CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

SERVICE TAX APPEAL NO. 52273 OF 2018

WITH

SERVICE TAX CROSS NO. 51100 OF 2018

[Arising out of Order in Original No. 27/PP/Commr./ CGST/Audit-II/2017-18 dated 05.04.2018 passed by the Commissioner, CGST, Audit II, Delhi]

COMMISSIONER OF CENTRAL GOODS & SERVICE TAX, DELHI SOUTH COMMISSIONERATE, **Appellant**

2nd & 3rd Floor, EIL Annexe Building
Bhikaji Cama Place,
New Delhi-110066

Vs.

M/S HAAMID REAL ESTATE PVT LTD **Respondent**

232-B, IIIrd Floor, Okhla Industrial Estate
Phase-II, New Delhi-110020

Appearance:
Shri S. K. Meena, authorised representative for the Appellant

Shri Atul Gupta, Chartered Accountant and Shri Varun Gaba, advocates for the Respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 59411 /2024

DATE OF HEARING: 09.10.2024
DATE OF DECISION: 04.11.2024

P. V. SUBBA RAO:

Revenue has filed this appeal to assail order in original[1] dated 28.3.2018 passed by the Commissioner in which he dropped the proceedings initiated against M/s. Haamid Real Estate Pvt. Ltd., New Delhi[2] by Show Cause Notice[3] dated 15.11.2016.

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1 **the impugned order**
2 **the respondent**
3 **SCN**

2. The respondent is registered with the service tax department and has been providing taxable services of construction of residential complexes and has been paying service tax and filing its returns. Its records for the period 2012-13, 2013-14 and 2014-15 were audited and it was found that the appellant had considered sale of development rights as non-taxable and had not paid service tax on the consideration received for transfer of development rights.

3. The department felt that the transfer of development rights became a 'service' with effect from 1.7.2012 as per section 65B (44) of the Finance Act, 1994[4] and therefore, it was taxable. It was also felt that as per Rule 5 of the Point of Taxation Rules, 2011, tax was payable. Accordingly, SCN dated 15.11.2016 was issued to respondent proposing demand of Rs. 7,11,91,036 as service tax along with interest under section 75 and penalties under sections 76,77 and 78 of the Finance Act.

4. The proposals in the SCN were dropped by the Commissioner by the impugned order dated 28.03.2018. The Revenue has filed this appeal to assail this order.

5. Learned authorised representative for the Revenue made the following submissions:

i) The Commissioner gravely erred in not deciding whether the transaction of 'transfer of development rights' is a service under section 65B(44) read with section 65B(51) of the Finance Act.

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4 the Finance Act

ii) The Commissioner also erred in holding that that in case of transfer of development rights, the liability arises on the date of signing of the agreement since it actually arises on the date of providing the service.

iii) The demand in the case pertains to taxable services in respect of transfer of development rights and, therefore, the demand needs to be upheld.

iv) The date of rendition of service is after the date of the agreement which is the relevant date to be considered to determine if the service was taxable. The date of rendition of service is the date of invoice or the date of receipt of payment. The Commissioner erred in considering the date of agreement as the date of rendition of services and dropping the demand.

v) The impugned order may be set aside and the matter may be remanded to the Commissioner for de-novo adjudication or the impugned order may be modified.

6. Learned Chartered Accountant for the Respondent made the following submissions:

i) The service was rendered prior to the introduction of negative list, i.e., 1.7.2012 when the service was not taxable, whereas the demand has been proposed under the provisions after 1.7.2012 under Section 65B (44). No invoice was ever issued and the payments for transfer of development rights were received in terms of the agreements which were entered into prior to 1.7.2012.

Therefore, the demand cannot be sustained and has been correctly dropped by the Commissioner.

ii) Extended period of limitation is not invokable in the present case as there was considerable confusion about taxability of transfer of development rights. These were not taxable in the pre-negative list regime as there was no head under which they could be taxed. The respondent was under the bonafide belief that no tax was payable and had not paid tax. The SCN dated 15.11.2016 was issued to cover the period 2012-13 which was clearly beyond the normal period of limitation. There were no grounds to invoke extended period of limitation.

7. We have considered the submissions on both sides and perused the records.

8. We first proceed to examine the question of limitation because if the demand is hit by limitation, the merits of the case need not be considered. The SCN was issued on 15.11.2016 covering the period 2012-13 which was clearly beyond the normal period of limitation provided under section 73 of the Finance Act. Extended period of limitation can be invoked if the non-levy, non-payment, short levy, short payment or erroneous refund is because of (a) fraud; or (b) collusion; or (c) willful mis-statement or (d) suppression of facts; or (e) violation of the provisions of the Act or the Rules with an intent to evade payment of service tax.

9. The reasons indicated in the SCN for invoking extended period of limitation are in paragraph 5.6 which is reproduced below:

> "5.6. It further appears that the assessee had deliberately and willfully suppressed material facts related to non-payment of service tax on consideration received by the assessee against transfer of development rights. No disclosure regarding this transaction was made by the assessee in their ST-3 returns filed by the assessee during the relevant period. Thus, the said amount has escaped the assessment of service tax liability and subsequent payment thereof to the credit of the Government account in respect of such amounts. All these actions of assessee amount to non-disclosure of facts to the department, resulting in contravention of various provisions of the Finance Act and the Service Tax Rules with an intent to evade payment of service tax as applicable. These facts would not have come to the notice of the department but for the audit verification conducted by the department. It therefore, appears that the extended period for recovery of service tax due under proviso to section 73(1) of the Act, ibid can be invoked in this case."

10. The Commissioner recorded the following findings regarding invoking extended period of limitation and held in favour of the appellant even on the question of limitation.

> 15.1. I find that the issue in the instant case involves interpretation of legal provisions. Whether TDR is a transaction in immovable property or a service is a debatable issue. In such a situation allegations in the SCN that the Noticee suppressed the value of taxable services seems to be a far stretched one. The issue that extended period of limitation in cases involving interpretation of law is not invokable is a settled issue and it has been held by the judicial forums that extended period of limitation in not sustainable in such cases. In this regard, the following judgments decisions are relevant-
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> **(i) Larsen & Toubro Ltd. vs. Commissioner of C. Ex. Pune II[5]**
> **(ii) Commissioner of Customs Import vs. Reliance Industries Ltd. [6]**
> **(iii)Escorts Ltd. vs. Commissioner of Central Excise, Faridabad[7]**
> **(iv) Taj Sats Air Catering Ltd. vs. Commissioner of Central Excise Delhi II[8]**
> **(v)CCE vs. Vineet Electrical Industies Pvt Ltd. [9]**
> **(vi)CCE vs. Raptakos Brett & Co. [10]**
> **(vii) CCE vs. Rishabh Velveleen (P) Ltd.[11]**
> **(viii) Pee Jay Apparels (P) Ltd vs. CCE[12]**

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5 2007 (211) ELT 13 (SC)
6 2015 (325) ELT223 (SC)
7 2015 (319)ELT 406 (SC)
8 2016 (334) ELT 680 (Tri.-Del.)
9 2002 (144) ELT A292
10 2006 (194) ELT 101 (Tri.-Mum)
11 1999 (114) ELT 839 (Tri.)
12 2001 (135) ELT 842 (Tri.-Del.)

(ix) Cosmic Dye Chemicals vs. CCE[13]

15.2. Thus, I find that the demand is also not sustainable on limitation aspect and thus liable to be dropped."

11. We find that the SCN invoked extended period of limitation for the following reasons:

a) No disclosure was made by the assessee regarding this transaction in the ST-3 Returns filed during the relevant period;

b) Thus, the service tax escaped assessment.

c) Non-disclosure of the facts to the department resulted in contravention of various provisions of the Act and Rules with an intent to evade payment of service tax as applicable.

d) These facts would not have come to the notice but for the audit and therefore, extended period of limitation is invokable.

12. We have examined these grounds in the SCN for invoking extended period of limitation. Section 73 of the Finance Act provides for recovery of service tax not levied, not paid, short levied, short paid or erroneously refunded. This section enables invoking extended period of limitation to raise a demand on the following grounds:

a) Fraud; or

b) Collusion; or

c) Wilful misstatement; or

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13 1995 (75) ELT 721 (SC)

d) Suppression of facts; or

e) Violation of the Act or Rules with an intent to evade payment.

13. There is no other ground on which the extended period of limitation can be invoked. Evidently, fraud, collusion, wilful misstatement and violation of Act or Rules with an intent all have the *mens rea* built into them and without the *mens rea,* they cannot be invoked. Suppression of facts has also been held through a series of judicial pronouncements to mean not mere omission but an active suppression with an intent to evade payment of service tax. In other words, without an intent being established, extended period of limitation cannot be invoked.

14. In **Pushpam pharmaceuticals company** vs. **Collector of Central Excise Mumbai**[14], the Supreme Court examined Section 11A of the Central Excise Act, 1944 which is pari materia to Section 73 of the Finance Act, 1994 and held as follows:

> **"4.** Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he**

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14 1995 (78) E.L.T. 401 (S.C.)

might have done and not that he must have done, does not render it suppression."

15. In this appeal, the case of the Revenue is that the appellant had not disclosed the transaction in its ST-3 Returns which resulted in escapement of service tax and, therefore, the non-disclosure resulted in contravention of the Finance Act and Rules with an intent to evade payment and but for the audit, the escapement of service tax would not have come to light.

16. The position of the appellant was, at the time of self-assessment, during the adjudication proceedings and also before us is that it is not liable to pay service tax. Thus, it is only a difference of opinion between the appellant and the Revenue. Naturally, the appellant self-assessed duty and paid service tax as per its view. The allegation in the SCN that the appellant had not disclosed this transaction in its ST-3 returns has no legs to stand on. ST-3 Return does not require transaction wise details. It only requires the assessee to disclose the aggregate value of the taxable services provided during the period, service tax paid, CENVAT credit availed and utilised, etc. There is neither any responsibility on the appellant nor any scope to disclose individual transactions in the ST-3 returns.

17. It is also the case of the Revenue that but for the audit, the alleged non-payment of service tax would not have come to light. It is not possible to accept this contention. It is undisputed that the appellant was self-assessing service tax and filing ST-3 Returns. Unlike the officers, the assessee is not an expert in taxation and can only be expected to pay service tax and file

returns as per its understanding of the law. The remedy against any potential wrong assessment of service tax by the assessee is the scrutiny of the Return and best judgment assessment by the Central Excise Officer under section 72 of the Finance Act. This section reads as follows:

> **"72. Best judgment assessment.** If any person, liable to pay service tax,—
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> (a) fails to furnish the return under section 70;
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> (b) having made a return, **fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer**, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, **shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment** and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."

18. Thus, 'the central excise officer' has an obligation to make his best judgment if either the assessee fails to furnish the returns or, having filed the return, fails to assess tax in accordance with the Act and Rules. Thus, although all assessees self-assess tax, the responsibility of taking action if they do not assess and pay the tax correctly squarely rests on the central excise officer, i.e., the officer with whom the Returns are filed. **For this purpose, the officer may require the assessee to produce accounts, documents and other evidence he may deem necessary. Thus, in the scheme of the Finance Act, 1994, the officer has been given wide powers to call for information and has been entrusted the responsibility of making the correct assessment as per his best judgment. If the officer fails to scrutinise the returns and make the best judgment**

assessment and some tax which escaped assessment is discovered after the normal period of limitation is over, the responsibility for any loss of Revenue rests squarely on the shoulders of the officer. It is incorrect to say that had the audit not been conducted, the allegedly ineligible CENVAT credit would not have come to light. It would have come to light if the central excise officer had discharged his responsibility under section 72.

19. This legal position that the primary responsibility for ensuring that correct amount of service tax is paid rests on the officer even in a regime of self-assessment was clarified by the Central Board of Excise and Customs[15] in its *Manual for Scrutiny of Service Tax Returns* the relevant portion of which is as follows:

> "1.2.1A The importance of scrutiny of returns was also highlighted by Dr. Kelkar in his report on Indirect Taxation[16]. The observation made in the context of Central Excise but also found to be relevant to Service Tax is reproduced below:
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> > It is the view that assessment should be the primary function of the Central Excise Officers. **Self-assessment on the part of the taxpayer is only a facility and cannot and must not be treated as a dilution of the statutory responsibility of the Central Excise Officers in ensuring correctness of duty payment. No doubt, audit and anti-evasion have their roles to play, but assessment or confirmation of assessment should remain the primary responsibility of the Central Excise Officers**.
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> **(emphasis supplied)"**

20. Therefore, it is incorrect to say that had the audit not been conducted, the alleged non-payment of service tax would not have come to light is neither legally correct nor is it consistent with the CBEC's own instructions to its officers.

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15 CBEC

16 Report of the Task Force on Indirect Taxation 2002, Central Board of Excise and Service Tax, Government of India.

21. For the sake of completeness, it needs to be pointed out that the aforesaid *Manual* provides for two levels of scrutiny- preliminary scrutiny of all Returns and Detailed Scrutiny of some Returns selected based on some criteria laid down in it. Relevant extracts of the manual are as follows:

> "1.2A Service Tax administration has had the benefit of building on the experience of Central Excise administration which is an older tax going back to 1870. More recently, in July 2000, under the CIDA-assisted capacity building project, a detailed business process reengineering exercise was initiated. For the first time, key business processes were identified and small working groups set up to examine each business process and suggest qualitative improvements to enhance revenue efficiency and ensure taxpayer satisfaction. The business re-engineering exercise conducted for returns' scrutiny revealed the need to distinguish between preliminary scrutiny and detailed scrutiny in a two-tier scrutiny process.
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> 1.2B It was decided that a preliminary scrutiny would be conducted on all returns. This
> could even be undertaken online. Detailed scrutiny, on the other hand, would cover select returns, identified on the basis of risk parameters, drawn from the information furnished by taxpayers in the statutory returns (Service Tax returns or ST-3 in this case). CBEC felt that facilitating preliminary scrutiny online would enhance efficiency and release manpower for detailed manual scrutiny, which could then become the core function of the Range/Group.
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> 2) A detailed scrutiny programme also serves a 'workload development' function by
> initiating referrals for audit/anti-evasion.
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> *1.2.2 Authority and Ownership*
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> 1.2.2A The authority to conduct scrutiny of returns for verifying the assessment done by the assessee is provided in Rule 5A of the Service Tax Rules, 1994. This rule, interalia, authorizes the Commissioner to empower any officer to carry out 'Scrutiny, verification and checks, as may be necessary to safeguard the interest of revenue'. The Rule also allows the officer to call for any record maintained by the assessee for accounting of transactions, the trial balance or its equivalent, and the Income Tax Audit Report maintained under Section 44AB of the Income Tax Act. In other words, the Rule permits the officer to examine financial records for scrutinizing the return to determine the correctness of the assessments made. In pursuance of this, the Board has also issued guidelines vide letter F.No.137/27/2007 CX.4, dated 08.02.2007, which makes it mandatory to scrutinize returns on a regular basis. Details of the Board's guidelines on returns' scrutiny are discussed in Chapter 2 of this Manual.

> 1.2.2B The guidelines clearly envisaged that returns' scrutiny would become the core function of the Service Tax Group/Range, supervised by the Assistant Commissioner of the Service Tax Unit."

22. Thus, the CBEC took a conscious decision that detailed scrutiny of the Returns should be done only in some cases selected based on some criteria. In those Returns, where detailed scrutiny is not done by the officers some tax may escape assessment which may not be discovered within the normal period of limitation. Such loss of Revenue, needless to say, is a risk which is taken as a matter of policy by the CBEC.

23. To sum up:

a) The respondent assessee was required to file the ST 3 Returns which it did. Unless the Central Excise officer calls for documents, etc., it is not required to provide them or disclose anything else.

b) It is the responsibility of the Central Excise Officer with whom the Returns are filed to scrutinise them and if necessary, make the best judgment assessment under section 72 of the Finance Act and issue an SCN under Section 73 of the Finance Act within the time limit. If the officer does not do so, and any tax escapes assessment, the responsibility for it rests on the officer.

c) Although the Central Excise Officer is empowered to scrutinise all the Returns and if necessary, make the best judgment assessment, if, as per the instructions of CBIC, the officer does not conduct a detailed scrutiny of the Returns and as a result is unable to discover any short

payment of tax within the period of limitation, neither the assessee nor the officer is responsible for such loss of revenue. Such a loss of Revenue is the risk taken by the Board as a matter of policy.

d) Extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or wilful misstatement or suppression of facts or violation of the provisions of the Finance Act or Rules with an intent.

e) Intentional and wilful suppression of facts cannot be presumed because (a) the appellant was operating under self-assessment or (b) because the appellant did not agree with the audit or (c) because the officer did not conduct a detailed scrutiny of the Returns and the escapement of tax was discovered only during audit.

24. We, therefore, find in favour of the respondent on the question of limitation. It is therefore, not necessary to examine the merits of the case.

25. We dismiss the appeal filed by the Revenue and uphold the impugned order. The Cross-Objections filed by the Respondent also stand disposed of.

[Order pronounced on **04.11.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

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