Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10234 of 2021- DB

(Arising out of OIO-AHM-EXCUS-001-COM-014-20-21 dated 10/11/2020 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Calcutta Ahmedabad Roadlines Private Limited .....Appellant
Near Kankaria Railway Yard Diwan
Ballubahi School Road Kankaria
Ahmedabad, Gujarat

VERSUS

Commissioner of SERVICE TAX – AHMEDABAD .....Respondent
7 th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat- 380015

APPEARANCE:
Shri Rahul Patel Chartered Accountant for the Appellant
Shri Tara Prakash Learned Deputy Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 12298/2024

DATE OF HEARING: 27.08.2024
DATE OF DECISION: 03.10.2024

RAMESH NAIR

The present appeal is directed against the impugned Order-in-Original No. AHM-EXCUS-001-COM-014-20-21 dated 10-11-2020 passed by the Pr. Commissioner of Central GST, Ahmedabad-South.

1.1 The brief facts of the case are that the inquiry against the appellant was initiated in order to verify the facts and service tax liability vide letter dated 05.04.2016 for the period April, 2013 to June, 2017. The appellant was engaged in the business of transportation of goods by road and also undertaking transportation of goods through rail certain cases. The appellant had not furnished service tax returns for the period involved in the inquiry and after commencement of the inquiry they filed service tax returns but they were not found to be proper and complete. Though the appellant furnished certain primary records including audited financial statements but could not furnish the

consignment notes and railway receipts due to non-availability of all the records at respective times on account of destruction by white ant. The appellant pleaded before the inquiring officer that the services of transportation of goods by road undertaken by them were not liable to service tax in their hands and therefore they shall not be held liable to pay the tax. Pursuant to the inquiry, the revenue had proceeded to issue the show cause notice demanding the service tax of Rs. 2,77,83,558/- from the appellant under forward charge mechanism. Furthermore, the revenue demanded the service tax of Rs. 18,82,617/- shown to have paid by way of utilization of CENVAT Credits in service tax returns furnished after commencement of inquiry. Show cause notice also proposed to demand the service tax of Rs. 62858/- and Rs. 14247/- under reverse charge mechanism in respect of legal services and security services on the basis of ledger accounts furnished by the appellant during the course of inquiry.

2. Shri Rahul Patel, learned Chartered Accountant appearing on behalf of the appellant submits that the service tax of Rs. 2,77,83,558/- was not recoverable in hands of the appellant. In the present matter revenue has classified the services of the appellant as "transportation of goods by road" and demanded the service tax by determining the value on the basis of turnover reported in balance sheet and after deducting therefrom the amount reported in service tax returns filed after commencement of the inquiry against the appellant. He also explained with the help of tables incorporated in the show cause notice as well as impugned order that the value of taxable service was determined after allowing abatement of 70% as per Notification No. 26/2012-ST and service tax was demanded under forward charge mechanism.

2.1 He vehemently submitted that the revenue had completely overlooked the fundamental aspects of taxation as they concern the taxability of services by way of transportation of goods by road. Services by way of transportation of goods by road is a negative list activity as per section 66D(p) and accordingly tax cannot be levied and recovered unless proven by the revenue that the services were provided as GTA and for which the consignment notes were required to be depended upon in the show cause notice. He explained that the entire case of the revenue was based on the fact that the appellant had not provided consignment notes to the investigating authority and that itself sufficient to show that the services provided by the appellant were not taxable in terms of section 66D(p). Thus it was necessary to appreciate that the revenue was not able to demonstrate taxability of the transactions as per their own theory and facts. He also explained that the burden was on the revenue to prove the taxability with sufficient degree of evidences while issuing the show cause notice. It was also put forward that the services, if considered as services by GTA, were exempt from payment of tax in terms of Entry No. 21 and / or 22 of Notification No. 25/2012-ST. Furthermore, they submitted that in case services were taxable and exemption was not available, the liability was to be recovered from the recipient under reverse charge mechanism since they discharged the prima facie burden by showing the status of recipients with the help of sample documents such as Form ST-2, confirmation letters and Form 26AS. Furthermore, they submitted that the show cause notice was issued merely on the basis of balance sheet which is not tenable in eye of law and thus all the demands arising from the show cause notice, irrespective of the

findings of the adjudicating authority, are to be found baseless, arbitrary and bad-in-law. He also pressed that the show cause notice was issued in violation of the provisions of section 73 inasmuch as it invoked larger period of limitation and issued without affording opportunity of pre-show cause notice consultation as per requirements of the Board instruction. Therefore all the demands arising from the order are liable to be dropped.

3. Shri Tara Prakash, learned Authorised Representative appearing on behalf of the revenue reiterates the findings given in the impugned order.

4. We have carefully considered the submissions made by both sides and perused the case records. The primary and significant issue arising from the appeal and the arguments presented by the learned Chartered Accountant on behalf of the appellant and the grounds taken in appeal memorandum and synopsis, is whether the tax was leviable and recoverable from the appellant in respect of the turnover reported in balance sheet and which exceeded the amount reported in Form ST-3 returns filed belatedly and after initiation of the inquiry. Based on the facts and findings outlined in the show cause notice, particularly paragraph 15 read in conjunction with Table A incorporated in paragraph 23 of the notice, it is evident that the disputed demand was proposed against the appellant under the classification of 'transportation of goods by road'. This said classification is emanating from the fact that the revenue applied a rate of 70% in computing the tax liability as reflected in Table A for which was available under Entry No. 7 of Notification No. 26/2012-ST dated 20.06.2012 for *"services of goods transport agency in relation to*

transportation of goods other than used household goods". It therefore unequivocally transpired from the bare reading and perusal of the show cause notice that the revenue had considered the disputed amount of turnover to be the value of services provided by way of transportation of goods by GTA. Furthermore, the impugned Order, specifically in paragraph 38 read with paragraph 23(i), clearly indicates that the demand of service tax was confirmed under the classification of 'transportation of goods by road'. Additionally, the documents provided by the appellant, including audited financial statements which formed the basis of the demand in the show cause notice, along with other evidentiary materials, substantiate that the disputed amount pertains to services rendered by way of 'transportation of goods by road'. Consequently, based on the facts presented in both the show cause notice and the impugned order, which remains undisputed at all levels, we find that the turnover was deemed as the value of services by way of 'transportation of goods by road' by the revenue and the demand of tax was proposed in the show cause notice and confirmed in the impugned order.

4.1 The learned Chartered Accountant in detail explained the scheme of taxation as it concerned the services in the nature of 'transportation of goods by road' by referring to following :

a. provisions of section 66D(p) as per which the activities of transportation of goods by road shall be deemed as negative list;
b. Entry No. 21 and 22 of Notification No. 25/2012-ST whereby certain exemptions were granted with respect to services by way of transportation of goods by GTA

c. Rule 2(1)(d) read with Entry No. 2 of Table to Notification No. 30/2012-ST whereby liability to pay tax was shifted to recipient for the purpose of section 68(2) of the Act

4.2 Accordingly the appellant vehemently pressed and submitted that the service tax cannot be recovered from the appellant having found by the revenue that the turnover was relating to services by way of 'transportation of goods by road' unless established that the services classifiable as services by GTA, exemptions were inapplicable and recipients were not falling in the specified categories of rule 2(1)(d).

4.3 We find that there was no dispute as regards classification of the services i.e. services by way of 'transportation of goods by road' and thus we prefer to analyse the grounds and arguments placed by the appellant in context of legal as well as factual matrix. Section 66D(p) of the Finance Act, 1994 treated the all the services by way of transportation of goods by road to be negative list activities except when they were provided by GTA or courier agency.

Section 66D

"(p) of section 66D of the Act had declared the 'services by way of transportation of goods by road' to be negative list activities except when provided by the 'Goods Transportation Agency' and 'Courier Agency'."

4.4 Section 66B of the Act imposed a tax on the value of all services, except for those specifically listed in the negative list under Section 66D. Activities detailed in Section 66D were thus outside the levy of service tax. Therefore, it was crucial to establish that any given activity falls outside the scope of Section 66D to subject it to taxation under Section 66B. On the contrary, Clause (p) of Section 66D, as

designed by Parliament, excluded the entire gamut of transportation services provided by road for goods from the scope of taxation, except when such services are rendered by a Goods Transport Agency (GTA) or a courier agency.

4.5 Consequently, it is important to examine as to whether the services were falling within the scope of exception carved out to clause (p) or not and for which it is necessary to examine as to whether the revenue established the applicability of exception to clause (p) with the help of contemporaneous evidences while issuing show cause notice. We find no hesitation in appreciating the legal position as it emanated from the plain reading of clause (p) of section 66D with section 66B that the activity in the nature of transportation of goods by road would not attract levy if it could not be specifically and undisputedly proved to fall within the scope of exception carved out to clause (p). Since the rate of abatement taken by the revenue implied that the services were treated as taxable services of transportation of goods by road by GTA, it is the definition of GTA given in section 65B which is relevant at this stage and not the definition of courier agency. As per the definition of GTA provided in Section 65B(26), presence of a consignment note issued by the person who shall be deemed as GTA was mandatory. Therefore, it was necessary in the case before us to examine as to whether the revenue had made out their case in the show cause notice on the basis of consignment notes issued by the appellant or not. In absence of such consignment notes, the turnover of activities cannot be deemed as value of services provided by way of transportation of goods by GTA. Therefore, we carefully peruse the show cause notice especially the outcome of investigation and

reproduction of the statement of Shri ManharbhaiAmrutlal Solanki and find that no consignment notes were found by the revenue during the course of investigation nor they had brought them on record before issuing the show cause notice. We also find that the appellant was not having practice of issuing consignment notes in all cases and therefore it was matter of paramount significance to ascertain as to which transactions involved issuance of consignment notes by the appellant themselves and which did not involve. We also find from the outcome of investigation incorporated in the show cause notice did not reveal exact information, quantifications and basis thereof with respect to services provided by the appellant by issuance of consignment notes. Based on the facts and contentions presented in the show cause notice and looking to the complete absence of crucial and necessary evidence in form of consignment notes, the turnover taken from the balance sheet cannot be attributed towards the services by way of GTA. Consequently, we find that the revenue has not made out a case in the show cause notice as well as in adjudication to bring the amount of turnover reported in balance sheet within the scope of exception carved out to clause (p). Consequently, we find that the clause (p) of section 66D cannot be taken out from the taxation of the turnover in dispute and accordingly the tax cannot be levied under section 66B of the Act.

4.6 We find the issue covered by the decision taken by the Tribunal in case of Chartered Logistics Limited v. CCE – 2023 (7) TMI 883 – CESTAT AHMEDABAD wherein it was laid down that :

> *"6.7 Now it is a settled law that even if a person has provided Goods Transport Service but not issued consignment note/LR, Service Tax*

from that person under GTA cannot be recovered. Some of the Judgments on this issue are given below:

- *Narendra Road Lines Pvt. Ltd Vs. Commissioner Of Customs, Central Excise & CGST, Agra, 2022 (64) G.S.T.L. 354 (Tri. - All.)*
- *Mahanadi Coalfields Ltd Vs. Commissioner Of Central Excise & Service Tax, BBSR-I, 2022 (57) G.S.T.L. 242 (Tri. - Kolkata)*
- *East India Minerals Ltd Vs. Commissioner Of Central Excise, Customs & Service Tax, Bhubaneswar-Ii, 2021 (44) G.S.T.L. 90 (Tri. - Kolkata)*

From the above Judgments, it is settled that a person even if provides Goods Transportation service but if he does not issue Consignment Notes/LR, he cannot be brought under the ambit of GTA. The case of the appellant is on much better footing on the admitted fact that the appellant's client FCPL is in fact the GTA who issued 'Consignment Note' in respect of the Transportation Service provided to M/s Reliance Industries Ltd. Therefore, appellant is not liable to pay Service Tax."

4.7 We also find that the above decision has reached to finality pursuant to dismissal of the appeal by Hon'ble Supreme Court in CCE v. Chartered Logistics Ltd – 2024 (4) TMI 8 – SC Order. Following the principle of *res judicata* we are inclined to follow the same in case of the appellant to hold a contention that the services were not liable to taxation.

4.8 Similar stand was taken by the Tribunal in case of Ashray Infrastructure v. Commissioner of Central Excise & ST – 2024 (8) TMI 846 - CESTAT Ahmedabad by following catena of precedents.

4.9 Furthermore, we find it necessary, in the interest of equality in justice which is available to both the sides including revenue, to examine the records presented by the appellant and to find as to whether the liability of service tax was recoverable from them as proposed in the show cause notice. The appellant has provided various documentary evidences on a sample basis in support further support of their pleading of non-taxability. These included copies of consignment notes, registration certificates of the recipients issued in Form ST-2 indicating their legal status, extracts from the Registrar of

Companies (ROC) to demonstrate the legal status of the recipients, and confirmation letters from recipients affirming that the tax liability would be discharged by them under the reverse charge mechanism. Having carefully examined those records especially the registration certificates, confirmation letters and some of consignment notes, which were available with the revenue during the course of adjudication, we find that the claim of the appellant as regards non-taxability was multifold. We also find the adjudicating authority rejected these consignment notes, questioning the appellant's ability to provide them in light of ability expressed by appellant during the course of investigation due to "white ant". We find that excuses taken by the adjudicating authority in guise of "white ant" facts are irrelevant for determining taxation under the applicable statutory scheme for transportation of goods services. What is pertinent is that certain of evidences existed and they were provided by the appellant to substantiate their claim of non-taxability. Such evidence should be considered regardless of the reasons or circumstances under which it was presented, provided it is not found to be fraudulent or falsified. From the show cause notice and the impugned order, there is no positive and corroborated finding from the revenue regarding the authenticity of such evidences. The existence of a consignment note is a critical factor in determining tax liability, and its absence would negate the entire tax levy. Therefore, it was indispensable on part of the adjudicating authority to decide the case based on the given evidences or to deprecate them with the help of incriminating and contemporaneous counter evidences. We cannot take out of our sight that the revenue could have furthered its investigation so as to bring

more evidences such as list of services provided, invoices, confirmations from the recipients to ascertain the exact classification and taxability of the transactions and would have proved their case against the appellant. Thus, in absence of such evidences and allegations in the show cause notice, we are not inclined to deem taxability in hands of the appellant in respect of that portion of turnover which was not represented by the consignment notes and which could not cross the bar of exemption granted by Notification No. 25/2012-ST and the shifting of liability under section 68(2) of the Act.

4.10 We also find from the copies of consignment notes submitted by the appellant that, in numerous instances, the value of the services provided did not exceed Rs. 750. Consequently, these services were eligible for exemption from tax under Entry No. 21 of Notification No. 25/2012-ST. Since the appellant pleaded exemption during the course of investigation and being supported by sample of evidences available, and since the revenue had not brought on record contrary evidences, we find it necessary to appreciate that the appellant was eligible for exemption under Notification No. 25/2012-ST.

4.11 Another critical aspect related to the taxation of services for the transportation of goods by road, which is a fundamental part of the taxation scheme and was strongly emphasized by the learned Chartered Accountant in his argument, is the non-recoverability of the taxes if leviable, in the appellant's hands. Through sample documents, including consignment notes and other relevant materials, it was demonstrated that the recipients of the appellant's services were liable for tax under Section 68(2), read in conjunction with Rule 2(1)(d) and Notification No. 30/2012-ST.

Section 68

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

4.12 Sub-section (2) of Section 68 of the Act incorporated a non-obstante provision, stipulating that the liability for tax must be discharged by the person specified and notified by the government, rather than by the service provider. In the present case, where it is undisputed that the services provided were for the transportation of goods by road, it was crucial to identify the recipient of these services, as they are listed under Entry No. 2 of Notification No. 30/2012-ST in accordance with Sub-section (2) of Section 68. Therefore, it was incumbent upon the revenue, during their investigation and before issuing the show cause notice, to ascertain both the recipient and the nature of the recipient for each service provided by the appellant and which they intended to bring within the taxation in hands of the appellant, given that these services fall under Rule 2(1)(d) and Notification No. 30/2012-ST. We find that the show cause notice and the impugned Order lacked any evidence or factual details regarding the identification of the recipients and the determination of the person liable to pay tax as required by Section 68(2) read with Rule 2(1)(d) and Notification No. 30/2012-ST. However, it was clear that the disputed amounts were relating to the services by way of

transportation of goods by road which primarily fell within the scope of rule 2(1)(d) read with Entry No. 2 of Notification No. 30/2012-ST. Thus the services provided by way of transportation of goods by road, when presumed to be services by GTA as deemed by the revenue in the show cause notice, clearly fell within the scope of Entry No. 2 of table to Notification No. 30/2012-ST and accordingly it became unavoidable and indispensable to determine the person who is liable to pay tax as per mandate of sub-section (2) of section 68. In the absence of such findings from the revenue no demand can be validly imposed on the appellant who is not the person liable to pay service tax as per rule 2(1)(d) read with Notification No. 30/2012-ST. On the other side, the appellant, by way of sample evidences brought on record, substantiated that the recipients were the specified persons and deemed to be the persons liable for payment of tax under sub-section (2) of section 68 of the Act and thus the appellant cannot be attributed with the recoverability of the taxes if leviable. We are also inclined to follow the principle of preponderance of probabilities and weight of evidences, which significantly balanced in favour of the appellant, to hold a contention that the appellant was not the person liable to pay tax under section 68 of the Act, in respect of such turnover.

4.13 After reviewing the facts presented in the show cause notice, the impugned Order, and the various submissions made by the appellant, and considering the preceding discussion, we find that the demand of tax was not recoverable from the appellant. Consequently, the tax demand confirmed in the impugned Order is unsustainable both in terms of the facts and the legal position.

4.14 We also find that the appellant has challenged the demand of tax on ground of unsustainability since the demand was computed on the basis of comparative difference of turnover reflected in balance sheet and amount reported in ST-3 returns filed belatedly and after initiation of the inquiry. We find from the show cause notice as well as Relied Upon Documents listed in Annexure 'A' to the show cause notice that the demand was solely based upon the turnover reflected in balance sheet. It is well-established in law that a tax demand cannot be based solely on financial statements or income tax returns. It was the responsibility of the revenue to conduct a thorough investigation and present incriminating evidence to accurately determine the nature, extent, scope, value, and recipient of the services provided by the appellant. The scheme of taxation for services related to the transportation of goods by road is multi-faceted and excluded from the very levy of tax, except in specific circumstances which were also subjected to certain exemptions and reverse charge mechanism. In such cases, particularly when the revenue has not disputed the classification of services as transportation of goods by road, it was imperative to provide proof through contemporaneous evidence that the revenue could have collected during the investigation and used in the show cause notice. Therefore, while the turnover reported in the balance sheet may hold persuasive value, it is not conclusive and cannot replace the contemporaneous evidence required by statute. This position is consistent with the Tribunal's ruling in Rajputana Stainless Steel Ltd v. CCE & ST – 2023 (10) TMI 289 – CESTAT Ahmedabad, which established that:

"4.15 We also observe that in the present matter demand is based on the cancelled invoices drawn from Visual Udyog Software on which name of the Buyers were appearing. Though some of the buyers' statements were recorded but none of these buyers has admitted that they have received the goods without payment of duty. Here it is pertinent to note that the revenue did not rely these Statements in the show cause notice. Further Appellant also produced the information collected under RTI from Gujarat VAT Check Post authorities showing the consignments which has passed through the said Check Post. However in the said Check Post report the consignments related to the aforesaid cancelled invoices and well as the disputed invoices has not passed through the VAT Check Post. On this vital documentary evidence also the Revenue's case that appellant have clandestinely removed the goods is not sustainable.

4.16 Without prejudice, we also find that the disputed entries made in the Tally Data and Visual Udyog Software may create doubt but it cannot take place of evidence. It is observed that the allegation of suppression of production and clandestine removal is a serious allegation and it has to be established by the investigation by affirmative and cogent evidence. CESTAT in the case of Sober Plastic Pvt. Ltd. v. CCE [2002 (139) E.L.T. 562 (T)] has held that demand based on weighment slips, slips recovered from Dharamkanta etc. relied upon for raising demand not verified with reference to transactions is not sustainable. Further, it is settled position of law that proof and evidence of purchase of raw materials and sell of final product clandestinely is necessary in to establish the allegation of suppression of production and clandestine removal of goods and that the allegation are to be proved with affirmative evidences. Tribunal in case of Emmtex Synthetics Ltd. v. CCE [2003 (151) E.L.T. 170 (Tri.) has held that the charge of clandestine removal has to be established by the revenue by adducing tangible, convincing and cogent evidences, CESTAT in the case of Esvee Polymers (P) Ltd. v. CCE [2004 (165) E.L.T. 291 (Tri.)] dealt with a case of alleged clandestine production and clandestine removal. The case was based on some private slips. The CESTAT observed that the mere slips or statement are not sufficient for confirmation of demand and allegation of clandestine removal. Evidence in the form of receipt of raw material, shortages thereof, excess use of electricity excess/shortage of inputs in stock, flow back of funds, purchase of final products by parties alleging receipt and removal of goods etc. is necessary. CESTAT in the case of CCE v. Supreme Fire Works factory [2004 (163) E.L.T. 510 (Tri.) dealt with the allegation of clandestine manufacture and removal and observed that mere suspicion can not take place of proof. Proof and evidences of purchase of raw materials, sale of final goods clandestinely is necessary. The allegations are not sustainable in absence of evidences. CESTAT in case of CCE v. Shree NarottamUdyog (P) Ltd. [2004 (158) E.L.T. 40 (Tri.)] has dealt with the allegation of clandestine manufacture and removal of goods and held that settled law is that the charge of clandestine removal being a serious charge required to be proved beyond doubt on the basis of affirmative evidences. CESTAT in case of JagatpalPremchand Ltd. v. CCE [2004 (178) E.L.T. 792 (Tri.) held that it is settled law whenever charge of clandestine removal made revenue has to prove assessee procured all raw materials necessary for manufacture of final product. The allegations are not sustainable if no investigation conducted by the revenue in respect of raw material essential for production of final

goods and no evidence regarding removal of such final product brought on record by revenue. Similar view has been taken by the Tribunal in several other cases such as JangraEngg. Works v. CCE [2004 (177) E.L.T. 364 (Tri.)], Premium Moulding & Pressing Pvt. Ltd. v. CCE [2004 (177) E.L.T. 904 (Tri.)], Vakharia Traders v. CCE [2004 (173) E.L.T. 287 (Tri.)], Nutech Polymers Ltd. v. CCE, Jaipur [2004 (173) E.L.T. 385 (Tri.)], CCE v. Sumangla Steels [2004 (175) E.L.T. 634 (Tri.)], CCE v. Sangamitra Cotton Mills [2004 (163) E.L.T. 472 (Tri.)], CCE v. Velavan Spinning Mills [2004 (167) E.L.T. 91 (Tri.)]. The ratio of these decisions is applicable in the instant case. Since the investigation has failed to adduce evidences to establish suppression of production and clandestine removal of the goods as discussed above and failed to discharge the onus to prove the allegations, the allegations are not sustainable. In view of the above discussions, the allegation of clandestine removal of 92,352.04 MTs of finished goods is not established. Hence, the impugned demand of central excise duty is liable to be dropped for lack of evidences.

5. In view of the foregoing, we hold that the charges of clandestine removal against M/s. Rajputana Stainless Ltd. are not sustainable. Thus, we hold that the impugned order is not sustainable and we set aside the same."

4.15 We also note that the Tribunal has extensively addressed this issue in the case of Goyal and Co Construction Pvt Ltd v. C.S.T. – Service Tax Ahmedabad – 2022 (4) TMI 735, where it was determined that a service tax demand cannot be sustained solely based on income declared under the Income Disclosure Scheme (IDS). Similarly, we have no reservation in adopting this principle, consistent with the ratio decided in that case and other similar cases discussed therein, that service tax cannot be levied based merely on amounts reported in financial statements.

4.16 We also find that in catena of other decisions such as MPA Marketing Pvt Ltd v. Commissioner of CE & ST – 2020 (1) TMI 370 – CESTAT Chandigarh, GodawariSpherocast Ltd v. CCE – 2018 (5) TMI 1349 – CESTAT Chandigarh, Go Bindas Entertainment Pvt Ltd v. CST – 2019 (5) TMI 1487 – CESTAT Allahabad, Deltax Enterprises v. CCE – 2017 (12) TMI 966 – CESTAT New Delhi, similar stand has been taken. Thus, we find no hesitation in holding that the demand of tax made by

the revenue in the show cause notice and impugned Order on the basis of turnover difference is illegal and unsustainable.

4.17 Furthermore, we also find that the demand made in the impugned Order on the basis of comparative difference of ST-3 with balance sheet is unsustainable for the another reason that ST-3 returns filed by the appellant were not admissible evidences in the instant case. We find from the records as well as the show cause notice that the ST-3 returns were filed by the appellant after initiation of the inquiry on 05.04.2016 and that too without payment of late fees prescribed in rule 7C. ST-3 returns would have become the basis for analysis and investigation vis-à-vis financial statements when they were filed within the prescribed time limit or before commencement of the investigation. When the returns were filed after commencement of investigation they do not carry evidentiary value and cannot be taken into consideration for ascertainment of the tax liability arising on account of the investigation. Purpose of the ST-3 returns in the present case, was limited to ascertain the exact amount of tax liabilities discharged by the appellant which shall be required to be appropriated in the show cause notice and the order-in-original. Though the tax would have been paid by the assessee and shown in ST-3 returns, it remains paid after commencement of investigation and thus it would partake the character of evaded tax, if there was any evasion and thus that cannot be held outside the process of adjudication. In the case of the appellant, the revenue has instead of including the amount of tax shown to have paid in belated ST-3 returns in the amount of tax to be demanded and appropriated, transformed into the demand of CENVAT credits, which is

impermissible and contrary to the settled position. Thus, we find that the demand of CENVAT credits which found its root in the demand of service tax on services provided by way of transportation of goods and thus that shall be treated equally as the demand of service confirmed in the impugned Order. Therefore, we find that the demand of CENVAT credits made in the impugned Order is *nonest*and liable to be set aside. Because the demand of tax on transportation services is not sustainable for the reasons discussed in earlier paragraphs the demand of tax involved in utilization of CENVAT credits becomes unsustainable.

4.18 Furthermore, we find that the ST-3 returns were filed by the appellant without payment of late fees prescribed in rule 7C. We also find that the late fees have been demanded by impugned Order and which were not paid by the appellant. Section 70 of the Act required every person liable to pay service tax to self-assess tax due on the services provided and shall furnish the return in prescribed time limit and with such late fee not exceeding Rs. 20000 for delay in furnishing of returns. Having looked at the scheme postulated by section 70 read with rule 7C, it is necessary to hold that the returns were furnished contrary to the procedures laid down in the law inasmuch as the late fees were not paid and therefore the returns were required to be deemed as defective returns liable to loose the sight of law. Accordingly, the returns as well as facts stated therein became *non est*for the purpose of investigation as well as adjudication and therefore nothing can be based upon the facts stated in the said defective returns. Since the demand of CENVAT credits was solely based on the returns, it is liable to be held baseless.

4.19 Since we hold that the demand is unsustainable, we do not find necessary to go into submissions of the appellant as regards eligibility of the CENVAT credits. For the various reasons elucidated hereinbefore, we find that the other demands with respect to legal services and security services are liable to be dropped.

4.20 We also find that the appellant had forcefully challenged the issue of limitation and strongly argued that the allegations made against them cannot be attributed under the proviso to sub-section (1) of Section 73 of the Act. They further contended that the revenue failed to present any substantive evidence to justify the invocation of the extended period. We find that the invocation of the extended period in the show cause notice was mechanical, arbitrary, and unsupported by any cogent evidence or facts. It is unclear why the appellant would have suppressed information from the revenue, especially when there was no significant tax liability involved. Therefore, the extended period of limitation was not applicable to the appellant's case. Since the show cause notice was issued based on the extended period and the entire liability falls outside the normal limitation period, the entire demand proposed in the show cause notice and confirmed in the impugned Order is invalid.

4.21 This Tribunal has taken similar stand in case of Chartered Logistics Limited v. CCE – 2023 (7) TMI 883 – CESTAT AHMEDABAD by following various judicial precedents which is required to be followed in case of the appellant. Relevant part of the said decision is reproduced:

> *"6.10 Without prejudice to the above, we also find that the appellant have strongly made a submission that there is no suppression of fact to invoke the extended period for demanding service tax. In this*

regard we find that in this case the period of demand is 01.10.2014 to 30.06.2017, whereas the show cause notice was issued by invoking extended period on 31.08.2020. From the impugned order we have observed that the adjudicating authority as regard the invocation of extended period given the finding that the appellant have misdeclared the services falling under 'negative list' in their ST-3 return.

6.11 We find that when an assessee under a bonafide belief claims any exemption, in the present case on the basis of negative list, than it is incumbent on the department to strictly examine the admissibility of such exemption. Once the assessee has declared as per their belief that the service falls under negative list and the same has been declared in their ST-3 return, it cannot be said that there is a suppression of the fact on the part of the appellant. In the present case the appellant have acted legitimately by entering in to legal contract with their service recipient M/s FCPL. All the transaction were recorded in their books of account and all documents such as invoices for their services were issued. Moreover, the issue involved in the present case is strict interpretation of the taxable service. Therefore, considering the overall facts of the case, we are of the opinion that extended period of limitation could not have been invoked. Therefore, the demand for the extended period is not sustainable on limitation also. The above view is supported by the following Judgments:

(a) In the case of Pahwa Chemicals Pvt. Ltd Vs. Commissioners of Central Excise, Delhi reported in 2005 (189) ELT 257 (Supreme Court) the Hon'ble Apex Court held that mere failure to declare does not amount to wilful mis-declaration or wilful suppression and there must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression. The Apex Court further held that when the facts are before the department and the party is in the belief that affixing of label makes no difference, does not make a declaration, there would be no wilful mis–declaration or wilful suppression. If the department felt that the party was not entitled to the benefit of the notification it was for the department to immediately take up the contention that the benefit of the notification was lost.

(b) In the case of Continental Foundation Joint Venture Vs. Commissioner of Central Excise Chandigarh–I reported in 2007 (216) ELT 177 (SC) the Apex Court held as under:

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

(c) In the judgment of the Hon'ble Supreme Court in the case of Tamil Nadu Housing Board Vs. Collector of Central Excise, Madres reported in 1994 (74) E.L.T. 9 (SC), wherein the Apex Court held that limitation for extended period invokable only if existence of both situations (1) suppression, fraud, collusion etc. and (2) intent to evade payment of duty proved. The Apex Court further held that once the Department is able to bring on record material to show that the appellant was guilty

of any of those situations which are visualised by the Section, then only the burden shifts on the assessee."

4.22 From the above judgments, coupled with the facts in the present case discussed above the demand for the longer period is hit by the limitation also.

4.23 We also find that the appellant had challenged the validity of the show cause notice on a ground that the opportunity of pre-show cause notice consultation was not afforded as per mandatory requirement of the board. We do not find any contrary fact in submission of the appellant. We also find that with the given opportunity of pre-show cause notice consultation, facts would have been well appreciated and the case would have avoided unwarranted litigation. However, it is decided by us that the show cause notice itself failed to survive on various counts elaborately discussed and decided hereinbefore, the challenge made by the appellant for want of pre-show cause notice consultation is infructuous and thus we do not enter into that aspect.

5. As per our discussion and finding, the demands of service tax, cenvat credits, interest and penalties are held unsustainable and the same are accordingly set aside. The appeal is allowed with consequential relief.

(Pronounced in the open court on 03.10.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi