Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10024 of 2020

(Arising out of OIA-SUR-EXCUS-000-COM-029-18-19 dated 07/03/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

FORWARD RESOURCES PVT LTD **......Appellant**

7-8, Vidhi Tower No.2, Sanghvi Tower, Adajan Road
Surat
Surat, Gujarat

VERSUS

C.C.E. & S.T.-SURAT-I **......Respondent**

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,Gujarat – 395001

APPEARANCE:

Shri Jigar Shah & Shri Ambarish Pandey, Advocates for the Appellant
Shri Dinesh Prithiani, Assistant Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No . A/ 10801 /2022

DATE OF HEARING: 08.02.2022
DATE OF DECISION: 15.07.2022

RAMESH NAIR

The present appealis directed against the impugned Order-In-Original No. SUR-EXCUS-000-COM-029-18-19 dated 07.03.2019 passed by the Principal Commissioner of Central Excise & GST, Surat.

2. The brief facts of the case are that the appellant are engaged in providing of various services namely 'management or business consultancy service and 'Business Auxiliary Service and GTA Service. Acting on the intelligence that the appellant was indulging in evasion of Service tax, search was conducted at the office of the appellant. During the search documents related to income tax TDS statements, copies of Balance Sheet /audit reports, bank statement were seized and statement of Shri Jagdishchandra Somani was recorded. Since, no documents like invoices/ bills were issued by the Appellant to various parties against the provisions of services could be found and recovered during the search, the revenue authorities collected the copies of invoices/ debits notes from the customers of the Appellant. On examination of the said debit notes/ invoices it was alleged that the Appellant have provided the Business Auxiliary Service, Management or

Business Consultancy Services and Advertising Agency Services to customers. The officers also searched the premises of M/s Consumer Marketing Pvt. Ltd. and statement of Mr. Rajesh Ramchandra Stave, Authorized Signatory of M/s Consumer Marketing Pvt. Ltd. was recorded. It was alleged that the Appellant have collected the service tax from the customers. Investigation also revealed that Appellant have availed the cenvat credit without having any corroborative evidence. The said investigation was culminated into show cause notice asking them to show cause as to why -

"(i) the service tax amounting to Rs. 3,50,25,248/- including cess, should not be demanded and recovered under proviso to section 73 of the Act and Rs. 2,25,95,000/- paid by them should not be appropriated.

(ii) appropriate interest on the amount of Service tax should not be demanded and recovered under Section 75 of the said Act;

(iii) the penalty for contravention of provision of the said Act or any rule made there under should not be imposed on as provided under Section 77 of the said Act;

(iv) the penalty should not be imposed under Section 78 of the said Act;

(v) the Cenvat Credit availed of Rs. 49,88,527/- as shown in their ST-3 returns should not be demanded and recovered under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944.

(vi) Interest at applicable rate under the provisions of Rule 14 of Cenvat Credit Rules 2004 read with Section 11AA of Central Excise Act, 1994 should not be demanded and recovered.

(vii) the penalty should not be imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

In addition the show cause notice also proposed the penalty on Shri JagdishchandraSomani under Section 78A of the Finance Act, 1944 and penalty under Rule 15 of Cenvat Credit Rules, 2004.

2.1 The show cause notice was adjudicated by the Principal Commissioner, Excise & GST, Surat confirming the demand of Service Tax along with interest and penalties as proposed in the show cause notice.Aggrieved by the impugned order present Appeals have been filed.

3. Shri Jigar Shah, Learned Counsel along with Shri Ambarish Pandey, Advocate appearing on behalf of the appellant submits that the impugned proceedings are without Jurisdiction, unconstitutional and erroneous, as the department has completely failed to comply with the scheme so applicable after the enactment of the Central Goods and Service Tax Act, 2017. In the present case, the legislature has omitted the provisions of Chapter -V of the Finance Act, 1994. Thus, Section 6 of the General Clauses Act, 1897 shall not be applicable in view of the Judgment of Hon'ble Supreme Court in case of Rayala Corporation Vs. Directorate of Enforcement, 1969 (2) SCC 412, supra. Therefore, no proceedings can be initiated, and no liability can be fastened by the Government in respect of the any alleged violation or non-compliance of the provisions contained in Chapter -V of the Finance Act, 1944 as omitted vide Section 173 of CGST Act. The initiation of the proceedings vide the present show cause notice and the confirmation of demands by the impugned order is without jurisdiction, unconstitutional and erroneous and hence, deserves to be quashed and set aside.

3.1 He submits that the impugned order failed to consider that the show cause notice invoked wrong provision of the Finance Act, 1994 to demand Service tax. The demand of Service tax should have been proposed under Section 73A of the Finance Act, 1994 and not under Section 73. Therefore, there can be no demand of Service tax as the impugned order is passed without jurisdiction and hence liable to be quashed and set aside. He placed reliance on the following decisions:

(i) Checkmate Industries Services Vs. CCE, Pune -III, 2016(44)S.T.R. 290 (Tri. -Mumbai)

(ii) M/s Fusion India Inc V. CCE & ST., Lucknow- 2018(11)TMI 358 - CESTAT Allahabad.

3.2 He also submits that the show cause notice proposes to recover service tax amounting to Rs. 3,50,25,248/- under Section 73 of the Finance Act, 1994 which is the provision for recovery of Service tax. However, the show cause notice failed to invoke the relevant provision for charging of service tax on alleged activities. In the Finance Act, 1994, Section 66B provides for levy of Service tax on services other than those services specified in the negative list. Since the charging provision was not invoked, therefore, no demand is sustainable. He placed reliance on the decision in

the case of Frisco Foods Pvt. Ltd. Vs. Commissioner, Customs & Central Excise, Dehradun – 2022-VIOL-49-CESTAT-Del-ST.

3.3 He argued that the show cause notice dtd. 26.09.2017 baldly alleged that the Appellant have rendered taxable services. However, the show cause notice dated 26.09.2017 does not analyse the activities allegedly carried out by the Appellants and whether the same would fall within the definition of any taxable services. It is settled principle of law that unless and until the clear analysis of the activity done by the assessee is carried out, demand of service tax cannot be confirmed. He placed reliance on the following decisions:

- United Telecom 2011(22) STR 571 (Tri. -Bang)
- Swapnil Asnodkar 2018 (10) GSTL 479 (Tri.- Mumbai)
- Balaji Enterprises 2020 (33) GSTL 97 (Tri. Del)
- ITC Ltd. 2014 (33) STR 67 (Tri. Del)
- Kafila Hospitality & Travels Pvt. Ltd. Vs. Commissioner, Service tax, Delhi. 2021 (3) TMI 773-CESTAT New Delhi (LB)

3.4 He also argued that during the course of search at the premises of the Appellant no documents like invoice/ debit notes raised on the customers were found. Therefore, the revenue authorities sought these documents from the recipient/ customers of the Appellant's services. The revenue have failed to prove the case that the Appellants have collected the Service tax from their customers and not deposited with the Government. Appellant have never collected the Service tax from their customers. The alleged invoices referred to as being raised by the Appellant on CMIPL and ECL Finance Ltd., Edelweiss TokioLife Insurance Co. Ltd. etc. are not available in the records of the Appellant, nor has the department added the same in the RUDs annexed to SCN. Show Cause Notice alleges collection of Service tax from their customers but the documents like debit notes which are so called supplied by the recipients is not authenticated. There is no evidence produced by the revenue that these documents were provided by the recipients/ customers of the Appellant.

3.5 He also submits that the Appellant have provided Goods Transport Agency Services to M/s Consumer Marketing Pvt. Ltd. and M/s Lupin Ltd. The Service tax if any had to be paid by the recipient of the services under reverse charges mechanism and not the Appellant. The Show cause notice

relies on the statement of Mr. Rajesh Stave of M/s Consumer Marketing Pvt. Ltd. to allege that the Appellant have provided marketing consultant services. The statement of Mr. Rajesh Stave is not based on any documentary evidence.

3.6 He further submits that demand of service tax is based on the definition of Services existed prior to 01.07.2012. However, the entire period of dispute in the present case is falling on or after 01.07.2012. The demand of service tax on the definition based in erstwhile regime cannot be confirmed. The show cause notice has failed to analyse the transactions properly and mechanically raised the demand of Service tax. He placed reliance on the following decisions:

- Maharashtra Industrial Development Corporation 2014(36)STR1291 (Tri.- Mum)
- Frisco Foods Pvt. Ltd. Vs. CCE, Dehradun 2022-VIOL-49-CESTAT-Del-ST

3.7 As regard the cenvat demand he submits that the Ld. Adjudicating authority has observed that Appellant are not entitled for the Cenvat Credit amounting to Rs. 49,88,527/- shown by them in their ST-3 returns for the period October 2012 to March 2013. However, due to some difficulty on the part of the Director of the Appellant, they could not file their reply to show cause notice and no evidences such as documents/copies of invoices/cenvat credit register etc. could be placed for the consideration of the Ld. Adjudicating authority. He produced the copies of the invoices and CENVAT register maintained by the Appellant.

3.8 He also submits that the show cause notice relies on the statements of the directors of the Appellant to allege the rendition of services. The statements of the directors of the Appellant were recorded under duress and pressure. The show cause notice alleges rendition of services and collection of service tax without any documentary evidence. It is well established principle of law that demand of service tax cannot be confirmed merely on the basis of statements. The Appellant have produced enough documents to support their claim that they have not provided any taxable services for which they may be held liable for service tax. He placed reliance on the following decisions:

- Godavari Khore Cane Transport Co. 2013(29)STR 32
- Mahesh Sunny Enterprise 2014 (34) STR 21 (Del)

3.9 He further submits that the impugned order relies upon 26AS statements for confirming liability of Service tax. The demand of Service tax cannot be based solely on its basis. He placed reliance on the decisions in M/s Ved Security Vs. CCE, Ranchi-III, 2019(6)TMI 383-CESTAT, Kolkata and M/s Lord Krishna Real Infra Pvt. Ltd. Vs. CCE, Noida 2019(2) TMI 1563-CESTAT Allahabad.

3.10 He also submits that the department has recorded statements of the Directors of the Appellant under applicable provisions of the Finance Act, 1994. Section 9D of Central Excise Act, 1994 provides that a statement made and signed by a person before any Central Excise Officer during the course of inquiry or proceeding shall be relevant for the purpose of proving any prosecution for an offence under the Act. The statement recorded should be first admitted as evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act. The Procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in the adjudication proceedings as in criminal proceedings relating to prosecution. He placed reliance on decisions M/s G-Tech Industries Vs. Union of India 2016 (6) TMI 957-P&H - HC.

3.11 He submits that during the search proceeding at the premises of the Appellant at Sanghvi Tower, Adajan Road, Surat by the department, the panchnama was drawn. The said Panchnama refers to the Panchas as Mr. Ashwin Modi, resident at Katargam Darwaja, Surat & Mr. Swaroop Majee, Resident of Udhana, Surat. For the search proceedings, provisions of Code of Criminal Procedure, 1973 (2 of 1974) shall apply. The provisions of CrPC require that the Panchas ought to be the persons from the same locality who are respected and not dis-reputed. In the present case, the Panchas identified by the officials of the department were of a different locality. Thus, the entire search proceedings stands vitiated for want of proper procedure.

3.12 He also submits that it is a settled principle of law that in absence of corroborative evidence when the only relied upon document by the officers is disputed by the assessee, the assessee cannot be penalized for the same. He placed reliance on the following decisions:

- CCE Vs Ravishankar Industries Ltd. 2002 (150) ELT 1317 (Tri. Chennai)
- KashmitVanspati (P) Ltd. Vs. CCE 1989 (39) ELT 655 (Tribunal)
- Shabroc Chemicals Vs. CCE 2002 (149)
- T.G.L. Poshak Corporation Vs. CCE 2002(140) ELT 187 (Tri.- Chennai)
- Ruby Cholorates (P) Ltd. Vs CCE 2006 (204) ELT 607 (Tri. Chennai)
- Charminar Bottling Co. (P) Ltd. Vs. CCE, 2005 (192) ELT 1057
- Nagubai Ammal & Others Vs. B. Shama Rao, AIR 1956 SC 593

3.12 Without prejudice he also submits that demand is barred by limitation. No suppression of facts by the Appellant. Mere failure or omission on the part of the assessee to disclose some information to the department will not amount to suppression of facts. There must be a deliberate attempt on the part of the assessee to suppress the facts from the Department with an intention to evade payment of Service tax. He placed reliance on the following decisions:

- Padmini Prodcuts Vs. CCE 1989(43)ELT 195(SC)
- CCE Vs Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC)
- Gopal Zarda Udyog Vs. CCE 2005 (188) ELT 251 (SC)
- Lubri -Chem Industreis Ltd. Vs. CCE 1994 (73) ELT 257 (SC)
- Anand Nishikawa Co. Ltd. Vs. CCE 2005 (188) ELT 149 (SC)

4. Per contra, Shri Dinesh Prithiani, Learned Assistant Commissioner (AR) supported the findings of Adjudicating authority and submits that Appellant have filed fresh and new evidences before the Bench by submitting for the first time i.e. Cenvat Documents, GTA Vouchers /Consignment Notes, Affidavit in reply dated 03.02.2022 of Director along with its Annexures.

4.1 He submits that new grounds and documents may only be admitted according to the procedure prescribed under Rule 23 of CESTAT (Procedure) Rules, which has not been complied with. Appellant never filed any reply to SCN before Commissioner nor appeared before him for PH. So, all arguments tendered by the Appellant now have not been first observed by the Adjudicating Authority. The fresh evidences/documents are not allowed in Tribunal. He placed reliance on the decisions:

- Kneader House Vs. CCE, Delhi -I 2013 (290) ELT 249 (Tri- Delhi)

- Sterlite Industries (I) Ltd. Vs. CCE Tirunelvelli 2017(357)ELT 161 (Tri-Chennai)

4.2 As regard the availment of Cenvat Credit by the Appellant he submits that ST return of service provider does not commensurate with Appellant's claim and condition of Rule 4(7) of Cenvat Credit Rules not fulfilled. Cenvat invoices of M/s Mehmood Construction Pvt. Ltd. show that appellant have received manpower services but it is not understood what is the need of the manpower service received by the Appellant while providing their output services.

4.3 He argued that for the GTA service rendered Appellant have only produced Debit Note/ Consignment note. No supporting details was produced.

4.4 He further submits that Section 73 covers the tax not paid or short paid, which covers the demand made of service tax in present case, while Section 73A covers only two situations viz. 73A (1) covers tax collected in excess than the prescribed rate and 73A(2) covers the situation where any amount representing as service tax has been collected which was not liable to be paid. Here, in this case none of the above two situation is there. He placed reliance on the decision of Bajaj Allianz Life Insurance Co. Ltd. Vs. Commissioner of C.E. & S.T., Pune -III (Mumbai -Tri.).

4.5 He further argued that contention of the Ld. Counsel that Section 73A should have been invoked instead of Section 73 in this case is absolutely incorrect. Even if it is admitted that it is inadvertently made by mistake, it should not vitiate SCN. He placed reliance in the following decisions:

- Swami Communication Vs. Commr CGST, Kolhapur – 2019(27) GSTL 562 (Tri. Mumbai)
- Indus Integrated Information Mgmt Ltd. Vs. Pr. Commr of ST. Kolkata – 2018 (14) GSTL 24 (Cal.)

4.6 He also submits that director of Appellant in his statement accepted that they have issued debit notes to M/s Consumer Marketing (India) Pvt. Ltd. as charges for promotion/marketing of their products and authorized signatory Shri Rajesh Ramchandra stave of M/s Consumer Marketing (India) Pvt. Ltd. accepted that they have received service of commission agent from

the Appellant. The Appellant have not brought any version of the service recipients M/s Consumer Marketing (I) Pvt. Ltd. and M/s Lupin Ltd. on record to substantiate their claim whether they received GTA service or otherwise. All the service recipient of the Appellant have admitted to have paid the service tax along with value of service. The appellant suppressed the material facts from the Department and therefore extended period of limitation will be applicable.

5. We have considered the submissions made by both sides and perused the case records. The primary dispute in the issue relates to the fact also arise that whether this tribunal is competent to consider the fresh documents submitted first time for deciding the present case. The Ld. Departmental representative strongly argued that Appellant have filed fresh and new evidences before this Tribunal by submitting for the first time. In this connection, we find that it is held in catena of cases that the tribunal is the final fact finding authority, any documents even submitted first time before this tribunal can be considered in the interest of justice. We take note of the decision of the Hon'ble Supreme Court (Three Judges Bench), in the case of National Thermal Power Co. Ltd. v. Commissioner of Income Tax, reported in 1998 (99) E.L.T. 200 (S.C.), which is to the effect that the Tribunal has jurisdiction to examine the question of law which arises on facts, as found by the authorities below, and having bearing on tax liability of assessee, even though said question was neither raised before the lower authorities nor in appeal memorandum before the Tribunal, but sought to be added later as an additional ground by a separate letter.

5.1 In the matter Devangere Cotton Mills Ltd. v. Commissioner — 2006 (198) E.L.T. 482 (S.C.) the question arose whether the third member of the Customs, Excise and Gold (Control) Appellate Tribunal to whom the case was referred on difference of opinion between the Bench of two members could permit an additional ground to be raised under Rule 10 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982. The Hon'ble Supreme Court held that the Tribunal has got wide power to hear and consider a new ground and decide the appeal. The relevant observations are as follows :

> *"Rule 10 of the 1982 Rules allows the parties to urge grounds not taken in the appeal provided the Tribunal grants leave to the parties to do so. The Tribunal has also been given a wide power to decide the appeal on grounds not taken in the memorandum of appeal. The only*

limitation on this power of the Tribunal is that the party affected must be given an opportunity of being heard in respect of the new grounds sought to be urged. According to M/s. Davangere Cotton Mills Ltd., the issue had been raised originally before the Tribunal and again before the third member when it was referred to the third member on a difference of opinion. Revenue had ample opportunity of dealing with the submission. Besides, it was submitted, that the issue was in any event being agitated in the matter of M/s. Coats Viyella (India) Ltd. and there was no question of taking the Revenue by surprise.

We are of the view that the Tribunal did err in refusing to hear the appellant only on the ground that the ground had not been raised earlier. Rule 10 was sufficiently widely framed to allow the Tribunal to do so. Having regard to the fact that the Tribunal was itself considering the issue on a contested (sic connected) hearing there was no reason why the appellant should have been shut out from pleading its case on the same basis."

In the matter of Utkarsh Corporate Service Vs. CCE, 2014 (34) STR (35) (Guj.) the Hon'ble Gujarat High Court also held that additional legal grounds can be raised before any authority. The relevant para reproduced below:

"11. *On the basis of the aforementioned discussion, we are of the firm opinion that both, Commissioner (Appeals) and the Tribunal have committed error in not considering the additional grounds raised by the appellant before it. As it could be noted very clearly that these were the legal grounds which could have been raised at an stage before any authority as laid down in the decision rendered in case of Sanghvi Reconditioners Pvt. Ltd. v. Union of India (supra) on which the Commissioner (Appeals) sought to rely upon and the said proposition hardly requires any further elaboration and yet both the authorities having failed to entertain these new legal grounds for which already the facts were existing on record, the appellant has succeeded in convincing us of a need to interfere with the orders of both the authorities by answering the question framed in its favour.*

12. *Resultantly, impugned orders of both the authorities are hereby quashed and set aside. Parties are requested to be relegated to the Commissioner (Appeals) for consideration of these issues afresh. Accordingly, the Commissioner (Appeals) is directed to examine all the grounds raised before it by both the sides in accordance with law and both the parties are directed to cooperate in proceeding with the matter with requisite promptness. Appeal is, accordingly, allowed. Rule is confirmed. No order as to costs."*

In view of the above precedent law, we are of the considered opinion that the Law/Rules has not precluded CESTAT for considering new grounds/ evidence. We do not find merit in the pleas of the Ld. Departmental representative in this regard.

5.2 We find that in the present matter it is on record that during the search at the premises of the Appellants, no invoices/ debit notes etc., raised to their customers were found. The department in the present matter recovered the said alleged debit notes/ invoices from the customers. The Business Premises of M/s Consumer marketing (India) Pvt. Ltd. was searched and documents/ records were seized. Shri Rajesh Ramchandra Stave, Authorized Signatory of service recipient of M/s Consumer Marketing (India) Ltd, in his statement admitted the receipts of taxable services from Appellant.We also noticed that presumption of documents in certain cases under Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned, we also take into consideration the provisions of Sections 36A the Central Excise Act, 1944 for the sake of convenience and ready reference the same are reproduced below :-

> ***Section 36A. - Presumption as to documents in certain cases. -*** *Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -*
>
> *(a) unless the contrary is proved by such person, presume -*
>
> *(i) the truth of the contents of such document;*
>
> *(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;*
>
> *(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.*

In view of above Section 36A of Central Excise Act, 1944 it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized that the presumption under Section 36A is available. In the present case admittedly none of the alleged invoices / documents was produced by the Appellant or seized from the Appellant's premises or control. In view of the above, when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove that the source documents related to the Appellants' and that any taxable services under the source documents were actually provided by the Appellant. This burden has not at all been discharged in the present case. The department could not have simply accepted the customers documents provided by them on its face value and the same need strict corroboration which is completely absent in the present case.

Further, the Section 83 of the Act states that sections of the Central Excise Act 1944, as stipulated and in force from time to time shall apply so far as may be in relation to Service Tax as they apply in relation to duty of excise. Section83 of the Finance Act reads as under : -

> *"**83. Application of certain provisions of Act 1 of 1944. -***
> *The provisions of the following sections of the Central ExciseAct, 1944, as in force from time to time, shall apply, so far as may be, in relation to Service Tax as they apply in relation to a duty of excise :-*
> *sub-section (2A) of section 5A, sub-section (2) of Sections 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF, to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."*

5.3 In view of the above Section 83 of the Finance Act, 1994 a relevant Section 9D is applicable in the case of Service Tax matters also. The Department for confirmation of service tax demand also relied on the statement of the Director of the Appellant. We find that, it is settled law that though the admission is extremely important piece of evidence but it cannot be said to be conclusive and it is open to the person who has made the admission to show that this is incorrect. We also note that there are numerous decisions of the Tribunal laying down that such admission of persons, cannot be considered to be conclusive evidence to establish the

guilt of the assessee. Burden of proof is on the Revenue and same is required to be discharged effectively. The details contained in records of service recipient cannot be accepted as admissible piece of evidence. Moreover, none of the persons on whose statement reliance was placed by the department were cross-examined. The Hon'ble P & H High Court in case of M/s. G-Tech Industries Ltd. v. Union of India [2016 (339) E.L.T. 209 P&H] has held that Section 9D of the Act has to be construed strictly, as mandatory and not merely directory.

5.4 The Hon'ble High Court in the matter of Jindal Drugs Pvt. Ltd. Vs. Union of India 2016 (340) E.L.T. 67 (P & H) also held that:

> *"**19.** Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice."*

In the present matter the Adjudicating Authority had failed to follow the requirement of Section 9D of the Act regarding examination in chief of witness, therefore demand of service tax on the basis of statement of persons not sustainable.

5.5 We also find that in the present case, allegation of the department is that Appellant have collected amount as commission from M/s Consumer Marketing (India) Pvt. Ltd. and M/s Lupin Ltd. against the provisions of commission agency service, when the Service tax is demanded on alleged services, it is the responsibility of the department to show that the appellant had rendered same services to customers with positive evidences. In the

present case department failed to do so. We noticed that in the present matter director of Appellant's company submitted the Affidavit along with copies of invoices/ Debit notes /consignment notes raised by the Appellant and invoices raised upon them by their service providers. The said documents clearly established that the nature of the service provided by the Appellant to their customers are in the nature of Goods Transport Agency service and not the Commission Agency Service. We noticed that in terms of Notification No. 30/2012 -ST dated 20.06.2012 on GTA service, service tax is to be paid by the recipient of services i.e. M/s Consumer Marketing Pvt. Ltd. and M/s Lupin Ltd. and appellant do not become a person liable for payment of service tax in this case. Further on the basis of documents/ records received from customers of Appellant revenue alleged that they have collected the service tax payment. However on the basis of records of other persons it cannot be concluded that Appellant has collected the service tax from their customers. In the present matter revenue in support of their contentions nowhere produced any corroborative evidence in the form of Bank Details or any documents recovered from the business premises of the Appellant by which it can be concluded that Appellant have collected the Service tax. In the present matter department clearly failed to prove the case that Appellant have collected the service tax from their customers.

5.6 We also find that in the present matter for confirmation of service tax demand Ld. Commissioner also relies upon the TDS /26AS Statement. The said statement under provisions of Income Tax Act, 1961 is an Annual Consolidated tax statement. Income tax and service tax are two different/ separate and independent Acts and their provisions operating in two different fields. Therefore by relying the 26AS /TDS Statement under the Service Tax Act, demand of service tax cannot be made. We also find the support from the decision of M/s Ved Security Vs. CCE, Rachi -III 2019(6) TMI 383 CESTAT, Kolkata wherein it was held that the value of taxable services cannot be arrived at merely on the basis of the TDS statements filed by the clients inasmuch as even if the payments are not made by the client, the expenditure are booked based on which the form 26AS is filed, which cannot be considered as value of taxable services for the purpose of demand of Service tax.

5.7 In the matter of Synergy Audio Visual Workshop Pvt. Ltd. Vs. Commr. of S.T. Bangalore 2008 (10) S.T.R. 578 (Tri. - Bang.), the Tribunal observed as under :

"The other ground is for confirming demands is that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeed on this ground also. The impugned order is set aside and the appeal is allowed."

In the matter of Calvin Wooding Consulting Ltd. Vs. Commissioner of C.Ex. Indore 2007 (7) S.T.R. 411 (Tri. - Del.) also Tribunal observed as under :

21. *The liability of the recipient cannot arise merely from the fact that, the income-tax was deducted at source, which was the requirement of the Income-tax Act, on the recipient who made payment to the foreign supplier. Such a statutory requirement, as exists under the Income-tax law on the person making the payment to deduct tax at source, as a tax collecting agency of the Revenue, does not exist under the provisions of the Service Tax law, and no obligation was cast upon the recipient of the service to make any deduction from the amounts payable by way of consideration, under the statutory provisions. Authorization to pay Service tax under a contractual arrangement which obliged the recipient to pay the tax and file return, was a matter distinct and different from a statutory obligation to make tax deduction as a collecting agency, as envisaged under the Income-tax law. The Commissioner (Appeals) has, therefore, rightly set aside the orders-in-original insofar as respondent of Service Tax Appeals Nos. 170, 171 and 173 of 2005 was concerned.*

In the matter of Commissioner of C.Ex. Jaipur-I Vs. Tahal Consulting Engineers Ltd. – 2016(44) S.T.R. 671 (Tri. Del) the Tribunal also observed as under

2. *The brief facts of the case are that respondents are engaged in providing taxable service. Certain proceedings were initiated against them for not paying the Service Tax mainly on the basis of income-tax return filed by them at Jaipur. It is the case of the Revenue that the respondent failed to discharge the Service Tax on full taxable value as reflected in the income-tax returns. Accordingly, the original authority, after due process, confirmed the Service Tax of Rs. 8,25,789/- under the category of*

> *'Consulting Engineer service'. He also imposed penalties under various sections on the respondent. On appeal by the respondent, the learned Commissioner (Appeals) vide impugned order set aside the Order-in-Original and allowed the appeal. Aggrieved by this, Revenue is in appeal.*
>
> ***3.*** *The main grounds of appeal is that respondent could not produce documentary evidence about Service Tax payment properly for the impugned period at Chandigarh and Lucknow. The ST-3 return filed at Chandigarh and Lucknow did not tally with income-tax return filed in Jaipur office.*
>
> ***4.*** *We have heard the AR who reiterated the grounds of appeal. None represented the respondent.*
>
> ***5.*** *We find that Commissioner (Appeals) examined the respondents appeal against confirmation of demand and allowed the same mainly on the ground that income-tax return cannot be the basis for demanding Service Tax. Further, the respondent's contention that they have rendered services outside the jurisdiction of Rajasthan and have discharged the Service Tax in Chandigarh and Lucknow, could have been verified with the concerned jurisdictional Chandigarh Commissionerate office. Departmental authority at Jaipur have no jurisdiction to proceed against the respondent for demanding Service Tax without any evidence of taxable service being provided within their jurisdiction. We find that there is nothing in the grounds of appeal which makes us to interfere with the finding of the learned Commissioner (Appeals). The appeal did not advert to any assertion as to how the Service Tax demand can be made when there is no evidence to any taxable service having been rendered in the Jurisdiction of Rajasthan. No inquiries have been conducted by the Revenue to support their case. As such, we find that present appeal is without merit and accordingly, the same is dismissed.*

As per the consistent view taken in the above judgments, we are of the view that the demand of services tax is not sustainable on the basis of TDS /26AS statements.

5.8 Without prejudice, we also find that the show cause notice alleged that Appellant have provided business auxiliary services to M/s Consumer Marketing (India) Pvt. Ltd., Mumbai and M/s Lupin Ltd. whereas appellant have provided the GTA services as discussed above. Even if it is assumed that appellant have provided the business auxiliary service the impugned

show cause notice has not specified under which clause of the definition of Business Auxiliary Service the activity of the Appellant falls. For determining the taxability of services, it very important. In the absence of the specification of the exact sub-heading under which the service falls, taxability of service cannot be decided. In this regard, the judgments relied upon by the appellant in the case of United Telecoms Ltd. v. Commissioner of Service Tax - 2011 (22) S.T.R. 571 , Swapnil Asnodkar 2018(10)GSTL 479 (Tri.- Mumbai) , Balaji Enterprises v. C. Ex. & S.T. - 2020 (33) G.S.T.L. 97 and ITC Ltd. 2014 (33)STR 67 (Tri. Del) (supra) support their case.The said decisions are squarely applicable to the facts of the present case and hence we find that the demand for service tax cannot be sustained on this ground also.

5.9 As regard the cenvat demand we find that the charges against the Appellant that they have not produced the input service documents on which they have taken cenvat Credit, We find that contrary to this fact, the appellant has recorded the receipt of the input services in their cenvat account and produced the cenvat credit account along with input service invoiceson the basis of which Cenvat credit has been availed by them. Therefore, we do not find any reason to deny the Cenvat Credit.

5.10 We also find that in the present matter by way of affidavit, Director of Appellant company fairly submitted that the company is challenging the demand of Service tax on service related to the Goods Transport Agency Service provided to M/s CMIPL& M/s Lupin Ltd. Other than the GTA service, service tax of Rs. 69,76,167/- duly paid by the company on the taxable services provided to remaining entities viz, M/s CEAT Ltd., M/s RA Realty, M/s Mohan Infro, M/s ECL Finance, M/s Inonz Digital (Interactive Media) and M/s Edelweiss. The Para 3.12 of impugned show cause notice also shown that Appellant have paid the Service tax of Rs. 83,25,727/- and the same was also reflected in ST-3 returns. The department has liberty to verify the calculation of the actual liability and payment thereof as submitted by the appellant.

5.11. Since we decide the matter on the facts of the present case and on law as discussed above, we do not incline to deal with the other issues such as Limitation, demand to be made under Section 73 or 73A, omission of Chapter V the Finance Act, 1994 vide Section 173 of CGST Act etc. and the same are kept open.

6. As per our above discussion and finding, the demand of service tax (except the amount of service tax payable as per the appellant, admitted by the appellant and deposited as stated in the appellant's submission) interest and penalty is not sustainable and the same is accordingly set aside. The appeal is allowed in the above terms with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 15.07.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

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