Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10628 of 2021- DB

(Arising out of OIO-KCH-EXCUS-000-COM-24-2020-21 dated 26/02/2021passed by Commissioner of Central Excise, Customs and Service Tax-KUTCH (GANDHIDHAM)

KANDLA PORT TRUST **.....Appellant**
Now Knowa As Ms Deendayal Port Trust,
Po Box 50 Administrative Building Gandhidham Kutch
Kutch, Gujarat

VERSUS

C.C.E. &KUTCH (GANDHIDHAM) **.....Respondent**
Central Excise & Service Tax Commissionerate,
Central Excise Bhavan Plot No. 82, Sector 8, Gandhidham (Kutch)
Gandhidham (Kutch), Gujarat

APPEARANCE:
Shri. Jigar Shah, Advocate for the Appellant
Shri Prabhat K Rameshwaram, Additional Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR

Final Order No. A/ 11311 /2023

DATE OF HEARING: 23.02.2023
DATE OF DECISION: 23.06.2023

RAMESH NAIR

The present appeal is directed against order-in-original dated 26.02.2021 whereby Learned Commissioner confirmed the demand of Interest amounting to Rs. 3,04,00,376/- under Section 75 read with Section 71 (1) of Finance Act, 1994 and also imposed penalty on Rs. 10,000/- under Section 77 and Penalty of Rs. 3,04,00,376/- under Section 78 of Finance Act, 1994. Being aggrieved by the said order in original the appellant filed the present appeal.

2. Shri Jigar Shah, Learned Counsel appearing on behalf of the appellant submits that the service tax itself was not payable on the leasing of the land of Kandla Port Trust for the reason that the oil companies to whom the bills were raised were having unauthorized occupation of the land as the lease contract was expired. Therefore, without contract service cannot be

chargeable to tax. He further submits that the appellant have not raised the bills for lease rent, whereas it was raised for compensation against the unauthorized occupation of land by the oil companies. The compensation which was filled cannot be considered as consideration towards any service, therefore, service tax itself is not leviable. Consequently, neither interest is recoverable not the penalties are imposable.

2.1 He further submits that the dispute regarding increase of lease rent is pending before the Hon'ble Supreme Court in the case filed by the lessees as well as the appellant. He further submits that since in the present case the show cause notice was not issued under Section 73 (1) neither interest can be recovered nor penalty can be imposed.

2.2 He further submits that the show cause notice for recovery of interest and imposition of penalties was issued after normal period of 1 year therefore the SCN itself is time barred. Consequently, the impugned order is not sustainable on limitation itself. He relied upon the following judgment:

- Pushpam Pharmaceuticals Company Vs. CCE, Bombay – 1995 (78) ELT 401 (SC)

3. Shri Prabhat K Rameshwaram, Learned Additional Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the rival submissions and perused the records. We find that the appellant have raised the ground of taxability on the service of renting of immovable property for the first time before this Tribunal. However this issue is neither in the show cause notice nor in the impugned order. The show cause notice was issued only for demand of interest and penalty and there is no demand of service tax. The appellant have admittedly paid the service tax without raising any protest. It is for this reason the Revenue has not demanded the service tax under Section 73 (1)

of Finance Act, 1994. As regard the issue whether the interest is recoverable and penalty was rightly imposed or otherwise, we find that the show cause notice for recovery of interest and imposition of penalties was issued much after the normal period of limitation. It is undisputed fact that or malafide intention on the part of the appellant particularly being a trust of Government of India. Therefore, the invocation of the extended period is not legal and proper. The show cause notice was issued under the extended period is clearly time barred. As regard the penalty though the same is not imposable for the above reasoning of the show cause notice being time barred. Moreover, the penalty under section 78 can only be imposed when the demand of service tax is raised under section 73 (1) of the Finance Act, 1994. In the present case there is no demand raised in the show cause notice or otherwise under Section 73 (1) of Finance Act, 1994. In this undisputed position also the penalty under section 78 is not sustainable. The issue of show cause notice being time barred we take the support of the following judgment:-

Pushpam Pharmaceuticals Company vs. CCE, Bombay – 1995 (78) ELT 401 (SC)

> *"The only question that arises for consideration in this appeal is whether the Department was justified in initiating proceedings for short levy by invoking proviso to Section 11A of the Central Excises & Salt Act, 1944 for the years 1978-79, 1979-80, 1980-81 and 1981-82.*
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> ***2.****The appellant manufactured an item falling under Tariff Entry 14E as well as another item under Item 68. The item under item 68 was fully exempt from payment of duty. The value of items manufactured under Tariff Item 14E in each year was less than Rs. 5 lakhs. Notification No. 111/78 was issued on 9th May, 1978 exempting the turnover of goods manufactured under Item 14E if it was below Rs. 5 lakhs. Therefore, the appellant surrendered its licence and it was cancelled. Notices were, however, issued because if the turnover of the two items, i.e. exempted under Item 68 for the years in dispute was clubbed together with turnover of Item 14E, then it exceeded Rs. 5 lakhs and the goods became liable to duty. The Department invoked extended period of*

limitation of five years as according to it the duty was short levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.

3.*Law about excisability of exempted goods was settled by this Court in Wallace Flour Mills Co. Ltd. v. Collector of Central Excise, Bombay, Division III - 1989 (44) E.L.T. 598 (SC) = (1989) 4 SCC 592. Till then conflicting decisions were rendered by different High Courts and Tribunal and it was not settled whether the turnovers of assessable and exempted goods were liable to be clubbed for determining liability. Therefore, two questions arise whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain.*

4.*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.*

5.*In the result this appeal succeeds and is allowed. The matter is remitted back to the Authority for determining the turnover of the assessee in respect of only that period which is within six months from the date of issue of show cause notice.*

4.1 In view of the above judgments the show cause notice being time barred the impugned order is not sustainable. As we stated above since the show cause notice has not raised the demand of service tax which appellant had admittedly paid we are keeping the issue of taxability open.

5. As per our above discussion and finding the impugned order is not sustainable, hence the same is set aside. Appeal is allowed in the above terms.

(Pronounced in the open court on 23.06.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L.MAHAR
MEMBER (TECHNICAL)

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