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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.208 of 2008

(Arising out of Order-in-Original No.17/Commr/ST/Kol/2008-09 dated 15.09.2008 passed by Commissioner, Service Tax Commissionerate, Kolkata.)

M/s. General Security & Information Service
(7C, Abinash Chandra Banerjee Lane, East Beliaghata, Kolkata-700010.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(Central Excise Bhawan, 180, Shantipally, Rajdanga Main Road, 3rd Floor, Kolkata-700107.)

APPEARANCE

Shri Ananda Sen & Shri Indranil Banerjee, Advocates for the Appellant (s)
Shri H.S.Abedin, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75501/2021

DATE OF HEARING : 30 July 2021
DATE OF DECISION : 27 August 2021

P.K. CHOUDHARY :

This Appeal has been filed by the appellant against Order (Original) No. 17/Commr./ST/KOL/2008-09 dated 15.09.2008 passed by the Commissioner of Service Tax Commissionerate, Kolkata. By Order and Judgement dated 06.02.2020, the Hon'ble Calcutta High Court, in CEXA No. 16 of 2019 (General Security & Information Services - Vs – Commissioner of CGST & CX, Kolkata) was pleased to set aside the FINAL Order of the Tribunal and directed to re-hear the appeal and pass a reasoned Order. Hence, this Appeal is taken up for hearing.

2. The relevant facts of the case, as per record, in brief, are that, the appellant was registered under the provisions of Service Tax Laws for providing taxable services under the category of “Security Agency Service”. They had also provided other services like that of Manpower Supply, Cleaning Service etc. which at the material time, were not taxable under Service Tax statute. The Officers of the Zonal Unit of DGCEI, Kolkata on 10.06.2005 searched the appellant’s office situated at Kolkata and Siliguri simultaneously and seized several records. Subsequent to the search operation, the statements of the proprietor and the employees of the appellant were recorded. A Show Cause Notice dated 27.03.2007 was issued by the Additional Director General of DGCEI, Kolkata Unit to the appellant and its Proprietor proposing demand of Service Tax along with Interest and to impose penalty in respect of Kolkata Office and Siliguri Office separately. By the impugned Order dated 15.09.2008, the Commissioner of Service Tax, Kolkata adjudicated the demand in respect of Kolkata Office and confirmed the demand of Service Tax of Rs. 53,65,724.00 along with interest and imposed penalty on the appellant under Finance Act, 1994 for the period from September 2001 to May 2005. There is a further demand of Rs. 3,37,538.00 under Section 11D of the Central Excise Act, 1944. Hence, the appellant filed this appeal.

3. The Learned Advocate on behalf of the appellant submitted that admittedly the appellant rendered the taxable services in the nature of Security Agency and various non-taxable services such as Manpower Supply, Cleaning, Washing, Sweeping, Gardening, Watch & Ward (Checking Assistance) to Metro Railways etc. It is submitted that the demand of Service Tax is related to Watch & Ward Service for checking of the tickets to Metro Railways and others which cannot be covered under the “Security Agency Service”. It is well known that the Security of the Metro Railways is controlled by the Railway Police. In support of its contention, the Learned Counsel drew the attention of the Bench to the Certificate dated 04.12.2008 of the Chief Operation

Manager of Metro Railways and Letter of Acceptance dated 07.06.2001 of the Metro Railways. It is also contended that the Adjudicating authority accepted that “Watch and Ward” Service cannot be treated as “Security Agency Service” but it was erroneously proceeded on the presumption that their function cannot be restricted to checking of tickets of the passenger only. Further, the entire demand of tax is barred by limitation as there is no suppression of facts with intent to evade payment of tax. It is submitted that the demand was raised on the basis of Bills, Contracts & Agreements. The demand was confirmed under Security Agency Service without any evidence and enquiry. It is also submitted that the demand under Section 11D cannot be sustained for the reasons that there is no evidence of collection of tax from the customers. Moreover, it is admitted in the notice that the amount of Rs. 3,37,538.00 is in respect of Non Taxable Services. There was no provision to invoke Section 11D in respect of collection of amount on non-taxable services during the material period. Section 73A has been inserted in the Finance Act, 1994 with effect from 18.04.2006 for recovery of Service Tax collected in respect of non-taxable services and the present case is prior to that date. The Learned Counsel submitted a Written Submission along with Case Laws. On a query from the Bench regarding the “Watch and Ward” Service, the Learned Advocate submitted Supplementary Letter of Acceptance dated 09.10.2009 indicating the “Watch and Ward” Service was in respect of checking assistance of the Metro Railways during the material period.

4. The Learned Departmental Representative on behalf of the Revenue reiterates the findings of the Adjudicating authority. It is submitted that the Certificate of the Metro Railways is not sufficient to establish that the appellant have not rendered any Security Agency Service to the Metro Railways. In any event, the said Certificate was issued after passing of the Adjudication Order. It is further submitted that the definition of “Security Agency” is wide and included “Watch &

Ward" Service. It is also submitted that the Letter of Acceptance as referred by the Learned Counsel would not show that the appellant rendered "Watch and Ward" Service as Checking Assistance of the tickets of Metro Railways. The appellant suppressed the material facts to the Department and therefore extended period of limitation will be applicable. It is contended that they have charged tax in the invoices in respect of Non- Taxable Services and Section 11D of the Act, 1944 would be applicable.

5. Heard both sides through video conferencing.

6. After hearing both the sides and on perusal of the records, we find from the Adjudication Order that the appellant was engaged in providing services related to Security, Manpower Supply for Cleaning, Washing, Sweeping, Gardening, Up keeping, Watch & Ward, Grass Cutting, Checking, Mechanised Cleaning, Driving, Office Assistance etc. They were registered with the Service Tax Department under the category of "Security Agency" which was introduced in the Service Tax net on 16.10.1998 vide Clause 94 of Section 65 of Chapter –V of Finance Act, 1994 as amended. The term "Security Agency" is defined in Section 65(94), as it stood during the relevant time is as below :-

> " Security Agency" means any person engaged in the business of rendering the services relating to the security of any property, whether moveable 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".

7. The ingredient of definition "Security Agency" is that it should be engaged in the business of rendering of services relating to Security of any property whether moveable or immovable or person. It further includes services of investigation, detection or verification of any facts or activity whether of a personal nature or otherwise. It also includes services of providing security personnel. It has been alleged in the

Show Cause Notice that from the description of the service provided by the appellant as appearing in the Bills and from a study of Work Orders, Contracts, it appears that in most of the cases the services provided by the appellant has been in the nature of Security Agency Service. However, they have also provided other services like the Manpower Supply, Cleaning Services etc. which were non taxable during the material period. It has further been alleged that the appellant have appeared to have collected Service Tax in their Bills even in respect of such non-taxable services, thus, bringing such amount under the ambit of Section 11D of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

8. The appellant contested the demand in reply to Show Cause Notice on the ground that the entire demand was raised on non-taxable services. It is submitted that the amount of Rs. 39,70,003.00 has been demanded on “Watch and Ward” services provided to Metro Railways and such services are not taxable within the definition of “Security Agency Service”. It is also submitted that the balance amount would also apply on the same reasoning because no allegation has been made in the Show CauseNotice dated 27.03.2007 to the effect that they deployed the persons for the security of property or person.

9. For the purpose of proper appreciation of the case, the relevant portion of the findings of the Adjudicating authority in respect of Watch and Ward service provided to Metro Railways are re-produced below :-

> “ The said Noticee No. 1 has argued that they have deployed personnel for “Checking Assistance” or “Watch and Ward” service and the personnel were not for security of “Metro Property” or any person. It is observed that the argument advanced by them is not supported by any evidence or not any solid foundation. This would be evident from the statement of Sri Jaydeb Chandra Sinha, Proprietor recorded on 10.03.2007 (discussed in

> foregoing para). He has admitted that he made several correspondences with Metro Railway authority for payment of Service Tax. Again the very word "Watch and Ward" used by the said Noticee No. 1/Metro Railway Authority in the relevant bills does not make it sure that their personnel did not do the job of security work. Their functions cannot be restricted to checking of tickets of the passengers only. The personnel deployed by them must have done the overall supervision of passengers including watching the property of Metro Railway and watching that any passenger cannot make any damage to any property. The personnel deployed must have under taken the job related to security of Metro Property."

10. We find from the statement dated 10.03.2007 of the Proprietor of the appellant that the appellant had been providing up-keeping and checking assistance service (i.e. Watch & Ward Service) since early part of 2001, the copy of the Work Order has been tendered. The appellant produced the Certificate dated 04.12.2008 of the Metro Railways before the Tribunal clarifying the services rendered by the appellant to the Metro Railways, which reads as under :-

> "This is to certify that M/s. General Security & Information Service having its Registered Office at 7/C, Abinash Chandra Banerjee Lane, Kolkata-700010 is providing manpower to M/s. Metro Railway/ Kolkata since 2001, to act as facilitators for directing passengers through automated ticket gates, to guide commuters regarding purchase of tickets, carrying baggages and other miscellaneous jobs relating to overall upkeep of the premises. Their services are not similar to the services for general purpose security duty. As such, Metro Railway is not making any payment towards Service Tax for these services to M/s. General Security & Information Services, Kolkata-700 010."

11. The Learned Departmental Representative submitted that there is no evidence regarding the Watch and Ward Service relating to checking of the tickets at Metro Railway. In this context, the Learned Counsel of the appellant submitted copy of the Supplementary Letter of Acceptance dated 09.10.2009 where it is clearly indicated the deployment of personnel (checking assistance) for watch and ward services at Metro Railways. The said documents referred to the tender dated 20.11.2000 LOA dated 07.06.2001 which are relevant in the present case. Thus, it can be construed on the basis of said documents and the certificate that the Watch and Ward Service to Metro Railway is checking assistance to act as facilitators for directing passengers through Automated Ticket Gate. The definition of Security Agency Service as mentioned above would cover the business of rendering services relating to Security of any property whether moveable or immovable or person. In the present case, on perusal of the records including Certificates of Metro Railways it is clear that Watch and Ward of checking assistance of ticket and to guide the commuters to pass through Automated Gates would not cover within the definition of Security Agency Service.

12. The other aspect of the case is that the Adjudicating authority passed the Order on the basis of assumption and presumption that their function cannot be restricted to checking of the tickets to the passengers only. The Learned Counsel for the appellant referred the following Case Laws :-

(a) In the case of Karna Security & Housekeeping Services Vs. C.S.T Ahmedabad 2010 (20) STR 807 (Tri. – Ahmd) and in the case of Canny Detective & Security Services Vs. Commr. of C.Ex.Ahmd. 2010 (20) STR 695 (Tri- Ahmd.), the Tribunal observed that when Invoice does not show the details, then some of the receivers of service could have been detected and details obtained as to the nature of service received by them. No investigation whatsoever has been conducted in this case.

The lower authority has chosen to presume that the security service has been rendered even though the invoices did not give the name of the service.

(b) In the case of Tejwal Dyestuft Industries Vs. Commr. Of C. Ex, Ahmedabad 2007 (216) ELT 310 (Tri-Ahmd.) the Tribunal observed that having obtained the confessional statement the Revenue Officer did not carry out the detailed investigation into the relevant aspects of the case. Recording of the confessional statement would not put to an end of the investigation and the Revenue Officer should have careful to ensure that they are not tricked out of a regular and detailed investigation by making strategic confession which are retracted by preparing affidavit soon after they are made and such affidavit are again strategically withheld from the Revenue Officers.

13. In the present case, we find that the appellant in the statement during the investigation categorically stated that watch and ward service are for checking of tickets of the Metro Railways. But, no investigation was taken. Therefore, the Adjudicating authority passed the order on a conjecture that the appellant had also function not merely on watch and ward of checking tickets, which cannot be accepted.

14. The balance amount of Rs. 13,95,701.00 other than the Metro Railways, the Adjudicating authority observed that the appellant have not submitted any clarification regarding this. We have seen the submission of the appellant as recorded in the Adjudication Order that the demand of balance amount of tax is the same reasoning would apply because no allegation has been made in the notice to Show Cause Notice dated 27.03.2007 to the effect that it was deployed by them for security of property or person. It appears from the statements of the appellant that no enquiry was conducted in respect

of services rendered other than the Metro Railway related to balance amount of tax. The Learned Counsel for the appellant submitted that the demand is also barred by limitation. In this context, the Learned Counsel drew the attention of the Bench to the Para -6.1 of the Show Cause Notice that the department was well aware of this fact as revealed from the earlier Show Cause Notice dated 17.09.2004 in respect of Siliguri Branch. It is further submitted that the demand was raised on the basis of bills, contracts and agreements as mentioned in the impugned Show Cause Notice. The Learned Advocate referred various Case Laws in this respect.

15. It has been discussed above that the demand of tax of Rs. 39,70,003.00 on Watch and Ward Service provided to Metro Railways cannot be sustained on merit. It is seen that the appellant contested the demand for balance amount as recorded in the Adjudication Order. So, the finding of the Adjudicating authority cannot be acceptable. It is noted that the demand was raised on the basis of Bills, Contracts and Agreement. The Adjudicating authority invoked the extended period of limitation on the ground that the appellant is a very old Registered Firm of 1992 and have not discharged their service tax liability properly and have suppressed the value of taxable service with intent to evade payment of Service Tax.

16. In the case of DEEK Printers Vs. Commissioner of Central Excise, Ahmedabad 2013 (291) ELT 433 (Tri.- Ahmd) it has been observed by the Tribunal that the suppression, mis-statement etc. for invocation of extended period of limitation, would be applicable for entire proceedings and not limited to particular period. In the case of Rashmi Marketing Vs. Commissioner of Central Excise & Customs & Service Tax, Nagpur 2019 (26) GSTL -244 (Tri- Mum) it has been observed that suppression of facts can be alleged for the whole period or it may not exist altogether. In the case of Continental Foundation Joint Venture Vs. Commissioner of Central Excise, Chandigarh 2007

(216) ELT 177 (SC), it has been observed by the Hon'ble Supreme Court that the expression "Suppression" has been used in proviso to Section 11A of Central Excise Act, 1944 to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with intent to evade payment of duty. An incorrect statement cannot be equated with willful mis-statement. In the case of M/s. Sisodia Associate Vs. Commissioner of Central Excise & Service Tax -2019-TIOL-1794 –HC – RAJ –CX. the Hon'ble Rajasthan High Court held as -

> *" The second question urged is with respect to the invocation of the extended period of limitation. In the present case, the disputed period is between 01.04.2005 and 05.09.2008.*
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> *6. The law is well settled that in the absence of any proven or established allegations of existence of active intent to defeat the law or to cheat the revenue [expression used in Section 11A of the Central Excise Act "fraud or willful misrepresentation or suppression of facts"] the revenue cannot claim the benefit of an extended period of limitation.*
>
> *7. In this regard, Court is cognizant of decisions of the Supreme Court in - Collector of Central Excise Vs Chempher Drugs & Liniments, 1989 (40) ELT 276 (SC) = 2002-TIOL-266-SC-CX Uniworth Textiles vs. Commissioner of Central Excise, 2012 (9) SCC 753 = 2013 –TIOL-13-SC-CUS and Pushpam Pharmaceuticals Ltd vs. Collector of Central Excise, 1995 (Supp) (3) SCC 462 = 2002 –TIOL-235-SC-CX*
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> *8. In these circumstances, the mere omission to pay tax and the revenue inability to prove of any mental intent to evade taxes per se cannot result an invocation of the extended period of limitation."*

17. We find from the Adjudication Order that the Adjudicating authority had merely observed that the applicant is a very old Registered Firm and they have not discharged their service tax liability properly and therefore the extended period of limitation would be invoked. There is no material available on record to invoke the

extended period of limitation. Apart from that, a part of demand is liable to be dropped on merit and therefore the extended period of limitation cannot be invoked for the balance amount. Hence, the balance amount of tax is liable to be set aside on limitation.

18. The Adjudicating authority observed that the appellant in their Bills have collected Service Tax on non-taxable service and such amount collected by them as Service Tax comes under the ambit of Section 11D of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The appellant submitted that Section 11D of the Act, 1944 has no application in respect of non-taxable service. Section 11D of the Act 1944 as it stood during the relevant period is reproduced below :-

> "SECTION 11D. Duties of excise collected from the buyer to be deposited with the Central Government – (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government."

19. The expressions "every person who is liable to pay duty under this Act or Rules made thereunder, and has collected any amount in excess of the duty" in Section 11D of the Act make it clear that the said provision would be applicable where the person is liable to pay duty and collected any amount in-excess of the duty assessed. Apart from that Section 73A of the Finance Act, 1994 has been introduced with effect from 18.04.2006 and that according to Sub Section (2) of Section 73A, Service Tax collected on non-taxable service is

demandable/payable to Government exchequer. The Learned Departmental Representative had not disputed the legal position. We find that the present case is prior to insertion of Section 73A(2) of the Act 1994 and therefore the demand of the amount under Section 11D is not justified.

20. In view of the above discussion, we find that the impugned Order is not sustainable and the same is set aside. The appeal filed by the appellant is allowed with consequential relief, if any.

(Order pronounced in the open court on 27 August 2021.)

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

Sd/
(RAJU)
MEMBER (TECHNICAL)

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