CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

SERVICE TAX APPEAL NO. 50834 of 2018

[Arising out of Order-in-Original No. 01/COMMR/DDN/2018 dated 03.01.2018 passed by the Commissioner, Central Goods and Service Tax, Uttarakhand]

M/S RIGHT RESOURCE MANAGEMENT SERVICE — **Appellant**

Plot No. 1, Arz Tower, Sri Ram Garden,
Shimla Bahadur Road, Rudrapur,
US, Nagar, Uttarakhand

Vs.

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, CENTRAL EXCISE AND CUSTOMS, DEHRADUN — **Respondent**

E-Block, Nehru Colony, Haridwar Raod,
Dehradun, Uttarakhand

Appearance:
Shri R M Saxena and Shri Rajesh Kumar, Advocates for the appellant
Shri S K Meena, Authorised Representative for the Department

WITH

SERVICE TAX APPEAL NO. 51364 OF 2018

[Arising out of Order-in-Original No. 01/COMM/DDN/2018 dated 03.01.2018 passed by the Commissioner of Customs, Central Excise and CGST, Dehradun]

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, CENTRAL EXCISE AND CUSTOMS, DEHRADUN — **Appellant**

Vs.

RIGHT RESOURCE MANAGEMENT SERVICE — **Respondent**

Plot No. 1, ARZ Tower,
Sri Ram Garden
Shimla Bahadur Road,
Rudrapur, Udham Singh Nagar

Appearance:

Shri S K Meena, Authorised Representative for the Department
Shri R M Saxena and Shri Rajesh Kumar, Advocates for the respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 51467-51468/2023

Date of Hearing : 15/09/2023
Date of Decision: 30/10/2023

P V SUBBA RAO:

1. M/s Right Resource Management Service[1] and the Revenue filed these cross appeals to assail Order-in-Original [2] dated 3.1.2018 passed by the Commissioner of Central Excise, Dehradun whereby he decided the Show Cause Notice[3] dated 18.4.2017 issued by the Directorate General of Central Excise Intelligence[4], Lucknow proposing recovery of service tax of Rs. 2,81,34,607/- from the assessee for the period 2010-11 to 2014-15 under section 78 of the Finance Act, 1994[5] invoking extended period of limitation along with interest under section 75. The SCN also proposed to impose penalties upon the assessee under sections 77 and 78 and late fee under section 70 of the Act.

2. The assessee is registered with the Service Tax department for providing 'Manpower supply Service' and it has been paying service tax and filing ST-3 returns. Officers of the Directorate General of Central Excise Intelligence[6] searched its premises on 30.3.2015 and after completing investigations, issued the aforesaid SCN. Part of the demand in the SCN was beyond even the extended period of limitation of five years, which the

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1 Assessee
2 Impugned order
3 SCN
4 DGCEI
5 Act
6 DGCEI

Commissioner dropped in the impugned order and for part of the demand, giving the benefit of reckoning the amounts received as cum tax values, the Commissioner confirmed demand of only Rs. 99,34,381/- and dropped the rest of the demand. He, however, confirmed the demand within the extended period of limitation of five years which can be invoked only if the short payment of tax is by reason of fraud or collusion or willful mis-statement or suppression of facts or violation of the provisions of the Act or the Rules with intent to evade payment of duty.

3. **Service Tax Appeal 50384 of 2018** is filed by the assessee assailing the confirmation of the part of the demand and imposition of penalties.

4. **Service Tax Appeal 51364 of 2018** is filed by the Revenue assailing dropping of the part of the demand. It also seeks confirmation of the interest on that part of the demand and consequent enhancement of the penalty imposed under section 78.

Submissions of the assessee

5. Learned counsel for the assessee made the following submissions:

a) The demand of Rs. 99,34,381/- was confirmed in the impugned order by invoking *best judgment assessment* under section 72 of the Act which was not invoked in the SCN.

b) Giving reasons for invoking the best judgment assessment, it has been wrongly alleged in paragraph 6 of the SCN that the

assessee had not provided the requisite information/ documents such as Form 26AS, balance sheets and copies of the bills issued by it. All these documents, except the bills which are voluminous, were resumed by the officers during search on 30.3.2015 itself. Only Form 26AS for the period 2010-11 and 2011-12 of the assessee were obtained by the officers from the Income Tax department. Form 26AS is generated by the Income Tax department based on TDS returns filed by third parties.

c) Since the officers were issuing repeated letters and summons and harassing the assessee and had also demanded a bribe, the assessee complained to the CBI who filed an FIR a copy of which is at page 229 of the paper book.

d) The assessee had calculated its tax liability as Rs. 24,73,553/- based on Form 26AS figures.

e) There were no grounds to invoke extended period of limitation of five years in the case. The SCN incorrectly alleged suppression of true taxable value and wilful mis-declaration of taxable value which have been upheld in the impugned order.

f) The normal period of limitation under section 73 was 18 months upto 13.5.2016 and thereafter, it was extended to 30 months. The question of applicability of the amended period of limitation to the past cases was examined by the Supreme Court in **UOI vs Uttam Steel**[7] and it was held that**' There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso**

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7 2015(319)ELT 598(SC)

super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time barred before an Amending Act with a larger period of limitation comes into force.' Applying this ratio, the demand upto September 2014 was time barred under the old provision of 18 months on 25.4.2016. The only demand which survives is for the period 1.10.2014 to 31.3.2015 against which the assessee had deposited service tax of Rs. 50,51,636/- along with interest of Rs. 4,50,000/-.

g) Penalty under section 78 should not be imposed as the elements fraud or collusion or willful mis-statement or suppression of facts or violation of the provisions of the Act or the Rules with an intent to evade payment of duty which are essential to impose the penalty under section 78 were not present.

h) Penalty under section 77 (1)(c) was imposed on the assessee for failure to appear for appearance on five dates against summons and produce the desired documents. These documents were already with the department and hence they were not provided and nor had the assessee appeared and instead complained to the CBI who filed an FIR in the matter. Penalty under section 77(1) (c) cannot exceed Rs. 10,000/- in any case.

i) Penalty under section 77(2) was arbitrarily imposed and needs to be set aside.

j) To sum up, the officer could not have resorted to best judgment assessment in the present case, extended period of limitation could not have been invoked, the demand within the normal period of limitation may be liable to be confirmed and the penalties under sections 77(1)(c), 77(2) and 78 are not imposable.

Submissions on behalf of the Revenue

6. Learned authorised representative for the Revenue submitted as follows:

a) The assessee had failed to provide the required documents during investigation despite repeated letters and summons and therefore, the department had done the valuation on the basis of the documents which were available and those which were received from income tax department such as Form 26AS as per the best judgment under section 72.

b) The adjudicating authority, however, erred in holding that the period April 2010 to September 2011 was beyond five years and hence was hit by limitation on the ground. Where no ST-3 return is filed by the due date, the relevant date to calculate the limitation is the last date on which such return should have been filed and not the actual date of filing the return. In this case, the assessee filed the returns much after the due date and if the date of actual filing of returns is considered, the demand for the period April 2010 to September 2011 would fall within the extended period of limitation. The relevant dates are as follows:

S.NO.	Half year	Due date for filing ST-3	Actual date on which ST-3 is filed
1	April 2010 to September 2010	25.10.2010	1.11.2012
2	October 2010 to April 2011	25.4.2011	1.11.2012
3	April 2011 to September 2011	25.10.2012	25.4.2102

c) Section 73 states that the relevant date to calculate the limitation is the date of filing of the return and if no return is filed, the last date of filing of return. For the above three periods, the assessee had filed the returns, albeit late. Therefore, the date of filing of the return must be considered as the relevant date and if this date is considered, the entire demand was within the extended period of five years. The demand for this period was wrongly dropped by the Commissioner. Section 73 does not make a distinction between the returns filed within time and returns filed late. 'Date of filing of return' under this section cannot be read as 'Date of filing of return when the return is filed within the period prescribed for the purpose.' The statutory provisions must be strictly interpreted.

d) The demand of service tax dropped by the Commissioner in the impugned order should be confirmed along with interest.

e) Penalty under section 78 may also, consequently, be increased.

7. We have considered the submissions on both sides and perused the records. The following issues fall for consideration in this case:

a) Best judgment assessment invoked in the SCN and the impugned order

b) What is the relevant date for reckoning the limitation under section 73 and what was the normal period of limitation?

c) Invocation of extended period of limitation

d) Imposition of penalties under sections 77 and 78

Best judgment assessment

8. According to the learned counsel for the assessee, Best Judgment Assessment was wrongly invoked in this matter while according to the learned authorised representative, it was correctly invoked. According to the learned counsel, the best judgment assessment was invoked 'suo moto'. In paragraph 3 of the synopsis submitted by him, he has stated that the invocation of the best judgment assessment was not proposed in the SCN, while in paragraph 4 of the same synopsis he specifically stated that paragraph 6 of the SCN gave reasons for invoking best judgment assessment. He also disputed the use of Form 26AS for the best judgment assessment on the ground that it was generated by the Income Tax department based on information provided by third parties and hence is public record as per section 74 of the Indian Evidence Act, 1872 and only income tax department is authorised to provide it to the Central Excise department.

9. According to the learned authorised representative, the best judgment assessment had to be resorted to because the assessee had, despite repeated letters and summons, not produced the required documents. He further asserts that this

failure of the assessee was the reason penalty was imposed on the assessee under Section 77(1)(c).

10. In order to examine this assertion of the assessee, it is necessary to examine section 72 of the Act which reads as follows:

> **SECTION 72. Best judgment assessment. —** If any person, liable to pay service tax, —
>
> (a) fails to furnish the return under section 70;
>
> (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,
>
> the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

11. The following is evident from section 72.

(a) Best judgment assessment can be resorted to if the assessee fails to file the return or fails to assess the tax liability correctly.

(b) To make the best judgment assessment, the Central Excise officer may ask the assessee to produce such accounts, documents or other evidence as he may deem necessary.

(c) After taking into account all the relevant material which is available or which he has gathered, he can make the best judgment assessment.

(d) The assessment has to be in writing.

(e) Before making the judgment, the assessee must be given an opportunity of being heard.

12. Nothing in the section suggests that best judgment assessment has to be done at the request of the assessee or at the behest of anyone. The Central Excise officer, evidently, can do this on his own, in other words, *suo moto*. Therefore, the submission of the learned counsel for the assessee that this cannot be done suo moto holds no water. Nothing in the section says that best judgment can be resorted to only if the assessee requests for it. On the contrary, it is meant for such cases where the assessee either fails to file the return or fails to assess the tax correctly. All that is required is that it should be done in writing which requirement is met in this case because it is done through the impugned order and that the assessee must be given an opportunity of being heard which is also met since the SCN was issued. The submission of the learned counsel for the assessee in paragraph 3 of his synopsis that invocation of best judgment assessment was not proposed in the SCN is contradicted by paragraph 4 of the very synopsis which states that even the reasons for invoking best judgment assessment was given in paragraph 6 of the SCN.

13. Learned counsel for the assessee also questioned the reliance on Form 26AS of the assessee itself for the assessment on the ground that it is a statement generated by the Income Tax Department based on third party TDS returns. According to

the learned counsel, Form 26AS is a public document within the meaning of section 74 of the Indian Evidence Act and only the Income Tax department is authorised to provide them to the Central Excise Department.

14. We have considered these submissions regarding Form 26AS. The Income Tax Act requires various persons to deduct tax at source before paying the payee and file returns of Tax Deducted at Source (TDS) online with the Income Tax department. These returns indicate the PAN of each payee and the amounts paid and the tax deducted and details of the credit to the Income Tax department. The person deducting the tax has to also issue Form 16 (in case of salaries) of Form 16A (in case of other payments) to the payee at the end of the Financial Year. The amounts deducted by various persons from an assessee's accounts get set off against his final tax liability at the end of the year. For instance, if an employee gets a salary of Rs. 10,00,000/- in a year and a sum of Rs. 50,000/- was deducted as tax and his bank paid him some interest and deducted, say, Rs.5,000/- as tax, both these amounts get consolidated into Form 26AS of the employee and these amounts get adjusted against final tax liability at the end of the year. It is a matter of common knowledge that anyone can log into the income tax website and download one's own Form 26AS for any year. Therefore, the assertion of the learned counsel that Form 26AS can be provided only by the Income Tax department to the Central Excise officers is not correct. The assessee himself could have provided this form to the central excise department as well.

15. Learned counsel also submitted that Form 26AS is not a proof that service has been rendered. It is certainly proof that amounts have been paid by various persons to the assessee and that tax has been deducted from the payments. It cannot be argued that some random person made some payment to the assessee and also deducted tax so that it could be credited to the account of the assessee as tax deducted. If the persons who made the payments are the assessee's clients, it is not unreasonable to assume that the payments were for the services rendered. If it is not so, the assessee could have clarified as to why the payments were made by its clients. In the absence of any specific explanation and the evidence that amounts were paid to the assessee by its clients after deducting tax and the tax so deducted has been credited to the assessee's accounts, the obvious conclusion which one can come to is that the payments were for the services rendered.

16. It also needs to be pointed out that the demand for the normal period of limitation which the assessee has admitted and is not contesting before us is also as per the best judgment assessment, inter alia, based on the Form 26AS and other records.

17. In view of the above, we find that the assessee's objections to best judgment assessment in the impugned order has no legs to stand on and deserves to be dismissed.

What is the relevant date for reckoning the limitation under section 73 and what was the normal period of limitation?

18. In the impugned order, the Commissioner dropped part of the demand finding it to be beyond the extended period of 5 years from the relevant date. Revenue's appeal is against such dropping of demand on the ground that the 'Adjudicating authority erred to the extent of holding demand pertaining to service tax payable for the period of April 2010 to September 2011 was hit by limitation'. It is the submission of the learned authorised representative of the Revenue that if the date on which the assessee had actually filed the returns for that period is reckoned, the demand was not beyond five years. It is further his submission that section 73 does not distinguish between cases where the return was filed within time and the return was filed after the due date. A plain reading of the section indicates that once a return is filed, that date is the relevant date for determining the limitation.

19. We find that section 73(6) reads as follows:

> (6) For the purposes of this section, "relevant date" means,-
>
> **(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid** —
>
> (a) **where under the rules made under this Chapter, a periodical return**, showing particulars of service tax paid during the period to which the said return relates, **is to be filed by an assessee, the date on which such return is so filed;**
>
> (b) **where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules**;
>
> (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;
>
> (ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.

20. In case of short payment of tax, the relevant date from which the limitation is to be reckoned is the date on which the Return is filed. However, if no Return is filed, the last date for such filing the return is to be reckoned. The rationale behind this provision is self-evident. Once a return is filed with the officer, it comes within his knowledge and he can scrutinize it and raise demands from that date onwards. However, if the Return is not filed by due date, the officer need not wait endlessly and he can start action on the last date for filing the return. He can call summon or call for any documents he deems necessary and if necessary, raise a demand and take action. Evidently, if return is filed, the clock starts ticking from that date and if no return is filed, the clock starts ticking from the due date.

21. The case of the Revenue is that if the assessee files a return after the due date, such date must be reckoned as the relevant date because the section does not distinguish between the return filed by due date and return filed after due date. In our considered view, this section cannot be read in that manner. If the assessee does not file the return by the due date, the relevant date begins on the due date. Thereafter, even if the assessee files a return for that period belatedly, there is nothing in the law according to which the relevant date will change and a new relevant date will emerge. For instance, according to the learned authorised representative for the Revenue, for the half year ending September 2010, the due date for filing the return

was 25 October 2010 but the assessee filed the return for this period after two years only on 1 November 2012. According to him, 1 November 2012 should be reckoned as the relevant date. In this example, for the period ending September 2010, the relevant date began on 25 October 2010 and the demand has to be raised within the normal period or, as the case may be, extended period of limit from this date. There is no provision to change the relevant date by any subsequent development such as, in this case, the assessee filing the return on 1 November 2012.

22. The proposition of the Revenue that the relevant date in this case must be 1 November 2012 cannot also be accepted because it would mean that the assessee would be worse off by filing the return with delay than by not filing it at all.

23. Thus, the proposition of the department that the date on which the return is filed after the due date should be reckoned as the relevant date cannot be accepted because (a) once the assessee does not file the return by the due date, the relevant date sets in and there is no provision in the law to modify this relevant date by any subsequent events including filing of the returns; and (b) because it results in absurdity because the assessee will be worse off by filing the return late than by not filing it at all. Hence it needs to be rejected and we do so. The Constitution Bench of Supreme Court in the **Commissioner of Customs vs. Dilip Kumar & Company** held that in interpreting statutes based on plain language, absurdity should be avoided. Paragraph 20 of the judgment is as follows;

> " 20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statues and penal statues. **Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose. Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation.** Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation."

24. As far as the normal period of limitation is concerned, it was 18 months from the relevant date up to 13 May 2016, after which it was increased to 30 months. The question as to what would happen to the past cases when the period of limitation is increased was answered by the Supreme Court in **Uttam Steel.** It was held that limitation being a procedural law will have retrospective effect but any case which has already lapsed on the date the amendment came into force will not revive. The amendment will not put life into dead cases but those which are still live on the date of amendment will be governed by the new limitation. Paragraph 10 of the judgment reads as follows:

> "10. We have heard learned counsel for the parties and Shri Bagaria, the learned Amicus Curiae at some length. There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time barred before an Amending Act with a larger period of limitation comes into force. A number of judgments of this Court have recognized the aforesaid proposition. Thus, in S.S. Gadgil v. Lal and Company, AIR 1965 S.C. 171, this Court stated:-

> "13. As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income Tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party under Section 43 within two years from the end of the year of assessment. But authority of the Income Tax Officer under the Act before it was amended by the Finance Act of 1956 having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The legislature has given to Section 18 of the Finance Act, 1956, only a limited retrospective operation i.e. up to April 1, 1956, only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income Tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided, become barred."

To similar effect is the judgment in J.P. Jani, Income Tax Officer v. Induprasad Devshanker Bhatt, AIR 1969 SC 778. The Court held:

> "6. In our opinion, the principle of this decision applies in the present case and it must be held that on a proper construction of Section 297(2)(d)(ii) of the new Act, the Income Tax Officer cannot issue a notice under Section 148 in order to re-open the assessment of an assessee in a case where the right to re-open the assessment was barred under the old Act at the date when the new Act came into force. It follows therefore that the notices dated 13-11-1963 and 9-1-1964 issued by the Income Tax Officer, Ahmedabad were illegal and ultra vires and were rightly quashed by the Gujarat High Court by the grant of a writ."

In New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840, this Court said:

> "The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation."

Similarly in T. Kaliamurthi v. Five Gori Thaikkal Wakf, (2008) 9 SCC 306, this Court said:

> "40. In this background, let us now see whether this section has any retrospective effect. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of

> limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right."
>
> For the latest exposition of the same Rule see: Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 at para 29."

25. Therefore, for the half year ending September 2014 in the present case, the last date for filing returns was 25 October 2014 and the normal period of limitation ended on 24 April 2014. The new limit of 30 months came into force only on 13 May 2016. The normal period of limitation ended for the period upto September 2014 and for the period from October 2014, the new limit of 30 months applies.

Invocation of extended period of limitation

26. The SCN was issued and the demand was confirmed in this case invoking extended period of limitation of five years under the proviso to section 73. To invoke the extended period of limitation, the short payment of tax should be, on account of,

a) Fraud; or

b) Collusion; or

c) Wilful mis-statement; or

d) Suppression of facts; or

e) Violation of the provisions of the Act or Rules made thereunder with an intent to evade payment of tax

27. The reasons for invoking extended period of limitation given in the SCN is as follows:

" 8. Whereas, from the above, it appears that M/S RRMS have suppressed the correct taxable values in the ST-3 returns filed for the period 2010-11 to 2014-15 and thereby, evaded the service tax amounting to Rs. 2,81,34,607/-.They willfully mis-declared the taxable values in ST-3 returns with an intention to evade payment of service tax. Theevasion has been unearthed as a result of enquiry undertaken by the officials of Directorate General of Central Excise Intelligence, Regional Unit, Dehradun. M/s RRMS failed to self assess correctly the amount of service tax applicable on the value of taxable services provided by them during the period 2010-11 to 2014-15, as per the provisions of the Finance Act, 1994 and the Rules made there-under. Had the department not initiated the enquiry against M/S RRMS, the facts of suppression of taxable value and evasion of Service Tax would not have been unearthed. Therefore, service tax amounting to Rs. 2,81,34,607/-(including Education Cess and Higher Secondary Education Cess) for the period from 2010-11 to 2014-15 appears to demandable and recoverable from M/s RRMS by invoking the extended period of limitation under the proviso to sub-section (1) of Section 73 of the Finance Act, 1994 along with interest thereon under Section 75 of the Act, ibid."

28. The reasons for invoking extended period of limitation given in the impugned order is as follows:

"6.21 Now I take up the point whether the proviso invoking the extended period of time for demanding the service tax for the disputed period as laid down under Section 73(1) is applicable in this case. I found that in the present case party has suppressed value of taxable services in their ST-3 returns, failed to pay service tax charged and collected from their customers in government exchequer, not co-operated with the investigation carried out by the DGCEI, failed to submit actual value of taxable value realized by them before the investigating authorities. The aforesaid conduct of the party clearly prove that they intentionally suppressed the material information knowingly and willfully from the department with an intent to evade payment of service tax. In the circumstances of the case I find that the suppression on the part of the party also stands proved that the during the period in question all the ST-3 returns have been filed by the party after a considerable delay. Furthermore, act of the party to collect service tax from their clients but of not depositing the same in the government exchequer proves beyond any doubt that the intention of the party was from very beginning to defraud the government exchequer by way of omission and commission. Therefore, the contravention of the provisions of Finance Act' 1994 and the Rules made there under as alleged in the notice to show cause have been committed with the sole intent to evade payment of duty by suppressing the vital facts from the department knowingly and willingly. Accordingly, I find that the extended period of limitation for demand and recovery of service tax as provided under the proviso to Section 73(1) of the Finance Act 1994 is invokable in the present case."

29. In order to invoke extended period of limitation, at least one of the five elements indicated in the proviso to section 73(1) needs to be present. The case of the Revenue is that the assessee had suppressed the value of the taxable services provided by it in its ST-3 returns with an intent to evade payment of duty. This intent, according to the Revenue, is evident from the assessee's lack of cooperation during the investigation and also from the fact that in some cases, it had collected service tax from its clients and had not deposited it. The case of the assessee is that it had filed the ST-3 returns and had paid the service tax and also paid the differential service tax along with interest for the normal period during investigation itself. It is further the case of the assessee that not only has it been filing the returns with the Range Superintendent but it was also audited before this case was worked by the DGCEI and therefore, it had not hidden anything and cannot be alleged to have had any intention to evade. As far as the lack of cooperation during the investigation is concerned, it is the case of the assessee that the officers were harassing it for bribes and hence it stopped cooperating and instead complained to the CBI who filed a First Information Report against the officers a copy of which is enclosed with this appeal. The case of the Revenue regarding the audit conducted previously is that though the audit was conducted, the audit could not detect the evasion which was unearthed by the officers of DGCEI much later. After considering the above submissions of both sides and the factual matrix, we

are of the considered view that the department has not made out a case to invoke extended period of limitation in the matter. While it is true that the DGCEI discovered that some tax had escaped assessment and that the assessee does not dispute it on merits, it is equally true that the entire demand is based on the records of the assessee, some of which it produced and the other records which the DGCEI could obtain through the Income Tax department. Such a scrutiny could have been and should have been done by the Range officer with whom the Returns were filed and he was fully competent to call for any records from the assessee. Such scrutiny could also have been done by the audit team which audited its records. What is evident is that if some tax escaped assessment even after the Returns being filed with the Range Superintendent and despite the assessee was audited is that neither had done their job properly. We, therefore, are of the considered view that in this case, the demand only in respect of the normal period of limitation can be sustained.

Imposition of penalties under sections 77 and 78

30. Penalties have been imposed on the assessee under sections 77(1)(c), 77(2) and 78. Late fee was levied under section 70. Of these, the elements necessary to impose penalty under section 78 are identical to the elements required to invoke extended period of limitation. Since we have held in favour of the assessee with respect to extended period of limitation, the penalty under section 78 needs to be set aside.

31. Section 77(1) (c) reads as follows:

> **SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere**. — (1) Any person, —
>
> (a) …..
>
> (b) …….
>
> (c) who fails to —
>
> (i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or
>
> (ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or
>
> (iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,
>
> **shall be liable to a penalty which may extend to ten thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher,** starting with the first day after the due date, till the date of actual compliance;

32. According to the Revenue, despite several summons and letters, the assessee failed to produce the documents and records and also failed to appear before the officers and hence penalty @ Rs. 200/- per day for the period of failure was correctly imposed. Learned counsel for the assessee does not dispute that the assessee failed to appear in response to the summons and also that it had not provided the documents called for by the officers. His submission is that the officers were calling them to harass and hence they did not appear before officers. As far as the documents are concerned, it is his submission that many of these were already with the department and hence he did not provide them. He, however, admits that the invoices were not provided by it despite being asked because, 'they were bulky'. It is also the submission of the learned counsel for the

assessee that in any case, the amount of penalty under this section cannot exceed Rs. 10,000/-

33. None of the submissions of the assessee can be a defence to not appear in response to summons and not produce the relevant documents. In particular, the invoices are the basic documents which show the value of services rendered by the assessee. The ST-3 Returns only require the aggregate values of the taxable services rendered, tax paid, etc. If these are to be verified, invoices are required. There is no justification for the assessee to have not submitted the invoices. It is for this reason, the SCN was issued based on Form 26AS of the assessee obtained from the Income Tax department which shows how much was paid by various clients to the assessee. The assertion of the learned counsel that the penalty under this section cannot exceed Rs. 10,000/- is also not correct. He has completely mis-read the section which provides for penalty of Rs. 10,000/- or Rs.200/- per day **whichever is higher.** Thus, the penalty cannot be less than Rs. 10,000/- but there is no upper limit. For all these reasons, we find that the penalty imposed under section 77(1) (c) calls for no interference.

34. Section 77(2) reads as follows:

> **SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere**. —
>
> ……
>
> (2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

In paragraph 6.27 of the impugned order, penalty of Rs. 10,000/- was imposed 'under section 77(2) for contravention of various provisions of the Act, as discussed above'. We find that this sentence is cryptic and vague and does not even mention which provisions have been violated and therefore, it cannot be sustained.

35. Late fee was imposed under section 70 on the assessee for late filing of returns. This is a statutory fee and no specific averments have been made before us regarding this late fee.

34. In view of the above, we find that:

a) the relevant date for reckoning the limitation under section 73 in cases where no return is filed by the due date is the due date for filing the return and there is no provision for changing this relevant date even if the assessee files a return after the due date and the Commissioner was correct in reckoning the last date for filing of returns as the relevant date;

b) best judgment assessment can be resorted to by the officers suo moto and it is not necessary that an assessee requests for it;

c) the reasons for resorting to best judgment assessment given in the SCN and the impugned order are fair and reasonable;

d) the demand for the extended period of limitation under section 78 is not sustainable in the factual matrix of this case;

e) the normal period of limitation was 18 months up to 13.5.2016 and 30 months thereafter and the 30 months limitation will apply to all the past periods also except those

which have already expired by 13.5.2016 under the previous limitation of 18 months;

f) the demand for the normal period of limitation must be sustained along with interest thereon but the demand for the extended period of limitation cannot be sustained;

g) the penalty under sections 77(2) and 78 need to be set aside and the penalty under section 77(1)(c) needs to be upheld.

36. **Service Tax Appeal no. 51364 of 2018** filed by the Revenue is dismissed. **Service Tax Appeal no. 50384 of 2018** filed by the assessee is partly allowed upholding the demand of service tax with interest for the normal period of limitation, the late fee imposed under section 70 and the penalty under section 77(1)(c). However, the demand of service tax for the extended period of limitation and the penalties imposed under section 77(2) and section 78 are set aside. The assessee is entitled to consequential relief, if any.

[Order pronounced on **30.10.2023**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

Tejo