IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.ST/76820/2016

(Arising out of Order-in-Appeal No.61/ST/B-I/2016 dated 28.07.2016 passed by the Commissioner of Central Excise,Customs & Service Tax, Bhubaneswar)

Smt. Priyatama Mohanty

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise & Service Tax, BBSR-I

Respondent (s)

<u>Appearance:</u>

Shri N.K.Dash, Advocate for the Appellant (s)
Shri K.Chowdhury, Suptd.(AR) for the Respondent (s)

CORAM:
Hon'ble Shri P.K.Choudhary, Member (Judicial)

Date of Hearing/Decision: 22.05.2018

ORDER NO. FO/A/76615/2018

Per Shri P.K.Choudhary

This is second round of litigation before the Tribunal.

Briefly stated the facts of the case are that the show cause notice dated 22.04.2010 was issued as under:

To M/s. Universal Travels At – Plot No.N-6/287, IRC Village Nayapalli Bhubaneswar	To M/s. Universal Travels C/o Smt. Priyatama Mohanty, Partner/Proprietor W/o Jyoti Ranjan Mohanty Qrs.No.Type II/345, New A.G.Colony, Bhubaneswar	To M/s. Universal Travels C/o Sri Santosh Kumar Sarangi, partner At-Panchapal P.O.- Barang Dist.- Cuttack

Show Cause Notice alleged that M/s Universal Travels bearing Service Tax Registration No.102/ST-BBSR/RAC-50/2000 dt. 23.11.2000 & Pan Based

No.AJJPM0788PST001 have provided 'Rent-A-Cab Scheme Operator Service' and 'Rail Travel Agent Service' during the period from 2004-2005 to 2008-2009. The Adjudicating Authority confirmed the service tax demand of Rs.43,00,661/- alongwith interest and imposed equal penalty under Section 78 and a penalty of Rs.5,000/- under Section 77 of the Finance Act, 1994.

Aggrieved by the same, the appellant has filed an appeal alongwith a stay petition dated 05.10.2011, contesting the confirmation of the alleged demand, interest and penalty and for staying the operation of the order-in-original. Considering the factual position of the case, and the appellant's defense reply at the time of hearing, the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar, vide Stay Order No. 02/Stay/ST/BBSR-I/2013, dated 15.02.2013 ordered pre-deposit of Rs.15,00,000/- only.

The appellant failed to comply with the stay order dated 15.02.2013, and filed a writ petition under Article 226 & 227 of the Constitution of India before the Hon'ble Orissa High Court on 07.03.2013. The appeal was taken up for final hearing by the Ld. Commissioner (Appeals) taking into consideration the fact that the appellant had not submitted any copy of the writ petition filed before the Hon'ble High Court and there was no order from the Hon'ble Court directing not to pass any order consequent to non compliance of stay order. Vide order-in-appeal No. 24/ST/BBSR-I/2013 dated 26.03.2013, the Ld. Commissioner (Appeals) rejected the appeal for non-compliance of the order of deposit under Section 35 of the Central Excise Act, 1994.

Being aggrieved, with the above-mentioned Order-in-Appeal dated 26.03.2013, the appellant filed an appeal before the Hon'ble CESTAT, EZB, Kolkata. The Tribunal vide Order No. FO/A/75042/2015 dated 05.02.2015 ordered to deposit Rs.1.50 lakhs and remanded the matter to the Commissioner (Appeals).

The Ld. Commissioner (Appeals) vide the impugned order modified the demand to Rs.15,57,375/- alongwith interest and imposed equal penalty under Section 78 and upheld the penalty imposed under Section 77 of the Finance Act,1994. Hence, the present appeal before the Tribunal.

2. Ld. Advocate appearing on behalf of the appellant drew the attention of the Bench to Annexure-1 to the Appeal Memo i.e. Form ST-1 which shows that M/s. Universal Travels as a partnership firm, having 3 partners, namely:- (i) Smt. Priyatama Mohanty, W/o Jyoti Ranjan Mohanty quarters No. Type II/345, New A.G.Colony, Bhubaneswar, (ii) Shri Santosh Kumar Sarangi, S/o Shri Banamali Sarangi At-Panchapal, P.O.- Barang
Dist.- Cuttack, (iii) Shri Bhuban Mohan Mohanty, S/o Jyoti Mohan Mohanty quarters No.2RA-46, Unit-II, Bhubaneswar and they had applied for registration under Section 69 of the Finance Act, 1994, declaring the constitution of the entity as a 'Partnership Firm", and having its address at 738 (D), Rath Commercial Complex, Jayadev Vihar, Bhubaneswar. The Registration was given to the partnership firm vide ST-2 dated 23.11.2000 and the Registration no. allotted to the partnership firm is 102/ST-BBSR/RAC-50/2000. Ld. Advocate also made the Bench go through the audited financial statements of the partnership firm for the financial year 2005-2006 and 2006-2007. It is his submission that the partnership firm M/s. Universal Travels was registered with the service tax and the confirmation of entire service tax demand of the Erstwhile Partnership Firm against Smt. Priyatama Mohanty (one of the erstwhile partner), holding her as the sole proprietor is bad in law in as much as the liability of the erstwhile partnership firm cannot be shifted to any one partner holding him/her as the

sole proprietor. He strongly contended that the Show Cause Notice was issued to the partnership firm and its partners for the period during which M/s. Universal Travels was in the business of providing Rent-A-Cab Service as a partnership firm. Hence, the Adjudicating Authority has traversed beyond the scope of the Show Cause Notice in as much as the determination of the constitution of the firm was not alleged in the Show Cause Notice. The Ld. Advocate strongly argued that one of the erstwhile partner, Shri Santosh Kumar Sarangi had also applied for registration with the service tax authorities as proprietor of the firm M/s. Universal Travels and was given registration no. AUSPS3804qst001 vide Form ST-2 Dated 08-09-2008, photocopy of the form ST-2 is filed at Page 127 of appeal paper book. The Ld. Counsel submits that this was also filed before the first appellate authority.

3. The ld. DR reiterates the discussion and findings of the Adjudicating Authority.

4. Heard both sides and perused the appeal records.

5. I find that Smt. Priyatama Mohanty, as Proprietor applied for a registration in the name and style of Universal Travel which was granted by issuing registration on 29.09.2008 where the registration issuing authority very categorically mentioned *"This certificate is issued incorporating the changes intimated by the applicant and the previous certificate of registration bearing Registration Number 102/ST/BBSR/RAC-50/2000 dated 23.11.2000 stands cancelled".*

6. I also find that the Noticee firm was a Partnership firm at least up to issue of the new registration on 29.09.2008 as per the records of the department and the observation of the Ld. Addl. Commissioner based on reply of one of the Partners, without giving any opportunity to the other

Partners, for their submission to the effect that it was a sole Proprietary firm from the beginning is bad in law. The organization of the firm was " Partnership" and it is evident not only form the application form in ST-1, but also from the Balance Sheet which has been signed by the Partner Shri Santosh Kumar Sarangi.

7. I further find that the other partner – Shri Santosh Kumar Sarangi was given over all charge of the organization since the Appellant is a house-wife, completely ignorant about the complex provisions of Service Tax procedures and as submitted earlier, due to her engagement in attending to her disabled husband, she was not able to concentrate in the Partnership work.

8. I also find that in the Show Cause Notice, there is no allegation against Smt. Priyatama Mohanty either as Partner or as Proprietor or the other partner – Shri Santosh Kumar Sarangi, in as much as, demand had been issued to the Partnership firm, i.e. M/s Universal Travels.

9. I find that in para 5.8 of the order-in-original, the Ld. Addl. Commissioner, has observed *"The notice proposes imposition of penalty on M/s Universal Travels as a partnership firm and a separate penalty on Smt. Priyatama Mohanty as its partner/proprietor".* With this starting point taking into account the submission of other partner, he has concluded *"However Smt. Priyatama Mohanty is not the partner of M/s Universal Travels but she is sole Proprietor. The proprietorship concern and the proprietor are not separate legal entity. Since separate penalty has been considered against the proprietorship concern, no penalty is warranted against its proprietor".* In this context the Ld. Counsel brings to the notice of the Bench that in the Show Cause Notice there was no proposal for imposition of penalty on Smt. Priyatama Mohanty. Also the organizational status of the concern/firm was not in question. Hence, by observing Smt. Priyatama Mohanty is not the

partner of M/s Universal Travels but she is sole Proprietor, the Ld. Addl. Commissioner has travelled beyond the Show Cause Notice. In the present case, the Ld. Adjudicating Authority has not given any notice to the Appellant to record her submissions on the point and therefore the order cannot be sustained. In this context, the ratio of the decision of Hon'ble High Court of Jharkhand in the case of Damodar Valley Corporation Vs. CCE reported in 2014-302-ELT-30 is squarely applicable to the facts of the present case. The relevant paragraph of the above-mentioned decision of the Hon'ble High Court is reproduced as under:-

> "**7.** Having heard the counsel for both the sides and looking to the facts and circumstances of the case, we hereby quash and set aside the following paragraphs from the order of Additional Commissioner, Central Excise, Ranchi :
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> ñ(ii) On DVC, CTPS, as they are fully involved in receiving above referred services from the Noticee & in turn owe the Service Tax dues to the Noticee, to compensate the entire financial loss including interest and penalty to the Noticee, on account of above order, as such loss arose on account of serious mistake and carelessness of DVC CTPS. Had they paid the Service Tax amount timely to the Noticee, this situation could be avoided.
>
> (iii) Preventive wing and arrear recovery wing of the Commissionerate of Central Excise and Service Tax, Ranchi are directed to take corrective and punitive measures on the DVC CTPS, in case of non compliance of this Order & in order to ensure the non recurrence of such incidents in future.ò
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> for the following facts and reasons :
>
> (i) The aforesaid observations and directions are vital in nature and it affects the rights of present petitioner and these observations could not have been made by the Respondent No. 4 without giving any notice to the present petitioner. In the present case, the Additional Commissioner, Central Excise, Ranchi has not given any notice to the present petitioner and that is admitted in the impugned order [that is in internal page no. 10 of the impugned order running page 62 of the Writ Petition (Tax) No. 1290 of 2013].
>
> (ii) Admittedly no opportunity of being heard has been given to the petitioner and without giving any opportunity of being heard, the aforesaid observations have been passed in the impugned order against this petitioner by Additional Commissioner, Central Excise, Ranchi and therefore, the said observation is in gross violation of principle of natural justice.

(iii) It is ought to have been kept in mind by the Additional Commissioner, Central Excise, Ranchi that if any observation is made against any party which may impose financial liability then at least notice should have been given an opportunity of being heard should have been given to the concerned party.

8. Looking to the order passed by the Additional Commissioner, Central Excise, Ranchi, we find that it has travelled beyond show cause notice given to the service provider i.e. Respondent No. 3. The present petitioner is service receiver. Thus, the directions and observations made by the Additional Commissioner, Central Excise, Ranchi as stated hereinabove, are hereby quashed and set aside because the same are observed in the impugned order without giving any notice and without giving any opportunity of being heard and the said directions are travelling beyond the show cause notice. All these writ petitions (Tax) are hereby allowed and the aforesaid paragraphs insofar as these affect the petitioner, are hereby quashed and set aside.ò

10. In view of the above discussions, I set aside the impugned orders and remit the matter to the ld. Adjudicating Authority to decide afresh in the light of the above decision of the Hon'ble High Court of Jharkhand, and pass order in accordance with law. Needless to mention, a reasonable opportunity of hearing be granted to the appellant to present their case.

11. The appeal is allowed by way of remand.

(Operative portion of the order have already pronounced in the open court)

(P.K.Choudhary)
MEMBER (JUDICIAL)

T.K.