

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 75677 of 2023

(Arising out of the Order-in-Appeal No. 133/RAN/2023 dated 19.05.2023 passed by Commissioner of CGST & Central Excise (Appeals), Ranchi.)

Shri Rajeshwar Prasad Choudhari,
Kunwar Singh Colony, Chas, Bokaro-827013.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Ranchi,
2nd 3rd Floor, Grand Emerald Building, Between Road, No. 1 & 2,
Ashok Nagar, kadra, Argora Main Road, Ranchi-834002.

...Respondent(s)

APPEARANCE :

Shri Akshat Agarwal & Shri Anand Pasari, both Advocates for the Appellant
Shri P. K. Ghosh, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77516/2023

DATE OF HEARING : 14.11.2023

DATE OF PRONOUNCEMENT: 22.11.2023

PER K. ANPAZHAKAN :

The present Appeal has been filed by the Appellant, Shri. Rajeshwar Prasad Choudhari, against the impugned order dated 19.05.2023, passed by the Commissioner (Appeals), CGST & CX Ranchi, wherein the Ld. Appellate Authority has upheld the Order-in-Original. In the Order-in-Original, the Ld. Adjudicating authority has confirmed the service tax demand, including Cess, of Rs. 6,98,811/-along with interest and equal amount of tax as penalty. Penalty has also been imposed under Sections 77(1) (a),(b), (c) and 77(2) of the Finance Act, 1994. Aggrieved against the impugned order of the Commissioner (Appeals), the Appellant preferred this appeal.

2. The Appellant submits that the demand in the instant case is barred by limitation. It is their contention that the entire proceedings has been carried out on the basis of information available in Form 26AS of

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Income Tax department. Since these figures are included in the Profit/Loss Account in the Balance Sheet, which is a public document and so there can be no suppression. Moreover, the Department has not adduced any positive evidence to show malafide intention or *mens rea* for evasion of Service Tax, under any particular head of Taxable Services. Since none of the ingredients necessary for invoking extended period of limitation as visualized under proviso to Sec. 73(1) of the Act exists in this case, the demand confirmed in the impugned order by invoking extended period of limitation is not sustainable. In this regard, the Appellant relied on the decision of the Hon'ble Supreme Court in the case of ***Aban Lyod Chiles Offshore Ltd. vs. CCE*** reported in **2006 (200) ELT 370 (SC)** wherein it has been held that when all the facts were already within the knowledge of the Department, invoking extended period of limitation to demand duty is not justified.

3. The Appellant submits that the demand of Service Tax cannot be made solely on the basis of Form 26AS Statement provided by the Income Tax department. In the present case, the Service Tax Department has demanded service tax solely on the basis of the data provided by the Income Tax Department, which is the gross value as received by the Appellant and it is no longer *res integra* that the Department cannot straightaway take in account the amount shown in the ITR/Form 26AS for the purpose of charging and demanding Service Tax, without verifying the nature of such amount received, as to whether service tax is payable or not. In this regard, the Appellant relied on the decision in the case of ***Kush Constructions vs. CGST NACIN*** reported in **2019 (24) GSTL 606 (Tri. All)**, wherein the CESTAT has held that "revenue cannot raise the demand on the basis of such difference without examining the reasons for the said difference and without establishing that the entire amount received by the Appellant as reflected in the said returns in the Form 26AS being consideration for services provided and without examining whether the difference was because of any exemption or abatement, since it is not legal to presume that the entire differential amount was on account of consideration for providing services."

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4. The Appellant also relied on the decision of Tribunal, Kolkata, in the case of **Luit Developers Pvt. Ltd. vs. Commissioner, CGST** bearing **ST No. 75792 of 2021**, vide Order dated 23.02.2022, wherein it has been held that the figures reflected in Form 26AS cannot be used to determine Service Tax liability unless there is evidence shown that it was due to a taxable service. The Appellant also relied on the decision of Tribunal, Kolkata, in the case of **M/s Piyush Sharma vs. Commissioner of CGST & CX, Patna – I** bearing ST Appeal No. 75856 of 2021, in support of their contention. Accordingly, they prayed for setting aside the demands confirmed in the impugned order.

5. The Ld.A.R. submitted that the Appellant were given ample opportunities to represent their case, but no communication was received by the department. Three opportunities have been given at the time of personal hearing, but the appellant has not appeared for the hearings to explain their case. Accordingly, the adjudicating authority has rightly confirmed the demand, which has been upheld by the Commissioner (Appeals) in the impugned order. Thus, he prayed for rejecting the appeal filed by the Appellant.

6. I observe that in the instant appeal the main ground raised by the Appellant is limitation. The Appellant submits that the demand in the instant case has been raised on the basis of information available in Form 26AS of Income Tax department. Since these figures are included in the Profit/Loss Account in the Balance Sheet, which is a public document and so there can be no suppression. It is their contention that the Department has not adduced any positive evidence to show malafide intention or *mens rea* for evasion of Service Tax, under any particular head of Taxable Services. Accordingly, they argued that none of the ingredients necessary for invoking extended period of limitation as visualized under proviso to Sec. 73(1) of the Act exists in this case and hence the demand confirmed in the impugned order by invoking extended period of limitation is not sustainable. I find merit in the argument of the Appellant. In the case of **Aban Lyod Chiles Offshore Ltd. vs. CCE** reported in **2006 (200) ELT 370 (SC)**, the Hon'ble Supreme Court has held that when all the facts were already within the knowledge of the Department, invoking extended period of limitation to

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demand duty is not justified. The Ld.A.R submitted about the non cooperation of the Appellant during the adjudication proceedings. But, I find that the Appellant questions the sustainability of the Notice itself.

7. In the present case, I observe that the Service Tax Department has demanded service tax solely on the basis of the data provided by the Income Tax Department, which is the gross value as received by the Appellant. The department has not conducted any verification to ascertain whether the amount mentioned in the Form 26AS was received on account of providing any taxable service by the Appellant. I observe that the demand of Service Tax cannot be made solely on the basis of difference between Income tax return and 26AS Statement, as held by the Tribunal in the case of ***Kush Constructions vs. CGST NACIN*** reported in ***2019 (24) GSTL 606 (Tri. All)***. The same view has been taken by the Tribunal, Kolkata, in the case of ***Luit Developers Pvt. Ltd. vs. Commissioner, CGST*** bearing ***ST No. 75792 of 2021***, vide Order dated 23.02.2022 wherein it has been held that the figures reflected in Form 26AS cannot be used to determine Service Tax liability unless there is evidence shown that it was due to a taxable service. The decision of Tribunal, Kolkata, in the case of ***M/s Piyush Sharma vs. Commissioner of CGST & CX, Patna – I*** in ST Appeal No. 75856 of 2021, also supports the above view. Thus, by relying on the decisions cited above, I hold that extended period cannot be invoked in this case. The Notice in this case was issued on 08.09.2021, demanding service tax for the period 2016-17. The Department has not adduced any positive evidence to show malafide intention or *mens rea* for evasion of Service Tax on the part of the Appellant. Thus, I hold that extended period cannot be invoked in this case to demand service tax on the Appellant. On perusal of the documents, I find that the entire demand has been raised beyond the normal period of limitation. In view of the discussions above, the demand of service tax by invoking extended period is not sustainable in this case. Accordingly, I hold that the demand is liable to be set aside on the ground of limitation. Since the demand itself is not sustainable, the question of demanding interest and imposing penalty does not

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arise. Accordingly, I hold that the impugned order is liable to be set aside.

8. In view of the above discussion, I set aside the impugned order on the ground of limitation and allow the appeal filed by the Appellant.

(Pronounced in the open court on...22.11.2023...)

Sd/-

**(K. Anpazhakan)
Member (Technical)**

Tushar

