

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.**

**PRINCIPAL BENCH - COURT NO. IV**

**Service Tax Appeal No. 50880 of 2019-SM**

(Arising out of order-in-appeal No. 24(SM) ST/JPR/2019 dated 28-29.01.2019 passed by the Commissioner (Appeals), Central Excise and Central Goods & Service Tax, Jaipur).

**M/s ECR Builders**

Village Bilhari, Main Chopanki Road  
Bhiwadi, Distt – Alwar, (Rajasthan).

**Appellant**

VERSUS

**Commissioner, Central Excise and  
Central Goods & Service Tax**

'A' Block, Surya Nagar  
Alwar, Rajasthan.

**Respondent**

**APPEARANCE:**

Shri B. L. Yadav, Advocate for the appellant  
Shri Pradeep Gupta, Authorised Representative for the respondent

**CORAM:**

**HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. 51226/2021**

**DATE OF HEARING/DECISION: 05.04.2021**

**RACHNA GUPTA:**

The present is an appeal against the Order-in-appeal No. 24(SM) ST/JPR/2019 dated 28.01.2019. The relevant factual matrix for the adjudication of the impugned appeal is that based upon an intelligence by the Officers of Anti Evasion branch of Central Excise Commissionerate, Alwar that the office of M/s ECR Builders i.e. the appellant was searched on 31.01.2005. His residence premises was already searched vide Warrant No. 05/2015-ST dated 29.01.2015. Several summons were issued to the Partners of the

appellant. However, all required documents were not provided by the appellant except that a chart showing the payment liability towards service tax and the deposits thereof made by the appellant. Based thereupon the Department vide show cause notice No. 7602 dated 27.09.2016 proposed the demand of Rs.40,79,178/- towards service tax liability of the appellant alongwith interest and the penalties under Section 78 of the Act. The said proposal was initially confirmed by the Order-in-original No. 12/2017-18 dated 14.11.2017. The appeal thereof has been rejected vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. Heard Shri B. L. Yadav, learned Advocate for the appellant and Shri Pradeep Gupta, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that the amount of service tax demand for the impugned period stands paid to the Department that too prior to the issuance of the show cause notice. Learned Counsel has placed reliance upon the details as have been acknowledged in the show cause notice itself as apparent from the chart given at page 3 of the said show cause notice. It is submitted that in view of the same there remains no reason for the imposition of penalty upon the appellant, also for the reason that non payment of service tax was not intentional. The Department would not have invoked the extended period of limitation. It is accordingly prayed that order under challenge may be set aside.

While rebutting these arguments, Id. AR has submitted that the non payment of service tax in instalments/ parts. The conduct of the appellant during the investigation proceedings is impressed upon to be highly non co-operative.

4. Learned Authorised Representative (DR) for the Department has impressed upon para 6 of show cause notice, despite issuance of show cause notice no documents was ever provided to the Department except for the payment details. Accordingly, the Department had no other option but to raise the demand based upon the appellant submissions and based upon the record as was recovered during the search. Such conduct of the appellant is sufficient to allege suppression and entitle the Department to invoke the extended period of limitation. Learned DR placed reliance upon the decision of Hon'ble Apex Court Commissioner of Service Tax, Mumbai vs. Lark Chemicals Pvt. Limited in civil appeal No. 3890 of 2011 has held, "It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable". Accordingly, Id. DR prayed for dismissal of appeal.

5. After hearing the parties, I observe and hold as follows:  
The appellant is engaged in providing construction of commercial / industrial building, civil structure & residential complex under works contract and was registered with Service Tax Department. Jurisdictional officers after a visit in

appellant's premises on 30.01.2015 noticed that appellant had not paid service tax amounting to Rs. 40,79,178/- during the period from 01.04.2014 to 31.03.2015 nor have filed the service tax returns. Accordingly, the same was demanded vide show cause notice (SCN) No. 7602 dated 27.09.2016. The proposal was confirmed vide Order-in-original No. 8834 dated 14.11.2017, which has been challenged before this Tribunal. It is observed that the demand as raised by the Department against the appellant amounting to Rs.40,79,178/-, the entire amount alongwith the interest of Rs. 3,08,328/- stands paid by the appellant over a period of four months starting from 21.01.2015 i.e. from the date even prior to the search was conducted in the appellant's premises and the entire aforesaid amount stand paid till May, 2015 i.e. much prior before the issuance of the impugned show cause notice dated 27.09.2016 as stands clear from the table in the show cause notice as well as reproduced in the order-in-original. Even an amount of Rs. 59,900/- for delayed filing of return has been made. It is apparent that the show cause notice has been issued after a period of almost 1½ years from the date of the payment of entire demand. Section 78 of the Finance Act under which the penalty in the present case has been imposed provides that where the Service Tax and interest payable thereupon is paid within 30 days from the date of communication of the order of Central Excise Officers determining such service tax, the amount of penalty is liable to

be paid by such person under the first proviso shall be 25% of such service tax. In the present case, where the entire payment has been paid even prior the order of assessment is being communicated to the appellant, to my opinion, the decision of Hon'ble Apex Court in **M/s Lark Chemicals Pvt. Limited** is not applicable to the present case.

6. As far as the imposition of penalty is concerned, I rely upon the decision reported as **2016 (42) STR 65 (Tri. Ahm.)**, wherein it has been held that when the service tax stands paid alongwith interest after being pointed out but before the issuance of the show cause notice, the penalty under Section 78 of Finance Act, 1994 is not imposable. However, I simultaneously hold that the appellant did not discharge his liability at the appropriate time as was otherwise required by the law and also fail to inform the issue of financial crunch as mentioned in the impugned appeal to the notice of the Department. The possibility of intentional suppression as is alleged against him cannot be ruled out. I find no infirmity in the order where the demand of service tax, though it stands already paid, is hereby confirmed. However, the order with respect to imposition of penalty, I hereby set aside in view of the above discussions. As a result of above discussion, the present appeal is partly allowed.

(Dictated and pronounced in open Court)

(Rachna Gupta)  
Member (Judicial)

