CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH –COURT NO. 4

VIRTUAL HEARING

Service Tax Appeal No. 50211 of 2024

(Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-181-2023-24 dated 13.10.2023 passed by the Commissioner (Appeals), CGST, Customs & Central Excise, Indore)

M/s Shree Ganesh Telecom Pvt. Ltd. **Appellant**
1182/11, Nanda Nagar,
Indore (MP)-452011

Versus

Commissioner (Appeals), Central Goods & Service Tax & Central Excise, Indore **Respondent**
Manik Bagh Palace,
Indore (MP)

Appearance:

Present for the Appellant: Shri Pankaj Sethi, Chartered Accountant

Present for the Respondent: Shri Anuj Kumar Neeraj, Authorized Representative

CORAM:

Hon'ble Dr. Rachna Gupta, Member (Judicial)

Date of Hearing: 29/05/2025
Date of Decision : 02/07/2025

Final Order No. 50950/2025

Dr. Rachna Gupta:

M/s Shree Ganesh Telecom Pvt. Ltd.[1] herein has filed the present appeal, being aggrieved of Order-in-Appeal No. 181/2023-24 dated 13.10.2023. The facts relevant for adjudication are as follows:

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1 the appellant

1.1 The appellant is engaged in providing Erection, Commissioning and Installation Service[2] and Maintenance or Repair Service[3] to various telephone service providers. During the course of audit of the appellant record for the period from April 2016 to March 2017 the difference in the taxable value shown in ST-3 returns from the income booked in the statutory record like balance sheet vis-à-vis job work receipt for the said period was observed by the department and the appellant was found to have not paid service tax on the amount of the said difference. Resultantly, vide Show Cause Notice No. 62/2021-22 dated 30.07.2021, service tax amounting to Rs. 25,66,614/- along with the proportionate interest and the appropriate penalties under Section 77 & 78 of the Finance Act were proposed to be recovered/imposed from the appellant. The said proposal was initially confirmed vide Order-in-Original No. 02/2022-23 dated 30.08.2022. Appeal against the said order has been rejected vide the impugned order in appeal. Being aggrieved the appellant is before this Tribunal.

2. I have heard Shri Pankaj Sethi, learned counsel for the appellant and Shri Anuj Kumar Neeraj, learned Authorized Representative for Revenue.

3. Learned counsel for the appellant has submitted that the demand of service tax based on the income tax returns/any third party data is not sustainable. Accordingly, is liable to be set aside. Learned counsel further submitted that while replying the audit memo pointing out the said short coming itself, the appellant had

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2 **ECS**
3 **MRS**

explained reason of non-payment of the equivalent amount of service tax. It was clearly informed to the department that the amount which has not been received by the appellant has not been included in the taxable value and the tax has otherwise been fully paid on the amount of consideration received by the appellant. Thus the entire information was with the department as the return for the said financial year was filed by the appellant in July 2019 itself. Seen from that angle the appellant is wrongly alleged to have mis-represented/suppressed facts from the department. Hence invocation of extended period while issuing the show cause notice in July 2021 proposing the demand for the period 2016-2017 is not permissible to the department. Show cause notice is alleged to be barred by time.

3.1 Learned counsel further submitted that the findings in para 8 of the impugned order in appeal are not applicable to the facts and circumstances of the present case. Rule 3 of Point of Taxation Rules, 2011 has wrongly been invoked. The allegations of non cooperation in para 9 of the order in appeal are also been vehemently objected. With these observations, the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

4. While rebutting these submissions, learned Authorized Representative for the department submitted that the appellant has not submitted any supporting document/evidence in support of their contention that they had not received any payment vis-à-vis invoices raised to their client due to some dispute in relation to the service provided/billing.

5. Learned Departmental Representative has relied upon Rule 2(e) of Point of Taxation Rules 2011 and the respective clarifications vide Notification No. 18/2018 dated 1.3.2011 and Rule 3(b) thereof.

That said Rules/Notification and the admission that the appellants did raise the invoices, the non-payment of service tax with respect of some amount of consideration is a definite suppression of fact on the part of the appellant. In the light of the said statutory provision and the noticed suppression there is no infirmity in the order under challenge. Appeal is prayed to be dismissed.

6. Having heard both the parties, I observe that only issue to be adjudicated is as to whether the appropriate amount of service tax has been paid by the appellant at the relevant time in terms of the statutory provisions of Point of Taxation Rules, 2011. The demand has been confirmed invoking Rule 3 of Point of Taxation Rules, 2011. Foremost, I have perused the said Rule which reads as follows:

> "Determination of point of taxation - For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be, - (a) the time when the invoice for the service provided or agreed to be provided is issued: Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service. (b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment."

7. These rules have been framed vide Notification No. 18/2011 dated 1.4.2011 which tends to determine the point in time when the services shall be deemed to be provided. According to this

rule, the time of provision of service will be the earliest of the following date:

(i) Date on which service is provided or to be provided;

(ii) The date of invoice;

(iii) The date of payment amount of consideration.

It is clear that the first criteria about time of payment of service tax is the date of invoice provided it has been issued within 14 days. There is no denial with respect to the issuance of invoices, however there is no evidence on record as to whether it got issued within 14 days. The burden was upon the department. The same remains undischarged.

8. It is also observed that vide reply to Show Cause Notice dated 16.07.2021 it was conveyed that the appellants did not receive the payment of the amount of invoices due to some dispute in relation to billing. Department has failed to produce any evidence to falsify the said contention. Resultantly, the situation remains is that there is no amount of consideration received. Hence the activity of appellant fails to fall under the scope of definition of service given under Section 66B of the Finance Act, 1994, rendering of activity has to be *quid pro quo* of considering for it to be called as taxable service defined under Section 66B(44) of the Finance Act. In absence thereof, question of leviability of service tax does not arise.

9. Further, I observe that the only document based whereupon the demand has been confirmed is from 26AS from Income Tax

Department. But the law is settled that Revenue cannot raise the demand on the basis of difference in the figures reflected in the ST-3 returns and those reflected in Form 26AS without examining the reasons for said difference and without establishing that the entire amount received by the appellant as reflected in the Form 26AS is the consideration for services provided and without examining whether the difference was because of any exemption or abatement. It is not legal to presume that the entire differential amount was on account of consideration for providing services, as was held by the Tribunal, Allahabad Bench in the case of **M/s Kush Constructions Vs. CGST NACIN, ZTI, Kanpur[4].** This Tribunal, Bangalore Bench in the case titled as **Indus Motor Company Vs. CCE, Cochin [5]** held that demand of service tax based on assumptions and presumptions cannot be confirmed.

10. I also observe that the department came to know about the affairs of the appellant, i.e. providing of taxable service in view of the admitted facts that appellant is a registered assessee under the Service Tax provision, and have been filing their returns and paying tax. It is also not denied by the Revenue that the appellant was maintaining proper financial records, register and vouchers for their transaction. Thus it is held that the appellant is wrongly alleged to have suppressed the material facts from the department regarding the failure to discharge service tax liability on the taxable receipts. The amount was well reflected in the financial records. I draw our support from the decision of Hon'ble Apex Court in the case of

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4 2019 (5) TMI 1248-CESTAT Allababad

5 2008 (9) STR (Tri.-Bang.)

Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay[6] wherein it is held as follows:

> **"***Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

11. In view of this discussion, it is held that extended period is wrongly invoked by the department while issuing the show cause notice. Since the entire period of demand is beyond the period of limitation, the show cause notice is, therefore, held to be barred by time.

12. Finally, it is observed that order-in-original is an ex-parte order, the appellant's contention is that wrong Document

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6 **1995 (3) TMI 100; 1995 (78) ELT 401 (SC)**

Identification Number[7] is mentioned in the order-in-original. The website verification is placed on record by the appellant which shows that all columns against said DIN vis-à-vis party detail are blank. Commissioner (Appeals) has brushed aside the said contention holding it to be the flimsy ground. However, once there is a Board Circular No. 122/41/2019-GST dated 05.11.2019 vide which DIN is made mandatory absence of proper DIN invalidates the proceedings in terms of aforementioned circular.

13. In light of entire above discussion, it is held that department has failed to prove its case against the appellant. The reliance of 26AS as the basis of demand is not permissible. There is no corroborative evidence on record to prove the allegations. The Show Cause Notice is already held to be barred by time. Hence the impugned order is held to have wrongly confirmed the demand. Accordingly, the order under challenge is hereby set aside. Consequent thereto, the appeal is hereby allowed.

(Pronounced in open Court on 02/07/2025)

(Dr. Rachna Gupta)
Member (Judicial)

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7 **DIN**