesitation to go with the order passed by the Commissioner in setting aside the demand etc. raised in the Showcause notice dated 16.04.2019. Further the basis of demand is purely taken from the difference between the value shown in the Service Tax Returns and income shown in the Income Tax Return. In this context it is worth reproducing the finding of this Tribunal made in the case of M/s Umesh Tilak Yadav Vs. Commissioner of Central Excise, Nagpur reported in 2023 (11) TMI 473-CESTAT Mumbai, the relevant portion of which reads.

Para-4 We have carefully gone through the record of the case and submissions made. The demand was raised invoking the provisions of sub-section (1) of Section 73 of Finance Act, 1994. The said provision of Finance Act empowers Revenue for recovery of service tax which has not been levied or which has not been paid or which has been short levied or which has been short paid or which has been erroneously refunded. Therefore, the first step for Revenue is to establish that a specific amount to be demanded through show cause notice by invoking the said provision is service tax either not paid or short paid or not levied or short levied. Therefore, it is essential to establish that the value on which such service tax is calculated is the value under Section 67 and the same is derived from the consideration received by the appellant out of the activity which has to satisfy definition of service under sub-section (44) of Section 65B of Finance Act, 1994. Such type of examination of the facts and arriving at the prima facie view that the appellant had received the consideration by providing service is missing in the show cause notice. We, therefore, hold that the said show cause notice dated 26.06.2020 is not sustainable in law

8. Hence, in view of irregularity in the Show cause and the nonsustainability of demand purely on the basis of difference between ST- 3 return and Income Tax returns of any other period, without any further examination to establish that the difference is on account of consideration received towards discharge of services, the following order is passed.

<u>*THE ORDER*</u>

9. The appeal is dismissed and the order passed by the Commissioner in Order-in-Original No. 45/SN/COMMR-Audit-III/CGST&CEX/2021 vide order dated 30.03.2021 is hereby confirmed."

Further, we also note that the final order of this Tribunal in the case of Sharma Fabricators & Erectors Pvt. Ltd. reported at 2017 (7) TMI 168 – CESTAT Allahabad was affirmed by Hon'ble Allahabad High Court through its order reported at 2019 (22) GSTL J166 (All.).

8. This Tribunal has held in the above stated case of Sharma Fabricators & Erectors Pvt. Ltd. that the charges in show cause notice have to be on the basis of books of account and records maintained by the assessee and other admissible evidence. The said decision of this Tribunal has been affirmed by Hon'ble Allahabad High Court. We note that in the present case the charges were framed in the show cause notice for arriving at taxable value of Rs.4,54,64,051/- without examining the books of account and records maintained by the appellant and without quoting any admissible evidence for making out a *prima facie* case. We note that in the case of Kush Constructions (supra), this Tribunal had held that without examining the records for difference in the figures reflected in income tax returns and ST-3 returns, Revenue cannot raise demand without establishing the entire amount received by the appellant as reflected in the income tax returns is consideration for providing services. It was also held by this Tribunal in the case of Umesh Tilak Yadav (supra) that it is essential to establish that the value on which service tax is calculated is the value under Section 67 and the same is derived from the consideration received by the appellant out of the activity which has to satisfy definition of service under sub-section (44) of Section 65B of Finance Act, 1994 and such type of examination of facts and arriving at *prima facie* view, appellant had received the consideration by providing service is essential for issue of show cause notice. The same is missing in the present case.

9. We, therefore, hold that there was no basis for arriving at taxable value of Rs.4,54,64,051/- for the period from October

2013 to March 2014 in the subject show cause notice dated 24.04.2019. We, therefore, hold that the subject show cause notice is not sustainable in law.

10. Now we come to the third issue framed by us for determination i.e. whether the impugned order is sustainable in law. Since the subject show cause notice is held as non-sustainable, we set aside the impugned order passed by learned Commissioner (Appeals) and allow the appeal.

(Order pronounced in the open court on 10.06.2024)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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ADDITIONAL NOTE ON CONCURRING ORDER:-

I concur with the ultimate findings of the Hon'ble Member (Technical) in allowing the appeal primarily for the reason that there is no reference to the defence reply to the show cause made in the order passed by the Commissioner and nothing is mentioned as to if any reply to show cause was received at his end before commencement of hearing. To my considered opinion, the same forms the primary basis to confirm a demand raised in the show cause notice in view of clear provision contained in section 73 (2) of the Finance Act, 1994. Further, it is also found from the record that documents as sought for, from the Appellant were duly tendered and some sample invoices of purchase and sale were also filed but computation was made by the adjudicating authority in deducting the amount mentioned in the sample invoices from the figures available in income tax TDS data record. TDS Deductions made by twelve parties was noted against actual Deductions from twenty three parties without seeking further detail on deductions against other elven parties which appears to be improper so as to make a demand sustainable. I, therefore, agree with the view of Hon'ble Member (Technical) that appeal is required to be allowed by way of setting aside the order passed by the Commissioner (Appeals) on 20.01.2022 in the above referred Order-In-Appeal and we do so.

(Dr. Suvendu Kumar Pati)
Member (Judicial)