

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75509 of 2022

(On behalf of Appellant)

(Arising out of Order-in-Original No.17/Pr..Commissioner/ADJ/ST/Commr/DIB/21-22 dated 23.03.2022 passed by Principal Commissioner of CGST & Excise, Dibrugarh)

M/s Rishu Enterprise

Church Field, Nehru Maidan, PO-Tezpur-784001, Dist.-Sonitpur, Assam

Appellant

VERSUS

Commissioner of CGST & Excise, Dibrugarh

C.R.Building, "F" Lane, Milan Nagar, Dibrugarh, Assam

Respondent

APPEARANCE :

Shri Indranil Banerjee & Ms.Ankita Mitra, both Advocates for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75177/2024

DATE OF HEARING : 08.02.2024

DATE OF DECISION : 08.02.2024

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the demand of Rs.2,60,99,364/- has been confirmed along with interest and various penalties have been imposed on the appellant under Sections 78,70 and 77 of the Finance Act, 1994.

2. The facts of the case are that appellant is a proprietorship concern and had been engaged in providing services such as, supply/renting of passenger vehicles and load carrier vehicles to the Indian Army. The appellant had also supplied fresh eggs, fish, chicken and fruits to the Indian Army for consumption of its personnel. During the period

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October, 2014 to March, 2017, the appellant has provided services exclusively to the Indian Army and during the period April, 2017 to June, 2017, they rendered services to the District Health Society, Sonitpur and to Patanjali Ayurveda Limited in addition to rendering the services undertaken to the Indian Army.

2.1 On the basis of the information received from the Income Tax Department, it came to know that the appellant is providing taxable services. Therefore, an enquiry was initiated against the appellant through letters dated 24.04.2015, 09.06.2015, 31.07.2015 and 19.03.2018 seeking copies of Form 26AS, copies of profit and loss account, copies of Balance Sheet, copies of Contract Agreement, copies of Bills/Invoices raised and copies of ST-3 Returns for the said period.

2.2 On non-submission of the above documents, the matter was transferred to Tezpur CGST and Divisional Anti Evasion Branch, who further initiated an investigation against the appellant through letters dated 09.10.2020, 03.11.2020 and 28.12.2000 seeking relevant documents.

2.3 In the meantime, a request was also made to the Income Tax Department to provide the details of Form 26AS for the financial year, but the appellant supplied Form 26AS for the Financial year 2014-15, 2016-17 to 2017-18 and Income Tax Return for the Financial Year, 2015-16.

2.4 On the basis of the said documents, a show-cause notice dated 30th December, 2020 came to be issued to the appellant for the period

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October, 2014 to June, 2017 to demand service tax as per Table A & Table B, which are as under :

FINANCIAL YEAR	NAME OF DEDUCTOR	SECTION	AMOUNT	TOTAL	Category of Service Provided
2014-15	CONTROLLER OF DEFENCE ACCOUNTS GUWAHATI	194C	50157456	50157456	The category of service provided to these service receivers is not ascertainable as the assessee did not provide any documents.
2015-16	CONTROLLER OF DEFENCE ACCOUNTS GUWAHATI	194C	58449927	58449927	
2016-17	CONTROLLER OF DEFENCE ACCOUNTS GUWAHATI		75888391	75888391	
2017-18 (APRIL-JUNE)	CONTROLLER OF DEFENCE ACCOUNTS GUWAHATI	194C	94646	275876	
	DISTRICT HEALTH SOCIETY SONITPUR	194C	63400		
	PATANJALI AYURVEDA LIMITED	194I(b)	117830		

Service tax liability is calculated as per prevalent service tax rates as mentioned in Table "B"

Sl.No	Financial Year	Gross receipt	Taxable Value	Rate	Service Tax Payable	Service Tax Paid	Short/ Not Paid
1	2014-15 (October-March)	50157456	50157456	12.36%	6199462	0	6199462
2	2015-16	58450082	58450082	14.50%	8475262	0	8475262
3	2016-17	75888391	75888391	15.00%	11383259	0	11383259
4	2017-18 (April-June)	275876	275876	15.00%	41381	0	41381
TOTAL		184771805	184771805	-	26099364	0	26099364

2.5 The appellant joined the adjudication through video conferencing and thereafter, the impugned order has been passed on the basis of information mentioned in Table A and Table B herein above confirming demand of service tax along with interest and various penalties were also imposed on the appellant. Aggrieved from the said order, the appellant is before us.

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3. The Id.Advocate for the appellant submits that during the period October, 2014 to March, 2017, the appellant provided supply/renting of passenger vehicles and load carrier vehicles to the Indian Army. The appellant had also supplied fresh eggs, fish, chicken and fruits to the Indian Army for consumption of its personnel. During the period October, 2014 to March, 2017, on all the payments made by the Indian Army, the Income Tax was deducted, which was reflected in Form 26AS as for supply of fish, chicken etc. to Indian Army, no service tax is payable as it is an activity of trading. With regard to supply/renting of passenger vehicles and load carrier vehicles to the Indian Army, it is his submission that the said service is exempted from payment of service tax in terms of Notification No.30/2012-ST dated 20.06.2012 under negative list regime as the appellant has not issued any consignment notes. He submits that the service involved herein is transport agency service. For the period April, 2017 to June, 2017, the appellant contended that the total amount of Rs.2,75,876/- has been received by the appellant, which is exempted from payment of service tax being less than Rs.10.00 lakhs threshold limit to demand service tax. Therefore, on that amount, the appellant is not liable to pay service tax.

3.1 He further submitted that the proceedings were initiated against the appellant in year 2015 itself and for the period October, 2014 to June, 2017, a show-cause notice came to issue on 30th December, 2020, which is barred by limitation as there is no suppression on the part of the appellant.

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3.2 He further submitted that the whole of the demand has been raised against the appellant on the basis of Form 26AS issued by the Income Tax Department, the demand cannot be raised on the basis of Form 26AS as held by this Tribunal in the cases of Pijush Sharma Vs. Commissioner of CGST & Excise, Patna I vide Final Order No.77332/2023 dated 17th October, 2023 and M/s Lord Krishna Real Infra Private Limited Vs. Commissioner of Customs, Central Excise & Service Tax, Noida vide Final Order No.70126/2019 dated 27.12.2018, wherein it has been held that the demand raised is not sustainable against the appellant. He also relies on the decision of the Hon'ble Supreme Court in the case of Pahwa Chemicals Private Limited Vs. Commissioner of Central Excise, Delhi reported in 2005 (189) ELT 257 (SC) to say that the demand is barred by limitation. He also relies on the decision of this Tribunal in the case of Balajee Machinery Vs. Commissioner of CGST & Excise, Patna II reported in 2022 (66) GSTL 440 (Tri.-Kolkata).

4. On the other hand, the Id.A.R. for the Revenue, strongly opposes the contentions of the Id.Counsel for the appellant and submitted that it is evident on record that the appellant did not join the proceedings during investigation despite several letters were written to them. Further, as per agreement filed by the appellant in appeal papers, the appellant was engaged in supply of vehicle for use of passengers, which is not exempted service under negative list regime. Therefore, the appellant is liable to pay service tax. As the appellant did not provide the details and did not join the investigation, therefore, the Department

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has no other alternative to demand the service tax on the appellant on the basis of Form 26AS. As the appellant did not join the investigation, therefore, extended period of limitation is rightly invoked.

5. Heard both sides and considered the submissions.

6. We find that it is evident from the facts of the case that the whole of the demand has been raised against the appellant on the basis of Form 26AS issued by the Income Tax Department. It is also evident from the fact that the appellant has also provided the copies of Balance Sheet, Form 26As, Income Tax Return etc. during the investigation itself. Further, the appellant also joined the adjudication proceedings through virtual hearing, but in the show-cause notice, the demand has been raised based only on the basis of Form 26AS issued to them. Therefore, the issue arises whether the demand can be raised on the basis of Form 26AS supplied by the Income Tax Department or not ? The said issue has also been examined by this Tribunal in the case of Pijush Sharma (supra), wherein this Tribunal has held as under :

"10. In this case, the appellant has contended that the demand has been raised on the basis of Form-26AS supplied by the Income Tax department. Although summons were issued to the appellant and the appellant did not join the proceedings, therefore, the demand has been raised on the basis of Form-26AS. Admittedly, no investigation has been conducted in this case at the end of the appellant by the adjudicating authority. Being the appellant a registered service provider and filing their Service Tax returns, in that circumstances, the demand cannot be raised on the basis of Form-26AS obtained from the Income Tax Department. Further, the adjudication order has been passed ex parte.

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11. Moreover, the show cause notice has been issued to the appellant by invoking extended period of limitation and some of the demand pertains to beyond five years and in this case, the demand has to be calculated in terms of Valuation Rules, 2006. The issue in this case is whether the appellant is eligible for the benefit of Notification No.30/2012-ST dated 20.06.2012 or not?

12. In that circumstances, we hold that extended period of limitation is not invocable. Moreover, on the basis of Form-26AS, no demand is sustainable against the appellant. "

7. Further, in the case of M/s Lord Krishna Real Infra Private Limited (supra), this Tribunal Tribunal has examined the issue and observed as under :

"We also note that there were no other record of the appellant which were taken into consideration for entertaining a prima-facie view that appellant was required to pay short paid service tax of around Rs.8 crores for the said period than the information that was available in returns in the form 26AS. In this regard we note that this Tribunal had an occasion to examine sustainability of demand raised only on the basis of form 26AS. It was held by this Tribunal in the case of Sharma Fabricators Pvt. Ltd. Vs Commissioner of Central Excise, Allahabad reported at 2017 (5) GSTL 96 (Tri.-All.) as follows:

"3.Heard the Id. Counsel for M/s. Sharma he has basically argued that the said Show Cause Notices were not issued by examining the books of account maintained by M/s. Sharma. The Show Cause Notices were based on the presumptions and third party information. He has argued that even when the payments were not made by the clients but the clients booked the expenditure in their books of account they were required to pay the related tax deducted at source to the exchequer and issue a certificate of TDS and incorporate the same in the return called

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26AS filed with the Income Tax Authorities and such information cannot be the basis for arrival of the consideration received by the service provider. He has submitted that both the Show Cause Notices were issued without examining the books of account maintained by M/s. Sharma and were issued on the basis of presumptions about the consideration received by M/s. Sharma. The considerations taken into account for issue of Show Cause Notices was in no way near to the actual consideration received by M/s. Sharma during the relevant period which should be the basis for arriving at the assessable value. He has stated that they had elaborated before the Original Authority various reasons for discrepancies in the figures arrived at presuming the considerations received by M/s. Sharma on the basis of such TDS Certificates and the figures in the returns. He has further relied upon this Tribunal's Final Order in the case of *Alpa Management Consultants P. Ltd. v. Commissioner of Service Tax, Bangalore* reported in 2007 (6) S.T.R. 181 (Tri. - Bangalore). He submitted that this Tribunal in the said case has held that demands, solely based on the income-tax returns for liability of Service Tax under Finance Act, 1994 is not sustainable. In respect of appeal filed by Revenue Id. counsel for M/s. Sharma has contended that the grounds of appeal are travelling beyond the Show Cause Notice and therefore that is not sustainable. He has further elaborated that cargo handling was brought in as ground by Revenue in the appeal filed by Revenue whereas that issue was not at all dealt with in the Show Cause Notices dated 20-4-2009 & 13-10-2009.

4. Heard the Id. DR, who has presented the grounds of appeal in appeal filed by Revenue.

5. Having considered the rival contentions and on perusal of record, we find that in the cases of both the Show Cause Notices dated 20-4-2009 & 13-10-2009 there is no whisper of examination of books of account maintained by M/s. Sharma to arrive at the value of consideration received by them. Surprisingly

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the draft audit report was the relied upon document. It may be worth mentioning here that the purpose of audit report is to point out any discrepancy to the notice for examination by the executive and it is the duty of executive to examine the records and examine the objection raised with reference to the records and facts of the case and take a view whether there is a sustainable case for issue of Show Cause Notice. Such vital aspects of framing of charges have been missing in the present case. The charges in the Show Cause Notice have to be on the basis of books of account and records maintained by the assessee and other admissible evidence. The books of account maintained by M/s. Sharma were not looked into for issue of abovestated two Show Cause Notices. Therefore, the transactions recorded in the books of account cannot be held to be contrary to the facts. Therefore, we hold that the said Show Cause Notices are not sustainable. Since the said Show Cause Notices are not sustainable, appeal bearing No. ST/890/2010 filed by M/s. Sharma is allowed and appeal bearing No. ST/949/2010 filed by Revenue is dismissed. Miscellaneous Applications also stand disposed of. Cross Objection also disposed of."

From the record it is very clear that none of the records of appellant were taken into consideration for framing of charges that appellant had short paid service tax to the tune of around Rs.8 crores and the said charges were framed only on the basis of information in the form 26AS. We further note that the audit report as explained by the Chartered Accountant for appellant found that Cenvat credit to the tune of Rs.6,38,024/- was inadmissible to the appellant out of total Cenvat credit of Rs.2,21,35,916/- whereas the learned Original Authority has disallowed the same only on the basis that original documents were not produced before him. We accept the claim by the appellant that original documents were seen by the audit party visited by the appellant and such evidence was not taken into

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consideration by the Original Authority. The learned Original Authority was required to follow the principles of natural justice and direct the appellant to produce the original documents on the basis of which Cenvat credit was availed by the appellant, in case he had doubt about the availability of original documents with the appellant. The order of Original Authority presuming that the appellant did not have original documents is not sustainable in respect of availment of Cenvat credit. Further, there was no proposal in the said show cause notice to deny said Cenvat credit. Further, we find that on the basis of form 26AS return filed under Income Tax Act without examining any other records of the appellant. Charges of short payment of service tax to the tune of Rs.8 crores were made against the appellant. It was possible for Revenue to know the transactions between other parties & appellant from form 26AS. Revenue could have investigated into the nature of such transactions & should have established that the said transactions were in respect of provision of said service. Then alone the charges of short payment of Service Tax would have sustained. We find that Final Order of this Tribunal in the case of Sharma Fabricators Pvt. Ltd. (supra) is squarely applicable in the present case. We, therefore, hold that Revenue did not discharge its burden to prove short payment of service tax. We also hold that the said show cause notice dated 05.10.2016 is not sustainable.”

8. In view of the judicial pronouncement of this Tribunal, we hold that merely on the basis of Form 26AS issued by the Income Tax Department, the demand of Service Tax is not sustainable against the appellant.

9. We further take note of the fact that the appellant had contested on limitation also. We find that initially, the investigation

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started against the appellant in April, 2015 when they came to know that the appellant is not paying service tax on taxable services and no efforts were made by the Department to issue the show-cause notice in time or to further investigate the matter, no efforts were made by the Department to find out for what purposes these amounts have been paid by the service recipient.

10. In that circumstances, we hold that as the investigation is faulty and the show-cause notice has been issued by invoking extended period of limitation, the demand is not sustainable on limitation itself.

11. In view of this, we hold that the impugned demand is not sustainable against the appellant on the basis of the details provided by the Income Tax Department in Form 26AS and the extended period of limitation is not invocable.

12. In view of the aforesaid observations, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)