IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 03/01/2017.
DATE OF DECISION : 31/03/2017.

Service Tax Appeal No. 3508 of 2012

[Arising out of the Order-in-Appeal No. 179/BPL/2012 dated 11/13.09.2012 passed by The Commissioner (Appeals), Central Excise, Bhopal.]

CCE & ST, Bhopal — Appellant

Versus

M/s Jain Caterers — Respondent

Appearance

Shri Ranjan Khanna, Authorized Representative (DR) – for the appellant.

None – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 52669/2017 Dated : 31/03/2017

Per. S.K. Mohanty :-

The Revenue is in appeal against order dated 13/09/2012 of Commissioner (Appeals), Bhopal. The brief facts of the case are that the respondent are engaged in providing taxable service under the category of outdoor catering covered by the provisions of Section 65 (76a) readwith Section 65 (24) and 65 (105) (zzt) of the Finance Act, 1994. Proceedings were initiated against the respondent for non-payment of service tax for the period 2005-2006 to 2009-2010 (upto September 2009) by way of show cause notice dated 05/08/2010. the case was adjudicated by the Original Authority confirming a service tax liability of Rs. 34,19,170/-. Penalty equal to the tax amount, under Section 78 and further penalties under Sections 77 and 70 were also imposed. On appeal, vide the impugned order, the Commissioner (Appeals) held that the demand for extended period is not sustainable. He restricted the demand of service tax to the period August 2009 and September 2009, to an amount of Rs. 1,31,362/-. He accordingly reduced the penalty under Section 78. The penalties imposed under Section 77 was reduced to Rs. 1,000/- only.

2. The Revenue contested the impugned order on the ground that the demand for extended period is legally sustainable and the penalties imposed under Section 77 by Original Authority were also to be upheld. The learned AR, elaborating the grounds of appeal, submitted that the respondent did not cooperate with the Department; did not file periodical statutory returns and deliberately avoided paying service tax. They have also collected service tax over and above service charges from their clients. The Commissioner (Appeals) erred in dropping the demand for extended period without appreciating the facts of the case.

3. None appeared on behalf of the respondent in spite of due notice. Accordingly, we proceed to decide the case based on the submissions made by the learned AR and the appeal records.

4. On the first issue regarding sustainability of demand for service tax for the extended period in terms of proviso to Section 73 (1) of the Act, we note that the impugned order examined the issue in detail. We also note that after enquiry about non-payment of service tax, earlier also proceedings were initiated against the respondent by way of show cause notice dated 18/05/2007 covering the period 10/09/2004 to 31/10/2006. The proceedings concluded by an order dated 08/10/2007. The present proceedings covered period 2005-2006 to 2009-2010 (upto September 2009) by issue of second show cause notice dated 05/08/2010. The impugned order recorded the following observation :-

> "I have perused the show cause notice dated 18/05/2007 and also the Order-in-Original dated 08/10/2007 and find that earlier STTF Wing of the department had initiated the enquiry/investigation against the appellant and in pursuance to this the appellant was issued summon dated 27/11/2006 for appearance and production viz. copy of all bills raised to customers since 10/09/2004, month wise details of payment received from customers, copies of contract/agreement and balance sheet for the year 2004-2005 and 2005-2006. I also find that the appellant had provided all these documents, which is evident from para 5 of the show cause notice dated 18/05/2007, which read as under :-

"….. Shri Sourabh Jain, Proprietor of the Noticee appeared on 27/11/2006 and his statement was recorded under Section 14 of the Central Excise Act, 1944 wherein he has stated that his firm has provided out door caterer's services to M/s BMHRC, M/s Reserve Bank of India, RCVP NOROHNA Academy of Administration, Bhopal. He further, stated that he has neither applied for service tax registration nor paid service tax, because he was in belief that the services provided to hospital are exempted from service tax by a notification. Later vide their letter dated 30/11/2006 they provided the details of bills raised and amount collected from their clients during the period March 2006 to October 2006 and copies of profit and loss account & balance sheet of his firm".

Based on the above documents/information the department has raised a demand of service tax for the period March 2006 to October 2006, amounting to Rs. 1,61,801/- which also paid by the appellant, I find that in the present matter under consideration demand related to the year 2005-2006, 2006-2007, 2007-2008, 2008-2009 and 2009-2010 (upto September 2009), however, since the appellant had produced all desired documents earlier and on the basis of these documents demand for period upto October, 2006 was already raised through show cause notice dated 18/05/2007, hence demand in the present subsequent for same period is repetition of demand, which cannot be permitted. Accordingly, such demand for period upto October 2006, is not sustainable and liable to be set aside.

5.2 The appellants yet another argument is that since their activity about provision of service was in the knowledge of the department which is evident from the earlier show cause notice dated 18/05/2007, which was also adjudicated by an order-in-original dated 08/10/2007, subsequently show cause notice for recovery of service tax cannot be issued by invoking extended period of limitation. Since, the subsequent show cause notice dated 05/08/2010 which is under consideration, has been issued by invoking extended period, the same is barred by limitation. In this context I find that during earlier enquiry, in his statement recorded on 27/11/2006 had categorically stated that he has provided outdoor caterer's services to M/s BMHRC, M/s Reserve Bank of India & RCVP Norohna and based on details of bills and profit and loss account/balance sheet submitted by the appellant demand of service was raised. It is therefore, evident that the department was aware about taxable service (Outdoor Caterer's Service) being provided by the appellant. In other words the department had knowledge about the activity of the appellant. …….. I also find that it has been a consistent view of court and Tribunal in various decisions that if department had issued show cause notice earlier, another show cause notice in respect of same subject matter cannot be issued invoking extended period of limitation".

5. The Commissioner (Appeals) relied on various decisions of the Hon'ble Supreme Court. We note that the reliance placed on the decisions in **Nizam Sugar Factory vs. CCE** reported in **2006 (197) E.L.T. 465 (S.C.)** is appropriate and relevant. In the said case, the Hon'ble Supreme Court held that while issuing second and third show cause notices based on same/similar facts, the allegation of suppression of fact on the part of the assessee cannot be invoked as the material facts are already in the knowledge of the authorities. The Revenue contended that the respondent failed to take timely registration and also did not

file the periodical returns. Hence, the details were collected for issue second show cause notice. We are not in agreement with the contention of the Revenue on the legal position. As recorded in the impugned order, an investigation was conducted against the respondent by calling for details of contract, agreement, balance sheet etc. which resulted in the issue of first show cause notice. The material facts, of the nature of service rendered by the appellant, the tax liability on such services were all in the knowledge of the Department. Timely follow up was not done for subsequent periods and that cannot be the basis for issuing another demand invoking suppression of fact etc. Following the ratio laid down by the Hon'ble Supreme Court in **Nizam Sugar Factory** (supra), we find that the decision of the Commissioner (Appeals) on this issue cannot be assailed. However, we note that the observation of the Commissioner (Appeals) regarding imposition of penalty under Section 78 may be contrary to the finding with reference to extended period of demand. Since, there is no appeal by the respondent against the impugned order, we are not making any further observation on the correctness of the penalty under Section 78.

6. Regarding penalties imposed under Section 77 we note that the impugned order reduced the same to Rs. 1,000/-. It was recorded that the show cause notice never proposed imposition of penalty under various sub-section/sub-clauses of Section 77 and the Original Authority traveled beyond the scope of show cause notice in imposing various penalties under the said section.

Accordingly, the impugned order reduced the penalty to Rs. 1,000/- for non-registration by the respondent. We find no legal infirmity in the findings recorded in the impugned order.

7. In view of the above discussion and analysis, we find no merit in the appeal by the Revenue and accordingly the same is dismissed.

(Order pronounced in open court on 31/03/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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