IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

ST/15/2008

(Arising out of Order-in-Original No. 124/2007 dated 2.11.2007 passed by the Commissioner of Service Tax, Chennai)

M/s. Best & Co. Appellant

Vs.

Commissioner of Service Tax, Chennai Respondent

Appearance

Shri A.R. Madhav Rao, Advocate for the Appellant
Shri K.P. Muralidharan, AC (AR) for the Respondent

CORAM

Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Madhu Mohan Damodhar, Technical Member

Date of Hearing / Decision: **10.03.2017**

Final Order No. 40490/2017

Per D.N. Panda

It is submission of the learned counsel that the demand for the period 1.7.2003 to 31.3.2006 made under Finance Act, 1994 is to bring the appellant to the fold of business auxiliary service provider. Revenue's contention in the adjudication is that it should squarely fall under the purview of section 65(19) of the Finance Act, 1994. He says that such a contention can be appreciated only after 16.5.2008 but not prior to that. The *E*xplanation added to section 65(19) with effect from

16.5.2008 having been held to be declaratory in nature, fastening the liability, that shall be read as prospective in nature without being retrospective as has been held by the Apex Court in the case of Union of India Vs. Martin Lottery Agencies Ltd. reported in (2009) 12 SCC 209. Therefore, the adjudication fails to sustain in view of para 12 and 13 of the judgment which are extracted below:-

> "12. After the special leave petition was filed in this Court, Parliament by the Finance Act, 2008 inserted an Explanation in sub-clause (ii) of section 65(19), which came into force on or about 16.5.2008 and reads as under:-
>
> Explanation – for the removal of doubts, it is hereby declared that for the purposes of this sub-clause, 'service in relation to promotion or marketing of service provided by the client' includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo".
>
> xxxx xxxx xxxx xxxx
>
> 14. The core question which arises for our consideration is as to whether the Explanation appended to sub-clause (ii) of section 65(19) is clarificatory or declaratory in nature so as to be construed having retrospective effect and retroactive operation. Sub-clause (i) of clause (19) of section 65 of the Act refers to "goods". What would come within the purview of the definition of "goods" must be construed having regard to the provisions of the Sale of Goods Act, 1930 in view of its definition contained in section 65(50) of the Act. This takes us to another question as regards the source of power of the State to conduct a business. Conduct of business by a State is permissible, inter alia, in terms of Article 298 of the Constitution of India. If it is not otherwise prohibited, the State in exercise of its executive power contained in Article 162 of the Constitution of India may also have the power to conduct a trade or business.
>
> [Emphasis supplied]

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2. It is further submitted by learned counsel that a substantive law can be introduced by an Explanation but still then that has no retrospective effect. Accordingly, the Court in para 50 and 51 of the judgment held that service tax is to be payable with effect from May 2008 but not prior to that. For convenience of reading, those two paragraphs are extracted hereunder:-

> "50. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. The notice issued to the assessee by the appellant has, thus, rightly been held to be liable to be set aside.
>
> 51. Subject to the constitutionality of the Act, in view of the Explanation appended to this [sic Section 65(19)(ii) of the Finance Act, 1994], we are of the opinion that the service tax, if any, would be payable only with effect from May 2008 and not with retrospective effect. In a case of this nature, the Court must be satisfied that Parliament did not intend to introduce a substantive change in the law"
>
> [Emphasis supplied]

3. To the above proposition of law, learned AR says that they are not only providing Service of selling of lottery tickets to State of Nagaland and Manipur but also various other activities as have been enumerated in the adjudication order like issuing invoice, settling the accounts and collecting the money etc, as is apparent from para 14 thereof. Therefore, the alleged activity brings the appellant to the fold of business auxiliary service.

4. Heard both sides and perused the records.

5. We would have agreed with learned AR had the case been a case of provision of lottery service provided after 16.5.2008 because from that date, any service provided in relation to promotion or marketing of lottery tickets etc. has been made taxable. But that is not the case in the present appeal. This appeal relates to prior period. Accordingly, following the Apex Court judgment in Martin Lottery's case (supra), the appeal is allowed.

(Dictated and pronounced in open court)

16/03/2017

(MADHU MOHAN DAMODHAR)
Technical Member

14.3.2017

(D.N. PANDA)
Judicial Member

Rex

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चेन्नै/Chennai