

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 75792 of 2021

Arising out of Order-in-Appeal No. 09/SH/CE(A)/GHY/2021 dated 29.07.2021 passed by the Commissioner (Appeals), CGST, Central Excise & Customs, Guwahati.

M/s Luit Developers Private Limited,
Junction Mall, R.K.B. Path, District-Dibrugarh, Assam-786001.

....Appellant (s)

Vs.

Commissioner of CGST & Central Excise, Dibrugarh,
C. R. Building, F Lane, Milan Path, Dibrugarh-786003.

....Respondent (s)

Appearance:

Shri Aakarsh Srivastava, Advocate for the Appellant(s)

Shri S. S. Chattopadhyay, Authorized Representative for the Respondent(s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

Final Order No...75120/2022

Date of Hearing:- 02.02.2022

Date of Pronouncement: 23rd February, 2022

PER SHRI P.K.CHOUDHARY:

The present appeal has been filed by M/s Luit Developers Pvt Ltd against Order-in-Appeal whereby the Ld Commissioner of CGST, Central Excise & Service Tax (Appeals), Guwahati upheld the order passed by the Ld Adjudicating Authority, i.e. Assistant Commissioner of CGST Dibrugarh Division, whereby he ordered payment of Service Tax (incl Cess) of Rs.10,17,623/- along with applicable interest and imposed equal penalty for the period from April 2014 to March 2017.

2. Briefly stated, the facts of the case are that the appellant provided taxable service of renting immovable property to various tenants. Third-Party data was received from CBIC Delhi by Dibrugarh Commissionerate regarding the appellant's mismatch of income reflected in Form 26AS and ST-3 Returns. During investigation and in response to queries raised by the Department, the appellant submitted various documents and information by letters dated 12.05.2017 and 05.06.2017. Parallel investigation for the same period was also initiated by GST Intelligence Guwahati, so the appellant informed Dibrugarh Commissionerate that various documents had also been

submitted to it. Based on mismatch of gross income being reflected in Form 26AS as compared to ST-3 Returns, and on non-payment of Tax on RCM basis, Show Cause Notice dated 08.11.2019 was issued to the appellant to show cause as to why Service Tax from February, 2014-15 to February, 2016-17, and for April 2017 to June 2017 should not be demanded under Section 73(1) Finance Act, along with interest and penalty. In Reply to the Show Cause Notice, the appellant submitted CA Certified Reconciliation Form 26AS & ST-3 Returns, and for demand on RCM basis. The Ld Adjudicating Authority did not agree with the Reply of the appellant, however he recalculated the Service Tax demand by including Service Tax paid through CENVAT Credit, and real gross income for the period April 2017-June 2017 after removing the income for the period of July 2017 onwards which came under GST Regime, thereby ordering payment of Service Tax (incl Cess) of Rs.10,17,623/- with interest and penalty. The appellant filed appeal before the first Appellate Authority, who rejected the appeal. Hence the present appeal before the Tribunal.

3. Shri Aakarsh Srivastava, Learned Counsel for the appellant argues that no extra Service Tax is payable because the CA certified Reconciliation of Form 26AS and ST-3 Returns clearly shows that some service recipients deducted TDS on the entire rent/commission plus the Service Tax component causing inflation in Form 26AS as compared to ST3 Returns, and these service recipients, namely M/s JRD Jewels Pvt Ltd, M/s Sohum Shoppe Pvt Ltd, Shree Krishna and ATC Associates, Chandrabali Commercial(I) Pvt Ltd also confirmed this fact by giving certificates of their own.

4. Learned Counsel for the appellant also states that regarding the service tax demand on the appellant on RCM basis, as seen from Reconciliation as well as from the Invoices, Service Tax was already collected by Service Provider and paid to the Department and therefore cannot be demanded again. Also, some of these Service Providers for which tax is being demanded by the Department on RCM basis are Private Limited Companies or Limited Companies, viz. Blue Star Ltd, Kone Elevator India Pvt Ltd and Tractors India Pvt Ltd and thus Service Tax is not on RCM for them as per Point I(A)(v) of Notification No 30/2012-Service Tax [Reverse Charge Notification] dated 20.06.2012 (w.e.f. 01.07.2012), enumerates that "service tax for the taxable services provided or agreed to be provided by

way of security services or service portion in execution of works contract by any individual, hindu undivided family or partnership firm.....”.

5. Learned Counsel for the appellant further states that even otherwise, it is trite law that figures of Form 26AS are not to be used for determining Service Tax liability unless there is proof to show that it was on account of any taxable service and relies on the order of **the Tribunal in Kush Constructions vs CGST NACIN 2019 (34) GSTL 606** for the same. He also argues that figures submitted to the Income Tax authorities cannot be used for determining Service Tax without evidence of taxable service and relies on the order of **Tribunal in Synergy Audio Visual Workshop Pvt Ltd versus Commissioner of Service Tax Bangalore 2008 (10) STR 578** and **in CCE Ludhiana vs Deluxe Enterprises 2011 (22) STR 203**.

6. Learned Counsel for the appellant further argues that the entire demand is for extended period and therefore barred by limitation since extended period is not invocable because :

- In the final operative part of the SCN, the appellant was asked to show why Service tax not be demanded under Section 73(1), whereas extended period of 5 years can only be invoked as per the proviso to Section 73(1). Therefore the impugned order is beyond the SCN, as held by the **Tribunal in Satish Kumar & Co vs Commissioner of Central Excise Nagpur 2019(22) GSTL 269** , that, “As regard limitation, we observe that the show cause notice in the main body does not make any allegation that the appellant have suppressed the fact or fraud or collusion or misstatement etc. and even in the proposal also the demand was raised under Section 73 and proviso to Section 73(1) which requires to demand for the longer period was not invoked. Therefore the adjudicating authority confirming the demand for the extended period is clearly beyond the show cause notice, hence the demand for the longer period could not sustain. In this fact the demand also does not survive on the ground of time bar. As regard the judgment of this Tribunal relied upon by the Learned Counsel and opposed by the Learned AR in the case of Praveen Engineering Works (supra), since we have decided the issue on the merits as per our own observation and analysing the definition of “Supply of Tangible Goods Service” and demand is also time bar, we do not need to consider the said judgment, accordingly the impugned order is set aside. The appeal is allowed.
- For the first half of F.Y 2014-15, the SCN is even beyond 5 years. Further, for the whole of F.Y 2014-15, the appellant was audited by the Department as seen from Detailed Manual Scrutiny Report dated 15.12.2017. The finding of the Adjudicating Authority that Manual Scrutiny did not include Form 26AS is not correct because Para 5.2 of CBEC Circular No 185/4/2015-ST dated 30.6.2015 vide F.No 137/314/2012-“Procedure of Detailed Manual Scrutiny” clearly states that Form 26AS is also checked. It is trite law that extended period of limitation cannot be invoked when the Department has already carried out Detailed Manual Scrutiny.

- The appellant regularly filed all returns, so the Department cannot take a stand that it examined the factual position only on receiving details of Form 26AS for invoking extended period, as seen from CBEC Circular No. 113/7/2009-S.T., dated 23-4-2009 vide F.No. 137/158/2008-CX. 4 and CBEC Circular No 185/4/2015-ST dated 30.6.2015 vide F.No 137/314/2012 which put a duty on the assessing officer to effectively scrutinize the returns at the preliminary stage. The same is supported by **Gannon Dunkerley & Co Ltd vs CST(Adjudication) Delhi 2021(47)GSTL 35 (Tri-Del)**.
- It is trite law that extended period cannot be invoked for part of the demand raised on RCM basis because it is a revenue neutral situation as the appellant would be eligible for credit if it paid tax, as confirmed by the Tribunal in **Universal Dredging & Reclamation Corporation Ltd vs Commissioner of CGST & Central Excise Madurai 2021(44) GSTL 401, (Tribunal Chennai)** wherein it was held that "Undisputedly, the demand has been raised on reverse charge basis and the appellant would be eligible for credit, if they paid the service tax. Thus it is a revenue-neutral situation. The Larger Bench of the Tribunal in the case of *Jay Yuhshin Ltd. v. CCE, New Delhi 2000 (119)ELT 718* has held that extended period cannot be invoked when the situation is of revenue-neutral one".
- The appellant is a Private Limited Company and therefore extended period of limitation cannot be invoked on the basis of documents like Form 26AS, since these figures are included in the Profit/Loss Account in the Balance Sheet, which is a Public document and so there can be no suppression, as held by the **Tribunal in Hindalco Industries Ltd vs Commissioner of Central Excise Allahabad-2003 (161) ELT 346 (Tribunal-Delhi) and Kirloskar Oil Engines Limited vs. CCE Nasik 2004 (178) ELT 998 (Tri.Mumbai)**.
- Mere non-payment of tax without omission or commission is insufficient to sustain allegation of suppression of facts for invoking extended period of limitation as held by the **Tribunal in M P Laghu Udhog Nigam Ltd vs Commissioner of Central Excise Bhopal (2015) 37 STR 308. (Tri.-Delhi)**. There is no positive evidence like incriminating statements, recovery, Invoices, etc, to show any malafide intention to evade Tax and therefore extended period cannot be invoked. The Ld Counsel draws support from the order of the **Hon'ble Supreme Court in Pushpam Pharmaceuticals Company vs CCE Mumbai 1995(78) 401** and of this Tribunal in **F.O No 75565-75566/2020 dated 09.11.2020 in Service Tax Appeal Nos 117/2009 & 175/2009**.

7. Therefore, on merits as well as on limitation, the Learned Counsel for appellant prays that no Service tax be demanded, and subsequently no interest and penalty be imposed.

8. The Learned D.R justifies and reiterates the findings of the impugned order of the Ld Commissioner (Appeals) and accordingly prays that the appeal be dismissed.

9. Heard both sides through video conferencing and perused the appeal records.

10. I find force in the contention of the Ld Counsel of the appellant that CA Certified Reconciliation of ST-3 Returns and Form 26AS clearly shows that inflated figure in Form 26AS is because some Service Recipients deducted TDS not only on the rent/commission but also on the Service Tax component. The Service Recipients also confirmed the same. I also find force in the contention of the appellant that part of the service tax being demanded by the Department on RCM basis cannot be sustained since Service tax was already collected by Service Providers as seen from invoices and Reconciliation Certificate. Moreover, some service providers for which the Department is demanding Service Tax on RCM basis are Limited companies or Pvt Ltd Companies like Blue Star Ltd, Kone Elevator India Pvt Ltd and Tractors India Pvt Ltd and therefore tax is not on Reverse Charge, but on forward charge basis as per Point I(A)(v) of Notification No 30/2012-Service Tax [Reverse Charge Notification] dated 20.06.2012.

11. I also find force in the submission of the Ld Counsel for the appellant that figures reflected in Form 26AS cannot be used to determine Service Tax liability unless there is any evidence shown that it was due to a taxable service as held in **Kush Constructions(supra)**. Also, figures shown to Income Tax authorities cannot be used to determine Service Tax as held in **Synergy Audio Visual Workshop Pvt Ltd(supra)** and **Deluxe Enterprises(supra)**.

12. I find that the Service tax demand for the period April 2014-September 2014 is beyond the extended period of 5 years. I also find that the Department has done audit of the appellant for February, 2014-15 as per Detailed Manual Scrutiny Report dated 15.12.2017, which includes checking of Form 26AS as clearly mentioned in Para 5.2 of CBEC Circular No 185/4/2015-ST dated 30.6.2015 vide F.No 137/314/2012 and therefore no suppression can be alleged for this period. I also find that as held in **Gannon Dunkerley & Co Ltd (supra)**, since the appellant was filing all ST-3 Returns regularly, the Department's stand that it could examine the factual position only on receiving details of Form 26AS cannot be sustained because CBEC Circular No. 113/7/2009-S.T., dated 23-4-2009 vide F.No. 137/158/2008-CX. 4 and CBEC Circular No 185/4/2015-ST dated 30.6.2015 vide F.No 137/314/2012 categorically puts duty on the Assessing Officer to effectively scrutinize the returns at the preliminary stage. I also find that proviso to Section 73(1) has not been invoked in the operative part of the SCN and therefore extended period cannot be invoked as held in **Satish Kumar and**

Co (supra). I also find that invoking extended period cannot be sustained for part of tax demand raised on RCM basis by virtue of it being a revenue neutral situation since the appellant is eligible for credit if it had done tax payment as also held in **Universal Dredging & Reclamation Corporation Ltd (supra)**.

13. I also find that the appellant is a Pvt Ltd Company and figures in Form 26AS are already included in Revenue from Operations in the Profit/Loss Account of Balance Sheet, which is a public document, and therefore no suppression can be alleged as held in **Hindalco Industries Ltd(supra)**. I also find that the Department has not adduced any positive evidence to show malafide intention for evasion of service tax and therefore extended period cannot be invoked as held in **Pushpam Pharmaceuticals Limited(supra)**.

14. Therefore, in view of the above discussions and decisions cited, the entire demand fails on merits as well as on limitation. Thus, there can be no imposition of Service tax, interest and penalty on the appellant. The impugned order cannot be sustained and is set aside. Accordingly, the appeal is allowed with consequential benefits.

(Pronounced in the Open Court on.....23rd February, 2022...)

Sd/-
(P.K. Choudhary)
Member (Judicial)

T.K.