CUSTOMS,EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO – 1

Service Tax Appeal No. 479 of 2009-DB

(Arising out of OIO no. 20/COMMR/2008 dated 29/02/2008 passed by Commissioner of Central Excise-AHMEDABAD-III)

Jaydev B Barot Appellant

Near Gurudwara,
Jail Road,
Mehsana
Gujarat, 384002.

-VERSUS-

C.C.E. & S.T. Ahmedabad-iii Respondent

Custom House... 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad,
Gujarat, 380009

Present For the Appellant : Shri Shailesh Vyas, Adv.
Present For the Respondent : Shri S.N. Gohil, Supdt. (AR)

CORAM:
HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/ 11061/2019

Date of Hearing: 30/04/2019

Date of Decision: 04/07/2019

RAJU

This appeal has been filed by Shri Jaidev Barot against confirmation of demand of Service Tax, interest and imposition of penalty under section 76, 77 & 78 of the Finance Act.

2. Ld. Counsel for the appellant pointed out that the appellant is engaged in providing services to ONGC by supplying jeep taxies on monthly basis. The terms of the agreement were that they would pay a fixed amount for a month for jeep taxies for a distance of upto 3,000 kms and beyond that a certain amount would be paid on kilometer basis. The appellant were holding Service Tax Registration and paid tax up to the period of November 2001. Later on the appellant came to know that the said services are not chargeable to Service Tax under the Rent-a-cab service and they are not required to pay Service Tax. Under this belief, the appellant stopped paying Service Tax and was not charging the same from ONGC. He pointed out that the enquiry started in February 2007. The appellant could not participate in the enquiry as he had serious heart problems. The Revenue, under the belief that

the entire income earned by the appellant consisted of income from rent a cab service and also from tour operator services, raised a demand in Show cause notice for the year 2002-03, 06-17 invoking a longer period of limitation without giving any abatement in the value. The said demand was confirmed by the Commissioner after granting personal hearing and considering the reply of the appellant.

2.1 Ld. Counsel further pointed out that the cabs given by them to ONGC were for a hiring charge and there was no word 'rent' mentioned in the contract. He pointed out that the fuel for the cab was the responsibility of the appellant. The responsibility of safe parking was also of the appellant. He pointed out that ownership of taxies, possession of the taxies and all liability of the taxies provided on hire remains with the appellant. Therefore, he argued that it cannot be said that the same were provided on rent to qualify as a rent a cab operator. Ld. Counsel pointed out that on merits they are not contesting the issue. However, they are contesting the issue on limitations. Ld. Counsel relied on the decision of the Hon'ble High Court of Gujarat in the case of Vijay Travels 2014 (36) STR 513 (Guj.). He pointed out that in the said case while the issue regarding the leviability to tax was against the assessee, benefit was granted by holding that the extended period of limitation is not applicable. Ld. Counsel also relied on the decision of Tribunal in the case of Maharashtra State Road Transport Corporation 2018 (2) TMI 237-CESTAT-Mumbai.

2.2 The other issue relates to provision of services as tour operator. Ld. Counsel pointed out that the SCN alleges that they were providing the services of 'Tour Operator' by providing buses by plying a group of passengers for the purpose of marriages, special Vardhis (Trips) and the appellant had not taken a registration.

3. Ld. AR relies on the impugned order.

4. We have gone through rival submission. On perusal of the grounds of appeal, it shows that while there is challenge in respect of rent a cab service, there is no challenge in respect of the demand under the head 'Tour Operator' service. Since the appeal does not contain any ground with respect of 'Tour Operator' service, no benefit in respect of such services can be granted.

4.1 It is seen that the appellant is only contesting the demand on limitation. The appellant has also produced the decision of Tribunal in the case of Maharashtra State Road Transport (supra). It is seen that the said decision was passed without taking notice of the decision of the Hon'ble High Court of Gujarat which is the jurisdictional High Court in the instant case, wherein an opposite view has been held as regards the liability to tax. The decision of the Tribunal in the case of Maharashtra State Road Transport cannot be followed in view of the decision of Hon'ble High Court of Gujarat in the case of Vijay Travels(supra).

4.2 In the case of Vijay Travels, the appellant was granted benefit of limitation while the demand on merit was upheld. In the said case, the SCN was issued on 20/10/2005 for the period 01/04/2000- 31/03/2001. Another SCN was issued on 31/08/2006 for the period 01/04/2001-31/03/2004. A third SCN was issued on 19/10/2007 for the period 01/04/2004-31/03/2007. In the proceedings in the said case of Vijay Travels were related to the second and third SCN in tax appeal no. 25/11 and 24/11. In the said case, the Hon'ble High Court allowed the benefit of limitation on the following grounds:

> ***"22.*** *This brings us to the question Nos. V and VI which concern invoking of extended period of five years for levying service tax in case of the respondent.*
>
> ***23.*** *Commissioner noted that the registration was effected by the petitioner in the year 2004 and one of the terms of its agreement with GSEB clearly indicates that liability to pay service tax shall be of the respondent. It also further held that necessary details as would be necessary for assessing the quantum of service tax were not furnished by the respondent and petitioner agreed not to have filed service tax return in his statement recorded and hence, this should be presumed as mala fide intention on the part of the respondent. It levied the penalty giving these reasonings.*
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> ***24.*** *Tribunal, however, treated this issue academic in nature and rightly so as it held in favour of the assessee on earlier adjudged issues (Nos. I and II). It, of course, held that no intentional suppression or mala fide could be read into the action of the respondent assessee as this service has been recently brought under the tax net and much ambiguity was prevailing in respect of the same.*
>
> ***25.*** *We are in complete agreement with the Tribunal that invocation of extended period required deliberate act of suppression or mala fide or to the Revenue, the same is not available in the instant case.*
>
> ***25.1*** *This service was levied with effect from 16th July, 1997, however, vide Notification No. 3/99, it was exempted from tax upto 31st March, 2000. Section 66(3) of the Finance Act which is the charging Section, brought the same under the tax net.*
>
> ***25.2*** *Initially, registration and owning of minimum particular numbers of vehicles was a must and later on, amendments in the law were brought.*
>
> ***25.3*** *Merely because the petitioner got himself registered on 23-3-2004 and by way of abundant caution incorporated and accepted its liability in one of the terms of agreement, as and when arises, that ipso facto cannot be adjudged as his deliberate act of non-payment of tax alleging suppression and mala fide intention. It is a matter of record that the petitioner has been operating in the field from the year 1997. Every year by virtue of tender*

> *published by GSEB on the basis of yearly contract, it provides vehicles to the Board for the purpose of examining squad, for transfer of papers and for other requirements during the SSC and HSC examinations. Considering a serious legal debate as to who can be said to be renting of a cab, petitioner if has not paid service tax on such services, the Tribunal correctly appreciated that such, by no stretch of imagination, be held as mis-statement or deliberate act of suppression or mala fide intent.*
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> ***26.*** *Both the notices being 31-8-2006 and 19-10-2007 since are given beyond the stipulated period invoking large period of limitation, we answer these issues in favour of the assessee holding that the Tribunal committed no error in deciding these issues."*

4.3 Relying on the aforesaid decision of Hon'ble High Court, the demand for extended period of limitation is set aside. It is settled law that penalties under both section 76 & 78 cannot be imposed. Penalties under both section 76 & 78 have been imposed in the impugned order. The penalty under section 76 is set aside.

4.4. Penalty under section 78 in so far as it relates, demand for rent-a-cab operator service is set aside. Appeal is partly allowed in above terms.

(Pronounced in the open court on 04/07/2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Diksha