

Service Tax Appeal No.77214 of 2019

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Service Tax Appeal No.77214 of 2019

(Arising out of Order-in-Original No.01/ST/Commr./2019 dated 11.07.2019 passed by Commissioner of CGST & Excise, Patna II)

M/s Balajee Machinery

Pokhar Mahar, Banmankhi, P.O.-Banmakhi, Dist.-Purnia, Bihar-854202

Appellant

VERSUS

Commissioner of CGST & Excise, Patna II

CTTC Building, 3rd to 5th Floor, Sanchar Parishar, Buddha Marg, Patna-800001

Respondent

Appearance:

Shri H.K.Pandey, Advocate for the Appellant

Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:

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

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75469/2022

DATE OF E-HEARING : 16.06.2022

DATE OF PRONOUNCEMENT : 16 AUGUST 2022

Per P.K.Choudhary :

The instant appeal has been filed by the assessee, M/s. Balaji Machinery, against Order-in-Original dated 11.07.2019 whereby the Ld. Commissioner, CGST & Central Excise, Patna has confirmed the demand of Service Tax of Rs.3,09,59,486/- along with interest and penalty for the period 2012-13 to 2016-17.

2. The facts of the case in brief are that the Appellant assessee is a proprietorship firm registered with the service tax authorities for payment of service tax under the category of Clearing and Forwarding Agent Services. The Appellant has filed the service tax return up to the

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Financial Year 2014-15. Proceedings were initiated for proposing demand of service tax on the basis of information obtained from the Income Tax Department and the figures appearing in TDS statements appearing in Form 26AS. The figures appearing in the said database of Income Tax Department were compared with the figures furnished in the service tax ST-3 Returns and those appearing in the profit and loss account. On the basis of the said enquiry, a Show Cause Notice dated 19.04.2018 (SCN) was issued against which reply in defence was submitted by the Appellant.

3. In the course of adjudication proceedings, the Appellant submitted that they were already audited by the Service Tax Department upto Financial Year 2013-14 and the assessment was completed for the said period and no dispute was raised thereafter. It was submitted that they were previously working as C & F Agent for their principal, namely Maihar Cements Ltd., which was discontinued. Since they ceased to provide any taxable service, they surrendered their service tax registration on 18.12.2004. They also submitted all the required documents to the adjudicating authority to contest the demand and submitted that the demand was raised primarily on trading operations on which applicable sales tax / VAT have been paid.

4.1 The Ld. Advocate appearing for the Appellant submitted that the impugned demand has been confirmed merely on the basis of the details available in the Income Tax Portal and the income amount appearing in the profit and loss account without appreciating that the same also includes trading transaction. Without giving any credence to the audit report no.19/ST/audit-pat-PC-03/1415, although the same has been recorded in the impugned Order, the instant demand has been confirmed. He submitted that no finding has been given by the Ld. Commissioner for the demand pertaining to the FY 2015-16 & 2016-17. Merely on the basis of the observation made for the previous period of 2012-13 and 2013-14, the Ld. Commissioner has confirmed the

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demand for the entire period in dispute without considering the trading turnover.

4.2 The Ld. Advocate also referred to the VAT returns wherein the Appellant has duly disclosed their turnover on which applicable VAT has been paid. The Ld. Commissioner having noted the said VAT returns has failed to exclude the value of sales turnover while arriving at the value of taxable services. He also submitted that the entire demand is on the basis of figures appearing in the Income Tax Portal without examining as to whether at all any taxable service has been rendered. No finding has been made with regard to the classification of taxable service on which the impugned demand has been sought to be raised. He also submitted reconciliation statement duly supported by CA Certificates to dispute the impugned demand. He also submitted that demand for the period up to March 2015 is completely barred by limitation inasmuch as there is no element of fraud or suppression.

5. The Ld. Authorized Representative appearing for the Revenue reiterated the finding made by the Ld. Commissioner in the impugned Order and submitted that the figures appearing in Income Tax Portal shows that the Appellant has earned huge amount of income by providing taxable services which they have not disclosed in the statutory service tax return. He accordingly prayed that the appeal filed by the Appellant be rejected being devoid of any merit.
6. Heard both sides and perused the appeal records in detail.
7. The Learned Advocate for the Appellant has submitted a datewise synopsis of the proceedings in respect of the Appellant, which are reproduced below :

"01.08.2014- The said company discontinued the C&F Agency of the appellant ;

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18.12.2014- The appellant surrendered the ST Registration Online ;

30.03.2015- The Hqrs. Audit team of the Commissionerate conducted audit of the Books and accounts and on concluding the audit, issued a memo asking the Appellant to deposit an amount of Rs.16,042/- which was made good. The short paid tax was ascertained by the audit team to Rs.5,562.00.

11.05.2015- Hqrs. Anti-evasion wing of the Commissionerate asked the appellant to submit Financial documents pertaining to 2011-12 onwards to which the submitted that all the documents were lying with Hqrs Audit Branch and could be held from that section.

19.04.2018- SCN issued raising demand on highest amount as per ITR or Trading A/C plus the gross value of taxable service as shown in the ITR.

In other words the figure of Trading amount shown in the Income tax Returns for the period of 2012-13 to 2016-17 was taken as gross value of taxable service and also for the year 2012-13 and 2013-14 wherein the Appellant has provided taxable service as C&F Agent of M/s Maihar Cement was added. Since it was not there in subsequent years, the figure in the respective column was shown as "O". Notably in the List of Annexure enclosed with the SCN, 26AS and Balance sheet & P/L account are shown.

23.01.2019- Written submission given and PH attended by the Appellant. The ITR for the respective figure alongwith the copies of VAT returns submitted to the State Authorities were submitted. Audited Balance sheet and a reconciliation sheet were also submitted.

11.07.2019; impugned OIO issued. Ld. Adjudicating Authority vide para 20 of the Order observed, "Thus, I observe that the notice has not only failed to submit complete set of documents of

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substantiate their claim that part of the income had accrued on account of trading but has also failed to submit credible data to substantiate their submission. Since the Noticee did not participate in the investigation and the financial documents of the Noticee could not be examined from source documents and, in the present proceedings also, they failed to submit complete set of documents and credible data to substantiate their claim, I am constrained to reject the contention of the Noticee that part of income, on which service tax has been demanded in the Notice, had accrued from trading.

Demand of Rs.3,09,59,486/- was confirmed and penalty of equal amount imposed. Also Penalties for delayed filing of return Rs.1,07,700.00 u/s 7C of Service Tax Rules and Rs.10000/- U/s 77 (1) of the FA 1994 for non-production of documents called for by the Central Excise Officer also imposed.

From the matrix of the case, it is clear that the issue is a fact base issue wherein the Ld. Adjudicating Authority has deliberately ignored the submission of the Appellant in so much so that no cognizance is given to assessed VAT Returns even. The TDS shown under Section 194C & 194H in respective 26 AS for F.Y. 2012-13 and 2013-14 accrued on C&F Agency were duly accounted for in the Service Tax Return as Taxable service and service tax duly discharged. In subsequent period i.e. 2014-15 onwards, as it is in records, the C&F Agency got discontinued and there was no taxable service rendered by the Appellant.

Pertinent to mention that on surrender of the ST Registration, Hqrs. Audit Branch conducted audit of all the Financial documents and the same was being sought for subsequently by the AE wing and that the Appellant has simply informed them that the documents as sought for were still lying with the Audit wing. Allegation of non-cooperation with the Department is unfounded, it is submitted, in as much as it is in record that during the

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adjudication proceedings the appellant had submitted VAT return. Audited Balance sheet and reconciliation sheet besides making written and verbal submissions.

As a matter of fact, the Appellant has all along been a trader of Cement but for the intervening period of 2012-13 and 2013-14 when he got agency as C&F Agent of M/s Maihar Cement. That the Financial documents including of VAT Returns submitted to the State Government was considered as genuine by the Audit wing of the Department but authenticity of the same set of documents has been doubted for the obvious reason for nonproduction of source documents. Such findings and an order passed on such predisposed findings does not survive the test of fair justice, it is humbly submitted”.

8. We find that the very basis of the impugned demand is the figures appearing in the Income Tax Portal and the Profit and Loss account. We also find that the Ld. Commissioner has duly noted the fact that the Appellant was duly audited by the Service Tax Department for the compliance up to the Financial Year 2013-14. Since the records have been duly audited, the demand cannot be raised for the same period on account of change in the opinion. Further, we find that the Appellant had duly submitted the VAT Returns which have been recorded by the Ld. Commissioner in the impugned order.

9. In the VAT Return for the Financial Year 2015-16, the Appellant has duly disclosed the sales turnover of Rs.8,13,46,124/- on which VAT has been duly paid, whereas the impugned demand has been raised considering the value of taxable services to be Rs.8,28,06,929/- by taking higher of the amount appearing in profit and loss account and the Income Tax Return. Similarly, for the Financial Year 2016-17, the value of taxable services have been considered to be Rs.8,96,52,728/- whereas the appellant has duly disclosed the sales turnover of Rs.8,79,88,828/- in its VAT Return on which VAT has been

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paid at applicable rate. From the above, it appears that the major demand has been computed on the sales turnover.

10. In so far as the issue of limitation is concerned, we do not find any ingredient of fraud or suppression with an intent to evade payment of tax. In the case of Pappu Crane Services vs. CCE, Lucknow (Final Order no. 71246 of 2019 in ST Appeal no. 70707 of 2018), the co-ordinate Bench of Tribunal at Allahabad has held that where the demand is merely based on the data appearing in the Income Tax Portal, there cannot be said to any fraud or suppression so as to justify invocation of extended period of limitation. Therefore in the present case, in our view, the demand raised for the period up to March 2015 is completely barred by limitation and accordingly the demand is set aside. Further, since there is no element of fraud or suppression, we are of the view that the entire penalty amount is liable to be set aside.

11. In so far as the demand pertaining to the Financial Year 2015-16 and 2016-17 is concerned, we are of the view that by considering the reconciliation statements and the Chartered Accountant Certificate submitted by the Appellant before the Adjudicating Authority, as well as the VAT returns as referred above, there is no occasion to sustain the demand as raised in the impugned order. We accordingly set aside the same.

12. In view of the above findings, the instant appeal is allowed with consequential relief as per law.

(Pronounced in the open Court on **16.08.2022**)

Sd/

(P. K. Choudhary)

Member (Judicial)

Sd/

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(P. Anjani Kumar) mm

Member (Technical)