CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 536 of 2011

[Arising out of Order-in-Appeal No.14/CE/CHD-I/2011 dated 31.01.2011 passed by the Commissioner (Appeals), Customs & Central Excise, Chandigarh-II]

Nikhil Sharda : **Appellant (s)**
142/6, Preet nagar,
Ladowali Road,
Jalandhar-144004

Vs

The Commissioner of
Central Excise- Ludhiana : **Respondent (s)**
Central Excise House, F-Block,
Rishi Nagar, Ludhiana-141001
(Punjab)

APPEARANCE:
Mr. Sudhir Malhotra, Ms. Gurmehar Kaur, Advocates for the Appellant
Ms. Shivani, Ms. Geetiaka, Authorised Representatives for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60150/2023

Date of Hearing: 27.03.2023
Date of Decision:06.06.2023

Per : P.ANJANI KUMAR

The appellants are engaged in selling health/ beauty care products of M/s Forever Living Products (India) Private Limited on a commission basis being recognised as distributors by M/s Forever Living Products (India) Private Limited. It appeared to the Department that the services rendered by the appellant were "Business Auxiliary Service" under Section 65(19) of Finance Act, 1944. A show cause notice dated 04.03.2009 was issued to the appellant demanding Service Tax of Rs.4,11,740/- along with interest and also proposing to
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levy penalties. The show cause notice was adjudicated by the Deputy Commissioner vide order dated 08.04.2010 confirming demand of Service Tax of Rs.3,67,987/- along with interest; imposing equal penalty under Section 76 and Section 78 and a penalty of Rs.3,67,987/- under Section 78. On an appeal filed by the appellants, Commissioner (Appeals) vide order dated 31.01.2011 upheld the order of the lower authority. Hence, this appeal.

2. Shri Sudhir Malhotra assisted by Ms. Gurmehar Kaur, learned counsel appearing for the appellant submits that in terms of Section 65(105) (zzb) of Finance Act, 1994, the individual being not a commercial concern was not liable to pay Service Tax under the category of "Business Auxiliary Service" prior to 18.04.2006; he brings out the changes in the definition of taxable service by Commission Agent under "Business Auxiliary Service" had undergone changes as under:

01.07.2003 to 15.06.2005

Taxable service means any service provided to a client, by a **commercial concern**, in relation to business auxiliary service.

16.06.2005 to 17.04.2006

Taxable service means any service provided or to be provided to a client, by a **commercial concern**, in relation to business auxiliary service.

w.e.f. 18.04.2006

Taxable service means any service provided or to be provided to a client, by any person in relation to business auxiliary service.

3. He submits that Tribunal in the case of *Mangal Singh Vs CCE- 2008 (11) STR 17 (T)* held that individual is not a commercial concern and thus does not come under the purview of service tax. He further submits that the Adjudicating Authority did not extend the benefit of input service tax credit of Rs. 7,817/- on telephones etc. He further submits that there was no wilful suppression of facts and intent to evade payment of Service Tax and therefore extended period cannot be invoked as held by the Hon'ble Supreme Court in the case of *Cosmic Dye Chemicals Vs CCE- 1995 (75) 721 (SC)* intent to evade payment of duty has to be proved and mere mis-statement or suppression of fact is not enough; CESTAT in the case of *K.K. Appachan Vs CCE- 2007 (7) STR 230 (Tri. Bang.)* held that larger period of limitation cannot be invoked when the issue relates to interpretation of law.

4. Learned Counsel further submits that the Adjudicating Authority erred in imposing penalty under Section 76 and Section 78; Hon'ble Punjab & Haryana High Court in the cases of *Pannu Property Dealers- 2011 (24) STR 173, First Flight Courier Ltd.- 2011 (22) STR 622* and *City Motors- 2010 (19) STR 486* held that simultaneous penalty under Section 76 and Section 78 of the Finance Act cannot be imposed. Hon'ble Gujarat High Court in the case *Astik Dyestuff Pvt. Ltd.- 2014 (34) STR 814* held that if there are any contrary decisions of the High

Courts, decision of Jurisdictional High Court is binding. It was held by Tribunal in the cases of *Kathuria Portfolios- 2003 (158) ELT 355* and *A.G. Shibu & Anothers 2008 (10) STR 317* that penalty is not justified where issue involves interpretation of law. He further submits that under Section 80 of the Finance Act, 1994 if a reasonable cause is shown for non-payment of Service Tax, penalty may not be imposed.

5. Ms. Geetika, Learned Authorized Representative for the Department submits that the issue of personal business being a business entity is no longer *res integra* and therefore, notwithstanding the fact that w.e.f 01.05.2006 the term "commercial person" in Section 65(105) (zzb) was replaced by "any person" even during the period prior to 01.05.2006, the Business Auxiliary Service even if provided by an individual to a client was taxable. Tribunal has upheld the view in the following cases:

- *Charanjeet Singh Khanuja VS CST-2016 (41) STR 213 (Tri. Del.)*
- *CCE VS R.S. Financial Services- 2008 (9) STR 231 (Tri. Del.)*
- *C.M. Sapkal Vs CCE- 2016 (43) STR 106 (Tri. Mumbai)*
- *Krishan Murari Gupta Vs CCE -2016 (44) STR 682 (Tri. Delhi.)*

6. On the appellant's contention that credit of service tax paid on input services was not extended to the appellant. She submits that the appellants did not produce any documentary proof and not even a Chartered Accountant certificate to justify their claim. On invocation of extended period, she submits that the appellant has not taken any registration and did not pay any service tax as held in *Dharampal Satyapal Vs CCE- 2005 (183) ELT 241 (SC)* and *Vidarbha Cricket Association Vs CCE, Nagpur- 2015 (38) STR 99,* held that invoking

extended period under such circumstances is permissible. Regarding the contention that penalty under Section 76 and Section 78 cannot be imposed together, she relies on Board of Control for *Cricket in India Vs CST- 2015 (37) STR 785 (Tri. Mumbai)* and *Asst. Commissioner Vs Krishna Poduval- 2006-TIOL-77HC-KERALA-ST.*

7. Heard both sides and perused the records of the case. The issue before us is to decide whether the appellants who rendered Business Auxiliary Services as a proprietor can be treated to be a commercial concern before 01.06.2005 also. The appellants rely upon the decision of the Tribunal in the case of *Mangal Singh* (supra) whereas the Department relies on various decisions which were subsequently passed. We find that Tribunal in the case of *Charanjeet Singh Khanuja* (supra) is observed as follows:

> *"14. Another objection raised by the appellants in Appeals Nos. ST/138 and 139/2009, ST/406/2010, ST/522 to 525/2010, ST/257, 259, 433, 473, 502, 580, 1123, 1383, 1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in Appeals Nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 is that the assessees are individuals and during the period till 30-4-2006, Service tax was chargeable only on the services provided to a client by a commercial concern in relation to Business Auxiliary Service and the individual persons cannot be treated as Business concern. We do not accept this plea as a business concern can be a proprietary firm also which is owned by an individual and there is no difference between proprietary firm owned by a person and that person. When an individual engages himself in a commercial activity, he has to be treated as business or commercial concern. Therefore, notwithstanding the fact that w.e.f. 1-5-2006 the term, 'commercial concern' in Section 65(105)(zzb) was replaced by any person', we are of the view that even during the period prior to 1-5-2006, the Business Auxiliary Service, even if provided by an Individual to a client, was taxable. Moreover, in this group of appeals, the Appellants in Appeal No. ST/257/2011 and ST/259/2011 are proprietary firms who, without any doubt, are commercial concerns."*

8. Tribunal in the case of *R.S. Financial Services* (supra) has observed as follows:

> *"6. There can be no dispute over the fact that the activity undertaken by the assessee was a commercial activity. The word 'concern' as per its ordinary dictionary meaning, in the present context, would mean, the business of somebody (see Oxford's Advanced Learner's Dictionary). Therefore, the word 'concern' in the context of the business run by a sole-proprietor would mean, the business of such sole-proprietor which is often described as sole-proprietary concern. Business of a partnership firm can also be described as business of a partnership concern and likewise for a company. Therefore, there was no valid reason for the appellate Commissioner to hold that, a sole-proprietory concern was not a commercial concern, and therefore, service tax was not leviable when taxable service was provided by a proprietory concern. A proprietory concern would mean the same thing as a proprietory business. The distinction sought to be made out by the Commissioner (Appeals) is without any real difference in the nature of activity in the nature of 'Business Auxiliary Services' which can be provided by any of such concerns. The ground that, specific clause of 'Business Auxiliary Services' was not specified by the Revenue in the show cause notice is erroneous because, sufficient facts are disclosed in the show cause notice to indicate that the services which are alleged to have been provided were in the category of 'Business Auxiliary Services'. The impugned order cannot, therefore, be sustained.*

9. In view of the above judgments, we find that commercial concern covers individuals also when they are into a business and to this extent, we find that the appellant's arguments are not acceptable. We find that the appellants are liable to pay service tax on the services rendered by them to M/s Forever Living Products Pvt. Ltd. before and after 01.06.2005.

10. Coming to the invocation of extended period, we find that learned Authorized Representative relies on in the case of *Dharmpal Satyapal* (supra) wherein Hon'ble Apex Court observed as follows:

> *"22. It was urged that the assessee was under a bona fide impression that no duty was leviable on the goods; the full quantity*

of disputed goods was used captively and, therefore, proforma credit/Modvat credit was available in respect thereof and, therefore, there was no intent to evade payment of duty. In support of the aforestated submissions, it was urged that suppression or breach of rules by itself would not amount to intention to evade, that some positive act of deliberate suppression or breach of rules was required to be shown by the department; that, if the assessee showed that credit available to it was equal to the demand then there may not be the case of intention to evade payment of duty, In this connection, reliance was also placed on the judgments of this Court in Amco Batteries Ltd. v. Collector of Central Excise, Bangalore reported in 2003 (153) ELT.7: Padmini Products v. Collector of Central Excise reported in 1989 (43) ELT 195; and Formica India Division v. Collector of Central Excise reported in 1995 (77) ELT. 511.

23. We do not find menit in the above contentions. In this matter, we are concerned with the application of the above judgments to the facts of this case. The words wilfulness" and "intent" in Section 11A are expressions of mental state at the time of manufacture and clearance of the goods. The situs of the levy of central excise is on manufacture. Pricing and value of clearances are matters specially within the knowledge of the assessee. As stated above, the assessee herein was in the business of manufacture of chewing tobacco and its preparations for last couple of years. In the course of business, the assessee had dealt with similarly situated traders. It was fully aware that those traders who produced similar compounds had their units licensed or registered and yet the assessee herein did not take steps to get the above two units, in which the impugned compound (kimam) was manufactured, registered or licensed. As stated above, it has been buying a similar kimam from various traders. These circumstances constituted evidence of suppression brought on record by the department in answer to which it was contended on behalf of the assessee that they were under a bona fide impression that the compound was not excisable and that the benefit of proforma and modvat credit together with the benefit of exemption under Notification No. 121/94, dated 11-8-1994 was substantially equal to the demand for duty herein and, therefore there was no intention to evade payment of duty.

24. We do not find any merit in these submissions. As stated above, the adjudication in this case was confined to the question of excisability and concealment of the existence of two units in which the compound (kimam) was manufactured. No explanation has been given by the assessee for not disclosing the affairs of these units, particularly when the assessee was in business for couple of years and when the assessee had been dealing with other traders who operated from licensed factories. It was for the assessee to explain the reasons for not getting the units registered or licensed. It was for the assessee to explain its failure to maintain the records under the 1944 Act and rules thereunder. In each of the above decisions, we find that there was substantial compliance of the rules under the said Act. In each of the decisions the findings indicate technical non-

compliance and not total non-compliance of the rules. It was for the assessee to explain the basis of its alleged bona fide impression. In this connection, no evidence was put before the commissioner about receipt and utilization of the compound in the manufacture of Tulsi Zafrani Zarda. No evidence was led to show that the amount of proforma/modvat credits was equal to the duty demanded, although it was urged that after 3/94, the liability to duty on inputs stood shifted to the final product.

11. As brought out by the Revenue, we find in the facts and circumstances of the case that the appellants have not obtained any registration and have not paid the applicable service tax. The appellants have not disclosed the material facts of providing taxable service under the category of "Business Auxiliary Service" to M/s Forever Living Products Pvt. Ltd. on their own and the Department came to know about the activity only after conducting certain inquiries. Therefore, we find that there is suppression of material fact on the part of the appellants. Therefore, we find that extended period is rightly invokable.

12. Coming to the imposition of penalties under Section 76 and Section 78, learned Counsel for the appellants relies upon Hon'ble High Court of Punjab & Haryana in the case of *Pannu Property Dealers- 2011 (24) STR 173* observed that simultaneous penalty cannot be imposed under Section 76 and Section 78. Moreover, in the instant case, the appellants have paid the duty along with interest and 25% of value as penalty on 06.05.2010 and looking into the provisions of Section 80 of the Finance Act, we find that penalties imposed can be waived in the facts and circumstances of the case.

13. In view of the above, the appeal is partially allowed in following terms:

(i) Service Tax of Rs.3,67,987/- is confirmed along with interest.

(ii) Penalty under Section 78 is restricted to Rs.92,060/- as paid by the appellants.

(iii) Balance of the penalty imposed under Section 78 and other penalties under Section 76 and Section 77 are set aside.

(Pronounced on 06/06/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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