CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

~~~~~

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.55137 Of 2013

[Arising out of OIO No.82/ST/CHD-II/2012 dated 06.08.2012 passed by the Commissioner of Central Excise, Chandigarh-II]

M/s S. L. Bajaj : **Appellant (s)**
H.No. 6791/1, Anand Nagar,
Abohar, Ferozpur,
Punbab

Vs

The Commissioner of Central Excise and Service Tax, Chandigarh-II : **Respondent (s)**
Plot No.19, C.R. Building,
Sector-17C, Chandigarh-160017

APPEARANCE:
Shri G.S. Sandhe, Advocate for the Appellant
Shri Siddharth Jaiswal, 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.60269/2023

Date of Hearing:04.08.2023

Date of Decision:21.08.2023

Per :P.ANJANI KUMAR

M/s S.L. Bajaj, the appellants have provided drivers,conductors and persons to man the workshop to M/s Punjab Road Transport Corporation (PRTC) under a contract. On conducting some enquiries with various depots of PRTC, Revenue concluded that the appellants have rendered the services "Manpower Recruitment or Supply Agency" as per Section 65(68) of the Finance Act 1994. Accordingly, a show cause notice dated 18.10.2011 was
~~~~~

issued to the appellants to recover Service Tax of Rs 70,77,922/-. The Commissioner of Central Excise, Chandigarh-II, Vide order dated 6.08.2012, confirmed the demand of Rs.63,50,280/- after allowing cum-duty benefits; imposing equal penalty under Section 78 and penalty of Rs.11,000/- under Section 77.

2. Shri G.S. Sandhe, learned counsel for the appellants submits that he was an "individual" providing services to PRTC; he was supplying drivers, conductors and mechanics, fitters, welders, blacksmiths, painters, for the workshop at the depots. He submits the circular issued by PRTC indicated the wages payable through agencies; the pay structure specified basic pay, HRA, conveyance allowance, medical and deductions of EPF, ESI, TDS etc; Accordingly rate per kilometer was arrived at; the payment was fixed for 26 working days of a month and 300 kms per day; the agreement provided for extra payment in case of night shifts and extra kilometers;

3. Learned counsel submits that the Department cannot include the consideration for salary, EPF and ESI as gross value of taxable services in terms of Section 67 of Finance act 1994. He relies on inter-*Continental Consultants and Technocrats Pvt. Limited- 2018(10) GSTL401 (SC)* and submits that Rule 5 of service tax (Determination of Value) Rules, 2006 is *ultra vires* of Section 67 of Finance act 1994. He also submits that the said decision has been followed in the following cases.

- *RAJCOMP INFO SERVICE LTD- 2022 (65) G.S.T.L. 103 (Tri. - Del.)*
- *GURUBANI SECURITY PVT. LTD.- 2021 (51) G.S.T.L. 404 (Tri. - Del.)*
- *INDIAN INSTITUTE FOR PRODUCTION MANAGEMENT- 2021 (46) G.S.T.L. 55 (Tri. - Kolkata)*
- *SECURITY GUARDS BOARD FOR GREATER BOM. & THANE DIST- 2017 (51) S.T.R. 51 (TRI. - MUMBAI)*
- *M.P. SECURITY FORCE- 2020 (43) G.S.T.L. 253 (Tri. - Del.)*

4. Learned counsel submits that alternatively the appellant was working as a "pure agent" of PRTC who was a principal employer and therefore in terms of Rule 5 of Service Tax (Determination of Value) Rules, 2006, the reimbursable expenses cannot be included. He further submits that during the period 1.04.2006 to 30.04.2006 only a "Commercial Concern" was taxable under Section 65 (68) of the Finance Act 1994; w.e.f01.05.2006, the word "Commercial Concern" was replaced by the words "Any Person"; as the appellant was not a "Commercial Concern", no service tax can be leviable upto 1.05.2006

5. Learned counsel further submits that the issue is time barred as the appellant has a *bonafide* belief on the basis of the circular issued by the PRTC that the wages and other deductions was not taxable ; Hon'ble Supreme Court in the case of *Inter-Continental Consultants and Technocrats Pvt. Ltd*. (supra) conformed the same; there was no willful intention to invade Service tax as they paid the Service on the contractor's share of the remuneration paid by PRTC; he also submits that as held in the following cases unless there is a deliberate suppression etc with intent to evade payment of Service tax and therefore extended period cannot be invoked. He relies upon the following cases:

- *TAMIL NADU HOUSING BOARD- 1994 (74) E.L.T. 9 (SC)*
- *CONTINENTAL FOUNDATION JT. VENTURE- 2007 (216) E.L.T. 177 (S.C.)*
- *PADMINI PRODUCTS- 1989 (43) E.L.T. 195 (S.C.)*

6. Shri Siddharth Jaiswal, Authorized Representative submits for the Revenue that the appellant's contention that they are "pure agents" of the "principal" is not tenable as they have not entered into the contract in those terms; PRTC is only a client to whom the appellant provided the services in respect of manpower supply; therefore they are not "pure agents" as per Rule 5 of Service Tax (Determination of Value) Rules, 2006. He relies on Tribunal's judgment in the case of *Wisdom Gods Pvt. Ltd. (1.11.2017-CESTAT-Delhi) MANU/CE/0855/2017* and in *Bombay Intelligence Security (I) Ltd. (11.4.2014-CESTAT-Mumbai) MANU/CM/0621/2014*

7. Learned Authorized Representative submits that the appellant's claim that being an individual they were not a "Commercial Concern" and therefore not taxable before 01.05.2006 in the light of judgment of Tribunal in the case of *Nikhil Sharada (Final order no. 60150/2023 dated 06.06.23-Chandigarh)*; *Liberty Sales- 2008 (11) STR 401(TRI-DEL)* and *R.S Financial Services 2008(9) STR 231 (TRI-DEL).* He submits that the appellant's contention that PRTC was not a client, is incorrect; the word "client" was substituted by the words "any other persons" with effect from 16.05.2008. He submits that though the word "client" is not defined under Service Tax, in the common parlance client is also a person who avails any service for a consideration. Learned Authorized Representative further submits that

the appellant's claim for SSI exemption is not acceptable as they have exceeded the gross turnover of Rs.4,00,000/- in the preceding financial year.

8. Learned Authorized Representative submits that the appellant was liable to pay Service Tax in the prescribed manner and to file ST-3 returns with the authorities; they have not paid Service Tax and have not filed ST-3 returns during the period 2006-07 to 2010-11, though they have registered themselves on 05.11.2004;therefore, extended period is fairly invokable.

9. Heard both sides and perused the records of the case. It is the case of the Department that the appellants have entered into a contract with PRTC and received the remuneration as per the contract on the basis of work hours per person; the contract does not provide for any deductions or additions on account of expenses towards the wages, EPF, ESI etc; the appellants have to include the amount under those Heads as per provisions of Section 67 of the Finance Act, 1994 and Rule 5 (2) of Service Tax (Determination of Value) Rules, 2006 and the appellants do not have a relationship of a pure agent and the principal employer. The Department also contends that it is incorrect to say that the appellant is not liable to pay service tax as they are not a "Commercial Concern" during the period 01.04.2006 to 30.04.2006; the appellant is not eligible for SSI exemption and the extended period is rightly invoked in the present issue.

10. It is the contention of the appellants that though the remuneration is per-kilometer per-person, PRTC have also mentioned categorically the amount of wages etc. to be paid to the workers and therefore, even if they are not mentioned specifically in the agreement, they are to be treated as reimbursable expenses which are not required to be included in the assessable value as held in various cases cited by them. We find that the Tribunal in the case of *M.P. Security Force* (supra) held that:

> ***7.*** *The provisions of the PF and ESI Act makes it clear that it will be the primary responsibility of the principal employer to deduct amount towards the PF and deposit the same with the Central Government. The appellant in this case claimed that it has deducted the contributions on behalf of principal employer, that is recipient of the service, for remittance to the competent authority in terms of the provisions of EPF and ESI Act. The contributions made towards PF & ESI is, therefore, not required to be added for the purpose of calculation of the gross amount under Section 67 of the Act, if the same has been deposited with the Government.*
>
> ***8.*** *The issue regarding valuation of taxable services has been the subject matter of decision of Hon'ble Delhi High Court in case of Intercontinental Consultants & Technocrats Pvt. Ltd. (supra), which has been affirmed by Hon'ble Supreme Court as reported in 2018 (10) G.S.T.L. 401 (S.C.), wherein it is held that under provision of Section 67(1) of the Act only service element has to be included for gross amount of "such services". The relevant portion of the judgment is extracted as under :*
>
> *"18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in*

consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427 :-

"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act.

Thus Section 94(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

***9.** In view of above, the contributions made towards EPF and ESI are not liable to be included for the computation of gross amount under Section 67(1) of the Act. We also find that the similar issue had been come up for consideration before this Tribunal in case of Young Brothers Transporters and Contractors v. CCE, Meerut-I - 2017 (6) G.S.T.L. 513 (Tri. - Del.), wherein it is held that employer contribution towards PF, EPF, ESI into Central Govt. account is not required to be included for the purpose of a computation of gross amount for discharge of service tax liability. Paragraph 6 of the order, which is the relevant paragraph, is reproduced as under :*

"6. The Employees Provident Fund & Miscellaneous Provisions Act, 1952 and the Employees State Insurance Act, 1948 created the liability upon the principal employer to contribute to the respective funds, an amount equal to employees contribution. Thus, in compliance of the said provisions, the service receiver M/s. HNGIL had contributed to such funds, the amount towards the workmen deployed by the appellant. The fact is not under dispute that such contributed amount was never given by such service receiver to the appellant. Thus, the gross value for the computation of service tax liability in the hands of the appellant will not take into consideration the amount of contribution made by the service receiver M/s. HNGIL directly into the respective heads of account. Therefore, in our considered view, service tax demand cannot be confirmed on the employer's contributed amount towards P.F., E.P.F. and E.S.I.

In this order earlier decision of Tribunal in case of Neelav Jaiswal and Brothers v. Commissioner of Central Excise, Allahabad - 2014 (34) S.T.R. 225 (Tri. - Del.) was also considered, which is referred in the impugned order. In this regard, we also find that the Hon'ble Allahabad High Court in the case of Ehardwez Security Services v. Union of India - in Civil Writ Petition No. 437 of 1998 held that the respondent shall be entitled to charge service tax on the gross except after giving the abatement in *respect of statutory levy and the taxes and if the same has direct relation with the services rendered by the client and charged specifically in the bill.*

10. *As far as the abatement towards deduction of wages and salaries paid to the personal employees by the appellant is concerned, the same is covered by the decision of Mumbai Bench of this Tribunal in case of Security Guards Boards for Greater Bom. & Thane Dist. v. CCE, Thane-II - 2017 (51) S.T.R. 51 (Tri. - Mum.), wherein it is held that wages and allowance including salary and administrative charge collected from client is excludible from the gross value of taxable service in terms of Section 67 of the Act. The relevant paragraph of order is reproduced hereinafter :*

"4.1 Further, under section 6 of the Maharashtra Private Security Guards (Regulation of Employment & Welfare) Act, 1981, following has been provided :-

"31. Disbursement of wages and other allowances to registered Security Guards of the Board. *- The wage and other allowances payable to the registered Security Guards of the Board every month by the registered principal employer shall be remitted by the registered principal employers by cheque to Secretary, of the Board, within such time after the end of the month, as may be specified by the Board. The Secretary thereupon shall arrange to disburse the wages and other dues, if any to the registered Security Guards of the Board on specified days every month subject to deductions, if any, recoverable from them under the Scheme :*

Provided that the Board may, if it thinks fit, and subject to such conditions as may be laid down by it, allow a registered principal employer to pay directly to the Security Guards the wages and other allowances after making such deductions as may be authorized and recoverable from them under the Scheme, within such time and in such manner as may be specified by the Board."

From the above clause, it is apparent that the wages and allowances are collected by the Board as an Agency for payment to the concerned

> *persons/authorities. Therefore, the wages and allowances are excludible from the value of service tax. Thus, the taxable value for the purpose of levy needs to exclude these charges. The demand is modified to that extent."*
>
> ***11.*** *We, accordingly, hold that the appellant is entitled for the abatement towards the payment made on account of contribution towards ESI, EPF and PF and also towards wages and salaries while computing the assessable value in terms of Section 67 of the Act for the payment of service tax.*

11. We find that the above decision of the CESTAT considers all the relevant items under discussion in the impugned order and therefore, we find that the Tribunal has decided the issue in favour of the appellants in principle. The Department relies on the decision in the case of *Wisdom Guards* (supra) and *Bombay Intelligence Security (India) Limited* (supra). However, we find that it is not the case of the Department that the appellant is separately recovering the charges towards wages, EPF, ESI etc. and that the same are not reimbursable deductions. We find that though the agreement is on the basis of per-kilometer per-person provided by the appellants to M/s PRTC, it is the PRTC who have also indicated the wages, PF etc. to be paid by the appellants. Notwithstanding the fact that the contract or the offer letter issued by PRTC does not indicate the wages etc. separately, the circular issued by them indicates the same. It is not the claim of the Department that such wages, PF etc. are not paid by the appellants or not paid in full by the appellants. Therefore, we are of the considered opinion that they are in the nature of the reimbursable expenses and cannot be termed to be expenditure incurred by the appellants in the course of provision of the service. Moreover, going by the latest

decision of the Tribunal in the case of *M.P. Security Force* (supra), we find that wages, EPF, ESI etc. cannot be included for the purpose of arriving at the value of taxable service for the purpose of Service Tax Valuation Rules.

12. The Department submits that, although, the appellants have registered themselves on 05.11.2004, the appellants have not submitted ST-3 Returns periodically and have not paid applicable service tax and for that reason, extended period is correctly invoked. We find that vide a catena of judgments including that of *M/s Pushpam Pharmaceuticals- 1995 (78) ELT 401 (SC)*, it was held that mere non-obtaining of registration; non-filing of returns and non-payment of service tax does not constitute a "suppression" with intent to evade service tax in order that extended period is liable to be invoked; there should be a positive act on the part of the assessee to show that there is such suppression or mis-statement etc. with intent to evade service tax. In the instant case, the Department has not adduced any evidence to this effect other than bare averment that extended period is invokable. Therefore, in view of the judgments cited above, we are of the considered opinion that in the facts of the impugned case, extended period cannot be invoked and the appellants succeed on limitation also.

13. The appellants contended that they are not a "Commercial Concern" during the period 01.04.2006 to 30.04.2006. The Department submits that as held, by the Tribunal in the case of *Liberty Sales- 2008 (11) STR 401 (Tri. Delhi)*, propriety firm doing

commercial activity merits to be treated as "Commercial Concern". However, this issue pertains to only a small period and as the appellants succeed both on merits and limitation, any discussion on this count is redundant.

14. In the result, we set aside the impugned order and allow the appeal.

(Pronounced on 21/08/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK