

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/341 /2007 - CU[DB]

Date 09/03/2011

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
IDEAL SECURITY SERVICES (P) LTD.
4, STRACHEY ROAD, CIVIL LINES, ALLAHABAD,
U.P.
211001

IDEAL SECURITY SERVICES (P) LTD.

Appellant

C.C.E ALLAHABAD

Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/81/ 2011 CU[DB]** dated 03.03.11
passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**


Assistant Registrar

(Customs Appeal Branch)

Copy to :

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4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
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Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file


Assistant Registrar

(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Date of Hearing: 03.2.2011

Service Tax Appeal No.ST/341/2007

[Arising out of Order-in Appeal No.9/ST/ALLD/2007 dated 22.3.2007 passed by the Commissioner (Appeals), Allahabad].

Ideal Security ...Appellant

Vs.

CCE, Allahabad ...Respondent

Present for the Appellant: Shri B.L. Narasimhan, Advocate
Present for the Respondent: Shri Amrish Jain, SDR

**Coram: HON'BLE MR.D.N.PANDA, JUDICIAL MEMBER
HON'BLE MR. MATHEW JOHN, TECHNICAL MEMBER**

Final ORDER NO. ST/341/4 DATED: 03.02.2011

PER: D.N.PANDA

Ld. Counsel submits that at the initial stage of introduction of law for levy of service tax under Finance Act 1994 in respect of security services, there were several confusions about the gross value of the service to become measure of value for payment of service tax. Only because of the confusion there was a discrepancy between the return and the profit and loss account. While Revenue's claim is that entire value of payments received from the consumer of

service shall be taxable, the appellant pleads bonafide belief that statutory payments like ESI, PF etc. received, not being consideration for the services, shall not be taxable. Similarly they plead that the profit earned on the activity shall not be taxable, so also certain other expenses. According to the appellant with the bonafide conception the appellant submitted the return and disclosed the receipts. There was no suppression of fact made by them in respect of the payment received, as it was furnished to the authorities in the course of adjudication. Only because the discrepancy was noticed by the department by comparing ST3 return with the profit and loss account, the adjudication was made. The appellant pleads that because of the bonafide belief they did not disclose the total receipts. It is also normal understanding that certain elements of recovery in respect of security services shall not form part of gross value on taxable service. Therefore, the appellant prays that the adjudication can not sustain both on limitation as well as on merit.

2. Ld. Counsel also prays that penalty should not be imposed on the appellant for the bonafide belief it had, at the early stage of implementation of law.

3. Per contra, Id. DR for the Revenue submits that there is nothing for debate on the value of services. Tribunal has already decided the case of Naresh Kumar and Co. Pvt. Ltd.

vs. CST, Calcutta reported in 2008 TIOL-1016-CESTAT and held that gross receipt shall be taxable although it was held that certain items like payment towards ESI etc. will not form part of the value. Following that decision, Tribunal had also occasion to deal with the case of CCE, Chandigarh vs. M/s. Team S & S reported in 2011 TIOL 33- CESTAT-DEL. Therefore, the valuation aspect is not open for further argument in the present appeal.

4. So far as the limitation aspect is concerned, Id. DR submits that when the appellant failed to provide entire detail to the Department and brought a discrepancy by its own documents namely profit and loss account and ST3 return, the proceeding was initiated well within the time and the action is not time barred.

5. So far as penalties are concerned the Id. D.R. argues that for the finding of suppression, the appellant was bound to face the consequence of penalty under different provisions of law.

6. Heard both sides and perused the record.

7. When we look into para 7 of the appellate order, we are able to confirm that there was difference in two sets of documents that were relied upon by the appellant. One such

document was ST 3 return and the second one is its own balance sheet and profit and loss account. The authority recorded that the appellant failed to explain the difference. Therefore, the disclosure being found to be faulty, adjudication was completed on the basis of figures appearing in its financial statements. The authority did not give any concession on the statutory dues. It comes out from para 8 & 9 of the appellate order at page 10.

8. So far as the contention of the appellant in respect of time bar issue and also adjudication under section 73 is concerned, the appellate authority dealt with the issue in para 10 and he found that one of the element like suppression, which is essential ingredient in section 73 is present. Therefore, he held that the proceeding was well within time. When he found all these aspects, he made the appellant liable to pay penalty also. He did not give any concession in respect of penalty.

9. We do agree with the Id. Appellate Authority in the matter of the discrepancy noticed by him in respect of the considerations received and appearing in different manner in two different statutory documents. While the ST 3 return was statutory document under Finance Act 1994, the balance-sheet and profit and loss account ~~was~~^{were} statutory documents under Companies Act 1956. Therefore, when the public

documents bring the discrepancy, the onus of proof was on the assessee to come ^{out} with clean hand ^{to prove its hand.} When we did not find any merit on the part of appellant, we agree with Id. appellate authority that invoking section 73 is appropriate. So far as the valuation aspect is concerned, whether the statutory dues which form part of gross value of the service shall be included or excluded is not a prescription of law. But the consideration that shall contribute to render the services shall essentially form part of the gross value of the taxable service. Tribunal had occasion to deal with this matter in elaborate detail in para 5 to 8 of its order in the case of CCE Chandigarh vs. TEAM S & S. For convenience, we reproduce it as under:-

"5. The basic principle that service tax being destination based consumption tax, till the service reaches its destination, that contributes to the proposition that all expenses incurred till that point and time become essential consideration of cost of service. Agreement of parties in respect of modality of payment of valuable consideration towards service provided does not matter for Revenue. In whatever manner the recipient and provider of taxable service arrange their affairs for their benefit or mutuality to deal with consideration that is also immaterial to Revenue. Service Valuation Rule of 1994 contributes to the above fiscal philosophy and the destination based consumption tax submit for taxation on the gross value of taxable service which is measure of taxation. The gross value takes into its fold entire cost of service enabling that to be performable. Therefore, by no stretch of imagination neither the

arrangements of the parties nor their mutuality or nomenclature or format of their agreement and mode of discharge of consideration shall prevail on the law relating to service tax. Legislature accordingly intend that the gross value of the service shall be the measure of value for taxation whether paid as consideration directly or by reimbursement of expenses relating to providing of taxable service.

6. *The philosophy of service tax law has been described by Apex Court in para 6,7,8 of **All India Federation of Tax Practitioners vs. Union of India** reported in **2007 – TIOL – 149 – SC – ST** in following terms :-*

"6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.

8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property based services and performance based services.

Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc.. Performance based services are services provided by service providers like stock-brokers, practicing chartered accountants, practicing cost accountants, security agencies, tour operators, event managers, travel agents etc.."

7. The nature and character of service tax has also been explained by Apex Court in para 22 of the judgment **Association of Leasing & Financial Service Companies vs. Union of India and others** reported in **2010 - TIOL - 87 - SC - ST - LB**.

"22. In All India Federation of Tax Practitioners' case (supra), this Court explained the concept of service tax and held that service tax is a Value Added Tax ('VAT' for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of service are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the

*concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65 (105) (zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted. The same view is reiterated broadly in the earlier judgment of this Court in Godfrey Phillips India Ltd. v. State of U.P. [(2005 (2) SCC 515] = **(2005-TIOL-10-SC-LT-CB)** in which a Constitution Bench observed that in the classical sense a tax is composed of two elements : the person, thing or activity on which tax is imposed. Thus, every tax may be levied on an object or on the event of taxation. Service tax is, thus, a tax on activity whereas sales tax is a tax on sale of a thing or goods. Law as it stood before the Constitution (Forty-Sixth Amendment) Act, 1982:"*

8. When logic of service tax incidence call for taxation of service on the gross value of taxable service and there is no specific deduction allowed under statutory provisions to diminish the value of

taxable consideration of taxable service, in absence of such provision in law, learned Commissioner (Appeals) committed error of law to exclude the expenses reimbursed by the service recipient to service provider from the purview of taxation. We are fully in agreement with learned DR to follow the decision made by the Division Bench of Tribunal in the case of Naresh Kumar & Co. Pvt. Ltd. vs. CST, Kolkata (supra). Our view aforesaid is fortified by the ratio laid down in para 6.10 of the said judgment to allow the appeal of revenue. Accordingly, we allow the appeal of revenue setting aside the first Appellate order and restoring the order-in-original."

10. When there is no prescription of law in respect of the statutory liabilities of the service provider, we are handicapped to provide any sort of relief to the appellant in the matter of EPF and ESI contribution received and forming part of the gross value of the service provided.

11. When we held that proceeding under section 73 was appropriate penal consequence under different provisions of law arise. The Adjudication order had directed penalty under section 76, 77 and 78 of the Finance Act 1994. So far as section 76 and 78 is concerned, looking at the lack of clarity experienced by the assessee at the initial stage of implementation of law, we are of the view that levy of penalty under section 78 would be appropriate to the extend permissible under the law, in view of the concessional

provision existing in the statute book. We are guided by the judgement of the Hon'ble High Court of Delhi that to remove hardship of the assessee and obviate the confusion that arises, the Court was of the view that the assessee who come forward to comply with law should get the opportunity to exercise the option in respect of concessional penalty under section 11 AC of the Act. Therefore there is nothing wrong to extend the benefit that has been granted by the judgement of Hon'ble High Court of Delhi in the case of K.P. Pouches reported in 2008(228) ELT 31 (Del.) in terms of para 27 which reads as under:-

27. *To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself.*

12. Similar is also the view of Hon'ble High Court of Punjab & Haryana in the case of CCE Chandigarh vs. Bajaj decided on 9.12.2010.

13. In view of the statutory provisions as well as judicial pronouncements, it would be proper for the appellant to get an opportunity to exercise the option to comply with the law, making payment of the demand that shall arise ⁱⁿ consequence of this order within the statutory period so that the appellant may get concession of limiting the penalty to 25% of the tax. The authority shall examine these aspects and pass proper order, if there is penalty.

14. So far as the penalty under section 77 is concerned, we do not consider it proper to grant any immunity to the appellant because in para 7 at page 9, the authority noticed that the appellant never submitted the ST3 return in time. Therefore, the penalty imposed under section 77 is confirmed. So far as the penalty imposed again under Rule 77 for non-furnishing the documents is concerned, there appears no reason recorded by the appellate authority to confirm the order on such aspect. Therefore, the appellant gets relief for the order not being a speaking order for imposition of penalty of Rs.10,000/-. Section 78 expressly provides that once penalty under section 78 is imposed no penalty shall be leviable under section 76. So penalty under section 76 is waived.

15. In the result, the appeal is dismissed except granting relief partly under section 78 subject to condition therein and

complete waiver of penalty under section 76 of the Finance Act 1994. We make it clear that the interest liability that shall arise shall follow.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

(MATHEW JOHN)
TECHNICAL MEMBER

Anita