CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 850 of 2008 [DB]

[Arising out of Order-in-Original No. 72/VKG/2008 dated 18.09.2008 passed by the Commissioner of Service Tax, New Delhi]

M/s. Graphisads Pvt. Ltd. **...Appellant**
R-300, Greater Kailash, Part-I,
New Delhi - 110048

VERSUS

Commissioner of Service Tax, Delhi **...Respondent**
17B, IAEA House, I.P. Estate,
M.G. Marg, New Delhi - 110002

APPEARANCE:
Shri Devesh Tripathi, Ms. Anjali Gupta, Shri Rajatdeep Sharma, Advocates and Shri Prasanjit Pathak, Consultant for the Appellant

Shri Prashant Kumar Singh, Authorised Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 12.05.2023
DATE OF DECISION: **11.07.2023**

FINAL ORDER No. 50866/2023

DR. RACHNA GUPTA

Present appeal has been filed against the Order-in-Original No. 72/2008 dated 18.09.2008 vide which an amount of Rs.55,89,455/- which was alleged to have been short paid, has been confirmed along with the appropriate interest. Penalty of equal amount has also been imposed upon the appellant under Section 78 of the Finance Act, 1994 (herein after referred as 'the Act') and penalty of Rs. 1000/- is imposed under Section 77 of the Act.

2. The facts in brief for the present appeal are that pursuant to an audit of the appellant's record conducted in November 2005 and

on the basis of scrutiny of Balance sheets and ST-3 Returns for the period from 2001-02 to 2004-05, department noticed following issues:

> (i) The assessee has collected the amount in the respective years under the heading 'Income-Sales' which is not the same as shown in the amounts realised in the relevant columns of the ST-3 Returns.
>
> (ii) The assessee has not paid service tax and education cess at applicable rates throughout the referred period which worked out to Rs.6,57,08,418/- and Rs.6,06,980/- respectively except to the tune of Rs.82,54,774/- and NIL respectively for the said period.
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> (iii) Thus, by doing so, the assessee appears to have short levied and short paid service tax and education cess to the tune of Rs.5,74,53,644/- and Rs.6,06,980/- respectively as detailed in the Annexure-B to this notice.

Accordingly, a Show Cause Notice No. 1684 dated 20.10.2006 was served upon the appellant proposing the demand of short paid service tax of Rs.5,74,53,644/- along with the education cess of Rs.6,06,980/- to be recovered from the appellant along with the proportionate interest and the appropriate penalties. The said proposal has been confirmed by the original adjudicating authority. Being aggrieved the appellant is before this Tribunal.

3. We have heard Shri Devesh Tripathi, Ms. Anjali Gupta, Shri Rajatdeep Sharma, learned Advocates and Shri Prasanjit Pathak,

learned Consultant for the appellant and Shri Prashant Kumar Singh, Authorized Representative for the department.

4. Learned counsel for the appellant has mentioned that the show cause notice has been issued merely on the basis of audit objection without verifying the factual position and without seeking any clarification from the appellant. The audit team has only noticed the difference in figures in the returns when compared to balance sheets. It is impressed upon that they have completely ignored the details shown in the balance sheet under head 'expenditure' and 'sundry debtors'. Learned counsel has mentioned that had there been a proper co-relation of all details, there was no need to issue the show cause notice. Learned counsel further impressed upon that appellant is registered with Service Tax Department for rendering following services in relation to advertisement:

(i) Booking of stands/displayed advertisement and sending the same to media.

(ii) Outdoor and other advertisement sub-contracted by other advertising agencies.

(iii) Design and production of advertisement

(iv) Advertisement under works contract.

4.1 It is mentioned that the adjudicating authority has erred in confirming the demand of service tax on the amount realised by the appellant from the principal advertising agencies who charged the amount towards services in relation to advertisements from the client and sub-contracted the work relating to the advertisements

to the appellant. It is further submitted that demand against the services provided under Works Contract Service has also been wrongly confirmed. It is mentioned that the adjudicating authority has ignored the fact that the contracts for advertisements included designing, production and display of advertisements, the cost includes the cost of raw materials used therein, hence, these composite contracts could not be vivisected. The demand for the impugned period could not be levied for rendering the works Contract Services. Learned counsel has relied upon the decision of this Tribunal in the case of **Daelim Industrial Co. Ltd. Vs. Commissioner of Central Excise, Badodara reported as 2004 (170) E.L.T. 457 (Tri. Del).** The said decision is mentioned to have been affirmed by the Hon'ble Supreme Court vide its decision **reported as 2004 (170) E.L.T. A181 (SC).** Finally, it is submitted that all transactions have been made under invoices and the entire amount liable to service tax has been duly reflected in Books of Accounts and balance sheets of the appellant. Hence, present is not the case of rendering services with an intent to evade the payment of service tax. Thus, the adjudicating authority has committed an error while justifying the invocation of extended period of limitation. Finally objecting reduction of cum tax benefit, the appellant has prayed for the order under challenge to be set aside and appeal to be allowed.

5. While rebutting these submissions learned DR has mentioned that difference in the values of returns and balance sheets is observed to be self evident to prove that total values of balance sheets are not shown in ST-3 returns. The short payment

therefore, of service tax, has rightly been confirmed. It is mentioned that the adjudicating authority after thoroughly analysing Section 67 of the Act with Section 65(105)(e) of the Act has held that appellant being an advertising agency are required to pay service tax at the specified rate on the gross amount charged by them from their clients for provision of the services i.e. Advertising Agency Services provided or to be provided. The circulars as relied upon by the appellant have also been duly dealt with by the adjudicating authority. Impressing upon no infirmity in the order, the appeal is prayed to be dismissed.

6. Having heard the rival contentions and perusing the entire records, we observe and hold as follows:

The appellant admittedly is registered with Service Tax Department under the category of Advertising Agency Services. They are regularly discharging their service tax liability and are filing their ST-3 returns. However, the discharge of liability is alleged as short for the reason that the entire taxable value has not been included while calculating the tax liability. The following are the admitted services:

(i) Booking of stands/displayed advertisement and sending the same to media.

(ii) Outdoor and other advertisement sub-contracted by other advertising agencies.

(iii) Design and production of advertisement.

7. Thus, we observe that there is no denial to the fact that the appellant is providing services to another service provider i.e.

another advertising agency instead of providing said services directly to the client. As per the definition of taxable Advertising Agency Service under Section 65(105(e), which reads as follows:

> "taxable service means any service provided to a client by an advertising agency in relation to advertisement in any manner".

8. There is also no denial to the fact that the amount received by the appellant is the amount for the other advertising agency for whom the appellant was collecting advertisement. It is only 15 per cent thereof the appellant was retaining as its commission. Admittedly, the appellant has paid service tax on this commission as has also been agreed by the adjudicating authority in Para 19.5 of the order under challenge. From the above activities at S.No. (i) to (iii) as performed by the appellant, it is clear that the service rendered by the appellant is nothing but an activity of space selling. The CBEC Circular No. 64/13/2003-ST dated 28.10.2003 has clarified as follows:

> *"2. The term canvassing may merely invoice contacting potential advertisers and persuading them to give advertisement to a particular newspaper/periodical/magazine. The making and preparation of the advertisement namely, drafting of the text, preparation of layout is left either to the advertiser or to newspaper/periodical/magazine. Such a service is known as 'space selling'. In such cases, since the agency undertakes the job of merely bringing the order for an advertisement and does not undertake any further activity, it would not fall within the definition of advertising agency and will not be subjected to service tax."*

9. This Tribunal also in the case of **M/s. Bhavya Enterprises (Advertisers) Vs. Commissioner of Central Excise, Delhi-III reported as 2006 (1) S.T.R. 50 (Tri.Del.)** has held that activity of space selling in print media without being engaged in making of the advertisement, is not covered in the definition of advertisement agency, hence, is not liable for service tax. Over and above, there is no denial that the principal advertisement agencies have been charging and paying service tax on the gross amount received by them from their clients. We observe that the adjudicating authority has failed to consider the clarifications put forth by the appellant and even the decisions rendered by the Tribunal. Thus, we observe that Judicial protocol has been ignored by the adjudicating authority. There is no discussion about the co-relation of balance sheet to the ST-3 returns vis-a-vis income shown under different heads. We, therefore, hold that there is no cogent basis of confirming the allegations of short payment of service tax merely on the basis of difference in figures noticed by the audit team. The discharge of liability with respect to the commission retained by the appellant has already been acknowledged.

10. Coming to the confirmation of demand with respect to the advertisement under works contract, we observe that adjudicating authority has nowhere denied the composite nature of certain contracts executed by the appellant. The composite work contracts were not liable to tax prior the concept came into existence in the year 2007 as has been held by Hon'ble Supreme Court in the case of **Commissioner of Central Excise & Customs, Kerala Vs. M/s. Larsen & Toubro Ltd. in Civil Appeal No. 6770 of 2004**

dated August 20, 2015. The relevant paragraphs of the decision are as follows:

> *"24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.*
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> *25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.*
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> *26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working*

downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax."

The entire period of demand herein is prior 1st July, 2007. Otherwise also, the adjudicating authority has no where denied the discharge of sales tax liability by the appellant with respect to the composite contracts. Confirmation of demand on this ground cannot sustain as on date and thus is liable to be set aside.

11. Finally, coming to the plea of invocation of extended period of limitation, we observe that the demand for the Year 2001-2002 to 2004-2005 has been raised vide show cause notice dated 20.10.2006. The entire demand is beyond the statutory period in terms of Section 73 of the Act. No doubt, the proviso thereof

permits the invocation of extended period till 5 years from the period of demand. But only and only in the case where there has been the wilful suppression of facts with an intent to evade the payment of service tax. We observe that the invocation of extended period has been justified by the adjudicating authority on the sole ground that the appellant had not filed the ST-3 returns by declaring the correct values of taxable services realised during the impugned period which resulted into the short payment of service tax. From the above discussion, we have already held that the appellant was discharging the liability on the amount he was receiving as commission. Since the remaining other amount was passed over to the principal advertising agencies, the appellant was not liable to pay service tax on the said amount. The findings of adjudicating authority for including the said amount in the gross value of taxable service are already held liable to be set aside. It becomes clear that there is no short payment of tax by the appellant. The returns were otherwise being filed regularly.

12. Resultantly, there remains nothing on record which may prove any positive act on part of the appellant to be called as an act of collusion or suppression of facts. We rely upon the decision of Hon'ble Supreme Court in the case of **Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut reported as 2005 (188) E.L.T. 149 (S.C.),** wherein it is held as follows:

> ***"27.*** *Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render*

it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik v. Collector of Central Excise [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts". This view was also reiterated by this Court in Collector of Central Excise, Baroda v. LMP Precision Engg. Co. Ltd. [2004 (9) SCC 703].

28. *However, in the case of LMP Precision Engg. Co. Ltd. (supra), this Court came to the conclusion that the manufacturer was guilty of "suppression of facts." In that decision, manufacturer did not make any attempt to describe the products while seeking an approval of classification list and in that background of facts, it was held that it amounted to "suppression of facts" and therefore, Excise authorities were entitled to invoke proviso to Section 11A of the Act. It also appears from that decision that this Court also held that if any classification was due to mis-interpretation of the classification list, suppression of facts could not be alleged. From this judgment, it is therefore clear that since the Excise authorities had collected samples of the products manufactured by the appellant and inspected the products and the relevant facts were very much in the knowledge of the Excise authorities and nothing could be shown by the Excise authorities that there was any deliberate attempt of non-disclosure to escape duty, no claim as to "suppression of facts" could be entertained for the purpose of invoking the extended period of limitation within the meaning of proviso to Section 11A of the Act.*

29. *Similarly, in the case of Collector, Central Excise, Jamshedpur v. Dabur India Ltd. [2005 (121) ECR 129 (SC)], this Court held that the extended period of limitation was not available to the Department as classification lists filed by the Assessee were duly approved by the authorities from time to time. In that decision this Court followed its earlier judgment in O.K. Play (India) Ltd. v. Collector of Central Excise, Delhi-III (Gurgaon) [2005 (66) RLT 657 (SC)], held that in cases where classification lists filed by the Assessee were duly approved, the extended period of limitation would not be available to the Department.*

30. *For the reasons aforesaid, we are of the view that the CEGAT was not justified in holding that the extended period of limitation*

would be available to the Department for initiating the recovery proceedings under Section 11A of the Act on a finding that there was suppression of facts by the appellant. Accordingly, it was not open to the Excise authorities to invoke proviso to Section 11A of the Act and therefore, the demand of the Revenue must be restricted to six months prior to the issue of notice dated 19-10-1995 instead of five years. In view of this conclusion, it is not necessary for us to consider the question of applicability of the classification lists namely of 4008.29 and 4016.19 and the question of MODVAT facilities. Accordingly, in our opinion, CEGAT came to a wrong conclusion for wrong reasons and therefore, we allow this appeal and set aside the judgment and order of the CEGAT and restore the order of the Commissioner."

In another decision of this Tribunal in the case of **Sands Hotel Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai reported as 2009 (16) S.T.R. 329 (Tri. Mumbai)**, wherein it is held as follows:

"7. *I am in agreement with the plea taken by the appellant that the original show cause notice nowhere brings out the facts on the basis of which it has been concluded that the activity of providing convention services was suppressed by the appellant with intention to evade duty. These words are totally missing and not to be found in the original show cause notice. Therefore the show cause notice issued by Commissioner clearly goes beyond the original show cause notice as allegation of suppression was not there in the show cause notice as entire show cause notice nowhere says that facts were suppressed with intent to evade duty. Mere invocation of Section 78 would not suffice for the purpose. Therefore in view of Tribunal's decision cited by the appellant the show cause notice and order-in-revision cannot go beyond the original show cause notice and is liable to be set aside on this ground alone. I further find that even the Commissioner while upholding the charge of suppression has simply stated that had the department not detected the case, the payment of service tax would have escaped and has accordingly concluded that this was done with intent to evade duty. Mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that the appellant was in the know that service tax was payable on such services but still the assessee chose not to pay the tax in order to evade the same. No such facts has been narrated in the show cause notice nor forthcoming in the findings. As regards search, it is not forthcoming as to whether the appellant was first asked to state whether they were providing any convention services or not and it is only after the appellants contention that no such services are provided that search was undertaken. If it is general search conducted in all hotels, bona fide belief on the part of the appellants cannot be out rightly rejected unless some circumstance is shown to establish that the appellant was in the knowledge that service tax is payable on such activity. When no*

separate charges for banquet halls are recovered there can be bona fide doubt whether service tax is payable in such situation. I further notice that Commissioner has acted as adjudicating authority and not as a Revision authority as he has issued an order-in-original and not order-in-revision and the whole tenor of the order is determining of the issue a fresh rather than revising the order."

13. We find no reason to differ from the above findings. The adjudicating authority has ignored the landmark decision of **M/s. Larsen & Toubro Ltd. (supra).** Resultantly, we hold that extended period has wrongly been invoked by the department while issuing the show cause notice. With respect to the imposition of penalties, we hold that burden of proving the *mala fide* lies with the Revenue. When there is nothing on record which displays any wilful default on part of the assessee, no circumstance arises for imposition of penalty. We rely upon the decision of Hon'ble Supreme Court in the case of **U.O.I. vs Ashok Kumar & Ors.** reported as 2005 (8) SCC 760.

14. In light of the entire above discussion, we hold that the order under challenge is not sustainable. Same is hereby set aside. Consequent thereto, appeal stands allowed.

[Order pronounced in the open Court on **11.07.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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