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

REGIONAL BENCH- COURT NO.3

## Service Tax Appeal No.10027 of 2020

(Arising out of OIA-CCESA-SRT-APPEAL-PS-465-2018-19 dated 18/10/2018 passed by Commissioner ( Appeals ) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

**SHRESTH LEASING & FINANCE LTD** **.....Appellant**
118, Shree Hari Park, Behind Centre Point, Ring Road
Surat
Surat, Gujarat

*VERSUS*

**C.C.E. & S.T.-SURAT-I** **.....Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat – 395001

**APPEARANCE:**
Shri Jigar Shah & Shri Ambarish Pandey, Advocates for the Appellant
Shri R.P Parekh, Superintendnet (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
**HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No . A/ 10804 /2022**

DATE OF HEARING: 08.02.2022
DATE OF DECISION: 15.07.2022

**RAMESH NAIR**

The present appeal is directed against the impugned Order-In-Appeal No. CCESA-SRT(APPEALS)PS-465/2018-19 dated 18.10.2018 passed by the Commissioner (Appeals) CGST &Central Excise, Surat.

2. The brief facts of the case are that the appellant are engaged in providing of various services. Acting on the intelligence that M/s Forward Resources Pvt. Ltd. and other firms operated by and related to the directors of the said company was indulging in evasion of Service tax, search was conducted and during the search number of documents related to income tax TDS statements, copies of Balance Sheet /audit reports, bank statement were seized and statement of Shri Jagdishchandra Somani Director of M/s Forward Resources Pvt. Ltd. was recorded wherein he stated that Shri Suneet Kabra was the Director of the Appellant and he along with Shri Suneet Kabra operated different firms including that of the appellant. Statement of Suneet Kabra was also recorded wherein he interalia stated that Appellant had received commission charges from different customers. On the basis of the investigation conducted and scrutiny of the records of

the Appellant, it appeared that Appellant were engaged in providing services as "Commission agents" to M/s Windsor Machines Ltd., and 'Management or Business Consultancy" to various customers in India. Appellant neither filed ST-3 returns nor paid any amount of service tax. Accordingly, show cause notice on 20.10.2016 was issued proposing the Service tax demand along with interest, penalty. The Additional Commissioner, Surat vide Order-In-Original No.20/ADJ/ADC-KSM/OA/2017-18 dated 30.01.2018confirmed the demand of service tax of Rs. 1,05,34,774/- under proviso to Section 73(1) of the Finance Act, 1994 and ordered for appropriation of Rs. 20,00,000/- paid by Appellant during the investigation. Further demand of Interest under Section 75 of the Finance Act, 1994 and Penalty of Rs. 20,000/- under Section 77, Penalty of Rs. 1,05,34,774/- under Section 78 of the Finance Act, 1994 also confirmed. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who by impugned order -in-appeal dated 18-10-2018 upheld the order passed by the Additional Commissioner and dismissed the appeal. Aggrieved by the impugned order-in-appealpresent Appeal has been filed.

3. Shri Jigar Shah, Learned Counsel along with Shri Ambarish Pandey appearing on behalf of the appellant submits that in the impugned order Ld. Appellate Authority has upheld the OIO in its entirety observing that the Appellant were engaged in providing 'financial consultancy service' under 'business auxiliary service and management or business consultancy services'. Appellant received commission charges to the tune of Rs. 10,56,34,930/- from various customers but did not pay any service tax on the same, which comes to Rs. 1,05,34,774/-. However, they provided diverse services to various entities and department has classified them all as commission agent under the category of 'Business Auxiliary Service' and 'Management Consultancy Service'.

3.1 He Submits that Appellant rendered services of wholesale and retail financing to M/s ECL, which is involved in the providing treasury and investment management services. M/s ECL is a subsidiary of M/s Edelweiss Asset Management Ltd., which in turn is a subsidiary of M/s Edelweiss Capital Ltd. M/s ECL is engaged in treasury and investment management activities. M/s Edelweiss Capital Ltd. is the asset management Company acting as an investment manager to M/s Edelweiss Mutual Fund, which has various fund options listed on FSM such as Edelweiss Arbitrage Fund -Bonus, Edelweiss Arbitrage Fund -Growth, Edelweiss Arbitrage Fund- Dividend etc.

As per the Rule 2(1) (d) (iv) of the Service tax Rules , 1994 the liability to pay Service tax on auxiliary service of distribution of Mutual Fund by a mutual fund distributor was on the service recipient, thus, the Asset Management Company in the present case is liable. However, the service tax was payable by the recipient of Services till 30.06.2012, thus, the demand of Service tax on the Appellant for the period prior to July 2012 legally not correct and the impugned order wrongly upholds the same. For the period post July 2012, the service provided by a mutual fund agent to mutual fund or asset management company or by distributor to a mutual fund or asset management company were exempted vide Notification No. 25/2012- ST dtd. 20.06.2012. The same is also clarified in CBEC Education Guide. He placed reliance on the case of Vijay Sharma & Co. Vs. CCE Chandigarh, 2010(20)STR 309 (Tri. -LB).

3.2 He further submits that service provided to M/s Windsor Machines Pvt. Ltd. of transporting machinery from premises of Windsor to M/s Manike Moulds Pvt. Ltd. and appellant performed commissioning and installation Jobs at the site of M/s Manike Moulds Pvt. Ltd. are not taxable as it amounted to intermediate process in manufacture of excisable goods. Appellant had provided services to M/s Welspon Corp Ltd., Welspon Syntex, Welspon Global Brands Ltd. and M/s Alkem Laboratories Ltd. towards providing advice and negotiation in respect of packing credit in foreign currency. Packing credit is a credit facility provided by the Bank to an exporter. Thus, the services provided by the Appellant were ancillary to export in nature and hence, was not liable to Service tax. Appellant provided the maintenance services to M/s KEC International Ltd. for power distribution channel allocation in order to obtain resources utilization. The services provided by the Appellant are related to the principal supply of 'electricity' and are thus, not liable to service tax. He placed reliance on the following decisions:

- Torrent Power Ltd Vs. Union of India 2019(1) TMI 1092-Guj High Court.
- Noida Power Co. Ltd. Vs. CCE, Noida 2014(33)STR383 (Tri. Del)
- kedar Construction Vs. CCE, Kolhapur 2015 (37) STR 631 (Tri. Bom)
- UP RajkiyaNirman Nigam Ltd. Vs. CCE, Meerut 2016(41)STR 967 (Tri. Del)
- Pashchimanchal Vidyut Vitran Nigam Ltd. 2012(28)STR 412 (Tri. Del)
- Purvanchal Vidyut Nigam Ltd. 2013(30) STR 259 (Tri- Del)
- Perfect Electricals Vs. CCE, 2018 (6) TMI 481 -CESTAT Bangalore

3.3 He also submits that impugned order wrongly confirmed the liability of service tax on the services provided to M/s Chaz Insurance Brokers Pvt. Ltd., which is a leading brokerage company which operates in various life insurance and general insurance products. In terms of Circular No. 59/8/2003-ST dated 20.06.2003 the services provided by insurance agent were covered under 'insurance agent' or 'insurance auxiliary services'. Thus the activity of the Appellant shall be classifiable under the head 'insurance agent' or 'insurance auxiliary services and not under the head 'Business Auxiliary Services'. In terms of Rule 2 (1) (d) of Service tax Rules, 1994 and Circular No. 96/7/2007-ST dated23.08.2007 in case of 'insurance intermediary Service' the liability to pay service tax is on the recipient of services i.e. the insurer in the present case.

3.4 He further submits that impugned order wrongly upholds the liability of Service tax on the services provided by the Appellant to M/s Equirus Capital Pvt. Ltd. and Edelweiss Commodities Services Ltd. The Appellant rendered services as stock exchange and commodity exchange sub-broker to the above two entities and raised the invoices. The said services were incorrectly classified under the category of 'management or business consultancy' under Section 65 (105) (r) of the Finance Act, 1994. The Appellant rendered stock exchange and commodity exchange sub-broker services. During the relevant period service provided by a sub-broker to a stock broker were exempted vide Notification No. 25/2012-ST dtd. 20.06.2012. The CBEC Education Guide also stating that the services provided by the intermediaries to entities which are liable to pay tax on their final output service shall be exempt. He placed reliance on the case on M/s Vijay Sharma & Co. Vs. CCE, Chandigarh, 2010 (20) STR 309 (Tri- LB)

3.5 He also submits that the impugned order failed to consider that the show cause notice invoked wrong provision of the Finance Act, 1994 to demand Service tax. The demand of Service tax should have been proposed under Section 73A of the Finance Act, 1994 and not under Section 73. Therefore, there can be no demand of Service tax as the impugned order is passed without jurisdiction and hence liable to be quashed and set aside. He placed reliance on the following decisions:

- Checkmate Industries Services Vs. CCE, Pune -III, 2016(44)S.T.R. 290 (Tri. -Mumbai)

- M/s Fusion India Inc V. CCE & ST., Lucknow- 2018(11)TMI 358 - CESTAT Allahabad.

3.6 He also submits that the show cause notice proposes to recover service tax under Section 73 of the Finance Act, 1994 which is the provision for recovery of Service tax. However, the show cause notice failed to invoke the relevant provision for chagrining of service tax on alleged activities. In the Finance Act, 1944, Section 66B provides for levy of Service tax on services other than those services specified in the negative list. Since the charging provision was not invoked, therefore, no demand is sustainable. He placed reliance on the decision in the case of Frisco Foods Pvt. Ltd. Vs. Commissioner, Customs & Central Excise, Dehradun – 2022-VIOL-49-CESTAT-Del-ST.

3.7 He argued that the show cause notice baldly alleged that the Appellant have rendered taxable services. However, the show cause notice does not analyse the activities allegedly carried out by the Appellants and whether the same would fall within the definition of any taxable services. It is settled principle of law that unless and until the clear analysis of the activity done by the assessee is carried out, demand of service tax cannot be confirmed. He placed reliance on the following decisions:

- United Telecom 2011(22) STR 571 (Tri. -Bang)
- Swapnil Asnodkar 2018 (10) GSTL 479 (Tri.- Mumbai)
- Balaji Enterprises 2020 (33) GSTL 97 (Tri. Del)
- ITC Ltd. 2014 (33) STR 67 (Tri. Del)
- Kafila Hospitality & Travels Pvt. Ltd. Vs. Commissioner, Service tax, Delhi. 2021 (3) TMI 773-CESTAT New Delhi (LB)

3.8 He also argued that during the course of search at the premises of the Appellant no documents like invoice/ debit notes raised on the customers were found. Therefore, the revenue authorities sought these documents from the recipient/ customers of the Appellant’s services. The revenue has failed to prove the case that the Appellants have collected the Service tax from their customers and not deposited with the Government. Appellant have never collected the Service tax from their customers. The alleged invoices referred to as being raised by the Appellant are not available in the records of the Appellant, nor has the department added the same in the

relied upon documents. Show Cause Notice alleges collection of Service tax from their customers but the documents like debit notes which are so called supplied by the recipients is not authenticated. There is no evidence produced by the revenue that these documents were provided by the recipients/ customers of the Appellant.

3.9 He further submits that demand of service tax is based on the definition of Services existed prior to 01.07.2012. However, the entire period of dispute in the present case is falling on or after 01.07.2012. The demand of service tax on the definition based in erstwhile regime cannot be confirmed. The show cause notice has failed to analyse the transactions properly and mechanically raised the demand of Service tax. He placed reliance on the following decisions:

- Maharashtra Industrial Development Corporation 2014(36)STR1291 (Tri.- Mum)
- Frisco Foods Pvt. Ltd. Vs. CCE, Dehradun 2022-VIOL-49-CESTAT-Del-ST

3.10 He also submits that the show cause notice relies on the statements of the directors of the Appellant to allege the rendition of services. The statements of the directors of the Appellant were recorded under duress and pressure. The show cause notice alleges rendition of services and collection of service tax without any documentary evidence. It is well established principle of law that demand of service tax cannot be confirmed merely on the basis of statements. The Appellant have produced enough documents to support their claim that they have not provided any taxable services for which they may be held liable for service tax. He placed reliance on the following decisions:

- Godavari Khore Cane Transport Co. 2013(29)STR 32
- Mahesh Sunny Enterprise 2014 (34) STR 21 (Del)

3.11 He submits that for the search proceedings, provisions of Code of Criminal Procedure, 1973 (2 of 1974) shall apply. The provisions of CrPC require that the Panchas ought to be the persons from the same locality who are respected and not dis-reputed. In the present case, the Panchas identified by the officials of the department were of a different locality. Thus, the entire search proceedings stands vitiated for want of proper procedure.

3.12 He also submits that it is a settled principle of law that in absence of corroborative evidence when the only relied upon document by the officers is disputed by the assessee, the assessee cannot be penalized for the same. He placed reliance on the following decisions:

- CCE Vs Ravishankar Industries Ltd. 2002 (150) ELT 1317 (Tri. Chennai)
- KashmitVanspati (P) Ltd. Vs. CCE 1989 (39) ELT 655 (Tribunal)
- Shabroc Chemicals Vs. CCE 2002 (149)
- T.G.L. Poshak Corporation Vs. CCE 2002(140) ELT 187 (Tri.- Chennai)
- Ruby Cholorates (P) Ltd. Vs CCE 2006 (204) ELT 607 (Tri. Chennai)
- Charminar Bottling Co. (P) Ltd. Vs. CCE, 2005 (192) ELT 1057
- Nagubai Ammal & Others Vs. B. Shama Rao, AIR 1956 SC 593

3.13 Without prejudice he also submits that demand is barred by limitation. No suppression of facts by the Appellant. Mere failure or omission on the part of the assessee to disclose some information to the department will not amount to suppression of facts. There must be a deliberate attempt on the part of the assessee to suppress the facts from the Department with an intention to evade payment of Service tax which is absent in the present case. He placed reliance on the following decisions:

- Padmini Prodcuts Vs. CCE 1989(43)ELT 195(SC)
- CCE Vs Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC)
- Gopal Zarda Udyog Vs. CCE 2005 (188) ELT 251 (SC)
- Lubri -Chem Industreis Ltd. Vs. CCE 1994 (73) ELT 257 (SC)
- Anand Nishikawa Co. Ltd. Vs. CCE 2005 (188) ELT 149 (SC)

4. Shri R.P Parekh, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order and submits that Appellant have filed fresh and new evidences before the Bench by submitting for the first time which is not permissible.

4.1 New grounds and documents may only be admitted according to the procedure prescribed under Rule 23 of CESTAT (Procedure) Rules, which has not been complied with. So, all arguments tendered by the Appellant now have not been first observed by the Adjudicating Authority. The fresh evidences/documents are not allowed in Tribunal. He placed reliance on the following decisions:

- Kneader House Vs. CCE, Delhi -I 2013 (290) ELT 249 (Tri- Delhi)
- Sterlite Industries (I) Ltd. Vs. CCE Tirunelvelli 2017(357)ELT 161 (Tri-Chennai)

4.2 He submits that as regard their contention of rendering of electric transmission service, sub-broker of Stock Exchange, agent of mutual fund, life insurance agent, etc. no supporting documents are submitted.

4.3 He further submits that Section 73 covers the tax not paid or short paid, which covers the demand made of service tax in present case, while section 73A covers only two situations viz. s. 73A(1) covers tax collected in excess than the prescribed rate and s. 73A(2) covers the situation where any amount representing as service tax has been collected which was not liable to paid. Here, in this case none of the above two situation is there. He placed reliance on the decision of Bajaj Allianz Life Insurance Co. Ltd. Vs. Commissioner of C.E. & S.T., Pune -III (Mumbai -Tri.).

4.4 He further argued that contention of the Ld. Counsel that Section 73A should have been invoked instead of Section 73 in this case is absolutely incorrect. Even if it is admitted that it is inadvertently made by mistake, it should not vitiate SCN. He placed reliance in the following decisions:

- Swami Communication Vs. Commr CGST, Kolhapur – 2019(27)GSTL 562 (Tri. Mumbai)
- Indus Integrated Information Mgmt Ltd. Vs. Pr. Commr of ST. Kolkata – 2018 (14) GSTL 24 (Cal.)

4.5 He also submits that after the negative list concept, classification of service does not matter. It’s only to be seen that the service do not fall under negative list (Sec. 66D) or under exemption Notification No. 25/2012-ST dated 20.06.2012, which is not the case here. Both the adjudicating authorities have not given any finding on the issues raised by the Appellant such as providing of exempted and non-taxable services. Debit note pasted in SCN along with form 26AS which show TDS deducted under Section 194H and 194J only. All the service recipient of the Appellant have admitted to have paid the service tax along with value of service. The appellant suppressed the material facts from the Department and therefore extended period of limitation will be applicable.

5. We have gone through the submissions made by both sides and perused the case records. The dispute in the issue relates to the fact arise that whether the appellant can submit additional documents / records and additional evidences before the appellate tribunal in their support?.The Ld. Departmental representative strongly argued that Appellant have filed fresh and new evidences before this Tribunal by submitting for the first time. In this connection, we are of the opinion that this Tribunal being a final fact finding authority can very well admit fresh evidence and argument. This issue has been considered by the Hon'ble Supreme Court (Three Judges Bench), in the case of National Thermal Power Co. Ltd. v. Commissioner of Income Tax, reported in 1998 (99) E.L.T. 200 (S.C.), which is to the effect that the Tribunal has jurisdiction to examine the question of law which arises on facts, as found by the authorities below, and having bearing on tax liability of assessee, even though said question was neither raised before the lower authorities nor in appeal memorandum before the Tribunal, but sought to be added later as an additional ground by a separate letter.

5.1 In the matter of Devangere Cotton Mills Ltd. v. Commissioner — 2006 (198) E.L.T. 482 (S.C.) the question arose whether the third member of the Customs, Excise and Gold (Control) Appellate Tribunal to whom the case was referred on difference of opinion between the Bench of two members could permit an additional ground to be raised under Rule 10 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982. The Supreme Court held that the Tribunal has got wide power to hear and consider a new ground and decide the appeal. The relevant observations are as follows :

> *"Rule 10 of the 1982 Rules allows the parties to urge grounds not taken in the appeal provided the Tribunal grants leave to the parties to do so. The Tribunal has also been given a wide power to decide the appeal on grounds not taken in the memorandum of appeal. The only limitation on this power of the Tribunal is that the party affected must be given an opportunity of being heard in respect of the new grounds sought to be urged. According to M/s. Davangere Cotton Mills Ltd., the issue had been raised originally before the Tribunal and again before the third member when it was referred to the third member on a difference of opinion. Revenue had ample opportunity of dealing with the submission. Besides, it was submitted, that the issue was in any event being agitated in the matter of M/s. Coats Viyella (India) Ltd. and there was no question of taking the Revenue by surprise.*

> *We are of the view that the Tribunal did err in refusing to hear the appellant only on the ground that the ground had not been raised earlier. Rule 10 was sufficiently widely framed to allow the Tribunal to do so. Having regard to the fact that the Tribunal was itself considering the issue on a contested (sic connected) hearing there was no reason why the appellant should have been shut out from pleading its case on the same basis."*

In the matter of Utkarsh Corporate Service Vs. CCE, 2014 (34) STR (35) (Guj.) the Hon'ble Gujarat High Court also held that additional legal grounds can be raised before any authority. The relevant para reproduced below:

> ***"11.*** *On the basis of the aforementioned discussion, we are of the firm opinion that both, Commissioner (Appeals) and the Tribunal have committed error in not considering the additional grounds raised by the appellant before it. As it could be noted very clearly that these were the legal grounds which could have been raised at an stage before any authority as laid down in the decision rendered in case of Sanghvi Reconditioners Pvt. Ltd. v. Union of India (supra) on which the Commissioner (Appeals) sought to rely upon and the said proposition hardly requires any further elaboration and yet both the authorities having failed to entertain these new legal grounds for which already the facts were existing on record, the appellant has succeeded in convincing us of a need to interfere with the orders of both the authorities by answering the question framed in its favour.*
>
> ***12.*** *Resultantly, impugned orders of both the authorities are hereby quashed and set aside. Parties are requested to be relegated to the Commissioner (Appeals) for consideration of these issues afresh. Accordingly, the Commissioner (Appeals) is directed to examine all the grounds raised before it by both the sides in accordance with law and both the parties are directed to cooperate in proceeding with the matter with requisite promptness. Appeal is, accordingly, allowed. Rule is confirmed. No order as to costs."*

In view of the above precedent law, we are of the considered opinion that the Law/Rules has not precluded CESTAT for considering new grounds/ evidence. We do not find merit in the pleas of the Ld. Departmental representative in this regard.

5.2 We find that in the present matter it is on record that during the search at the premises of the Appellants, no invoices/ debit notes etc., raised to their customers were found. The department in the present matter computed the service tax demand on the basis of TDS statement / 26AS Statement / 3CD Statement and financial statements seized from the premises of M/s Forward Resources Pvt. Ltd.However, presumption of documents in certain cases under Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the

custody or control of the person concerned, for the sake of convenience and ready reference the Section 36A is reproduced below :-

> ***Section 36A. - Presumption as to documents in certain cases. -*** *Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -*
>
> *(a) unless the contrary is proved by such person, presume -*
>
> *(i) the truth of the contents of such document;*
>
> *(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;*
>
> *(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.*
>
> In view of above Section 36A of Central Excise Act, 1944 it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized that the presumption under Section 36A is available. In the present case admittedly none of the alleged documents was produced by the Appellant or seized from the Appellant's premises or control. In view of the above, when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove that the source documents related to the Appellants and that any taxable services under the source documents were actually provided by the Appellant. This burden has not been discharged by the revenue in the present case. The department could not have

simply accepted the said documents recovered from the office premises of M/s Forward Resources Pvt. Ltd. on its face value and the same needed strict corroboration which is completely absent in the present case.

5.3 Further, the Section 83 of the Act states that sections of the Central Excise Act 1944, as stipulated and in force from time to time shall apply so far as may be in relation to Service Tax as they apply in relation to duty of excise. Section83 of the Finance Act reads as under : -

> *"**83. Application of certainprovisions of Act 1 of 1944. -***
> *The provisions of the following sections of the CentralExciseAct, 1944, as in force from time to time, shall apply, so far as may be, in relation to ServiceTax as they apply in relation to a duty of excise :-*
> *sub-section (2A) of section 5A, sub-section (2) of Sections 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF, to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."*

From the above Section 83 of the Finance Act, 1944 it is seen that Section 9D of the Central Excise Act, 1944 is applicable in the case of Service tax matters.

5.4 The department for confirmation of service tax demand also rely on the statement of Shri Suneet Kabra director of Appellant company and statement of Shri JagdishchandraSomani, Director of M/s Forward Resources Pvt. Ltd. However, we find that it is settled law that though the admission is extremely important piece of evidence but it cannot be said to be conclusive and it is open to the person who has made the admission to show that this is incorrect. In the present case admittedly none of the witnessed was examined in terms of Section 9D of the Act.

5.5 We also note that there are numerous decisions of the Tribunal laying down that such admission of persons, cannot be considered to be conclusive evidence to establish the guilt of the assessee. Burden of proof is on the Revenue and same is required to be discharged effectively. None of the persons on whose statement reliance was placed by the department were cross-examined. The Hon'ble P & H High Court in case of M/s. G-Tech

Industries Ltd. v. Union of India [2016 (339) E.L.T. 209 P&H] has held that Section 9D of the Act has to be construed strictly, as mandatory and not merely directory. The Hon'ble High Court in the matter of Jindal Drugs Pvt. Ltd. Vs. Union of India 2016 (340) E.L.T. 67 (P & H) also held that :

> *"**19.** Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice."*

In the present matter the Adjudicating Authority has failed to follow the requirement of Section9D of the Act regarding examination in chief of witness, therefore demand of service tax on the basis of statement of persons not sustainable.

5.6 When the Service tax is demanded on alleged services, it is the responsibility of the department to show that the appellant had rendered these services to customers with positive evidences. In the present case department failed to do so. Further we also do not agree with argument of Ld. Departmental representative that classification of service is not important after 01.07.2012. In the present matter demand was raised under the category of "Business Auxiliary Service", and Management or Business Consultant Services, without analyzing the activities carried out by the Appellant. Whereas as per the details submitted by the Ld. Counsel, we find that appellant was engaged in providing GTA Service, sub-distributer services of Mutual Funds, maintenance service related to principle supply of transmission and distribution of electricity, insurance

agent service, sub-broker services related to stock and commodity stock, Intermediatory Manufacturing Service and services towards providing advice and negotiation in respect of packing credit in foreign currency etc. The aforesaid services do not cover under the services alleged by the revenue and demand confirmed by the Ld. Adjudicating authority under "Business Auxiliary Service", and Management or Business Consultant Services. Therefore, the very foundation of the allegation is misplaced in the present matter. It was necessary for the Department to specify the activity and the nature of service that was to be taxed and for this it was necessary for the Department to point out how the activity of Appellant covered under the specific clause of services described in the Act.

5.7 In the case of *Swapnil Asnodkar*, 2018 (10) G..S.T.L. 479 (Tri. - Mumbai) supra a Division Bench of the Tribunal observed as follows :-

> *"4. We have carefully considered the submission made by both sides. We find that though in the SCN the Respondent was made liable to pay Service Tax but as rightly held by the adjudicating authority, no specific clause of Section 65(19) defining Business Auxiliary service has been shown to be applicable to levy Service Tax. It is not appearing from the show cause notice as to what goods or services the Respondent has promoted or helped to promote. The Appellate Commissioner also on the same ground has held that the demand being vague is not enforceable against the Respondent. We do not find any reason to infer any different view than expressed by the lower authorities as without specifying the activity and the nature of service of the Respondent he cannot be taxed. Further out of the seven clauses under Section 65(19) no clause has been pointed out under which the Respondent is liable for Service Tax."*

In United Telecoms Ltd.2011 (22) S.T.R. 571 (Tribunal)supra, another Division Bench of the Tribunal observed as follows :-

> *"6. We find that no demand can be confirmed against any person towards Service Tax liability unless he/it is put on notice as to its exact liability under the statute. In the show-cause notice basic to the proceedings, the impugned activities were proposed to be classified under BAS and BSS. This proposal was confirmed by the Original Authority. We find that this order is not in accordance with the law. The impugned order held that UTL provided services on behalf of the client i.e. Director, e-Seva and sustained the demand. We find that under BAS, there are seven sub-clauses. Demand under sub-clause (vii) could be on activities relatable to either one of the preceding six sub-clauses. Therefore, if a notice issued proposing demand under BAS, the noticee will not be aware as to the precise ground on which tax is proposed to be demanded from him unless the sub-clause is specified. In the instant case, Service Tax was proposed to be demanded for an activity under BAS and BSS. Under BSS also several activities are listed as exigible under that head. In the absence of proposal in the show-cause notice as to the liability of the assessee under the precise provision in the Act, we find the demand to be not sustainable."*

5.8 We may also refer to the observations of the Supreme Court in the decision of *Kaur & Singh* v. *C.C.E., New Delhi* - 1997 (94) E.L.T. 289 (S.C.).It is axiomatic that a show cause notice must communicate to the addressee the specific allegation/charge and the basis for the demand of tax. The Supreme Court stated that the party to whom a show cause notice is issued must be made aware of the allegation against it and that this is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him.

5.9 The aforesaid decisions clearly hold that it is imperative for the Department to specify under which specific clause of the section /services an activity is covered and in the absence of any specific service pointed out in show cause notice, the demand cannot be confirmed as the noticee will not be aware as to which precise service contained in the sub-clause has been rendered by him.

5.10 We also find that in the present matter for confirmation of service tax demand revenue also relies upon the TDS /26As Statement /3CD Statement. The said statement under provisions of Income Tax Act, 1961 is an Annual Consolidated tax statement. Income tax and servicetax are two different/ separate and independent special Act andtheir provisions are operating in two different fields. Therefore, byrelying the 26AS /TDS Statement / 3CD statement under the Service TaxAct, demand of service tax cannot be made. We also find the support from the decision of M/s Ved Security Vs. CCE, Ranchi -III 2019(6) TMI 383 CESTAT, Kolkata wherein it was held that the value of taxable services cannot be arrived at merely on the basis of the TDS statements filed by the clients inasmuch as even if the payments are not made by the client, the expenditure are booked based on which the form 26AS is filed, which cannot be considered as value of taxable services for the purpose of demand of Service tax.

5.11 In the matter of Synergy Audio Visual Workshop Pvt. Ltd. Vs. Commr. of S.T. Bangalore 2008 (10) S.T.R. 578 (Tri. - Bang.), the Tribunal observed as under:

> *"The other ground is for confirming demandsis that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The*

*appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeed on this ground also. The impugned order is set aside and the appeal is allowed."*

In the matter of Calvin Wooding Consulting Ltd. Vs. Commissioner of C.Ex. Indore 2007 (7) S.T.R. 411 (Tri. - Del.) also Tribunal observed as under:

***21.*** *The liability of the recipient cannot arise merely from the fact that, the income-tax was deducted at source, which was the requirement of the Income-tax Act, on the recipient who made payment to the foreign supplier. Such a statutory requirement, as exists under the Income-tax law on the person making the payment to deduct tax at source, as a tax collecting agency of the Revenue, does not exist under the provisions of the ServiceTax law, and no obligation was cast upon the recipient of the service to make any deduction from the amounts payable by way of consideration, under the statutory provisions. Authorization to pay Servicetax under a contractual arrangement which obliged the recipient to pay the tax and file return, was a matter distinct and different from a statutory obligation to make tax deduction as a collecting agency, as envisaged under the Income-tax law. The Commissioner (Appeals) has, therefore, rightly set aside the orders-in-original insofar as respondent of Service Tax Appeals Nos. 170, 171 and 173 of 2005 was concerned.*

In the matter of Commissioner of C.Ex. Jaipur-I Vs. Tahal Consulting Engineers Ltd. – 2016(44) S.T.R. 671 (Tri. Del) the Tribunal also observed as under:

***2.*** *The brief facts of the case are that respondents are engaged in providing taxable service. Certain proceedings were initiated against them for not paying the Service Tax mainly on the basis of income-tax return filed by them at Jaipur. It is the case of the Revenue that the respondent failed to discharge the Service Tax on full taxable value as reflected in the income-tax returns. Accordingly, the original authority, after due process, confirmed the Service Tax of Rs. 8,25,789/- under the category of 'Consulting Engineer service'. He also imposed penalties under various sections on the respondent. On appeal by the respondent, the learned Commissioner (Appeals) vide impugned order set aside the Order-in-Original and allowed the appeal. Aggrieved by this, Revenue is in appeal.*

***3.*** *The main grounds of appeal is that respondent could not produce documentary evidence about Service Tax payment properly for the impugned period at Chandigarh and Lucknow. The ST-3 return filed at*

*Chandigarh and Lucknow did not tally with income-tax return filed in Jaipur office.*

***4.*** *We have heard the AR who reiterated the grounds of appeal. None represented the respondent.*

***5.*** *We find that Commissioner (Appeals) examined the respondents appeal against confirmation of demand and allowed the same mainly on the ground that income-tax return cannot be the basis for demanding Service Tax. Further, the respondent's contention that they have rendered services outside the jurisdiction of Rajasthan and have discharged the Service Tax in Chandigarh and Lucknow, could have been verified with the concerned jurisdictional Chandigarh Commissionerate office. Departmental authority at Jaipur have no jurisdiction to proceed against the respondent for demanding Service Tax without any evidence of taxable service being provided within their jurisdiction. We find that there is nothing in the grounds of appeal which makes us to interfere with the finding of the learned Commissioner (Appeals). The appeal did not advert to any assertion as to how the Service Tax demand can be made when there is no evidence to any taxable service having been rendered in the Jurisdiction of Rajasthan. No inquiries have been conducted by the Revenue to support their case. As such, we find that present appeal is without merit and accordingly, the same is dismissed.*

In view of the above, we are of the view that the demand of services tax on the basis of TDS /26AS statements/ 3CD Statements are not sustainable.

5.12 Without prejudice, we find that in the impugned matter without examine the nature of activity of appellant, observation of department that appellant were engaged in providing 'financial consultancy services' , 'business auxiliary service' and 'management or business consultancy services' not tenable. From the submission of appellant it is clear that appellant provided the various types of services to various entities and department has classified all as commission agent services under the category of 'business auxiliary service' and 'management consultancy service' legally not correct.

5.13 During the impugned period appellant provided the mutual fund distribution service to M/s ECL. In this regard, as per Rule 2(l)(d)(vi) of the Service Tax Rules which was in force upto 30-6-2012 reads as follows :

*"2(1) In these rules unless the context otherwise requires, -*

*(d) "Person liable for paying the Service Tax" means, -*

*(vi) in relation to business auxiliary service of distribution of mutual fund by a mutual fund distributor or an agent, as the case may be, the mutual fund or asset management company, as the case may be, receiving such service;"*

It is very clear from the above Rule that, liability to pay service tax on auxiliary service of distribution of mutual fund was on the service recipient. The mutual fund or asset management company should discharge the Service tax. In the instant case, the mutual fund companies should have paid ST on the commission amount paid to the appellant. However, surprisingly, the department has confirmed the ST liability on the appellant. In the case of *Raj Ratan Castings Pvt. Ltd*. v. *CCE* [2012 (25) S.T.R. 481 (T)], it was held that -

> *Mutual fund distribution - Liability to pay Service Tax on commission - In terms of Rule 2(l)(d)(vi) of Service Tax Rules, 1994 such liability was on recipient of services, i.e., mutual fund company - If they did not pay it, liability was not transferred to mutual fund distributor. [paras 6, 7] [Emphasized].*

5.14 We also find that for theperiod post July 2012, the said activity of appellant were exempted vide Notification No. 25/2012-ST dtd. 20.06.2012. relevant entry of above notification reads as under.

> "29. Service by the following persons in respective capacities-
>
> (c) mutual fund agent to a mutual fund or asset management company;
>
> (d) distributor to a mutual fund or asset management company"

In view of above it is clear that the services of the Appellants were exempted.

5.15 The appellant had provided the maintenance service to M/s KEC International Ltd. The said activity of Appellant is directly related to the principal supply of transmission and distribution of electricity. We find that the sad service is also exempted in view of the following decisions relied upon by the Ld. Counsel.

- Torrent Power Ltd Vs. Union of India 2019(1) TMI 1092-Guj High Court.
- Noida Power Co. Ltd. Vs. CCE, Noida 2014(33)STR383 (Tri. Del)
- kedar Construction Vs. CCE, Kolhapur 2015 (37) STR 631 (Tri. Bom)
- UP RajkiyaNirman Nigam Ltd. Vs. CCE, Meerut 2016(41)STR 967 (Tri. Del)

- Pashchimanchal Vidyut Vitran Nigam Ltd. 2012(28)STR 412 (Tri. Del)
- Purvanchal Vidyut Nigam Ltd. 2013(30) STR 259 (Tri- Del)
- Perfect Electricals Vs. CCE, 2018 (6) TMI 481 -CESTAT Bangalore

5.16 Now coming to the service provided by the Appellant to M/s Chaz Insurance Brokers Pvt. Ltd., we find that appellant provided the services of commission agent to M/s Chaz Insurance Brokers Pvt. Ltd. The said brokerage company deal in the business of life insurance and general insurance products. In terms of circular No. 59/8/2003 -ST dtd. 20.06.2003, the services provided by insurance agent were covered under the 'insurance agent or 'insurance auxiliary service'. The relevant portion of above circular is reproduced below:

> *2.1.3 Certain doubts have been raised in case of business auxiliary services. In this regard the following is clarified,-*
>
> *.While it is not possible to give an exhaustive list of business auxiliary services, the following are illustrations of services that are covered under this category viz. evaluation of prospective customers, processing of purchase orders, customer management, information and tracking of delivery schedules, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, managing distribution & logistics. The services provided in relation to getting a customer, verification of prospective customer, processing of purchase order etc would also be covered under service tax, as the law specifically provides for inclusion of such services as business auxiliary support services.*
>
> *. As regards the question whether insurance agents, C&F agents working on commission basis fall under the definition of business auxiliary service, it is clarified that they do not, as they are specifically covered within the definition of other specified taxable services, namely the Insurance service and C&F Service respectively. Under Section 65A of Finance Act 1994, it has also been provided that in case of overlap, a service would be classified under the head, (a) which provides most specific description, (b) in case of a composite service having combination of different taxable services, the service which give them their essential character and (c) in case the test of (a) and (b) does not resolve, the service which comes earlier in the clauses of Section 65, i.e. the service that was subjected to service tax earlier. Since Insurance services and C&F Services are more specific description and were also subjected to service tax prior to imposition of tax on business auxiliary service, the insurance agents, C&F agents working on commission basis would fall under those respective categories. From this, it follows that a particular service can be taxed only under one head of service.*

In view of above the activity of the appellant classified by the department under the head 'business auxiliary service is legally not correct

5.17 Further, we find that in terms of Rule 2(1)(d) of Service tax Rules, 1994 and Circular No. 96/7/2007-ST dtd. 23.08.2007 and in terms of Circular No. 96/7/2007 -ST dtd. 23.08.2007 the service tax was liable to be paid by the Service recipient. Therefore, on the said activity of Appellant demand of service tax is not sustainable.

5.18 We also noticed that in the present case service provided by the Appellant to M/s Equirus Capital Pvt. Ltd., & M/s Edelweiss Commodities Services Ltd. was in nature of stock exchange and commodity exchange sub-broker. However, department was incorrectly classified the same service under the category of 'Management or business consultancy'. We noticed that the service provided by a sub-broker to a stock broker was exempted vide Notification No. 25/2012-ST dtd. 20.06.2012. Relevant entry of said notification is reproduced below.

> *29. Service by the following persons in respective capacities –*
> *A. Sub-broker or an authorized person to a stock broker;*
> *B. authorized person to a member of a commodity exchange.*

5.19 As regard the other services, we also find that the department wrongly classified the activity of appellant under the consultancy service and business auxiliary services without examining the nature of services. As we already discussed in above para also only on the basis of 26AS statement and other grounds mentioned above no service tax demand is sustainable.

5.20 Further the revenue alleged that Appellant have collected the service tax payment. However, revenue in support of their contentions nowhere produced any corroborative evidence in the form Bank Details or any documents recovered from the business premises of the Appellant by which it can be concluded that Appellant have collected the Service tax. In the present matter department clearly failed to prove the case that Appellant have collected the service tax from their customers.

5.21 Since we decide the matter on the facts of the present case and on law as discussed above, we do not incline to deal with the other issues such as Limitation, demand to be made under Section 73 or 73A, omission of Chapter V the Finance Act, 1994 vide Section 173 of CGST Act etc. and the same are kept open.

6. As per our above discussion and finding, the demand of service tax (except the amount of service tax payable as per the appellant, admitted by the appellant and deposited as stated in the appellant's submission) interest and penalty is not sustainable and the same is accordingly set aside. The appeal is allowed in the above terms with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 15.07.2022)

**RAMESH NAIR**
**MEMBER (JUDICIAL)**

**RAJU**
**MEMBER (TECHNICAL)**