

Notice issued based on presumptions without complying with fundamentals of prosecution is unsustainable – CESTAT

30 August 2023



Summary

The Customs, Excise & Service Tax Appellate Tribunal (CESTAT) Mumbai Bench has held that the authorities cannot issue a show cause notice (SCN) without proper investigation, and accordingly, set aside the impugned SCN. The CESTAT opined that the fundamentals of prosecution, such as framing charges based on admissible evidence, was absent in the present case. The said SCN was issued without examining the activity of the assessee and without examining the reason for difference in the turnover reported in income tax return and ST-3 return. Hence, such SCN issued on presumption is not sustainable.

Facts of the case:

- Modern Road Makers Pvt. Ltd. ('the assessee') is registered with service tax.
- The Revenue received data about the turnover of the respondent for the year 2013-14 based on income tax return and found that there was a mismatch between the turnover recorded in Form 26AS and the value of the services reflected in ST-3 returns.
- The value of the services reflected in ST-3 returns for the year 2013-14 was nil.
- A SCN was issued alleging recovery of service tax on this difference of turnover of around INR 2,369 crores.
- The respondent submitted their reply to the SCN and submitted that the turnover of about INR 2,295 crores was on account of undertaking works contract for construction, operation, repair and maintenance of national highways and expressways for use by public and the same were exempted from the levy of service tax.
- The Commissioner passed the order for dropping the recovery of demands on the account of exemption provided by the government and confirmed the demand of service tax only on the commission received by the respondent.
- Aggrieved by the same, the Revenue had filed an appeal before the Tribunal.

Assessee's contentions:

- The assessee filed a cross appeal and submitted their arguments against the grounds of appeal.
- The assessee mentioned that the SCN nowhere explained the reason on account of difference in turnover.
- The activity of the assessee was also not examined and contended that the difference in turnover could be on account of non-taxable businesses. Therefore, the demand raised in the SCN was not

sustainable.

- The assessee also submitted all the related papers related to the contract before the commissioner.

Revenue's contentions:

- The Revenue contended that the commissioner had not verified any record of the original parent contractor of the NHAI.
- The Revenue submitted that the commissioner had not recorded any findings to the effect that any verification was carried out to verify the principal genuineness of the contract for operation and maintenance of national highways.
- Therefore, the Revenue requested to adjudicate the matter afresh.

CESTAT Mumbai observations and ruling (Final Order No. 86160/2023, dated 28 July 2023):

- **SCN issued without verification and investigation:** The entire SCN nowhere examines as to on what account the turnover has taken place. The said SCN was issued without examining the activity of the assessee and without examining the reason for difference in the turnover reported in income tax return and ST-3 return.
- **SCN is totally presumptive in nature:** The Tribunal opined that the fundamentals of prosecution, such as framing charges on the basis of admissible evidence, was absent in the issue of a SCN. It was presumed in the SCN that the entire turnover reported in the income tax return was on account of the provision of taxable service, and accordingly, service tax was calculated on such turnover.

- **Basics of proceedings not fulfilled:** The basic of any proceeding is to frame charges based on the assessee's record and establish that the assessee has short paid calculated and pre-determined amount of service tax, and then issue them a SCN calling for their explanation as to why the stated amount of service tax should not be recovered from them. Further, the difference in turnover in the ST-3 return and income tax return could be on account of non-taxable businesses. Therefore, unless the Revenue examines the reasons for the difference, it cannot demand service tax blindly based on a difference in the turnover reflected in the two statutory returns.
- **Burden of proof is on the Revenue:** The burden of proof was on Revenue to establish that the alleged service tax was short paid. Unless such burden of proof was discharged by the Revenue, a SCN cannot be sustainable. The CESTAT observed that the Revenue did not discharge its burden to prove that there was short payment of service tax. Therefore, the impugned SCN cannot be sustained.
- **Impugned SCN is not sustainable:** The Tribunal set aside the SCN and held that it is not sustainable and dismissed the appeal filed by the Revenue and allowed the cross appeal filed by the assessee.

Our comments

Several Tribunal benches have previously ruled that it is not possible to demand service tax on a differential amount without first examining the cause of the difference between the turnover reported in ST-3 returns and the Form 26AS statement and without demonstrating that the difference was caused by the provision of taxable services.

Even recently, the Kolkata Bench of Tribunal, in the case of *M/s Balajee Machinery*, had held that the data appearing on the income tax portal cannot be the basis for levying a penalty on the account of fraud or suppression under the service tax law.

The current judgement is consistent with the precedents set forth above and reiterates that without the evidence of a taxpayer default, the Revenue cannot impose demands on taxpayers based solely on information displayed on the income tax portal. This is a positive decision and an analogy can also be drawn under the GST regime in similar matters.

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