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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 11757 of 2017 - DB

(Arising out of OIA-CCESA-VAD-APP-II-VK-109-2017-18 dated 11/07/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

Sunil International **........Appellant**
Richie Rich Caterers/hostel, House No.24,
Seema Row House, Ghod Dod Road, Nr. Svr College,
SURAT, GUJARAT

VERSUS

Commissioner of C.E. & S.T.-Surat-i **......Respondent**
NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT,
GUJARAT-395001

APPEARANCE:
Shri Rahul Gajera, Advocate, Appeared for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) Appeared for the Respondent

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

Final Order No. 11534/2024

DATE OF HEARING: 14.06.2024
DATE OF DECISION: 11.07.2024

RAMESH NAIR

M/s. Sunil International, Richie Rich Caterers/Hotel, House No. 24, Seema Row House, Ghod Dod Road, Surat (herein after referred to as "appellant") has filed this appeal against the Order-In-Appeal No. CCESA-VAD(APP-II)VK-109/2017-18 dated 11.07.2017 by which Learned Commissioner (Appeals) has upheld the Order-In-Original No. 71/ADJ/ADC-RN/OA/2015-16 dated 30.10.2015.

1.1 Briefly stated the facts of the case are that appellant was engaged in providing outdoor catering services and business auxiliary services and were registered with the service tax department since 25.11.2004 and deposited service tax towards provision of such services and filed ST-3 returns from time to time. During the month of December 2009, an inquiry was initiated by the department and in response to the summons dated 3.12.2009 the appellant provided sales bill, bank statement, catering booking menu, order booking book for the period 2009 -2010. Further in response to the summons dated 8.2.2010, the representative of the appellant Shri Bhavesh

F. Shah and Shri Jayanti A. Shah, Accountant of the appellant vide their letters dated 10.02.2010 and 15.02.2010 submitted that appellant had paid all the service tax dues till December 2009 and in support they submitted bank's collection counter foil duly stamped by bank along with the statement of periodical summary. Thereafter summons were issued from March 2010 to July 2010, however the same were not attended to or answered by the appellant.

1.2 On 21.12.2011 search was carried out at the appellant's premises and June 2012 onwards again summons were issued to the appellant to furnish various information for the period 2008 -2009 to 2012-2013, during which statements dated 20.3.2014 and 3.4.2014 of appellant's accountant shri Jayesh A. Shahand statement dated 3-4-2014 of Vijay Maganlal Goshal, chartered accountant were recorded wherein they have admitted that except for amount of Rs. 2,32,18,206 which pertained to inter-unit loan/transfer, the balance amount related to outdoor catering services.

1.3 Thereafter, based on the information provided in the ST-3 returns and bank statements of three bank accounts of the appellant; worksheets were prepared comparing the amounts reflected in the said three bank accounts with the taxable value shown in the ST-3 returns as differential taxable value, a show cause notice was issued on 16-4-2014 by which a demand of service tax amounting to Rs. 40,42,214/- was raised for the period October 2008 to September 2013. The demand raised in theshow cause was confirmed by Order-In-Original (OIO) dated 30.10.2015 passed by the Additional Commissioner, Surat. Learned Commissioner (Appeals) Surat vide his Order-In-Appeal (OIA) dated 11.07.2017 upheld the aforesaid OIO dated 30.10.2015 against which the present appeal is filed.

2. Shri Rahul Gajera, learned Advocate appearing on behalf of the appellant submitted that appellant was registered assessee since 2004 and had duly discharged their Service Tax liability under the category 'Outdoor Catering Services' and 'Business Auxiliary Services' and filed Service Tax returns for the disputed period. That the demand of Service Tax amounting to Rs. 40,42,214/- has been raised by the department solely based on the bank statements of the appellant, assuming the deposits made in the bank accounts as taxable value for rendering services. That the department has erroneously presumed that all bank deposits constitute taxable value without establishing any correlation between such deposited amounts and the actual provision of taxable services. That the appellant had provided a detailed summary and supporting documents to substantiate that the bank deposit

did not represent taxable value but were cash deposits from previously accounted sources unrelated to taxable services. By excluding these amounts from the total bank deposits, there would be no discrepancy between the figures reported in the ST-3 Returns and the actual taxable value. That it is settled law that onus to prove taxability is upon the department, and there is no nexus between such bank/cash deposits and the taxable value of services provided established by the department. He relied upon the following decisions in this behalf:

i. South Eastern Coalfields Ltd. v. Commissioner of Central Excise & Service Tax - (2024) 17 Centax 245 (Tri.-Del)
ii. Umesh Tilak Yadav v. Commissioner of Central Excise, Nagpur - (2024) 15 Centax 161 (Tri.-Bom)
iii. Maheshwari Transport v. Commissioner of Central Excise & Service Tax, Raigad - (2024) 16 Centax 206 (Tri.-Bom)

It was further submitted that statements dated 20.3.2014 and 3.4.2014 of the Authorized Signatory shri Jayanti A. Shah and statement dated 3-4-2014 of Shri Vijay Maganlal Goshal, chartered accountant cannot be relied upon being not relevant as they have not been examined by the adjudicating authority following mandate of section 9D of the Central Excise Act, 1944 applicable to the provisions of Finance Act, 1994.

3. Shri Himanshu P Shrimali, Learned Superintendent (AR) appearing for the department has contended that discrepancies between the ST-3 returns and bank statements is not explained sufficiently, and hence impugned order is required to be upheld. He reiterated the observations made in the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. The issue to be decided in the present case is whether demand of service tax based on the differential amount worked out comparing the bank statement and ST-3 returns can be taken as taxable value under Section 67 of the Finance Act, 1994. It can be seen that although inquiry and investigation was carried out in the matter from 2009 to 2013, there is no averment in the show cause notice as to how the differential amount as per the bank statement can be said as derived from the consideration received by the appellant out of the activity of 'service' under sub-section (44) of Section 65B of Finance Act, 1994. The statements of the appellant's accountants cannot be the basis to consider such amounts as taxable value without any corroborative evidence of actual provision of

services against such amounts. Moreover, such statements are not relevant in absence of examination of deponents as per the mandate of section 9D of the Central Excise Act, 1944 applicable to the provisions of Finance Act, 1994. Reliance in this behalf is placed upon the Judgement of Hon'ble High Court in the case of Jindal Drugs (P.) Ltd. V. Union of India - 2016 (340) E.L.T. 67 (P & H) in which it was held thus:

> *"19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice."*

In the present matter the Adjudicating Authority has failed to follow the requirement of Section 9D of the Act applicable to the provisions of Finance Act, 1994regarding examination in chief of witness, therefore the statements of persons are not relevant and cannot be relied upon.

4.1 It is further observed that although appellant have provided all the information to the department in the month of February 2010 and furnished records including payment of service tax upto December 2009, the investigation however continued till 2013 and yet there was no effort made to bring on record corroborative evidence of provision of taxable services to any recipient of services against such differential amounts except the aforesaid statements which themselves are not evidence of provision of taxable services. It is settled law that the onus to prove taxability is upon the department which must show with sufficient evidence the provision of taxable services in first place.

4.2 In view of this background, since department has not provided any evidence or justification to substantiate their claim that the differential amounts represent the consideration received for rendering taxable services, demand of service tax is not tenable. Reliance in this behalf is placed on the following decisions:

i. **South Eastern Coalfields Ltd. v. Commissioner of Central Excise & Service Tax - (2024) 17 Centax 245 (Tri.-Del**): The Tribunal held that mere difference in figures appearing in the trial balance as compared to the ST-3 returns, without any corroborative evidence that taxable services had indeed been provided by the assessee, cannot be upheld.

ii. Umesh Tilak Yadav v. Commissioner of Central Excise, Nagpur - (2024) 15 Centax 161 (Tri.-Bom) : The Tribunal held that a demand of service tax merely on the difference between figures of the ST Return and IT return was not sustainable without establishing that the consideration was received for an activity covered under the definition of services under the Finance Act, 1994. It is essential to establish that value on which such service tax was calculated was in terms of section 67 of the Act and that it represented consideration for activity which satisfied definition of service under Section 65B(44) of the said Act.

iii. **Maheshwari Transport v. Commissioner of Central Excise & Service Tax, Raigad - (2024) 16 Centax 206 (Tri.-Bom):** The Tribunal held that a demand of service tax based on a contradictory and presumptive show cause notice, alleging a mismatch between ST returns and IT returns, was not sustainable.

Following the aforesaid decisions of tribunal and high court, demand of service tax is liable to be set aside. Since demand of tax is not sustainable, penalty upheld under section 78 also cannot be sustained. As regards, penalty upheld under section 77; as discussed supra, appellant had supplied records and responded to the summons during initial stage of inquiry, and demand of tax is also worked out based on the maintained records of the appellant. Moreover, when we decide the demand of tax itself is not tenable, penalty being consequential to tax demand will also not survive. In the circumstances, penalty for not honoring summons and not maintaining records, in the facts of the present case, cannot be sustained.

5. In view of the above discussion and findings, we are of the considered view that the impugned order is not sustainable, hence we set aside the impugned order. The appeal is allowed with consequential relief.

(Pronounced in the open court on 11.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi