CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.709 Of 2011

[Arising out of Order-in-Appeal No.20/CE/LDH/2011 dated 31.01.2011 passed by the Commissioner (Appeals), Central Excise & Customs, Chandigarh-II]

M/s Lovely Autos : **Appellant (s)**
Lovely Mall, Ambedkar
Chowk, Jalandhar,
Punjab-144001

Vs

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

APPEARANCE:
Shri Ravi Chopra, Advocate for the Appellant
Shri Narinder Singh, Authorised Representative for the Respondent

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

FINAL ORDER No.60233/2023

Date of Hearing:04.07.2023

Date of Decision: 01.08.2023

Per:P. ANJANI KUMAR

M/s Lovely Autos, the appellants, are authorized service station of M/s Bajaj Auto; the appellants are registered for provision of service in the category of "Authorized Service Station" and "Business Auxiliary Service". Audit conducted, by the Department, on the accounts of the appellants, revealed that the appellants are collecting Rs.474/-, from all the customers who purchased Bajaj products, under a Scheme known as "Lovely Service Club" subscription; on enquiry,
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the appellants informed that they are collecting the amount for providing guaranteed service and also for providing replacement of engine oil, a few parts and a gift. A show-cause notice, dated 07.01.2009, was issued to the appellants seeking demand of service tax of Rs.4,46,078/- along with interest and penalties. The appellants submitted that out of this Rs.474/-, Rs.200/- is charged for service and therefore, this amount alone is chargeable to service tax; the appellants accordingly paid service tax of Rs.1,88,220/- on the same and contested the Department's claim on the remaining amount of Rs.274/-; they have also submitted that the show-cause notice is time barred; since they have paid the amount before issuance of show-cause notice, penalties also are required to be waived. The Original Authority vide Order dated 17.03.2010 confirmed the demand along with interest and penalties; the order was upheld by the Appellate Authority vide impugned Order dated 31.01.2011.

2. Shri Ravi Chopra, learned Counsel for the appellant reiterates the Grounds of Appeal and submits that the appellants have deposited service tax, which they admit to be payable, along with interest and penalty equal to 25%, within thirty days of receipt of OIO in terms of provisions of Section 78 of Finance Act, 1994; penalties under Sections 76 and 77 have not been paid. He submitted a date chart of the case and submits that they contest the entire duty demanded, except Rs.1,88,220/-, and interest and penalties. He submits that the show-cause notice is time barred as there was no suppression of facts involved. Learned Counsel also submits that penalties can also not be imposed. He further submits that learned Adjudicating Authority or the

Appellate Authority, for that matter, has not given the benefit of cum-duty while calculating the service tax payable. Learned Counsel, in support of his arguments, relies upon the following cases:

- *Chemphar Drugs & Liniments- 1989 (40) ELT 276 (SC).*
- *Aditya College of Competitive Exams- 2009 (16) STR 154 (Tri.)*
- *Omega Financial Service- 2011 (24) STR 590 (Tri.)*
- *First Flight Courier Ltd.- 2011 (2) STR 622 (P&H).*

3. Shri Narinder Singh, learned Authorized Representative for the Department, submits that the benefit of Notification No.12/2003 dated 28.06.2003, is available with the condition that there is documentary proof indicating the value of the said goods and materials. He relies on *Ador Fontech Ltd.- 2014 (36) STR 146 (Tri. Mumbai)* and submits that as the appellants have not submitted any documentary proof, exemption cannot be given. He submits that to claim the benefit, the value of the material should have been indicated in the invoices and applicable VAT/ Sales Tax should have been paid on the same in order to be eligible for the exemption as held in *Mahendra Engineering Limited- 2015 (38) STR 233 (All.)* and *Tanya Automobiles (P) Ltd.- 2016 (43) STR 155 (Tri. All)*. Adverting to the appellant's claim that in some cases, as service itself was not provided, inclusion for payment of service tax is not acceptable, he submits that gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of said service in terms of Section 67 of the Finance Act, 1994; the consideration includes any amount that is payable for the taxable services provided or are to be provided. Learned Authorized Representative further submits that though the appellant have paid

Rs.1,88,220/- for the entire period, it was only after the lapse was pointed out by the Department and therefore, it is incorrect to mention that the said amount has been paid in normal course and reflected in the Returns; waiver of the penalty under the Act is on the condition that service tax along with interest is paid before the issuance of show-cause notice; in the instant case, the appellant has not paid interest involved even for the amount accepted by the appellant. He submits that the appellants have failed to make correct and full declaration of the facts in the ST-3 Returns; the appellants did not pay service tax even in case which is not contested by them; the appellants have intentionally choose not to disclose the amount collected by them with intent to evade payment of service tax; as held in *Deccan Plaza Vs CST (Appeals)- 2016 (45) STR 202 (Madras)*, demand can be raised for the extended period for failure to make correct and full declaration in ST-3 Returns.

4. Heard both sides and perused the records of the case. We find that the appellants are not disputing either the levy or the classification of service tax. It is the case of the appellants that though they are collecting Rs.474/- from the customers for service of the vehicles under a Scheme, they are not liable to pay service tax on an amount of Rs.274/- because of the fact that out of this Rs.474/-, Rs.274/- does not pertain any service rendered; in fact, out of this Rs.274/-, Rs.124/- pertains to free oil change during the servicing, Rs.50/- for free replacement of parts and Rs.100/- for the gift. On the contrary, it is the argument of the Department, in order to avail exemption from service tax on the above items, the appellants are

required to satisfy the conditions laid down in the Notification No.12/2003; the appellants did not satisfy the conditions inasmuch as the said amounts are not reflected either in the invoices or in the books of accounts under relevant Heads and the appellants did not provide any proof like invoice etc. to show that those payments were for the purposes cited above and that applicable VAT/ Sales Tax has been paid on the same.

5. We find that Notification No.12/2003-ST dated 20.06.2003 is as follows:

> *"In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."*

6. We find that a simple perusal of the Notification would indicate that the exemption contained therein is applicable subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. The documentary proof could be in any form such as invoices, debit/ credit notes, books of accounts etc. We find that the appellants did not produce any evidence to that effect, either before the original adjudicating authority or before appellate authority or before us.

7. When the appellants avail the benefit of any notification, it shall be incumbent upon them to satisfy the conditions therein. As per the records of the case, we find that the appellants have not satisfied the conditions. Hence, we find that there is considerable force in the arguments put forth by the Authorized Representative. We find that Tribunal, in the case of *AdorFontech Ltd.* (supra), held that:

> *"9. We find that as per the provisions of the above Notification, there is a condition that there should be documentary proof specifically indicating the value of goods and material sold. In the present case, the appellants were clearing the goods under a consolidated invoice and uniformly taking 80% of the value of material and consumables and 20% towards the service. There is no separate invoice regarding the sale of goods and material."*

8. Coming to the arguments of the appellants that they have paid the service tax payable within one month of the issuance of OIO, we find that the appellants claim to have paid only Rs.1,88,220/- out of total demand of Rs.4,46,078/- along with interest and 25% of the penalty. We find that in terms of Section 73 (3) of the Finance Act, 1994, the appellants are required to pay the service tax confirmed along with interest and 25% of the penalty; it is not open to the appellant to pay a portion of the demand that they think is payable and claim the benefit of the provision of law. Therefore, we are of the considered opinion that the appellants cannot take shelter under the provisions of Section 73 (3) of the Finance Act, 1994.

9. Coming to the issue of limitation, the appellants submit that they have not suppressed any material fact so as to attract the

provisions of Section 73 for invocation of extended period. Revenue argues that the appellants have not paid service tax, even to the extent they agreed upon, on their own and have not filed any Returns in this regard. We find that the contention of the appellant is not acceptable. The word "Suppression" means "to hide something"; by not filing the Returns and by not disclosing the material fact, the appellants have clearly suppressed the fact that they have collected the consideration from their customers for the services to be provided by them. Now the question arises as to whether such suppression was with an intent to evade payment of service tax. Suppression by itself may not indicate any intent. However, suppression coupled with the appellant's failure to disclose the amounts collected in the ST-3 returns; failure to deposit the applicable service tax, which they are not disputing, leads to the inevitable conclusion that the intent, to evade payment of service tax, is presentin this case considering the facts and circumstances. For this reason and as per our discussions above, we find that the ratio of the cases relied upon by the appellant will not be of any avail to them.

10. Therefore, we are of the considered opinion that the extended period is rightly invoked for the reasons cited above. Therefore, the demand of duty as confirmed by the lower authorities along with interest and penalty under Section 78 requires to be upheld. We find that the decision of the Tribunal in the case of *Tech Mahindra- 2015 (38) STR 1200 (Tri. Mumbai)* supports our view. It was held that:

> ***6.3*** *As regards the argument that the demand is hit by time-bar, the argument advanced on behalf of the appellant in this regard is not convincing at all. The reliance placed in the case of MuthiahChettiarv. Commissioner of Income Tax (supra), has no relevance since the said decision pertains to the provisions of Income Tax Act, which is different from the provisions of the Finance Act, 1994, which governs the levy and assessment of the service tax. Further, in the case of Finance Act, 1994, Section 66A provides for a deeming fiction for treating the service-recipient in India as the service-provider in respect of the services received from abroad and for application of the provisions of the Finance Act, 1994 in respect of such a deemed service-provider. Therefore, in view of the clear unambiguous language used in Section 66A, it cannot be said that the appellant was not liable to declare the activities undertaken by the appellant in this regard. It is a fact on record that the appellant did not disclose this information in the ST-3 returns filed. The contention of the appellant that there was no specific column for declaration of the amounts paid lacks merits for the reason that the appellant has to declare the amounts received as the amounts billed or charged as the appellant is deemed as a service provider. Even otherwise, the appellant could have disclosed this information in the return with suitable remarks in this regard. Therefore, the non-disclosure of the details of the transaction in the ST-3 returns in spite of specific statutory mandate in this regard clearly amounts to suppression of facts. An identical issue was considered by this Tribunal in the case of Star India Pvt. Ltd. [2014-TIOL-1886-CESTAT-MUM = 2015 (38) S.T.R. 884 (Tri.-Mum.)] and the contention rejected as detailed in para 5.15 of the said decision.*

However, looking into the facts and circumstances of the case, we find that interest of justice will be more than met if penalty under Section 78 is imposed. Accordingly, penalty imposed under Sections 76 and 77 are being set aside.

11. In the result, the appeal is partly allowed by upholding the confirmation of duty, interest and penalty under Section 78; penalties under Sections 76 & 77 are, however, set aside.

(Pronounced in the open Court on 01/08/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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