IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/139/2008

(Arising out of Order-in-Original No. COMMR/BBSR-I/ST-11/2008 dated 22.04.2008, passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. Orex Security & maintenance Services — Appellant (s)

Vs.

Commissioner of C. Ex, Cus & S. Tax-BBSR-I — Respondent (s)

Appearance

None for the Appellant (s)

Shri S. Mukhopadhyay, Suptd. A. R. for the Revenue

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing-26.11.2018

ORDER NO. FO/77012/2018

Per Bench

The present appeal is filed by Revenue against the Order-in-original No. COMMR/BBSR-I/ST-11/2008 dated 22.04.2008.

2. The appeal filed by the Revenue has been listed from time to time. It was listed earlier on 16/05/2018 and 08/10/2018, but none appeared on behalf of the Respondent. Even today there is no appearance on behalf of the respondent. The appeal which has been filed over 10 years back cannot be kept pending incessantly and hence taken up for a decision on merit.

3. Brief facts of the case are that the respondent, having their business premises in Bhubaneswar, was engaged in providing services of the nature of 'Security Agency'. They registered themselves with the

Service Tax Department on 02/07/2004. The dispute covered the period 2001-2002 to 2005-2006. During the course of audit of the books of the respondent, the departmental officers noticed that the respondent has provided services in the nature of 'Security Agency' as well as 'Rent-a-Cab Scheme Operator Service' during the year 2005-06. Since they had not paid any Service Tax for the consideration received, the Department issued Show Cause Notice purposing to demand of Service Tax on the payment received by them during the disputed period.

4. The Show Cause Notice was adjudicated by the Ld. Commissioner with the issue of the impugned Order in which he dropped the entire demand for Service Tax. He took the view that the Respondent, who is an agency run by a Public Charitable Trust, was not formed with a profit motive but is of the charitable nature. By taking the view that the respondent was not a commercial concern; Adjudicating Authority held that no Service Tax will be liable to be paid on the amounts received.

5. The findings of the Adjudicating Authority have been challenged by the Revenue in the present proceedings.

6. Heard Shri S. Mukhopadhyay, Ld. DR for the Revenue.

7. He submitted that the respondent is a 'security agency' as defined in Section 65 (94), as prevalent during the period of dispute. He cited the decision of the Hon'ble Punjab and Haryana High Court in the case of Punjab Ex-Servicemen Corporation Vs. Union of India

reported in 2012 (25) S.T.R. 122 (P & H) and submitted that the Hon'ble High Court has taken the view that the use of word "business" in the definition of security agency is not enough to hold that the service provider must have profit motive. By relying on the above decision, he argued that the respondent agency will be liable to payment of Service Tax under the category of "Security Agency".

8. We have carefully gone through the record of the case and submission urge on behalf of the revenue. The definition of the Security Agency Service under Section 65 (94) during the period of dispute was as follows:-

> *'Security Agency' means any commercial concern engaged in the business of rendering the services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity, whether of a personal nature or otherwise, including the services of providing security personnel."*

9. It is not in dispute that the respondent has rendered Security Agency Service but the Adjudicating Authority has taken the view that no Service Tax is liable to be paid since the Respondent Agency is not formed with a profit motive. In this connection, we find that an identical dispute has come before the Hon'ble Punjab and Haryana High Court in the case relied by the Revenue. In this regard, the observations of the Hon'ble High Court are reproduced below:-

> ***"5. We are unable to accept these submissions. As regards absence of profit motive, we find that the charging provision under Section 68 of the Act provides for levy of service tax on the value of taxable service on every service provider. Value of taxable service has been defined under Section 67 to be gross amount charged by the service provider as consideration. There is no requirement that the service provider should provide service for profit motive.***
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> ***6. In the definition of security agency under Section 65(94), security agency is defined as a commercial concern engaged in business of rendering services relating to security of property of persons. Learned counsel submitted that the expression business implies that there must be profit motive while the appellant was a statutory corporation created for helping the ex-servicemen by employing them in security agency services.***
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> ***7. Use of the word business in the definition of security agency is not enough to hold that service provider must have profit motive. The word business does not necessarily imply requirement of profit motive. The expression is used in a taxing statute in the sense of occupation or profession which occupies time, attention and labour normally with the object of making of profit as against support or pleasure. In State of A.P. v. H. Abdul Bakshi & Bros, AIR 1965 SC 531, it was observed :-***
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> ***"4. We are unable to agree with this view of the High Court. A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression "business" though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."***
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> ***8. In State of T.N. v. Board of Trustees of the Port of Madras, (1999) 4 SCC 630, it was held that whether profit motive was essential ingredient in a particular taxing statute depended upon the legislative intent as expressed in the statutory scheme.***
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> ***9. In Sai Publication Fund, as per statutory scheme under Bombay Sales Tax Act, 1959, the definition of dealer under Section 2(11) required profit motive. It was held that if in predominant activity, profit motive was absent, incidental business of such an assessee was excluded. As per definition of security agency under Section 65(94) service provider should be engaged in the business rendering specified service. There is no warrant for reading therein requirement of profit motive. The word business would denote that service should not be gratis or casual but for consideration and as regular activity."***

10. In the light of the above decision, we are of the view that the view taken by the Adjudicating Authority merits revision. Hence, we set aside this part of the impugned order and hold that the respondent will be liable to payment of Service Tax along with interest under the category of "Security Agency Service". However, we are of the view that the respondent deserves the benefit of waiving of penalty

subjected to the condition that the Service Tax is paid along with interest. In the result, appeal filed by the Revenue is partly allowed.

(Dictated and Pronounced in the Open Court)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Pooja