CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51952 of 2022 [SM]

[Arising out of Order-in-Appeal No. 35(SM)ST/JDR/2022 dated 12.05.2022 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Smt. Reshma Joshi **...Appellant**
A-1, Vinayak Villa Apartment,
Behind Celebration Mall,
Udaipur (Raj.) - 313001

VERSUS

Commissioner of Central Excise
& CGST, Udaipur **...Respondent**
142-B, Hiran Magri, Sector-11,
Udaipur (Raj.) - 313001

APPEARANCE:

Ms. Jwaria Kainaat, Advocate for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 14.12.2022
DATE OF DECISION: 14.12.2022

FINAL ORDER No. 51221/2022

DR. RACHNA GUPTA

Present appeal has been filed assailing the Order-in-Appeal No. 35/2022 dated 12.05.2022, vide which the demand of service tax amounting to Rs.9,09,689/- as was confirmed vide Order-in-Original No. 64/2021 dated 28.07.2021 has been upheld and invocation of extended period while issuing the Show Cause Notice dated 28.12.2020 was held justified.

2. The facts in brief are that the appellant admittedly was providing the taxable service as that of "Business Auxiliary Service" on commission basis who had collected huge amount from various

persons/companies/organizations etc. during the period from 01.10.2014 to 30.06.2017, however, has not discharged the service tax liability thereupon. With these allegations, the service tax amounting to Rs.9,09,689/- along with the interest and the penalty was proposed to be recovered from the appellant. Proposal has been confirmed by both the adjudicating authorities below.

3. I have heard Ms. Jwaria Kainaat, learned Advocate for the appellant and Ms. Tamanna Alam, learned Authorized Representative for the department.

4. Learned counsel for the appellant has mentioned that the order under challenge is not contested on merits as the law as such stands settled that any amount received as a commission will be an amount as against providing service as that of "Business Auxiliary Service", whereupon service tax payment is the liability of the service tax provider. Learned Counsel, however, has challenged the confirmation of demand on the ground that there has been no reason for invoking the extended period of limitation. Mere failure to supply the information is wrongly considered as a ground of such suppression which entitles the department to issue notice even beyond the normal period of one year. It is mentioned that the show cause notice in the present case has raised a demand for the period from 2014 to 2017 but was issued in the year 2020. The demand as confirmed is therefore liable to be set aside on the ground of limitation itself. Order accordingly prayed to be dismissed and appeal is prayed to be allowed.

5. Per contra learned DR has laid emphasis upon the findings in Para 7.3 of the order under challenge wherein the Commissioner (Appeals) has discussed the issue of invocation of extended period. The act of the appellant for never disclosing the department about providing the taxable service has rightly been considered as suppression with an intent payment of service tax. As such there is no infirmity in the order under challenge. Accordingly, Appeal is prayed to be dismissed.

6. Having heard the rival contentions, perusing the entire records. It is observed and held as follows:

6.1 It is an admitted case of the appellant that the appellant did not get itself registered under Service Tax Commissionerate during the period in question while providing the impugned "Business Auxiliary Services" on commission basis. It has also been acknowledged while making submissions that the issue of services in question being taxable is no more *res integra.* I also rely upon the decision of this Tribunal in the case of **Ved Automotives Vs. Commissioner of Central Excise, Kanpur reported as 2016 (44) S.T.R. 140 (Tri.-All.),** wherein a reference has been answered holding that the activity of direct selling agent on commission basis is a "Business Auxiliary Service" which is taxable under Section 65 (19) of the Finance Act, 1994.

7. Coming to the aspect of as to whether the demand should not have been confirmed as the Show Cause Notice was issued beyond the normal period of limitation. It is observed that department can issue a show cause notice beyond the prescribed period of one year

from the period under question only in accordance of the proviso to Section 73 of the Finance Act, 1994. The provision reads as follows:

> *PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-*
>
> *(a) fraud; or*
>
> *(b) collusion; or*
>
> *(c) wilful mis-statement; or*
>
> *(d) suppression of facts; or*
>
> *(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*
>
> *by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [eighteen months] , the words "five years" had been substituted.*

8. Perusal makes it abundantly clear that recovery may be called for by the Central Excise Office within a period of 30 months from the period challenged. However, where there is suppression of any fact for the reason of fraud or collusion or any willful misstatement with an intent to evade duty, the department is entitled to invoke the extended period. No doubt mere non-disclosure of fact will not be such suppression as may entitle the department to invoke this provision except where there is an intent to evade the duty. From the above observed admission of the appellant, it is clear that appellant was not paying the service tax to the department despite providing the taxable service. It is also nowhere denied that even the service tax registration was not obtained. I also observe that no reply to the show cause notice was served till a letter dated

12.07.2021 was sent to the original adjudicating authority. However, the perusal thereof shows that the appellants have specifically conveyed about unawareness for their liability of service tax towards the amount being collected by them on commission basis. It is for that reason that the registration under service tax law was also not obtained. Even invoices were not issued to the recipients. The amount received was shown in Income Tax Returns. These facts are sufficient to hold that appellants were under *bona fide* belief that the amount of commission received by them is their income instead of it being their service tax liability. They have thus not charged any service tax, as admittedly was not mentioned as service tax in the invoices.

9. Hence, there remains no case of *mala fide* intent to evade service tax on part of the appellants. In such case, I opine, that the proviso to Section 73 of the Finance Act cannot be invoked. I draw my support from the decision of Hon'ble Supreme Court in the case of **Continental Foundation Jt. Venture Vs. Commr. Of C. Ex. Chandigarh-I reported as 2007 (216) E.L.T. 177 (S.C.),** wherein it has been held that the expression 'suppression' as has been used in the proviso to Section 73(1) of the Finance Act, 1994 is accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it

suppression. When the Revenue invokes the extended period of limitation under Section 73(1) of the Finance Act, 1994 the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of any incorrect statement with the knowledge that the statement was not correct. Though the proviso to Section 73(1) of the Finance Act, 1994 carves out an exception and permits the authority to exercise their power recovery within 5 years from the relevant date in the circumstances in the proviso, one of it being suppression of facts.

10. I also rely upon the decision of Hon'ble Supreme Court in the case of **Pushpam Pharmaceuticals Company Vs. Collector of C.Ex., Bombay reported as 1995 (78) E.L.T. 401 (S.C.),** wherein it has been held that the meaning of the word 'suppression' both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

11. I also draw my support from the decision of the Hon'ble Supreme Court in the case of **Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay reported as 1995 (75) E.L.T. 721 (S.C).** It reads as follows:

> *"6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground" for the purpose of the provision for invoking extended period of limitation. It was clarified that for going beyond the normal period of limitation while issuing show cause notice, mis-statement or suppression of fact must be wilful."*

12. It is also observed that the present show cause notice was issued based upon the information received from the Income Tax Department. It becomes clear that the amount received by the appellant during the period under challenge was taken as the income of the appellant and accordingly, the income tax liability thereupon was being discharged by the appellant. The circumstances are sufficient for me to hold that there was no intent on the part of the appellant to evade the liability. It is also apparent from the decision of **Ved Automotives (supra)** that till the year 2016 there was a confusion about receiving commissions

on various activities pertaining to promotion and marketing. In the said case, accordingly, it was held that there was existing an interpretational issue as to the liability to service tax in such cases. Accordingly, the service tax on such activities after considering them a taxable service of "Business Auxiliary Service" was confirmed but only for the normal period. The period in question is also the intervening period of the said decision. Hence, I have no reason to differ there from. Accordingly, it is held that the intent to evade the duty has wrongly been confirmed against the appellant. The non-payment of service tax was purely a *bona fide* unawarenss about the liability. In such circumstances the extended period could not have been invoked. The order under challenge though has dealt with the amount which was service tax liability of the appellant but the demand was not raised during the statutory period prescribed for raising the same. As held above, there was no reason to invoke the extended period of limitation. It is held that demand has been time barred and thus has wrongly been confirmed by Commissioner (Appeals).

13. Accordingly, order under challenge is hereby set aside. Consequent thereto, appeal stands allowed.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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