CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCPAL BENCH - COURT NO. 3

(E-Hearing)

Service Tax Appeal No. 55308 of 2023

(Arising out of Order-in-Appeal No. 89(RLM)ST/JPR/2023 dated 21.03.2023 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur)

M/s Baba Super Minerals Private Limited **Appellant**

VERSUS

The Commissioner, Central Excise & CGST, Jaipur **Respondent**

APPEARANCE:

Shri Ravi Gupta, Advocate for the Appellant
Shri Arun Sheoran, Authorized Representative for the Respondent

CORAM :

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 14.12.2023
Date of Decision: 31.1.2024

Final Order No. 50144 /2024

Hemambika R. Priya

Being aggrieved by the order-in-appeal No. 89(RLM)ST/JPR/2023 dated 21.03.2023 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur rejecting the appeal, M/s Baba Super Minerals Pvt. Ltd(hereinafter referred to as the appellant)has filed the present appeal.

2. The brief facts of the case are that the appellant's records for the period April 2016 to June 2017 was audited and IAR No. 07/L/2020-21 dated 28.06.2021 was issued to the appellant.

Thereafter, show cause notice dated 12.10.2021 was issued to the appellant calling upon the appellant upon to show cause as to why service tax amounting to Rs. 31,989/- (including cesses) should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017. A reply dated 15.07.2022 was filed to the show cause notice. The original adjudicating authority passed the order-in-original 02.08.2022 confirming entire demand with penalty. The appeal filed before the Commissioner (Appeal) was rejected and the present appeal is against the impugned order.

3. The Learned Counsel submitted that Tribunal may appreciate that the impugned order affirmed by the appellant authority is based on incorrect factual matrix and against the settled position of law. As per the prevailing law, the demand of service tax can be made only for 30 months from the relevant date and extended period of limitation can be invoked only when fraud, collusion, mis-statement, suppression of facts; or contravention of any of the provisions of the law, with an intent to evade payment of service tax exists. In this matter, there is no such reason exists as envisaged for application of extended period of limitation. It has been settled in the various judgments of higher judicial fora including the Tribunal that when facts are shown/reflected in financial statements of the assessee, the charge of suppression of facts is not sustainable. In the present case, ST-3 returns, EXP-2 with supporting documents were filed

which clearly indicate the fact of the service provided. The learned counsel relied upon the following judgements:

(i) **Continental Foundation Jt. Ventue Vs. CCE, Chandigarh-I [2007 (216) ELT 177 (SC),** in which Supreme Court went to the extent of ruling that the mere omission to give correct information is not suppression of facts unless it was deliberate and that an incorrect statement cannot always be equated with willful mis-statement:

(ii) In the case of **Uniworth Ltd. Vs. CCE, Raipur – [2013 (288) ELT 161 (SC)],** it was held that mere non-payment of duties is not equivalent to collusion or willful mis-statement or suppression of facts, otherwise there would be no situation for which ordinary limitation period would apply;

(iii) **Commissioner of C. Ex., Ludhiana Vs. Instant Credit – [2010 (17) STR 397 (Tri.-Del.);**

(iv) **Vijaya Advertisers Vs. Commissioner of Customs and C.Ex., Tirupati – [2007 (5) STR 345 (Tri.- -Bang.)]**

(v) **American Airlines Vs. CST (CESTAT-Del.) – [2016 (45) STR 226];**

(vi) **Jetlite (India) Ltd. Vs. CCE (CESTAT-Del.) – [2011 (30) STT 324].**

4. The learned counsel contended that the appellant had filed all EXP-2 with the supporting documents and ST-3 returns for the impugned period and all the details which are made subject of the show cause notice were available with the department at the relevant time. Consequently, the charge of willful suppression was unjust. The adjudicating authority could have confirmed from his office records that all the invoices had been duly submitted along

with EXP-2 by the appellant and service tax returns were also submitted within the prescribed time period. Therefore, when all the invoices and details were available with the department, the charge of suppression of facts was not sustainable against the appellant. The learned counsel went on to submit that in the show cause notice, the value of the alleged carriage inward freight had been taken excluding the value of freight up to Rs. 750/. However, clause (b) of entry no. 21 of the Notification No. 25/2012-ST clearly extends the exemption on services provided by a Goods Transport Agency by way of transport in a goods carriage of goods, where gross amount charged for the transportation of goods on a consignment transported in a single carriage does not exceed one thousand five hundred rupees. In this regard the appellant made averment in the reply to the notice as well as in appeal memo but no finding was given by the adjudicating authority and the appellate authority. In this context, the learned counsel relied on the following judgements:

(i) Ispat Industries Ltd. Vs. CCE – 2006 (199) ELT 509 (Tri.-Mum);

(ii) Secretary Town Hall Committee Vs. CCE -2007 (8) STR 170 (Tri.-Bang.)

(iii) CCE Vs. Sikar Ex-serviceman Welfare Coop. Society Ltd. – 2006 (4) STR 213 (Tri.-Del.)

(iv) Haldia Petrochemicals Ltd. Vs. CCE – 2006 (197) ELT 97 (Tri.-Del.)

(v) Siyaram Silk Mills Ltd. Vs. CCE – 2006 (195) ELT 284 (Tri.-Mumbai)

(vi) Fibre Foils Ltd. Vs. CCE – 2005 (190) ELT 252 (Tri.-Mumbai)

(vii) ITEL Industries Pvt. Ltd. Vs. CCE – 2004 (163) ELT 219 (Tri.-Bang.)

5. The learned Authorized Representative submitted that on verification of the books of accounts as produced in Tally by the appellant, a ledger in the name of carriage inward was noticed. Further verification revealed that this was the amount of freight paid for the inward of the goods. Notification No. 31/2012-ST dated 20th June, 2012 provides exemption to service tax under reverse charge to an exporter for the exported goods from any ICD to port or place of removal to ICD etc. and no exemption from service tax under Goods Transport Agency had been provided for inward receipt of the goods. In terms of Notification No. 30/2012-ST dated 20.06.2012, the liability to discharge the service tax for the services provided or agreed to be provided by a Goods Transport Agency in respect of transportation of goods by road, where the person liable to pay service tax on freight. In the instant case the appellant appeared to have contravened the provisions of Section 67, 68 and 70 of the Act read with Rule 6, 7 and Rule 2(I)(d)(i) of the Service Tax rules, 1994 and was liable to pay service tax.

6. I have heard the arguments of the learned counsel. In order to appreciate the submissions, we need to look at the relevant notification. Notification 31/2012 dated 20.06.2012 is reproduced hereinafter:

"Government of India
Ministry of Finance
(Department of Revenue)

Notification No. 31/2012 - Service Tax

New Delhi, the 20th June, 2012

G.S.R…. (E). -In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 18/2009-Service Tax, dated the 7th July, 2009, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R.490 (E), dated the 7th July, 2009, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as the said goods), of the description specified in column (2) of the Table below (hereinafter referred to as the specified service), from the whole of the service tax leviable thereon under section 66B of the said Act, subject to the conditions specified in column (3) of the said Table, namely:-

Table

Sr. No.	Description of the taxable service	Conditions
(1)	(2)	(3)
1.	Service provided to an exporter for transport of the said goods by goods transport agency in a goods carriage from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of the said goods by goods transport agency in a goods carriage directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported.	The exporter shall have to produce the consignment note, by whatever name called, issued in his name.

Provided that-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP1 appended to this notification, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with item (B) of sub-clause (i) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules,1994, for the specified service;

(b) the invoice, bill or challan, or any other document by whatever name called issued by the service provider to the exporter, on which the exporter intends to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item (v) of clause (a);

(c) the exporter availing the exemption shall file the return in Form EXP2, every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (4) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;

2. This notification shall come into force on the 1st day of July, 2012."

7. A plain reading of the said notification makes it clear that exemption from service tax is provided under reverse charge to an exporter for the transport of goods from any Inland Container Depot to a port or Place of removal to ICD. It is noted that the said notification does not provide any exemption for the receipt of goods into the factory. Consequently, any availment of exemption of service tax on such inward receipt of goods is incorrect.

8. I now take up the issue of time bar. I find that the said notification requires the exporter availing the said exemption to file EXP-1 to intimate the Assistant Commissioner that he intends to avail the exemption from service tax under Notification No. 31/2012-ST, dated 20th June, 2012 in respect of service for transport of the said goods by road, which has been used for export of goods. Thereafter, the exporter availing the exemption is required to file the return in Form EXP2, every six months of

the financial year, within fifteen days of the completion of the said sixth month. From the facts as recorded in the impugned order, it is apparent that the appellant was filing his ST-3 returns and the returns in the form EXP-2 regularly. It has been alleged in the impugned order that the appellant had submitted the EXP-2 and ST-3 returns to the Commissioner(Appeals) who has rejected the same by holding that the appellant had failed to file invoices along with the returns. In my opinion, once the EXP-2 was filed, the responsibility lies with the Department to examine/ scrutinise the returns in a timely manner, and point out any shortfall/discrepancies to the exporter/appellant. The Department never raised any the objection regarding any irregularity or highlight that invoices were not filed. Further, the Department has not brought any evidence on record to show that the appellant had suppressed any material fact in order to evade the payment of service tax. This was not done and thereafter to allege suppression with an intent to evade payment of tax to justify the demand cannot be upheld.

9. In this context, I find that the Supreme Court in the case of **M/s Anand Nishikawa Co. Ltd vs Commissioner of Central Excise, Meerut [2005 (188) ELT 149(SC)]** held as follows:

> **"26.** In *Tata Iron & Steel Co. Ltd.* v. *Union of India & Ors.* [1988 (35) E.L.T. 605 (S.C.)], this Court held that when the classification list continued to have been approved regularly by the department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied

by the appellant were duly approved from time to time regularly by the Excise authorities and only in the year 1995, the department found that there was "suppression of facts" in the matter of post-forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17-5-1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts'' of the CEGAT cannot be approved by us. This Court in the case of *Pushpam Pharmaceutical Company* v. *Collector of Central Excise, Bombay* [1995 Supp (3) SCC 462], while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly, *it does not mean any omission and the act must be deliberate and willful to evade payment of duty*. The Court, further, held :-

"In taxation, it ("suppression of facts") can have only one meaning that *the correct information was not disclosed deliberately to escape 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."*

27. Relying on the aforesaid observations of this Court in the case of *Pushpam Pharmaceutical Co*. v. *Collector of Central Excise, Bombay* [1995 Suppl. (3) SCC 462], 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 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 wilful suppression. Therefore, in view of our findings made herein above 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 proviso to Section 11A 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 the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In *Densons Pultretaknik* v. *Collector of Central Excise* [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts". This view was also reiterated by this Court in *Collector of Central Excise, Baroda* v. *LMP Precision Engg. Co. Ltd.* [2004 (9) SCC 703]."

10. In view of the foregoing discussions, I hold that the demand is barred by limitation. Accordingly, the impugned order is set aside and the appeal is allowed.

(Pronounced in the open court on 31.1.2024)

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)

ss