CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/27/2008-DB

[Arising out of Order-in-Original No.7/2007-ST (Commr.) dated 25/10/2007 passed by Commissioner of Central Excise, Thiruvananthapuram.]

Shaji Thomas, Proprietor
Manjankal Business Corporation
Karimpanal Statue Avenue,
M. G. Road,
Trivandrum – 695 001.
KERALA

Appellant(s)

Versus

Commissioner of Central Excise
T.C.NO.26/334 (1&2),
I.C.E BHAVAN, PRESS CLUB ROAD,
TRIVANDRUM – 695 001.
KERALA

Respondent(s)

Appearance:

Mr. Manoj Pillai, Advocate
TAXAIDE T C
26/1747,KALYAN
U R 72,UPPALAM ROAD, TRIVANDRUM
TRIVANDRUM – 695 001
KERALA

For the Appellant

Mr. K. B. Nanaiah, Asst. Commissioner (AR)

For the Respondent

Date of Hearing: 12/12/2018
Date of Decision: 14/01/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20048 /2019

Per : P. ANJANI KUMAR

Shaji Thomas, Proprietor of M/s. Manjankal Business Corporation (MBC), Thiruvananthapuram, is a proprietorship concern are engaged in providing services, to their clients like M/s. Bharat Distilleries, Mumbai and M/s. Allied Domecq Spirits and Wine India Pvt. Ltd., Delhi, in respect of supply of IMFL to CSD canteens. Their work as per the agreement is as below:

a) To collect the procurement orders issued by Main Head office – CSD, Mumbai and to submit the same with the depots (all over India) under the Main Head Office – CSD, Mumbai.

b) To collect the procurement orders processed by the Excise bonded warehouses connected with the depots.

c) To send the permits issued by the Asst. Excise Commissioner in charge of Excise bonded warehouses with the concerned company within a week from the date of receipt of permits.

d) To verify whether chemical examination reports have accompanied with the consignments sent by the company.

e) To collect Excise verification certificate as and when the consignment arrives with respect to breakages, if any.

f) To collect Goods Receipt Sheet from the warehouses and send it to the company.

g) To collect C-forms.

h) To submit BFA to Head Office – CSD, Mumbai

i) To do such other things and acts as may be necessary and incidental to the attainment of the above mentioned services on behalf on the client.

Revenue contended that the appellant is liable to pay service tax under the head Business Auxiliary Services for the period 1.7.2003 to 31.3.2006 and accordingly, issued a show-cause notice which was confirmed by the Commissioner vide Order-in-Original No.7/2007-ST-Commr. dated 25.10.2007. Hence, this appeal.

2. Ld. counsel for the appellant basically contended that they do not come under Business Auxiliary Service as the nature of work of MBC do not come under any clauses (i) to (iii) and (vii) under Business Auxiliary Service taxable from 1.7.2003. They do not come under Clause (ii) to (vi) from September 10, 2004, if at all their service is classifiable under Business Auxiliary Service, it would be under Clause (vi) as they are providing a service on behalf of the client, which is exempted according to the Notification No.14/2004.

2.1 They also contended that they are proprietary concern and as such, they cannot be classified as any commercial concern providing the above-mentioned services. They have also submitted that they are commission agents of their customers partly as they render sales on behalf of their customers.

3. Ld. AR has reiterated the findings of the OIO and has submitted that in view of the decision of Madras High Court in the cases of ***KMB Granites Pvt. Ltd.: 2014 (35) STR 63 (Mad.)*** and ***Subramania Siva Co-op. Sugar Mills Ltd.: 2014 (35) STR 500 (Mad.)***, in which it was held that commercial concern includes an individual operator or a proprietary concern either.

4. Heard both sides and perused the records.

5. The basic contentions of the appellant were on the issue that they being a proprietorship concern cannot be equated to a commercial concern for the purpose of Business Auxiliary Service. Though, the word 'commercial concern' has not be defined in the statute, the appellants themselves submitted that concise Oxford Dictionary defines the same to be "exchange of merchandise especially on large-scale" and submitted that if the transactions are on a large-scale, it is called commerce. We also find that in the case of ***Hyderabad Asbestos Cement Products vs. State of Andhra Pradesh: 1972 (30) STC (AP)***, it was held that "nobody can define the volume of business which would convert a trade into commerce. But everybody understands the distinction between the two with sufficient vagueness". It is seen from the records of the case that the appellants have entered into

contract with two companies and have engaged 34 people for helping them in the discharge of their functions vis-à-vis their customers; they have received commission to the tune of crores of rupees. The concern being reasonably big, the appellants claim that they are proprietorship concern and not a commercial concern, does not find favour with us. Therefore, we find that the activity undertaken by the appellants are certainly not on a small scale to be held to be a proprietorship concern in the understanding of a common man. We find that the agreements are entered into by Mr. Shaji Thomas as the proprietor of MBC. It is on record as observed by the Ld. Commissioner that the appellant themselves have taken a stand that they are a commission agent and, in that senses, he is a commercial concern. We find that the Ld. Commissioner has rightly observed that the service rendered by the assessee is as a commercial concern.

5.1 Another issue is that the appellant claims themselves to be a commission agent of their customers. On going through the contracts, the basic requirement of the service is not to be an agent of sale on behalf of the clients. The agreements provide for various services which are required for carrying out the business of their customers. The fact that the payments received by the appellants are on the basis of quantum of sales effected by the clients to the CSD canteens does not itself make them a commission agent. There is no express provision in the contracts making them as commission agents. Therefore the arguments of the appellants, that they are eligible for the benefit of Notification No.13/2003 or No.14/2004, are not acceptable. The appellants have also contended that the show-cause notice is not specific as regards to the exact nature of the service to fall under Business Auxiliary Service. We find that sub-clause (vii) under Business Auxiliary Service includes a service incidental or auxiliary to any activity specified in clauses (i) to (vi) and includes activities such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944. Looking into the exhaustive and inclusive nature of the services listed under Business Auxiliary Service, we have no doubt that the services rendered by the appellants are within the ambit of Business Auxiliary Service.

5.2 The period involved in the show-cause notice is 1.3.2003 to 31.3.2006 and the show-cause notice is issued on 1.3.2007. On the issue of limitation, we find that the Ld. Commissioner has held that the appellants did not comply even with the basic requirement of law in spite of hectic campaign taken by the department through visual as well as print media. The Commissioner has also observed that the intention to evade duty need not always be associated with actions, it can also be by inaction. We find that the findings of the Commissioner are at variance with the interpretation of law and provisions thereof, by various Courts and Tribunals. It has been laid down that to prove "intent to evade payment of duty" there should be a positive act on the part of the appellants by which an inference intent to evade payment of duty can be drawn. We do not find anything in the show-cause notice or in the Order-in-Original to allege or prove or to come to a conclusion that the appellants have resorted to any positive acts which would indicate intent to evade payment of duty. Therefore, we find that circumstances requiring the invocation of extended period are absent in the case. We find that the appellants were under *bona fide* belief that the services by them are not taxable to service tax. Therefore, though we uphold demand on merits, we find that extended period cannot be invoked. The demand needs to be limited to the normal period. For the computation of duty payable during the normal period, the issue needs to go back to the original authority.

5.3 Coming to the penalties imposed, we find that Ld. Commissioner has imposed penalty under Section 76 and Section 78 simultaneously, which is not permissible during the relevant period. Moreover, we find that Ld. Commissioner has imposed penalty under Section 78 equivalent to twice the duty demanded. We find that this is very harsh. Therefore, we set aside the penalty imposed under Section 78. However, penalty under Section 77 and Section 76 would continue.

6. In view of the above, the appeal is remanded with a direction to the Original Authority for computation of demand to the normal period and penalty under Section 77 and Section 76 would continue.

(Order was pronounced in Open Court on **14/01/2019.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

rv