CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60388 of 2013

[Arising out of Order-in-Original No. 32/Commr/PKL/2013 dated 18.09.2013 passed by the Commissioner of Central Excise, Panchkula]

M/s P S Construction **……Appellant**
House No. 215, Sector 7,
Panchkula, Haryana

VERSUS

Commissioner of Central Excise, Panchkula **……Respondent**
SCO 407-408, Sector 8,
Panchkula, Haryana

APPEARANCE:

Present for the Appellant: Sh. J. K. Mittal, Advocate

Present for the Respondent: Sh. Nikhil Kumar Singh and Sh. Aneesh Dewan, Authorized Representatives

CORAM:

HON'BLE Sh. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Sh. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO. 60330/2024

DATE OF HEARING: 29.02.2024
DATE OF DECISION: 25.06.2024

S. S. GARG

The present appeal is directed against the impugned order dated 18.09.2013 passed by the Commissioner of Central Excise, Panchkula whereby the learned Commissioner has confirmed the demand of Service Tax amounting to Rs.2,02,74,083/- under Section 73(1) of the Finance Act, 1994 (referred as "Act") by invoking

extended period of limitation and imposed equivalent penalty under Section 78 of the Act and also imposed penalty of Rs.5,000/- under Section 77 of the Act; however, demand of Rs.13,12,758/- was dropped for the periods 2007-08 and 2008-09 on the ground that the appellant during the said period was registered and paid the taxes and filed the service tax returns; but vide the impugned order the learned Commissioner further directed to appropriate the amount of Rs.24,11,299/- (alongwith interest of Rs.88,123/-) paid in respect of free of cost (FOC) supply for the contract commencing after 07.07.2009, subject to the verification on production of challan within 15 days, which the appellant submitted to the jurisdictional Assistant Commissioner with details and challan copies.

2.1 Briefly stated facts of the case are that the appellant is engaged in providing services under the category of "Works Contract". A show cause notice dated 11.09.2012 was issued to the appellant alleging that they were not entitled to the concessional rate of service tax @4% as provided under the Composition Scheme as they have not added the value of free materials supplied by the service recipients in the taxable value and therefore, they were liable to pay service tax as specified under Section 66 of the Finance Act, 1994 i.e. @12.36% for the period 2007-08 to 2008-09 and @10.36% for the period 2009-10 to 2011-12. Accordingly, vide the show cause notice dated 11.09.2012, service tax amounting to Rs.2,15,86,841/- short paid by them was proposed to be recovered by invoking the extended period of limitation.

2.2 The appellant filed the detailed reply to the show cause notice and pointed out certain infirmities in the show cause notice issued based on documents produced by the appellant. The appellant also submitted that the service tax has been demanded by taking figures highest from Form 26AS, Balance Sheet and ST-3 Returns; and on full value of composite contract including value of materials, which is not permitted in law.

2.3 After following the due process, the Adjudicating Authority confirmed the demand of service tax (including cesses) amounting to Rs.2,02,74,083/- (after allowing the amount already paid by them for the years 2007-08 and 2008-09) under section 73(1) of the Act by invoking the extended period of limitation alongwith imposition of equivalent amount of penalty under section 78 of the Act. Aggrieved by the said impugned order, the appellant has preferred the present appeal.

3. Heard both the parties and perused the material on record.

4.1 The learned Counsel for the appellant submits that the impugned order is not sustainable in law and is liable to be set aside as the same has been passed without properly appreciating the facts and the law.

4.2 The learned Counsel further submits that it has been alleged by the Department in the show cause notice that the appellant has obtained the registration in year 2009, but it is the findings of the Adjudicating Authority that the registration was obtained on

27.10.2004 which shows that there is an incorrect allegation in the show cause notice.

4.3 The learned Counsel further submits that the Department has alleged in the show cause notice that no returns were filed for the periods 2007-08 and 2008-09, but it is the findings of the Adjudicating Authority that there has been an actual payment and filing of service tax returns for the periods 2007-08 and 2008-09.

4.4 The learned Counsel further submits that for the periods 2007-08 and 2008-09, it has been held by the Adjudicating Authority that FOC (Free of Costs) has not been added while taking abatement/exemption under Notification No. 1/2006-ST dated 01.03.2006 and consequently, disallowed the abatement/exemption. In this regard, he submits that firstly, there was no such allegation in the show cause notice specifying said notification; and secondly, the said notification has become redundant in view of the judgment of the Hon'ble Supreme Court in case of ***CCE vs. L&T Ltd - (2016) 1 SCC 170***; and thirdly, it has been held that FOC will not be added in view of the decision of Hon'ble Supreme Court in the case of ***CST vs. Bhayana Builders (P) Ltd - (2018) 3 SCC 782***.

4.5 The learned Counsel further submits that the Department has alleged that the FOC is not added for the period on or after 07.07.2009, while opting for the composition scheme and making service tax payment @4%. However, service tax on the FOC with interest was paid, as recorded by the Adjudicating Authority and the

said amount of service tax with interest was paid from 08.05.2012 to 30.06.2012 prior to issuance of show cause notice and these facts have been duly recorded by the Adjudicating Authority and not disputed at all. Therefore, confirmation of demand is bad in law.

4.6 The learned Counsel further submits that the Department has alleged that appellant wrongly paid service tax @4% under composition scheme, whereas they were required to pay service tax at full rate i.e. 12.36% (for the period 2007-08 to 2008-09) and 10.3% (for the period 2009-10 to 2011-12) on the value determined as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. In this regard, he submits that firstly, the Rule 2A is applicable on "works contract" and hence there is no dispute that contract executed were "works contract" only; and secondly, the Department has proceeded on one hand by undisputedly taking works executed as a "Works Contract" and on the other hand, no valuation is made as per Rule 2A as the tax is computed @12.36% / 10.3% on the entire amount and no deduction is given for the components required to be deducted under Rule 2A, which is wrong; and thirdly, there is no reason for not allowing composition scheme, once it is admitted position that work executed were "works contract" and even on FOC, service tax was paid with interest prior to issuance of show cause notice then it is the option available to the appellant either go for composition scheme or under said Rule 2A.

4.7 The learned Counsel further submits that construction for school or foundation is not taxable being non- commercial

construction. The construction other than for the purpose of commerce or industry is not taxable and therefore, for non-commercial construction like construction for school or foundation is not taxable. In this regard, he submits that firstly, the show cause notice was issued without any investigation; and secondly, in the show cause notice, no category of taxable service and activities are mentioned except stating "*revealed that the Noticee had provided construction services...*" (in para 4 of show cause notice); and thirdly, the Adjudicating Authority, has wrongly rejected the submission of the appellant that construction was done for Educational Institutes/ College/Schools by submitting copies of contracts, by holding that *"...imparting education against consideration in the form of sustainable fee and other charges, therefore, cannot be termed as non-commercial institutions…."*. Whereas, no tax be levied on presumption and Adjudication Authority has admitted that documentary evidence produced by the appellant that the construction service was provided to foundation and charitable trust for school building and it is admitted fact that these institutions were imparting education, yet wrongly rejected on the basis of surmise and conjecture that building constructed by the appellant are solely used for education and were not any business and commerce, whereas, neither there was any such allegation in the show cause notice nor there was any such contrary evidence.

4.8 The learned Counsel also submits that the service tax has been demanded by taking figures highest from Form 26AS, Balance Sheet

and ST-3 Returns; and on full value of composite contract including value of materials, which is not permitted in law in view of the catena of decisions passed by the Tribunal and the higher courts. For this submission, he relies on the following decisions:

- ***Kush Constructions vs. CGST, Nacin – 2019 (34) GSTL 606 (Tri. All.)***
- ***Rajmohan vs. CGST, Panchkula – in Appeal No. ST/60185/2021 – Final Order dated 08.08.2022 passed by CESTAT Chandigarh***
- ***Shresth Leasing & Finance Ltd vs. CCE - 2023 (68) GSTL 143 (Tri. Ahmd.)***
- ***Synergy Audio Visual Workshop Pvt Ltd vs. CST, Bangalore – 2008 (10) STR 578 (Tri. Bang.)***

4.9 The learned Counsel further submits that the demand has been wrongly confirmed by invoking the extended period of limitation which is not invokable in the facts and circumstances of the case. In this regard, he submit that firstly, the allegations in show cause notice for invoking the extended period are – "(i) did not take registration on time, (ii) did not file ST-3 returns from April 2007 to September 2009, and (iii) suppressed the correct assessable value for 2009- 10 and 2010-11." Whereas allegations for not taking registration on time and non-filing return were found to be incorrect by the Adjudicating Authority; secondly, the show cause notice was issued based on the Audit, hence, it is settled law that such allegations of suppression are not sustainable; thirdly, the show cause notice is without proper investigation and is only based on

falsehood that registration was obtained in the year 2009, whereas the Adjudicating Authority found that the registration was obtained in the year 2004; further, the finding of the Adjudicating Authority that allegations in the show cause notice qua non-registration prior to 2009 and non-filing of service tax returns for 2007-08 and 2008-09 are wrong; further, the allegation of wilful suppression with intent to evade service tax, has not been proved by the Department. Further, the Adjudicating Authority has recorded its finding for invocation of extended period and penalty under section 78 as *"...had the audit not been conducted by the Audit department, the fact of non-inclusion of cost of material supplied free of cost by the service recipient would not have come to the notice of the department";* also held that *"..it is amply clear that the noticee have suppressed the fact of non-inclusion of material supplied free of cost by the service recipient in the taxable value, therefore, extended period in terms of Section 73(1) of the Act invokable and penalty in terms of Section 78 of the Act is impossible..."*. The learned Counsel submits that this finding is beyond the allegation in show cause notice and there is also no finding on wilful suppression. Therefore, once extended period is not invokable, penalty under section 78 is also not leviable. For this submission, he relies on the following decisions:

- ***MTNL vs. UOI – 2023 SCC ONLINE Del 1967***
- ***Bharat Hotels Ltd vs. CCE – 2017 SCC ONLINE Del 12813***

4.10 The learned Counsel also submits that when it is found that the extended period of limitation is not invokable, demand for the

normal period of limitation cannot be confirmed for the same transactions. In this regards, he relies on the following case law:

- ***Infinity Infotech Parks Ltd vs. UOI & Ors - 2014 (36) STR 37 (Cal.)***

He further submits that the amendment in Section 73 was made by the Finance Act, 2013 w.e.f. 10.05.2013 by inserting sub-section (2A), after the period in dispute, which permits, if extended period allegation could not be established, service tax could be demanded for normal period.

4.11 As regards penalty under Section 78, the learned Counsel submits that once extended period is not invokable, the penalty under Section 78 is also not leviable as ingredients for invoking extended period and levying penalty under Section 78 are same.

4.12 The learned Counsel also submits that the appellant is entitled for the benefit of waiver of penalty in terms of Section 80 of the Act, as it was prevalent at the relevant time. The Tribunal has waived the penalty in such cases, in terms of Section 80 of the Act; therefore, the penalties under Sections 77 & 78 are also not leviable.

5.1 On the other hand, the learned AR for the Revenue reiterates the findings of the impugned order and submits that the appellant is not entitled to abatement under the Notification No. 1/2006-ST dated 01.03.2006 because they have not included the cost of free supplies in the gross amount on which service tax is payable.

5.2 The learned AR also refers to the statement of Smt. Dikky Puri (partner of the appellant), dated 30.05.2012, where she has admitted that the appellant had received certain materials provided by the service receiver and they have not include the value of the said materials while paying the service tax.

5.3 The learned AR further submits that it is a settled law that to avail exemption from payment of tax, conditions of the said Notification should be strictly followed. In support of his submissions, he relies on the following judgments:

- ***CCE vs. Hari Chand Shri Gopal – 2010 (260) ELT 3 (SC)***
- ***CC (Import) Mumbai vs. Dilip Kumar & Company – 2018 (361) ELT 577 (SC)***

6. We have considered the submissions made by both the parties and perused the material on record, and also gone through the judgments relied upon by both the parties. We find that in the present case, the show cause notice was issued without conducting investigation and the allegation in the show cause notice for not taking registration on time was found to be false by the Adjudicating Authority. Further, the allegation in the show cause notice for non-filing of service tax returns for the periods 2007-08 and 2008-09 was also found to be false by the Adjudicating Authority. We note that the main allegation against the appellant in this case is that they were not entitled to concessional rate of service tax @4% as provided under the Composition Scheme as they have not added the value of

free materials supplied by the service recipients in the taxable value and hence, were liable to pay service tax as specified under Section 66 of the Finance Act, 1994. i.e. @12.36% / 10.36%. This issue has now been settled by the Hon'ble Apex Court in the case of ***CST vs. Bhayana Builders (P) Ltd*** (supra), wherein the Hon'ble Apex Court while referring the valuation provision under the Finance Act, 1994, and also referring the provisions of "such service", has held as under:

> "***16***. ….. *Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.*
>
> ***17***. …….
>
> ***18***. ..... *Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at "gross amount charged".*

7. Further, we note that in this case, the entire demand has been raised and confirmed merely by relying upon Form 26AS, Balance Sheet and ST-3 Returns, which is not permitted under law in view of the various decisions relied upon by the appellant cited supra. In this regard, we may refer to the decision in the case of ***Kush Constructions*** (supra), wherein the Division Bench of the Tribunal has held as under:

> *"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."*

8. Further, we note that in the present case, the show cause notice is issued which is lacking in certain material particular and has not been issued after proper investigation and certain allegations made in the show cause notice, were found false by the Adjudicating Authority. It has been held by the Hon'ble Apex Court in the case of ***CCE, Bangalore vs. Brindavan Beverages P Ltd – 2007 (213) ELT 487 (SC)*** as under:

> *"**14**. .... The show cause notice is the foundation on which the department has to built up its case. If the allegations in the show-cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice."*

9. Further, we find that the construction for school or foundation is not taxable as non- commercial construction as the same is not

constructed for the purpose of commerce or industry. Both the school and the foundation are set up under their respective trusts and the income from the schools or the foundations are exempted from the payment of income tax under the Income Tax Act. All the documents furnished by the appellant in this regard have not been considered by the Adjudicating Authority, hence, the impugned finding in this regard is not sustainable in law.

10. As regards invoking the extended period of limitation to demand service tax, we are of the view that in the facts and circumstances of the present case, extended period cannot be invoked as the appellant has been registered with the service tax and has been paying service tax and filing returns which has been acknowledged by the Adjudicating Authority in the impugned order.

11. Further, we find that in the present case, the show cause notice was issued only on the basis of Audit and it is a settled law that when the show cause notice is based on Audit, the extended period of limitation cannot be invoked. In this regard, we may refer to the decision of Delhi Bench of this Tribunal in the case of ***Sunshine Steel Industries vs. CGST, Jodhpur – (2023) 8 Centax 209 (Tri. Del.),*** wherein this issued was considered in details after considering the various decisions of the High Courts and the Supreme Court. It is pertinent to reproduce the relevant findings from para 27 to para 34, which are reproduced herein below:

> *"**27**. This apart, as noticed above, the show cause notice only alleges that the appellant had suppressed facts. It does*

not allege that the appellant had suppressed facts with intent to evade payment of excise duty. In the absence of any allegation made in the show cause notice that the appellant had suppressed facts with intent to evade payment of duty, the Department could not have invoked the extended period of limitation under section 11A(4) of the Act. This issue was raised by the appellant before the Commissioner (Appeals), but no finding has been recorded.

***28**. The provisions of section 11A(4) of the Excise Act came up for interpretation before the Supreme Court in Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay . The Supreme Court observed that section 11A empowers the Department to reopen the proceedings if 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. It is in this context that the Supreme Court observed:-*

> *"2. ****** The Department invoked extended period of limitation of five years as according to it the duty was short levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs. ******** 4. A perusal of the proviso indicates that it has been used in company of such strong works as fraud, collusion or willful 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 might have done and not that he must have done, does not render it suppression." (emphasis supplied)*

***29**. It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.*

***30**. This decision of the Supreme Court in Pushpam Pharmaceuticals was followed by the Supreme Court in Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut and the relevant paragraph is as follows:-*

> *"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts." (emphasis supplied)*

***31.** In Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore , the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.*

***32**. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur and the relevant portion of the judgment is reproduced below:*

> *"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of nonpayment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso." (emphasis supplied)*

33. *The Supreme Court in Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh also observed in connection with section 11A of the Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:-*

> *"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated*

> *with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct." (emphasis supplied).*
>
> ***34**. In such circumstances, the extended period of limitation could not have been invoked. The demand, which covers only the extended period of limitation, therefore, could not have been confirmed."*

This decision of the Tribunal has been upheld by the Hon'ble Apex Court as reported in ***(2023) 8 Centax 210 (SC) = 2023 (385) ELT 826 (SC).***

12. Further, in the case of ***Infinity Infotech Parks Ltd vs. UOI & Ors*** (supra), it has been held that when the extended period of limitation is not invokable, the demand cannot be confirmed for the normal period of limitation for some of the same transactions. Though, there is the amendment in Section 73 made by the Finance Act, 2013 w.e.f. 10.05.2013 by inserting sub-section (2A); but period of dispute in the present case is prior to that. Therefore, this amendment will not be applicable in the present case.

13. Further, when the extended period is not invokable, the penalty under Section 78 of the Act is also not leviable since ingredients for invoking extended period and levying penalty under Section 78 are same.

14. In view of our discussion above and by following the ratios of the various decisions cited supra, we are of the considered opinion that the impugned order is not sustainable in law and therefore, we

set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Order pronounced in the court on 25.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(RAJEEV TANDON)
MEMBER (TECHNICAL)

RA_Saifi