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

REGIONAL BENCH – COURT NO.2

S. Tax Appeal No. 75402 of 2018

Arising out of Order-in-Appeal No.34/ST/BBSR-GST/2017 dated 31.10.2017 passed by Commissioner (Appeals), CGST, Central Excise, & Customs, Bhubaneswar.

M/s. Siddhartha Engineering Ltd.
Plot No. 1015, Nayapalli, N.H.-5,
Bhubaneswar, Odisha
751012 **Appellant (s)**

VERSUS

Commr. of GST & C. Ex., & Customs, BBSR
C. R. Building, Rajaswa Vihar,
Bhubaneswar-751007, Odisha

Respondent (s)

APPERANCE :

Shri C. R. Das, Advocate for the Appellant
Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO.77297/2018

Date of Hearing : 17.08.2018
Date of Decision : 17.08.2018

PER P.K.CHOUDHARY :

Briefly stated the facts of the case are that the appellant-company is engaged in rendering of service of "Erection, Installation & Commissioning of equipments and machineries". Apart from this, the appellant also received amounts towards rent both used for business as well as for residential purpose.

Show Cause Notice dt. 10/10/2012 was issued for non-payment of Service Tax on 'renting of immovable property service'.

The Adjudicating Authority confirmed the demand of Rs.1,07,109/- along with interest and imposed equal penalty under Section 78 and a penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994.

On appeal before the Lower Appellate Authority, the Ld. Commissioner (Appeals) upheld the Adjudication Order and rejected the appeal. Hence, the present appeal before the Tribunal.

2. The Ld. Advocate appearing on behalf of the appellant submits that though renting of immovable property has been brought under the Service Tax net with effect from 01/06/2007, but its constitutional validity was challenged in the Delhi High Court in Home Solution Retail India Ltd. V. Union of India (2009) 14 STR 433. The High Court first observed that service tax being a tax on value addition, provided by a service provider, if there was no value addition, then there would be no 'service'. With the aforesaid observation in mind, the High Court analysed the provisions of Section 65 (105)(zzzz) of the Act, and came to the conclusion that, insofar as renting of immovable property for use in the course of or furtherance of business or commerce was concerned, any value addition could not be discerned. The High court therefore held that Section 65 (105)(zzzz) did not in terms entail that the renting of immovable property for use in the course of or furtherance of business or commerce would by itself constitute a taxable service and be exigible to tax under the Act. However, a special leave petition was filed in the Supreme Court by Revenue against the above judgment, and this petition is yet to be decided by the Hon'ble Supreme Court.

It is his submission that consequent upon the above situation, the appellant was under the bonafide belief that levy of Service Tax on renting of immovable property does not arise which resulted in non-payment of Service Tax by the appellant for the impugned period i.e. 2007-08 to 2008-09.

The Ld. Advocate relied upon the following decisions in support of his submissions-

(i) Collector-Vrs- Chemphar Drug, reported in AIR, 1989 (SC), 832

(ii) Pushpm Pharmaceuticals, -vrs- C. C. E., reported in 1995 (78) ELT 401 (SC)

(iii) Padmini Products, -Vrs- C. C. E., reported in 1990 (76) SCT 411 (SC)

4. The Ld. DR reiterates the findings of the Commissioner (Appeals).

5. Heard both sides and perused the appeal records.

6. I find that the appellant is not disputing the levy of service tax under renting of immovable property. However, challenging the demand being barred by limitation. Even though the show cause notice merely states that the service tax has not been paid by reason of wilful mis-statement and suppression of facts with an intent to evade payment of service tax, mere allegations in the show cause notice is not sufficient to allege suppression and mis-statement on the part of the appellant in absence of highlighting the reason of formation of such belief. Mere contravention of provisions of law is not sufficient to invoke extended period of limitation. Contravention necessarily has to be with intent to evade payment of service tax.

I also find from the statement of facts that it is clear that levy of service tax on renting of immovable property was under challenge before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court held that the definition of taxable service as provided under Section 65 (105)(zzzz) is not a "service", and in order to overcome the difficulty the Finance Act, 2010 substituted the above sub section retrospectively. Consequent upon the above situation, the appellant was under the bona fide belief that levy of service tax on renting of immovable property does not arise, which resulted non-payment of service tax by the appellant for the impugned period 2007-08 to 2008-09.

7. It is an undisputed fact, that due to the challenge of levy of service tax on renting of immovable property and the same held as no service by the First "Home Solutions Retailers (India)" case and without waiting for the decision of the Supreme court, the said sub section has been amended with retrospective effect i.e. 01.06.2007. As a result, it is undisputed fact that doubts and disputes prevails over the issue and the court also held the levy of service tax on renting of immovable property as per un-amended definition is not service. However, after amendment made by the Finance Act, 2010, the amended definition is held as service in the Second "Home

Solutions Retailers” case. As a result, larger period of limitation is not invokable. Renting on immovable property has been a subject matter of litigation in various judicial forums. In fact, renting *per se* was held to be not taxable by the Hon’ble Delhi High Court in Home Solutions Retail (I) Ltd., 2011 (24) S. T. R. 129 (Del.) resulting in amendment, including retrospective amendment in the statutory provisions for the said tax entry. As such, the demand cannot invoke extended period as the issue was not free from doubt. In the present case, the whole demand is for extended period only.

8. The Cases cited by the Ld. Advocate are discussed as under:-

(i) Collector-vrs- Chemphar Drug, reported in AIR, 1989 (SC), 832. Where in it is held that suppression does not mean mere in action or failure on the part of the manufacturer does not amount to suppression of fact but conscious or deliberate withholding of information when the manufacturer knew otherwise.

(ii) Pushpm Pharmaceuticals, -vrs- C. C. E. reported in 1995 (78) ELT 401 (SC), where in it is held that, suppression does not mean omission. The Act of Suppression must be deliberate. It means that correct information was not disclosed deliberately to escape payment of duty.

(iii) Padmini Products, -vrs- C. C. E., reported in 1990 (76) SCT. 411 (SC), where in it is held that mere non declaration is not sufficient to invoke larger period on the ground of suppression but some more positive act is required.

9. The whole demand against appellant arose because of the word ‘personal office’ used in the lease agreement. However, when read together, the said clause (c) will make it clear that the purpose of letting will be residential only and the lessee shall be responsible if the premises is used for other than residence. All the consequences including extra levy shall be the liability on the lessee. We note that the terms of lease make it clear that the building was let out to the appellant for residential use by one of its employees. Even if we consider that the said employee did

attend to some personal office work from the said premises, the same will not make it use of premises other than the residence.

I also note that the appellant do have a strong case on limitation. Admittedly the tax liability on his particular tax entry has been a subject matter of substantial litigation. As observed above, Hon'ble Delhi High Court even held that renting *per se* is not liable to service tax and it is only services in relation to renting that are liable to service tax. This resulted in statutory amendments, including retrospective amendments, with reference to this tax liability. In fact special provision for waiver of penalties under Section 80(2) of the Act was also made.

10. Considering the above position, I find that the present demand against the appellant is not tenable both on merit as well as on time bar.

11. The appeal is accordingly, allowed.

Sd/-
(P. K. Choudhary)
Member (Judicial)

Pooja