

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70394 of 2023

(Arising out of Order-in-Original No.LKO/EXCUS/000/COM/ST/089/2015-16 dated 26.02.2016 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s J M Manpower & Security Pvt. Ltd.,Appellant
(209, 2nd Floor, Vinay Place,
11-Ashok Marg, Lucknow-226001)

VERSUS

**Commissioner of Central Excise &
Service Tax, Lucknow**Respondent
(7-A, Ashok Marg, Lucknow-226001)

APPEARANCE:

Shri Anup Kumar Srivastva, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70037/2024

DATE OF HEARING : 12 January, 2024
DATE OF DECISION : 30 January, 2024

P. K. CHOUDHARY:

The present appeal has been filed by M/s J M Manpower & Security Pvt. Ltd. challenging the order passed by the Adjudicating Authority wherein he confirmed the demand of Service Tax of Rs.56,39,991/- alongwith interest and imposed equal penalty. Interest of Rs.30,585/- for late payment of Service Tax and penalty of Rs.1,100/- for late filing of ST-3 Returns were also imposed.

2. Briefly stated, the facts of the case are that the Appellant is providing Security Agency Services. Audit scrutiny was conducted by the Department, during which it was noticed that lesser amount was reflected in the value of taxable services shown in ST-3 Returns as compared to Revenue from Operations in the Balance Sheets for F.Y 2009-10 and F.Ys 2011-12 and

2012-13. Duly audited Revised Balance Sheet for F.Y 2009-10 was submitted by the Appellant in which the Revenue from operations is lower than the amount shown in ST-3 Returns, but this was rejected by the Department as an afterthought even though there was an FIR dated 31.08.2010 to the effect that the Appellant's relevant records had been lost. Accordingly, Show Cause Notice dated 17.10.2014 was issued by invoking extended period of limitation for the abovementioned Financial Years proposing demand for Service tax, interest and imposition of penalty. But for F.Y 2011-12, since the Appellant had reflected more amount in the value of taxable services shown in ST-3 Returns as compared to Revenue from Operations shown in the Balance Sheet, no Service Tax demand was proposed.

3. The impugned order confirmed all demands as proposed in the Show Cause Notice on the basis of mismatch of ST-3 Returns and Balance Sheet, hence the present appeal before the Tribunal.

4. Learned Counsel for the Appellant submits that for the F.Y 2009-10, the figures reflected in the duly audited Revised Balance Sheet submitted to the Department should have been taken into consideration by the Adjudicating Authority. The Appellant had informed the Department the reasons of showing reduced Service Charge in the revised Balance Sheet. Owing to their Chartered Accountant's oversight, caused by loss of records as shown in the FIR, one client namely M/s CMS Computer, who was billed for more than Rs.80 lakhs/- for F.Y 2008-09, was mistakenly billed again for the same amount in F.Y 2009-10. The decrease in total Service Charge wipes out the alleged service tax evasion as averred in the Show Cause Notice. He states that the Revised Balance Sheet cannot be considered as an afterthought as FIR was filed in August, 2010 for loss of records and Balance Sheets cannot be considered selectively to consider the Balance Sheet which leads to levy of additional Service tax on the Appellant while not considering the Revised Balance Sheet which does not impose any additional service tax.

5. Learned Counsel for the Appellant further submits that income shown to the Income Tax authorities could not be the basis to determine Service Tax liability unless there is any proof that the income was towards a taxable service. He relies on the order of the Tribunal in Kipps Education Centre vs. CCE Ludhiana 2009 (13) S.T.R. 422 and CCE Ludhiana vs. Mayfair Resorts 2011 (21) S.T.R. 589 affirmed by the Hon'ble High Court of Punjab & Haryana 2011 (22) S.T.R. 263 which held that it was for the Department to show the evasion of Service Tax and that the money found with the assessee represented proceeds of services provided by it.

6. Learned Counsel for the Appellant further states that it is a settled and trite law that amount reflected in Balance Sheet cannot be used to determine service tax liability unless there is proof that the entire amount received was taxable under the provisions of Service Tax. For this, he relies on the judgement of Hon'ble Madras High Court vide order dated 06.04.2018 in WP No.21799/2017 in Firm Foundations and Housing Pvt. Ltd. vs. Principal Commissioner of Service Tax Chennai and also on the following orders of the Tribunal:-

- Final Order No.75120/2022 dated 23.02.2022 in Appeal No.ST/75792/2021 in M/s Luit Developers Pvt. Ltd. vs. Commissioner CX & ST Dibrugarh.
- Final Order No.60403/2023 dated 18.09.2023 in Appeal No.ST/4174/2012 in M/s Indian Machine Tools Manufacturers Association vs. CCE Panchkula.
- Final Order No.60074/2022 dated 08.08.2022 in Appeal No.ST/60185/2021 in M/s Raj Mohan vs. Commissioner of CGST, Panchkula.
- Go Bindas Entertainment Pvt. Ltd. vs. Commissioner of S.T., Noida 2019 (27) G.S.T.L. 397 (Tri-All).
- Synergy Audio Visual Workshop Pvt. Ltd. vs. Commissioner of Service Tax, Bangalore 2008 (10) S.T.R. 578 (Tri.-Bang.)

- Tempest Advertising (P) Ltd. vs. CCE Hyderabad-II 2007 (5) S.T.R. 312 (Tri.- Bang.)
- CCE Ludhiana vs. Deluxe Enterprises 2011 (22) S.T.R. 203 (Tri.-Del.).

7. Learned counsel also states that extended period of limitation cannot be invoked as the Appellant was regularly filing S T - 3 Returns, so the Department cannot take a stand that it is only on going through the Balance Sheet that it could examine the factual position. We find that the 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 clearly directs the Assessing Officer to effectively scrutinize the returns at the preliminary stage as held by the Tribunal in Gannon Dunkerley & Co Ltd. vs. CST(Adj) Delhi 2021 (47) G.S.T.L. 35 (Tri-Del) and Luit Developers (supra).

8. Learned counsel for the Appellant further relies on the order of the Tribunal in M/s Chemix Oil Pvt. Ltd. vs. Commissioner of CX & ST Shimla 2023 (4) T.M.I. 434 and Hon'ble Calcutta High Court in Larsen & Toubro vs. Assistant Commissioner, Service Tax Commissionerate, Division III, Kolkata (2023) 2 Centax 327 to agitate the fact that audit objections cannot be the sole criteria to invoke extended period. He also states that since the SCN has been issued solely on the basis of the Appellant's own Records, extended period cannot be invoked as held by the Tribunal in Ace Creative Learning Pvt. Ltd. vs. Commissioner of CX & ST, Bangalore South 2021 (51) G.S.T.L. 393 (Tri-Ban).

9. It is the case of the Appellant that extended period of limitation cannot be invoked because the Appellant is a Private Limited Company due to which documents like Profit/Loss Account and the Balance Sheet are Public documents easily accessible by the public from the Registrar of Companies website. In support, he relies on Luit Developers (supra) which held in Para 13 of its order that,

"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)."

He also relies on the following decisions :-

- Hindalco Industries Ltd. Vs. CCE Allahabad 2003 (161) E.L.T. 346 (Tri-Del).
- Kirloskar Oil Engines Ltd. vs. CCE Nasik 2004 (178) E.L.T. 998 (Tri-Mum).
- CCE Raipur vs. Rajaram Maize Products 2010 (258) E.L.T. 539 (Tri-Del).
- Rolex Logistics Pvt. Ltd. vs. CST 2009(13) S.T.R. 147 (Tri-Ban).

10. Learned counsel also submits that in the absence of any positive evidence like recovery, or incriminating statements, or invoices, or contracts, or bills it cannot be alleged that there was *malafide* intent to evade service tax. In support, he relies on the following judgements :-

- (i) CCE vs. Chemphar Drugs & Liniments 1989 (40) E.L.T. 276 (SC).
- (ii) Pushpam Pharmaceuticals Company vs. CCE, Mumbai 1995 (78) E.L.T. 401 (SC).
- (iii) Indian Hotels Co Ltd. vs. Commissioner of Service Tax, Bangalore 2014 (36) S.T.R. 1268 (Tri-Ban).

11. Learned counsel for the Appellant further states that mere non-payment of service tax cannot sustain the allegation of suppression of facts for invoking extended period without showing that the Appellant was aware that service tax was short paid but still chose not to pay. In support, he relies on the following judgements :-

- Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I 2007 (216) E.L.T. 177 (SC).
- Anand Nishikawa Company Ltd. vs. Commissioner of Central Excise 2005 (188) E.L.T. 149 (SC).

- Religare Securities Ltd vs. CST (2014) 36 S.T.R. 937 (Tri-Del).
- M.P Laghu Udhog Nigam Ltd. vs. CCE, Bhopal (2015) 37 S.T.R. 308 (Tri-Del).

12. The Learned D.R. justifies and reiterates the findings of the impugned order and accordingly prays that the appeal be dismissed being devoid of any merits.

13. Heard both sides and perused the appeal records.

14. We observe that the Revised Balance Sheet for F.Y 2009-10 has been duly audited. Thus, there was no reason for the Adjudicating Authority and the Department to not take its figures into consideration. On taking the Revised balance Sheet into consideration, it can be seen that the receipts decrease by Rs.81,15,826/-, which even otherwise leads to reduction in Tax demand of Rs.8,35,930/- at the rate of 10.30%, thereby wiping out any alleged service tax difference of Rs.7,72,960/- for F.Y 2009-10.

16. We find that it has been held in a catena of decisions that without any evidence, only the amount received by the Appellant was liable to Service Tax, amounts reflected in Balance Sheet cannot be used to determine the Service Tax liability. The Hon'ble Madras High Court in Firm Foundations and Housing (supra) held that the reporting of income in the P and L is irrelevant for the purposes of determination of service tax payable and thus the basis of the impugned assessment is erroneous. Moreover, income reflected in the Balance Sheet is for Income Tax purposes, which cannot be used for the purpose of service tax without any corroboratory evidence as also supported by Luit Developers (supra) which held in Para 11 that,

"....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)." The same proposition was applied in Indian Machine Tools Manufacturers Association (supra) which held in its Para 11 that, *".....we are of the considered opinion that it is not open for the Department to raise*

demands on the basis of other statutory returns like Income Tax Returns or balance sheets without proving that such service has been rendered by the assessee and consideration thereof has been received....”.

Notably, the Hon’ble Punjab & Haryana High Court in Mayfair Resorts (supra) held that the Department had to show evasion of Service Tax and that the money found with the assessee represented proceeds of services provided by it, which has admittedly not been done in the present case by the Department.

17. We find that since the Appellant was filing ST-3 Returns regularly, the Department’s stand that it could examine the correct facts only on going through the Balance Sheet cannot be sustained as 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.No137/314/2012 categorically puts duty on the assessing officer to effectively scrutinize the returns at the preliminary stage, as held in Gannon Dunkerley & Co Ltd (supra).

18. We find that extended period of limitation cannot be invoked solely on audit queries and objections as held in Larsen & Toubro (supra) and Chemix Oil (supra). We find that the Appellant is a Private Limited Company and therefore the Profit/Loss Account and Balance Sheet is a public document accessible from Registrar of Companies website. Therefore, no suppression can be alleged to invoke the extended period as held in Hindalco Industries Ltd. (supra), Kirloskar Oil Engines Ltd. (supra), Rajaram Maize Products (supra) and Luit Developers (supra). It is our considered view that mere non-payment of tax will not sustain the allegation of suppression of facts for invoking extended period as nothing has been shown which points towards any omission or commission by the Appellant which shows the intention to evade tax as held by MP Laghu Udyog Ltd. (supra). We find that the Department has not adduced any positive evidence to show *malafide* intention for evasion of service tax and therefore extended period is

erroneously invoked as held in Pushpam Pharmaceuticals Limited (supra) and Continental Foundation Joint Venture Holding (supra).

19. Therefore, in view of the above discussions and decisions cited supra, there can be no demand of Service tax of Rs.56,39,991/- and interest under Section 75 and penalty imposed under Section 78 of the Act is set aside.

20. As far as interest demanded to the tune of Rs.30,585/- for the period F.Y 2009-2013 on late payment of the Appellants declared service tax liability, it is upheld only for normal period of limitation, i.e. for the period from October, 2012 to March, 2013 and rest is set aside.

21. The demand of Rs.1,100/- for late filing of ST-3 Returns pertains to the period April, 2012-June, 2012, which falls in the extended period and is therefore set aside.

22. Accordingly, the appeal is partly allowed as per the above terms. The Appellant shall be entitled to consequential benefits as per law.

(Order pronounced in open court on **30th January, 2024**)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS