CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

SERVICE TAX APPEAL NO. 55002 OF 2013

[Arising out of Order-in-Original No. 77/AKM/2012 dated 28.9.2012 passed by the Commissioner Service Tax, Delhi]

M/s HLS Asia Ltd. **Appellant**
109, Aurobindo Place, Hauz Khas,
New Delhi – 110 016.

Versus

The Commissioner, **Respondent**
Service tax Commissionerate
IAEA House, 17-B, I.P. Estate,
M.G. Marg,
New Delhi – 110 002.

Appearance:
Present for the Appellant : Shri B.L. Narasimhan, Advocate, Ms. Neha Choudhary, Advocate

Present for the Respondent: Shri Ravi Kapoor authorized representative for the Revenue

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

FINAL ORDER NO. 50278/2023

DATE OF HEARING: 29.11.2022
DATE OF DECISION: 06.03.2023

P V SUBBA RAO:

M/s. HLS Asia Ltd.[1], a registered provider of services, has filed this appeal with a prayer to set aside the Order-in-Original[2] dated 28.9.2012 passed by the Commissioner Service Tax, Delhi demanding Service tax of Rs. 10,89,40,842 for the

[1] **Appellant**
[2] **Impugned order**

period 10.9.2004 to 31.3.2008 along with interest and imposing penalties under sections 76,77 and 78. The operative part of the order-in-original is as follows:

> "(i) I confirm the demand of service tax amounting to Rs. 10,65,92,892/- (Rupees Ten Crore Sixty Five Lac Ninety Two Thousand Eight Hundred and Ninety Two only) against M/s HLS Asia Limited, New Delhi under Section 73 (1) of the Act read with Rule 6 (1) of Service Tax Rules, 1994 and order that the same be recovered from them.
>
> (ii) I confirm the demand of Education Cess of Rs. 21,31,856/- (Rupees Twenty One Lac Thirty One Thousand Eight Hundred and Fifty Six only) and higher education cess of Rs. 2,16,094/- (Rupees Two Lac Sixteen Thousand and Ninety four only) against M/s HLS Asia Limited, New Delhi under Section 91 of the Finance (No. 2) Act, 2004 read with Section 73 (1) of the Act and Rule 6 of the Rules and the same is recoverable from them ;
>
> (iii) I also order the recovery of interest at the applicable rates on the above amount under Section 75 of the Act ;
>
> (iv) I impose a penalty of Rs. 200/- (Rupees Two Hundred only) for every day during which such failure to pay service tax continues or @ 2% of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax upon M/s HLS Asia Limited, New Delhi under Section 76 of the Act, provided that the total amount of penalty payable in terms of this section shall not exceed the service tax payable;
>
> (v) I impose a penalty of Rs. 5,000/- (Rupees Five Thousand only) under section 77 of the Act; and
>
> (vi) I also impose a penalty of Rs. 11,00,00,000/- (Rupees Eleven Crore only) on M/s HLS Asia Limited, New Delhi under Section 78 of the Act read with rules 6 of Service Tax Credit Rules, 2002.
>
> In view of first and second proviso to Section 78, if the amount as determined above along with the interest payable thereon, is paid within thirty days from the date of communication of this order, the amount of penalty payable under Section 78 shall be 25% of the amount so determined. The benefit of reduced penalty shall be available only if penalty so determined is also deposited within 30 days of the communication of this order".

2. The appellant provides wireline logging and perforation services to Oil and Natural Gas Commission[3] and Oil India

---

[3] ONGC

Ltd.[4] and data processing services to OIL under agreements. ONGC and OIL drill the earth for petroleum and for this operation, the characteristics of the rock through the strata are to be ascertained. The appellant systematically takes many measurements and transmits them above ground through a electro-mechanical cable and this service is known as wireline logging.

3. In the casing inserted during drilling by ONGC and OIL, perforations have to be made at various places to enable the oil to flow and this service provided by the appellant is known as 'perforation'. The appellant also processed the measurements which were taken through wireline logging and provided it in the processed form to OIL and this service was 'data processing'.

4. Considering that these services fall under 'Technical Testing and Analysis[5], the appellant registered with the service tax department and paid service tax but its client OIL never reimbursed the service tax to it, while ONGC initially reimbursed service tax and then recovered it later as, according to both these clients, these services do not fall under TTA. So, the appellant stopped paying service tax from 25.5.2005 after informing the department.

5. Thereafter, from 1.6.2007, a new category of taxable service known as 'mining services' was introduced and the appellant started paying service tax under this head for the

---

[4] OIL
[5] TTA

same three services and has been filing returns and the department has not objected to this payment of service tax under 'mining services'.

6. Show Cause Notice[6] dated 23.10.2008 was issued to the appellant stating that it had come to the notice of the Range Office that the appellant had not been discharging its full service tax liability under TTA and demanding service tax for the period 10.9.2004 to 31.3.2008 invoking extended period of limitation which culminated in the impugned order.

7. Learned counsel for the appellant contests the impugned order on merits and also on limitation.

8. On merits, it is the submission of the learned counsel that once it is undisputed that from 1.6.2007, the services rendered by the appellant fall under 'mining services', they cannot be classified under any other category prior to that date. Even otherwise, the appellant is not testing anything but is only taking measurements and supplying them to its clients and in case of OIL, it was also processing the data so collected during measurements. The other service provided is of perforations or making holes in the casing to enable flow of oil which can also not be considered as technical testing and analysis. These services, nevertheless assist its clients' drilling operations and fall under the head 'mining services'.

9. On limitation, learned counsel submits that not only has the appellant been registered with the department and has

---

[6] SCN

been filing returns regularly, but when it stopped paying service tax under TTA after its clients refused to reimburse service tax and even recovered what was already paid, it had specifically written a letter to the department. Therefore, by no stretch of imagination can the department allege fraud or collusion or wilful suppression or violation of the Act with an intent to evade payment of service tax. Therefore, the extended period of limitation could not have been invoked.

10. Learned counsel further submits that since the demand is not sustainable on merits, the demand of interest and imposition of penalties also cannot be upheld.

11. Learned authorised representative supports the impugned order and reiterates its findings.

12. We have considered the submissions on both sides and perused the records. It is undisputed that the appellant provides **wireline logging, perforation and data processing** services to ONGC and OIL. The appellant has been paying service tax on these three services from 1.6.2007 under the head 'mining services' and the department has not disputed this classification of the service. Once the department accepted that these are 'mining services', it cannot, simultaneously, classify them under TTA services. Unless the department can establish that the appellant was wrong in classifying these services under 'mining services' and the department itself was equally wrong in accepting their classification under 'mining services', the department cannot

classify the services under any other head, including TTA. We do not find anything in the impugned order explaining why the department and the appellant were both wrong in classifying them as 'mining services'. Therefore, the demand cannot be sustained on merits.

13. As far as the limitation is concerned, the demand invoking extended period of limitation can be raised as per section 73 only if there is (a) fraud; or (b) collusion; or (c) wilful misstatement; or (d) suppression of facts; or (e) violation of Act, with an intent to evade payment of service tax. The SCN invoked extended period of limitation '**As self-assessment provisions apply to Service tax, incorrect assessment and payment of service tax by the assessee amount to deliberate misdeclaration and suppression of facts with the intent to evade..'**. This proposition of the Commissioner in the SCN is alien to law. While Finance Act, 1994, provided for issuance of an SCN within the normal period in all cases and invoking extended period of limitation only if one of the five elements was present, the Commissioner imagined a deeming provision that 'if an assessee is operating under self-assessment and incorrectly assesses and pays service tax, it will amount to deliberate mis-declaration and suppression of facts with the intent to evade'.

14. The existing provisions do not support the observation made by the Commissioner. All assessees under the Service tax operate under self assessment provisions and the appellant is no exception. Section 69 of the Finance Act, 1994 requires a

provider of taxable service to register, section 70 requires it to self-assess tax and file returns with the Superintendent of Central Excise and if the assessee either fails to file the returns or having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, Section 72 requires the Central Excise officer to make 'Best judgment assessment' and for this purpose, require documents, records, etc. to be produced.

15. Thus, the scheme in Finance Act, 1994 is that if the assessee does not self-assess tax correctly, the remedy against it is the 'Best Judgment Assessment' under section 72. This provision is similar to the provision for re-assessment under Section 17 (4) of the Customs Act, 1962. The Commissioner imagined that wrong self-assessment by an assessee would amount to deliberate mis-declaration and suppression of facts with intent to evade. As per the Finance Act, 1994, if the assessee wrongly self-assesses tax in its returns and none of the five elements required to invoke extended period of limitation is present and if the demand gets time-barred, the responsibility for it rest squarely on the officer who had the jurisdiction and the mandate to the Best Judgment assessment under section 72 but has not done so and NOT on the assessee. Therefore, the invocation of the extended period of limitation cannot be sustained.

16. The demand of interest and penalties also deserve to be set aside as we have held in favour of the appellant both on merits and on limitation.

17. For all the above reasons, the appeal is allowed with consequential relief, if any, to the appellant.

[Order pronounced on 06/03/2023.]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

PK