CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing: 14.06.2017

Appeal No. ST/834 & 823/2011-CU[DB]

[Arising out of the Order-in-Original No. 01/2011/ST/JPR-II/Comm dated 28.02.2011, passed by the Commissioner of Central Excise, Jaipur]

M/s. Chetak Travelling Agency
CCE Jaipur-II … Appellant

Vs.

CCE Jaipur-II
M/s. Chetak Travelling Agency … Respondent

Appearance:

Present Ms. Rinki Arora, Advocate for the appellant
Present Shri Sanjay Jain, DR for the respondent

Coram: Hon'ble Mr. D.N. Panda, Member (Judicial)
Hon'ble Mr. Ashok K. Arya, Member (Technical)

FINAL ORDER No.54098-54099/2017

Per D.N. Panda:

In these two appeals while assessee is in appeal against the service tax demand of Rs.21,70,985/- for the period from 18.04.2006 to 31.05.2007 and similar such demand of Rs. 20,68,051/- for the period June 2007 to March 2009 followed by interest and penalty, revenue is in appeal against the abatement granted by adjudicating authority to the assessee. Revenue is also against the decision of the Authority below on the point of dropping of the demand for the period from July 2004 to 17.04.2006.

2. So far as the period July 2004 to May 2007 is concerned the receipts from provision of taxable service were as stipulated

in the Table under para 13 of the adjudication order as under and the said table shows that the appellant collected tax from service recipient but did not deposit the same into the treasury:

(Amount in Rs.)

Sr. No.	Name of the Service recipient	Gross amount involved	Service tax collected	Education cess collected	Secondary Higher Education cess collected	Total Tax collected
1	M/s. Secure Meters Ltd. Udaipur	11689916	576662	11537	5766	59396
2	M/S. Hindustan Zinc Ltd. Chanderiya Lead Zinc Smelter, Putholi, Chittorgarh	29828947	3579471	71588	34157	685216
		4,15,18,863	**41,56,133**	**83,125**	**39,923**	**42,79,181**

3. Appellant rented its vehicles to the following concerns during the period 01.06.2007 to 31.03.2009 as is depicted by ld. Adjudicating authority in the Table at para 14 of the adjudication order dated 20.08.2011 as under but taxes realized from the recipient of service was not deposited into the treasury:

(Amount in Rs.)

Sr. No.	Name of the Service recipient	Gross amount involved	Service tax collected	Education cess collected	Secondary Higher Education cess collected	Total Tax collected
1	M/s. Secure Meters Ltd. Udaipur	2985202	143111	2866	572	146549
2	M/S. Hindustan Zinc Ltd. Chanderiya Lead Zinc Smelter, Putholi, Chittorgarh	298580856	3188601	60886	0	3249487
3	M.s, Hindustan Zinc,	7044207	308587	6153	0	314740

	Rampur, Agucha, Bhilwara					
4	M/s. Hindustan Zinc Ltd. Debari	5855760	295321	0	0	295321
		4,54,66,025	**39,35,620**	**69,905**	**572**	**40,06,097**

4. The assessee submits that Revenue alleged that in so far as the receipts in table at para 13 is concerned, the receipt pertaining to the period June 2007 to 09.05.2008 was not taxed by the Adjudicating Authority. Against which, Revenue is also in appeal.

5. Placing the argument on merit ld. Counsel for the assessee says that the services in relation to rent a cab was sought to be taxed under section 65(105)(o) of the Finance Act 1994 (hereinafter referred to as "the Act") read with section 65(91) and 65 (20) of the said Act. According to her, relevant provisions are extracted in para B3 at page 11 of the adjudication order which reads as under:

> *"65(105)(O) : any service provided or to be provided by a* ***rent a cab scheme operator*** *in relation to the renting of a cab.*
>
> *Also, as per Section 65(91) 'Rent-a-cab scheme operator' means:-*
>
> *"any person engaged in the business of renting of cabs." and as per Section 65(20) "cab" means:-*
>
> *"(i) a motorcab, or*
>
> *(ii) a maxicab, or*
>
> *(iii) any motor vehicle construed or adapted to carry more than twelve passengers, excluding the driver, for hire or reward."*

6. Assessee says that when a cab is rented under a scheme, the receipt therefrom cannot be taxed following the judgment of the ***Hon'ble High Court of Uttarakhand in the case of CCE Vs. Sachin Malhotra 2015 (37) STR 684 (Uttarakhand).*** That judgment brings out that the rent a cab scheme of 1989 is governed by Motor Vehicle Act 1988. The provision of the scheme has been discussed by the Hon'ble High Court in para 16 and 17 of the judgment as under:

> ***16.*** *What is sought to be taxed under the provisions, which we have adverted to in this judgment, is service, which is rendered in relation to renting of cabs. Under Section 65(91) of the Service Tax Act, "rent-a-cab scheme operator" has been defined as a person, who is engaged in the renting of cabs. The words "in relation to", undoubtedly, do have the effect of expanding the scope of taxation. With this proposition, we can have no quarrel. But, this cannot detract from our enquiring into as to what is the transaction, which is actually brought to tax. We are constrained to pose this question and answer this question as what is sought to be taxed is the service in relation to the renting of cabs. So, the most important and crucial element, which we must bear in mind, is, whether there is a business of renting of cabs. Unless there is renting of cabs, there is no question of further enquiring as to the services, which may be rendered therein. In other words, any service, which may be rendered and which does not relate to renting of cabs, would be irrelevant for our consideration. When we consider the matter in the said light, we have no doubt in our minds that the Tribunal has, in this case, correctly propounded the principle that, unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting. A perusal of Section 75 of the Motor Vehicles Act, 1988 would also fortify us in the view that we have taken. Section 75 reads as follows :*

"75. Scheme for renting of motor cabs. - *(1) the Central Government may by notification in the official Gazette, make a scheme for the purpose of regulating the business of renting of motor cabs or motor cycles to persons desiring to drive either by themselves or through drivers, motor cabs or motor cycles for their own use and for matters connected therewith.*

(2) A scheme made under sub-section (1) may provide for all or any of the following matters, namely;-

(a) licensing of operators under the scheme including grant, renewal and revocation of such licences;

(b) form of application and form of licences and the particulars to be contained therein;

(c) fee to be paid with the application for such licences;

(d) the authorities to which the application shall be made;

(e) condition subject to which such licences may be granted, renewed or revoked;

(f) appeals against orders of refusal to grant or renew such licences and appeals against orders revoking such licences;

(g) conditions subject to which motorcabs may be rented;

(h) maintenance of records and inspection of such records;

(i) such other matters as may be necessary to carry out the purpose of this section."

17. *In terms of Section 75, a scheme has been framed by the Government, which is called Rent-A-Cab Scheme, 1989. It contemplates the licensing of the operator; the making of an application for the licence; the grant of the licence; and the duration of the licence. We noticed, no doubt, that Clause 9 contemplates collection of hire charges. It also provides for the duties and responsibilities of the hirers of motor cabs in Clause 10, which we consider to be relevant, and we, therefore, extract the same as under :*

"10. Duties and responsibilities of hirers of motor cabs. -
(1) It shall be the duty of every hirer, to keep the holder of the licence informed of his movements from time to time.

(2) If an individual or company has hired the vehicles as a leader of the tourist party, it shall be the duty of such leader of the party to keep the holder of the licence informed of the movement of each vehicle, from time to time.

(3) If a hirer so desires, he may engage a person possessing a valid driving licence to drive the vehicle so hired during the period of the hire agreement." [Emphasis supplied]

7. The assessee further submits that on examination of section 75 of the Motor Vehicle Act 1988 Hon'ble High Court in para 18 of the judgment has dealt with the implication of the scheme of renting of motor cabs. The said paragraph reads as under:

"18. A perusal of Clause 10 would re-enforce us in the view that we are taking that, under the rent-a-cab scheme, the hirer is endowed with the freedom to take the vehicle, wherever he wishes, and he is only obliged to keep the holder of the licence informed of his movements from time to time. When a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled. These are all matters, which are regulated by the Government. Unlike the said scenario, in the case of a rent-a-cab scheme, as is clear from the very fundamental principle underlying the scheme, it is to give the hirer the freedom to use the vehicle as he pleases, which, undoubtedly, implies that he must have possession and control over the vehicle. This is the fundamental distinction between rent-

a-cab and a pure case of hiring. No doubt, the learned counsel for the appellant may be correct in saying that, in the case of rent-a-cab also, there is hiring in the general sense. As we have already noted, the word "hire" is used even in the rent-a-cab scheme. But, what is of fundamental importance and constitutes the distinguishing feature between "rent-a-cab" and "hiring" is that, in the case of "hiring", undoubtedly, the owner of the vehicle retains control and possession; he either drives the vehicle himself or employs somebody else to drive the vehicle; and the customer merely makes use of the vehicle by travelling in the vehicle on the basis of a contract that he will pay the requisite hire charges for the period he uses the vehicle. Unlike the same, in the case of rent-a-cab, as is provided in the Motor Vehicles Act, the person is enabled to take the vehicle with him wherever he pleases, subject, no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to his paying the rent. Though both, rent and hire, may, in a different context, have the same connotation; in the context of rent-a-cab scheme and hiring, we are of the view that they signify two different transactions. What the lawgiver has chosen fit to tax by way of imposition of Service Tax is only transaction relating to business of renting of cabs. It is also pertinent to bear in mind that, in the case of hiring, the hirer may refuse to provide the service to the prospective customer. We cannot accept the argument of the learned counsel for the appellant that the Court must ignore the provisions of Section 75 of the Motor Vehicles Act. We are of the view that, when the lawgiver introduced this new source of taxation, it must be treated as having been aware of the distinct concept of renting a cab for which there is provision in the Central Legislation, namely, Section 75 of the Motor Vehicles Act and also a scheme stood framed as early as in 1989. We are, therefore, of the view that, unless there is control, which is passed to the hirer under the rent-a-cab scheme, there cannot be a taxable transaction under Section 65(105)(o), read with Section 65(91) of the Service Tax Act." [Emphasis supplied]

8. The assessee submits that according to Hon'ble High Court of Uttarakhand when a customer chooses to hire a car which is

offered under Motor Vehicle Act, the control and possession of the vehicle remains with the owner of the vehicle and the customer is a mere user thereof as a passenger. He pays the charges as per meter. But in a renting scheme, the hirer has freedom to use vehicle as he pleases and he must have a possession and control over the vehicle. This is a fundamental distinction between the rent a cab and hiring. In the case of hiring, the owner of the vehicle retains the control and possession; he either drives the vehicle himself or employs somebody else to drive the vehicle; and the customer merely makes use of the vehicle by traveling in the vehicle on the basis of a contract that he will pay the requisite hire charges after use of the vehicle. In the case of rent a cab as is provided in the Motor Vehicle Act the person is enabled to take a vehicle with him wherever he pleases, subject to no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to paying the rent. Though both renting and hiring may in a different context, have the same connotation; in the context of renting a cab scheme and hiring, they signify two different transactions. Such fundamental concept has not been considered in the judgment by the Hon'ble High Court of Punjab & Haryana in the case of ***CCE Chandigarh Vs. Kuldeep Singh Gill 2010-TIOL-436-HC-P-H-ST***. Therefore, the law laid down by the Hon'ble High Court of Uttarakhand holds the field.

9. Further, the contention of the assessee is that the effective control was all along with the assessee in the present case and there was no freedom given to the recipient of the services.

Therefore, the meaning of the term hiring and renting should not be confused. Hon'ble High Court of Uttarakhand having said hiring and renting are different, the appeal may be decided annulling the service tax demand without any interest and penalty levied.

10. Further, the contention of the assessee is that the demands are time barred as no tax is payable by the assessee in view of confusion in the field of taxation.

11. Revenue on the other hand, submits that the taxing entry in the Finance Act 1994 has the object of taxing the services provided or to be provided to any person by the rent a cab scheme operator in relation to the renting of a cab and cab means any motor vehicle carrying more than 12 passengers excluding the driver for hire or reward. Taxation is on the services provided under the scheme. A person is engaged in the business of renting a cab is an operator of motor vehicle since cab means a "motor cab", or a "maxi cab" or "any motor vehicle constituted or adapted to carry more than 12 passengers excluding the driver for hire or reward". The adjudicating authority has analysed the mode of working of the assessee and the service recipient in the Tables aforesaid and having noted that vehicle was specifically meant for service recipient to make use thereof having possession and control over that and no other person was allowed to use the said vehicle during the tenure of the contract with the terms and condition and consideration, it was pure case of renting a cab. The motor vehicle had capacity of carrying more than 12 passengers and rented to different

public sector and companies for their own use having the control over the vehicles.

12. According to Revenue what is concerned for levy is that services provided in relation to renting of a cab is taxable. No doubt there are two judgments from two different Hon'ble High Courts but the fundamental concept of taxing provision is to tax the services provided relating to the renting of the cab. The Ld. adjudicating authority has rightly adjudicated the matter.

13. So far as the time bar is concerned according to Revenue, plea of confusion is not bonafide since the assessee collected the tax but did not pay the same to the Treasury. Therefore, there is no confusion of bonafide or time bar. Proceeding was initiated when intention to evade service tax is noticed by such modus operandi. Ld. Adjudicating authority has granted abatement without examining facts and circumstances of the case. Therefore, impugned order on that account should be reversed. At this juncture assessee says that abatement is available to it. Revenue emphatically submits that when the assessee claims abatement, there cannot be dispute on arise of admitted tax liability since when liability arises, abatement can only be granted. Therefore, it is an admitted case of assessee that its tax liability has arisen. Therefore, tax should be levied with interest and penalty.

14. Heard both the sides and perused the records.

15. When the scheme of taxation is looked into, the taxing entry seeks to levy service tax on the service provider in relation to renting of a cab.

16. It is an admitted fact on record that assessee rented its vehicle to the users thereof for transportation of their employees from one place to another as stated by the ld. Adjudicating authority in para 13 & 14 of the order. There was a consideration followed for such renting of motor vehicle by the appellant. The vehicles rented were under control and possession of the users thereof for their exclusive use under a contract. Whether driver was provided to the user by the license holder of the vehicle is immaterial. No other user other than the recipient of service was allowed to use the vehicle so rented during tenure of the contract. Therefore, the contract between the parties made the assessee an operator of renting the vehicle and liable to service tax. The judgment of Hon'ble High Court of Uttarakhand in the case of ***Sachin Malhotra*** (Supra) supports the case of revenue in view of the fundamental principle of renting discussed in para 18 of the judgment as extracted herein before.

17. There is no doubt that appellant has realized certain amount of taxes and not paid that into the treasury. It may be stated that the vehicle in the present case having more than 12 passengers capacity and were hired in specific terms with the control and possession of the vehicle remaining with the user of the vehicle to transport their employees, that established the case of renting of motor vehicle for a consideration.

18. Incidence of the levy having arisen in the present case in relation to renting of motor vehicle services provided by the assessee, levy of service tax is confirmed. However, quantum of

levy may undergo amendment subject to consideration of abetment if permissible which is left to the ld. Adjudicating authority for examination in the light of the law, considering the argument of the assessee and also subject to production of evidence if any. Further, allegation of Revenue for a part of the period covered by Table under para 14 of the OIO is considerable by the Authority in the re-adjudication process.

19. So far as the applicability of the time bar is concerned, the appellant has collected the taxes but not having paid the same to the treasury, it loses all its right to further argue when its conduct of evasion was patent. However, considering that there was a confusion between the assessee and Revenue due to varied judgment of different High Courts, the levy of penalty is considerable under the section 80 of the Finance Act 1944.

20. With the above direction, appeals are remanded to the limited extent as stated above and both the appeals are disposed of accordingly.

[Dictated and Pronounced in the open court]

(Ashok K. Arya)
Member (Technical)

(D.N. Panda)
Member (Judicial)

Bhanu