CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH - COURT NO. I

SERVICE TAX APPEAL No. 87082 of 2022

[Arising out of Order-in-Appeal No. DL/63-64/APPEALS THANE/BW/2022-23 dated 23.06.2022 passed by the Commissioner of CGST & Central Excise (Appeals), Thane, Mumbai.]

Nirmangold Property Developers Pvt. Limited .... Appellants
C/o Nitin Anant Patil, Owala
Mogharpada, Ghodbunder Road
Thane, Maharashtra – 400 615.

VERSUS

Commissioner of CGST & Central Excise .... Respondent
Bhiwandi Commissionerate
12th Floor, Lotus Info Centre,
Station Road, Parel (East)
Mumbai – 400 012.

Appearance:

Shri Vinod Awtani, Chartered Accountant for the Appellants

Shri S.B.P. Sinha, Authorized Representative for the Respondent

CORAM: HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85028/2026

Date of Hearing: 28.11.2025
Date of Decision: 20.01.2026

PER: M.M. PARTHIBAN

This appeal has been filed by M/s. Nirmangold Property Developers Private Limited, Thane (herein after, for short, referred to as 'the appellants') against the Order-in-Appeal No. DL/63-64/ APPEALS THANE/BW/2022-23 dated 23.06.2022 (referred to, as 'the impugned order') passed by the Commissioner of CGST & Central Excise (Appeals), Thane, Mumbai.

2.1 Brief facts of the case, leading to this appeal, are summarized herein below:

2.2 The appellants herein, *inter alia*, is engaged in providing "Works Contract service" and for the purpose of payment of service tax and for compliance with service tax statute are registered with jurisdictional authorities holding Service Tax Registration No. AADCN7651EST001. They are also holding PAN No. AADCN7651E for the purpose of income tax purpose.

2.3 During the course of verification of ST-3 Return data filed by the appellant with the data regarding declared turnover in Income Tax Return (ITR)/Tax Deducted at Source (TDS) through 26AS for the year 2013-14, the department had observed that the figures shown at Rs.70,33,042/- in the ITR, does not match with the ST-3 return filed for the period October, 2013 to March, 2014 indicating 'Nil' taxable value of services. Therefore, the department had come to a conclusion that the appellants had not declared the turnover of services to the above extent and that service tax amount of Rs.8,69,283/- had not been paid by the appellant.

2.4 On the above basis, Department issued Show Cause Notice (SCN) No.211/AC/2019-20 dated 24.04.2019 to the appellant demanding service tax of Rs.8,69,283/- along with interest and for imposition of penalty on the appellants. Further, the department also verified the data relating to 2014-15 & 2015-16 and similarly demanded service tax amount of Rs.23,39,421/- by issue of SCN No.04/2020 dated 29.09.2020. In the absence of any reply to the SCN and that in none of the three personal hearing dates/opportunities given, the appellants had appeared before the adjudicating authority, on the basis of the allegations mentioned in the SCN and the data available on record, he had proceeded to adjudicate the case. The original authority i.e., Assistant Commissioner, Division-I, Bhiwandi CGST & Central Excise Commissionerate in adjudication of the case had confirmed the demand of service tax amounting to Rs.8,69,283/- & Rs.23,39,421/- under Section 73(1) of the Finance Act, 1994 along with interest and had imposed Penalty of Rs.8,69,283/- & Rs.23,39,421/- under Section 78 and further penalty of Rs. 10,000/- each under Section 77 ibid vide two Order-in-Original dated 12.02.2021 & 24.03.2022. Being aggrieved with the aforesaid orders of the original authority, the appellant had filed an appeal before the Commissioner (Appeals). In deciding the said appeal vide impugned order dated 23.06.2022, learned Commissioner (Appeals), had on the basis of correct figures of the turnover for the period 2013-14 and that the SCN was issued beyond the statutory five years period had dropped the demand as time barred. Further, in respect of the demand for the period 2014-15 and 2015-16, on the basis of voluntary payment of service tax of Rs.23,39,421/- along with interest of Rs.5,95,071/-, he had set aside the demand of service tax and upheld the order of the original authority to the extent of imposition of penalty of Rs.23,39,421/- under Section 78 ibid by allowing the appeal filed by the appellant to the above extent. Feeling aggrieved with the impugned order, in imposition of penalty, the appellant has filed this appeal before the Tribunal.

3. Heard both sides and perused the case records. The additional submissions made in the form written paper book by both sides in this case were also perused carefully.

4.1 In the appeal preferred by the appellants against the orders passed by the original authority, the learned Commissioner (Appeals) vide impugned order dated 28.06.2022, had set aside the service tax demands and only upheld the imposition of penalty on the appellants under Section 78 of the Act of 1994, as follows:

> *"7.1. ….. Based on statutory records produced by appellant, I find that appellant was receiving income for works Contract service and their turnover was Rs.14,64,548/- in the year 2013-14 and not Rs.70,33,042/- as alleged in demand notice dated 24.09.2019. Therefore, I find that there was an error in demanding appliable service tax for the relevant period in the said demand notice. I find that Rule 7(2) of Service Tax Rules, 1994 provides due date to file ST-3 returns and state that every assessee shall submit the half-yearly return by the 25th of the month following the particular half-year. Therefore ST-3 returns of particular demand on value of Rs.70,33,042/- pertaining to 2012-13 were 25thOctober, 2012 and 25thApril, 2013 whereas the relevant demand Notice on the said taxable value was issued on 24.04.2019 after statutory 5 years under proviso to Section 73(1) of FA, 1994 and accordingly the said demand notice dated 24.04.2019 which is issued on incorrect value and period is actually time barred. Accordingly, impugned order No.36/HQ/Tech-II/KKS/2020-21 dated 12.02.2021 deprived or merit and hit by limitation is liable for setting aside.*
>
> *7.2 In respect of demand notice dated 29.09.2020 demanding Service tax of Rs.23,39,421/- for the period 2014-15 & 2015-16, I find that appellant was providing Works Contract Service and no applicable abatement were considered in the said demand notice. The appellant had already discharged applicable Service Tax with Interest before issuance of said demand notice and this facts were also quoted in their SVLDRS-I application under the column Reasons for disagreement. However, the department proceeded to issue demand Notice after issuance of SVLDRS-3 and non compliance/payment by appellant due to*

> *disagreement. I find that appellant had paid complete service tax of Rs.23,39,421/- with Interest of Rs.5,95,071/- vide challans dated 04.06.2015, 04.01.2016, 20.12.2016 and 28.12.2016. Therefore, I find that appellant had discharged their applicable service tax with interest for the period 2014-15 and 2015-16 voluntarily before applying for SVLDRS and before issuance of demand Notice dated 29.09.2020. I find that appellant had discharged their due Service Tax liability with interest for delayed payment of tax voluntarily but not paid due penalty applicable under Section 78 of FA, 1994. I find that disclosure of Service Tax amount in SVLDRS application itself indicate that there were short payment of tax and the said tax escaped regular self assessment by appellant and accordingly penalty under Section 78 of FA, 1994 is imposable and hence I confirm penalty of Rs. 23,39,421/- under Section 78 of FA, 1994 on appellant. Accordingly, the impugned orders are liable to be set aside except penalty of Rs. 23,39,421/- imposed on appellant under Section 78 of FA, 1994 vide impugned order dated 24.03.2022."*

5. In the above backdrop of the case, the short issue for determination before the Tribunal is whether imposition of penalty on the appellant under Section 78 of the Finance Act, 1994, is correct or not, in terms of the facts of present case?

6.1 On perusal of the facts of the case and the documents submitted by the appellant, the following undisputed facts are required to be taken into account:

(i) Learned Commissioner (Appeals) had dropped the entire duty demands confirmed in the orders of the original authority dated 12.02.2021 and 24.03.2022. However, based on the voluntary payments of service tax along with interest, he imposed penalty alone under Section 78 of the Act of 1994.

(ii) The appellants had paid the disputed service tax amount of Rs.23,39,421/- along with interest vide four challans dated 04.06.2015, 04.01.2016, 20.12.2016 and 28.12.2016;

(iii) The SCN for demand of service tax of Rs.23,39,421/- for the period 2014-15 and 2015-16 was issued by the department on 29.09.2020.

6.2 While adjudicating the SCN dated 29.09.2020, the Assistant Commissioner, Division I, Bhiwandi Commissionerate, had confirmed the service tax demands simply based on the difference between the figures indicating the value of services in ST-3 returns and the ITR-TDS data for the financial year 2014-2015 & 2015-2016. There is no other document or evidence taken on record to show that the taxable service had been rendered by the appellants for substantiation and in confirmation of the service tax demand. Further, the appellants were not heard, though opportunities of three dates were given, before deciding the case by the original authority.

7.1 The first appellate authority, upon noticing the fact that the appellants had already paid the entire amount of service tax demand along with interest, prior to the issue of SCN and had also informed the same to the department in the SVLDRS scheme, had found no ground to sustain the demand and accordingly dropped the demand of service tax. However, he upheld the imposition of penalty on the ground that the appellants had made a declaration in SVLDRS about the non-payment of service tax and thus it is sustainable.

7.2 On perusal of the records of the case, I find that the show cause proceedings were initiated vide SCN dated 29.09.2020, whereas the entire service tax of Rs.23,39,421/- along with interest of Rs.5,95,071/- was paid by the appellants vide four challans dated 04.06.2015, 04.01.2016, 20.12.2016 and 28.12.2016, almost four years prior to the initiation of show cause proceedings. Further, I find that the Designated Committee for scrutiny and approval of SVLDRS application gave 100% relief from interest and penalty, subject to payment of the service tax amount Rs.23,39,421/- as declared by the appellants by issue of SVLDRS-3 form. It is on the basis of such non-payment of service tax amount, the original authority had confirmed the service tax demand Rs.23,39,421/- under Section 73(1) of the Finance Act, 1994 along with penalty of an equal amount of Rs.23,39,421/- under Section 78 ibid. Had the original authority taken into account the fact that the said amount had been already paid by the appellants before issue of SCN, then there would no occasion for the original authority, either to demand service tax or to impose mandatory penalty. Therefore, I find that when there exists no ground to substantiate payment of service tax, which has already been paid four years earlier by the appellants into the Government exchequer, and there arises no reason for imposition of penalty under Section 78 ibid. In fact, on the basis of voluntary payments of service tax along with interest, in terms of the proviso to Section 73(3) of the Act of 1994, the Central Excise Officer shall not serve any notice under Section 73(1) ibid. Therefore, I find that the impugned order, upholding the imposition of penalty imposed by the original authority, is not legally sustainable.

7.3 On perusal of the relied upon case quoted by the learned Advocate for the appellants, I find that the underlying principle decided in those cases is that the serving of valid show cause notice is absolved in cases where the assessee pays the service tax along with interest voluntarily, either on the basis of their own ascertainment or on the basis of ascertainment by a Central Excise Officer. The relevant paragraphs dealing with such issue in the case of *Commissioner of Central Excise, Visakhapatnam Vs. Tirupathi Fuels Private Limited – 2017 (7) G.S.T.L. 142 (A.P.)* is as follows:

> *"**3.** It appears that the respondent-assessee registered themselves as an assessee under the Service Tax Rules, 1994. The respondent is offering the service of transport of goods by road. According to the Department, after an enquiry, it came to light that the respondent was not filing returns and not paying tax.*
>
> ***4.** However, even before a show cause notice could be issued, the respondent-assessee paid the duty involved together with interest on the duty short-paid by them. But, the Additional Commissioner issued a show cause notice calling upon the respondent-assessee to show cause as to why penalty should not be levied.*
>
> *xxx xxx xxx xxx*
>
> ***11.** It is true that under Section 78(1) of the Finance Act, 1994, an assessee is liable to pay service tax, if service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion, wilful misstatement or suppression of facts or contravention of any of the provisions of the Act and the Rules with the intent to evade payment of service tax.*
>
> ***12.** Before Section 78 was substituted by the Finance Act, 2015, the position remained the same, except with small differences. One of the differences was that under the second proviso to sub-section (1) of Section 78, if an assessee chose to pay service tax and interest within 30 days from the date of communication of the order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid under the first proviso, would be 25% of such service tax. The first proviso reduced the penalty to 50% in cases where true and complete details of the transactions were available in the specified records.*
>
> ***13.** After the amendment under the Finance Act, 2015, the penalty leviable under the first proviso remained at 50% and the penalty payable in cases where service tax and interest was remitted within 30 days of service of notice, was reduced to 15%.*
>
> ***14.** Therefore, it is clear that both before and after the amendment, the Act did not treat all cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of the provisions of the Act alike. The liability to pay penalty arose in cases of fraud, collusion, wilful misstatement, suppression of facts or*

contravention of the provisions of the Act. But, the quantum of said penalty depended upon the question as to whether the amount of tax and liability was paid and, if so, at what point of time. Keeping this distinction in mind, let us go back to Section 73(3) and Section 73(4). Section 73(3) reads as follows :

> *"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :*
>
> *Provided that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of eighteen months referred to in sub-section (1) shall be counted from the date of receipt of such information of payment."*

15. *We have already seen that the liability to pay penalty imposed under Section 78(1) arises only after the service of notice under the proviso to Section 73(1). But, under sub-section (3) of Section 73, the Department cannot even issue a show cause notice, in cases where the Service Tax and interest has been paid, immediately upon the ascertainment of the Service Tax either on own assessment or on the basis of what was ascertained by the Central Excise Officer. Sub-section (3) was intended to confer an extended benefit much more in nature than the varying degrees of penalty imposed under the different provisos of sub-section (1) of Section 78.*

16. *It is true that sub-section (4) of Section 73 keeps the operation of sub-section (3) out of the purview, in cases where the Service Tax has not been levied, paid, short-levied or short-paid by reason of fraud, collusion, wilful mis-statement, etc. But nevertheless, the law does not treat all cases of fraud, collusion, wilful misstatement, suppression of facts, etc., alike.*

17. *Keeping this in mind, if we go through the order-in-original, it could be found that the respondent-assessee paid the service tax to the extent of Rs. 40,39,751/- along with interest to the tune of Rs. 12,42,633/-. This amount was paid even before the show cause notice, dated 22-4-2010, was issued. It is only in Paragraph 15(iii) and 15(iv) that the adjudicating authority has recorded a finding that the respondent-assessee willfully suppressed the true and correct value of the freight incurred. But, the findings recorded in Paragraph 15(iii) and 15(iv), in our considered view, are not sufficient to enable the Department to fall back upon sub-section (4) of Section 73, so as to keep the application of Section 73(3) out of the reach of the respondent-assessee. Hence, we do not think that the Commissioner (Appeals) and the CESTAT were wrong in deleting the penalty. Therefore, the appeal is dismissed."*

8.1 Further, being not satisfied with the above judgement dated 13.03.2017 delivered by the Hon'ble High Court for the State of Andhra Pradesh and Telangana in the case of *Tirupathi Fuels Private* (supra) the department had preferred Special Leave Petition (Civil) Diary No. 31976 of 2017, before the Hon'ble Supreme Court. In disposing the said case, the Hon'ble Supreme Court had dismissed the appeal filed by the department holding the view taken by the Hon'ble High Court is without blemish.

8.2 In the above backdrop of the factual matrix of the present case, and taking into account that fact that the appellants have voluntarily paid service tax of Rs.23,39,421/- along with interest, I find that the appellant has fulfilled all the requirements for discharge of service tax liability as determined in the adjudication proceedings. In the above circumstances where the Hon'ble Supreme Court have already settled the issue in favour of the appellants and on the basis of the discussions at paragraphs at 6.1 to 7.3 above, I find that there are no strong grounds to hold that the appellants did not pay service tax in respect of the differential amount identified by the Department for the period 2014-2015 & 2015-2016. Therefore, I do not find any merits in the impugned order of the learned Commissioner (Appeals) in upholding the order of the original authority for confirmation penalties on the appellants and in rejecting their appeal to such extent.

8.2 In the result, the impugned order dated 23.06.2022, to the extent it had confirmed the penalties on the appellants, is set aside, on the basis of their voluntary payment of differential service tax amount into the account of Government exchequer, as per law, as indicated in paragraphs 6.1 & 7.2 above, and the appeal filed by the appellants is allowed in their favour.

(Order pronounced in the open court on 20.01.2026)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha