CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. IV

Service Tax Appeal No. 51065 of 2021

(Arising out of Order-in-Appeal No. 124/CRM/ST/JDR/2021 dated 08.06.2021 passed by the Commissioner(Appeals), CGST and Central Excise, Jodhpur 342003 (Rajasthan)

M/s Anju Makhija **....Appellant**
C/o M/s B. L Bhojwani & Associates,
Chartered Accountants,172
Vallabh Bari,Kota 324007 (Rajasthan)

Versus

Commissioner (Appeals), CGST and Central Excise -Jodhpur ....**Respondent**

APPEARANCE:

Shri B.L Bhojwani , Advocate for the Appellant
Shri Anil Kumar, Authorized Representatives of the Department

CORAM:

HON'BLE DR. RACHNA GUPTA, OFFICIATING PRESIDENT
HON'BLE MR. P. V SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 15.05.2026
DATE OF DECISION: 15.09.2026

FINAL ORDER NO. 51465/2026

DR. RACHNA GUPTA

The present appeal is filed to assail the order in appeal no. 124/2021 dated 08/06/2021.

1. The facts, in brief, relevant for the present adjudication are that Shrimati Anju Makhija[1] is engaged in providing services as can be defined under section **65 B (44) of Finance Act 1994**. Department observed that the appellant was neither registered with the service tax department nor was paying service tax. Third party information was

[1] The appellant

also received from the income tax department. Despite seeking clarification with respect to the said information, the appellant did not respond. The clarification was sought from the Assistant Commissioner Income Tax circle 1 quota, for the financial year 2013-214 and 2015-16.

1.1 On perusal of the documents provided by the income tax department, the revenue department observed that the appellant provided services to various companies/ firms and TDS on the amount of Rs. 1,40,65,334/- as was received (gross receipts as per ITR) by the appellant during the aforesaid period was found deducted by the said companies/ service recipients. It was observed that neither the activity of the appellant is specified in negative list of Section 66 D of Finance Act 1994 nor appellant appeared to have been granted any exemption not even of Mega Exemption Notification no. 25/2012-ST dated 20.06.2012. In the light of these observations and alleging the activity as taxable, the appellant was alleged liable to pay service tax on the afore mentioned gross value received by the appellant during the period in dispute.

2. The Show Cause Notice[2] bearing no. 15/384/2018/8297 dated 22/10/2018 was served upon the appellant proposing the demand and recovery of Rs. 19,72,702/- as service tax for the period 2013-14 to 2015-16 from the appellant along with the interest at the applicable rates in terms of **Section 75 of Finance Act 1994**. Penalties were also proposed to be imposed on appellant in terms of **Section 77 and 78 of Finance Act 1994**. The said proposal was confirmed vide the order in original no. 41/2020 dated 30.04.2020. Appeal against the said order has been rejected vide the impugned

[2] SCN

order in appeal/ order under challenge. Being aggrieved the appellant is before this Tribunal.

3. We have heard Shri B.L Bhojwani Advocate of the appellant and Shri Anil Kumar, Authorised Representative for the department.

3.(a) Learned counsel for the appellant submitted that the appellant furnished an elaborated written reply to the Show Cause Notice in question vide their letter dated 29/11/2018, providing the year wise working of actual taxable value. The said amount was received by the appellant in the form of commission. And by renting of immovable property for use as residence the requisite financial documents were submitted. Learned counsel mentioned that entire amount received from renting of immovable property during the period of demand (Rs. 50, 50,000/-) was exempted from payment of service tax, the immovable property being used as residence. Similarly, certain receipts related to trading activity of M/s Sawariya traders cannot be considered for the appellant (Shrimati. Anju Makhija) as no evidence was produced about Anju Makhija/ the appellant, to be the proprietor of M/s Sawariya Traders. On the contrary, as per income tax returns, she is the proprietor of M/s Anjali Marketing. These were the submissions of the appellant before the departmental adjudicating authorities also. However, neither the original adjudicating authority nor the Commissioner (Appeals) had considered those submissions. The order confirming demand of service tax for unduly exempted service is therefore, liable to be set aside.

4. Learned counsel also submitted that the demand otherwise has been raised on the basis of income tax return/ form 26 AS only. It is the settled position of law that the income reflected in the income tax returns is not a proper basis to determine the service tax liability

without establishing the nature of service and the purpose for which the income is received. Learned counsel has relied upon the following decisions.

- *Faquir Chand Gulati v. Uppal Agencies Pot. Ltd. 2008 (12) S.T.R 401" (SC)*
- *Kush Constructions v. CGST NACIN 2019 (24) G.S.T.L. 606 (Tri.- All)*
- *Shubham Electricals v. CCE 2015 (40) S.T.R. 1034 (ri. Del.). Affirmed by the Hon'ble Delhi High Court - 2016 (45) S.T.R. J314 (Del).*

5. Finally while challenging the Show Cause Notice on the grounds of limitation; Learned counsel submitted that the figures of Form 26AS were available with the department from the concerned year itself hence, could well be verified within the normal period of limitation. The allegations of suppression of material facts against the appellant are therefore not sustainable. Nor there is any evidence produced by the department proving that the appellant was indulged in any fraud or had made the wilful miss statement. Hence, the invocation of extended period while issuing the Show Cause Notice in question is not in accordance with law. Following decisions have been relied upon praying for the Order under challenge to be set aside and for the appeal to be allowed:

- Pappu Crane Service v. Commissioner (Service Tax Appeal No. 70707 of 2018- [DB]
- Delhi in Deltax Enterprises v. CCE, Delhi reported as 2018 (10) GSTL 392 (Tri - Del)

6. While rebutting these submissions, Learned DR appearing for the department, mentioned that the appellant did not produce any documentary evidence not even the copy of agreement/contract as would have been executed while renting out the immovable property which only could prove that the property was rented for being used as residence. Further, the copy of two passbooks and chart prepared by the appellant cannot be considered as evidence to establish that the said amount was received from renting of residential dwelling in use of residence. In view of these submissions there in no infirmity in the findings arrived at by the departmental adjudicating authorities. The appeal is accordingly prayed to be dismissed.

7. Having heard both the parties, it is observed to be the undisputed fact that the department has proceeded based on the third party information received from the income tax department as is coming apparent from the Show Cause Notice itself, para 3 thereof where it is also alleged that the appellant did not provide the requisite information to the department with respect to the receipt of income shown in the income tax return of the appellant for the period in dispute. However, it is observed that the appellant had filed a written reply dated 29/11/2018 to the impugned Show Cause Notice dated 22/10/2018 to deny the service tax liability with following pleas:

(i) the year wise income was received against renting three immovable properties for being used as residence.

(ii) renting for residence purposes is exempted vide exemption notification no. 9/2017 and even under Mega Exemption notification no. 25/2012.

(iii) the aggregate value received was mentioned to be below the threshold limit.

8. In light of the said written reply and the further written submissions given to the department vide letter dated 11/03/2021 and 16.03.2021, as are annexed on record it is clear that the observations in the impugned order about non co-operation on part of the appellant and about not furnishing the requisite documents, are not correct. It is also on record that the appellant also filed an application seeking rectification in the order of Commissioner (Appeals) further emphasising the grounds taken in the written synopsis. But those also were again not considered by the Commissioner (Appeals).

9. Now, reverting to the merits of the present case, we observe it to be an admitted fact that the appellant was having income during the period in dispute (2013-14 to 2015-16) from following two sources.

(i). by way of trading/ sales total amount of Rs 94,93,000/- was received.

(ii). in the form of rent received while renting an immovable property, an amount of Rs 57,50,000/-.

10. With respect to first income the appellant had submitted the profit and loss account and the VAT annual return however under the name of M/s Shri Sawariya Traders, it has categorically been recorded by Commissioner (Appeals) that the appellant, as per income tax returns, was the proprietor of M/s Anjali Traders and not of M/s Sawariya Traders. We do not find any other document on record to connect the appellant (Shrimati. Anju Makhija) to M/s Sawariya traders. The liability of later is wrongly fastened upon the appellant. Irrespective

trading/sale is out of the scope of the definition of service under **Section 65 B44 Finance Act** which specifically excludes an activity which constitutes merely,

(i) transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the constitution;

Resultantly, the activity for receiving the amount in question against trading or sale is wrongly held to be taxable service of Section 65 B (44) of the Act. The impugned order is liable to be set aside to that extent.

11. With respect to the income received from renting of immovable property, it is the stand of the appellant, since beginning/ the stage of reply to Show Cause Notice, that the property was rented out for being used as residence. It was specifically brought to the department's notice that the immovable property is rented by the appellant for being used as Hostel. We observe that the phrase 'residential dwelling' has not been defined in the Finance Act 1994. However, Education guide dated 20/06/2012 issued by CBIC in para 4.13.1 explains the meaning of residential dwelling, by saying that it is any residential accommodation which does not include hotel, motel, Inn, guest house, camp side, lodge, houseboat or like places meant for temporary stay. But **Hon'ble Bombay High Court in the case of Bandu Ravgi N vs Acharya Ratna Desh Bhushan Shikshan Prasark Mandal, Kolapur reported in 2003 (3) MLJ 472 Mumbai** has explained the meaning of "residential dwelling" holding that the

hostel qualifies to be called as residential dwelling as it is nothing but a house of residents for the students for a comparatively longer period as compared to the stay in hostel, motel etc. Decision of Privy Council in the case **AIR 1937 PC 46** was relied upon wherein it was observed that there is no reason for assuming that residence contemplates only to permanent residence and excludes the temporary one. In common parlance "residential dwelling" means any building structure or part of the building or structure other than offices or factories that is used or intended to be used as home/ residence though may be permanently or temporarily.

12. The entire period of demand in the present appeal is the post negative listing era i.e. when Section 66 D was in existence in the Finance Act. We observe that said clause (m) of said section 66D specifically mentions that services by way of renting of residential dwelling for use as residence are out of the scope of being called as taxable service defined under Section 66B (44) of Finance Act 1994. This observation is sufficient for us to hold that the income received by the appellant by way of renting of the immovable property is also not taxable.

13. From the above discussion it becomes clear that the appellant was under bonafide belief of their activity to be out of the ambit of being called as taxable service of section 65B (44) of Finance Act 1994. The non-payment of service tax and not obtaining the service tax registration, therefore, cannot be held to be an act of intentionally suppressing material facts. We hold that the extended period has wrongly been invoked by the department while issuing the impugned Show Cause Notice dated 22/10/2018. It, otherwise was the department's responsibility to bring on record the evidence towards the

positive act of the appellant to intentionally evade the payment of tax. The department has failed to do the same. As already observed above, department has even failed to consider the submissions of the appellant vis-a-vis the nature of the activity rendered by the appellant. We hold that the extended period has wrongly been invoked while issuing the present SCN. We draw our support from the decision of Hon'ble apex court in the case of **Uniworth Textiles Ltd vs. CCE Raipur 2013 (288) ELT 161 (S.C)**, it has been held Follow:

"Burden to prove malafide of noticee is on department who makes the allegation. Onus to prove bonafide conduct is not on notice even in terms of Sec-28 of the Customs Act.

Mere non-payment of duties is not equivalent to collusion or wilful mis- statement or suppression of facts. Otherwise there would be no situation for which ordinary limitation of six months would apply. Inadvertent payment is to be met with limitation of six months whereas deliberate default faces limitation of five years. Some positive act has to be there on part of appellant."

14. Further, the entire demand is based on Form 26 AS and it is settled position of law that merely form 26AS cannot be the basis of confirming the service tax demand. We draw our support from the decision of this Tribunal in the case of **Manoj Kumar Anand vs Commissioner of Central Excise Jodhpur reported as 2025 (10 TMI 1161) Tribunal Delhi**. Even the Chandigarh bench of this Tribunal in the case of **M/s Indian Machine Tools Manufacturer Association vs Commissioner Excise Punchkula reported as 2023 (9) TMI 815 CESTAT Chandigarh** has held that for leviability of service tax there has to be clear identification of service provider, service recipients and the consideration paid as quid pro quo for the

same. In the absence of any evidence for the same the demand cannot be confirmed merely on the basis of Form 26 AS/ income tax returns.

15. In totality of the entire above discussion we hold that the service tax demand has wrongly been confirmed on the above mentioned two kinds of amount received by the appellant both being received for providing activities which were non taxable. The order under challenge is therefore set aside. Consequent there to the appeal is hereby allowed.

(order pronounced on 15.09.2026)

(RACHNA GUPTA)
OFFICIATING PRESIDENT

(P. V SUBBA RAO)
MEMBER TECHNICAL

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