CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. ST/87507/2015

(Arising out of Order-in-Appeal No. SR/45/ST-I/2015 dated 31.08.2015 passed by Commissioner of Service Tax (Appeals), Mumbai-I)

Indfab Agencies **Appellant**
12 Phoenix Centre,
462 Senapati Bapat Marg,
Lower Parel,
Mumbai 400 013.

Vs.

Commissioner of Service Tax-I, Mumbai **Respondent**
5th floor, New Central Excise Bldg.,
Maharshi Karve Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Suyog Nawal, Advocate for the Appellant
Shri D.M. Shinde, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86075/2019**

Date of Hearing: 10.04.2019
Date of Decision: 07.06.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in appeal No SR/45/ST-1/2015 dated 31.08.2015 of Commissioner Service Tax (Appeal) –I Mumbai zone. By the said order, the Commissioner has upheld the order of Additional Commissioner Service Tax Mumbai 1 holding as follows:

"ORDER

27) Accordingly, after careful consideration of the facts of the case under the subject Show Cause Notice F. No.

V/ST-I/DARC/Commission/Indfab/168/13-14 dated 15.10.2013 (C. No. 171/ADC/Div.I/13-14) for Rs.19,07,162/- and evidence available on records, I pass the following order:-

27.1) I hold that Noticee's impugned activity of finding customers for sale of Grey fabrics, which amounts to promotion/marketing of the sale of goods belonging to their clients, is approximately classifiable as "Business Auxiliary Service" as defined under Section 65(19)(i) read with Section 65(105)(zzb) of the Chapter V of the Finance Act, 1994.

27.2) I also hold that Noticee's impugned activity of providing advice regarding business expansion, is appropriately classifiable as "Management and Business Consultancy" service as defined under Section 65(65) read with Section 65(105)(r) of the Chapter V of the Finance Act, 1994.

27.3) I confirm the demand of Service Tax amounting to Rs.18,41,602/- (Rupees Eighteen lakh Forty-one thousand Six hundred and Two only) under the taxable category of "Business Auxiliary Service" and Rs.65,560/- (Rupees Sixty-five thousand Five hundred and Sixty only) under the taxable category of "Management and Business Consultancy" service, totaling to Rs.19,07,162/- (Rupees Nineteen lakh Seven thousand One hundred and Sixty-two only) under Section 73(2) of the Act.

27.4) I order for payment of interest under Section 75 of the Act, at the appropriate rates prevalent during the material period, on the delay in payment of service tax amounting to Rs.19,07,162/- (Rupees Nineteen lakh Seven thousand One hundred and Sixty-two only) confirmed at paras 25.3 above.

27.5) I impose a penalty of Rs.19,07,162/- (Rupees Nineteen lakh Seven thousand One hundred and Sixty-two only) on the Noticee, under Section 78 of the Act. If the

Noticee pays the service tax confirmed, as mentioned in para 25.3 above, along with the interest on delayed payment within 30 (thirty) days from the date of communication of this Order, the amount of penalty liable to be paid by the Noticee under Section 78 of the Act shall be twenty-five percent of the service tax payable/confirmed in para 25.3 above. However, the benefit of reduced penalty under Section 78 of the Act shall be available only if the said service tax confirmed, interest and the penalty, of twenty-five percent of the service tax payable/confirmed, so imposed under the aforesaid Order, has been paid within the period of 30 (thirty) days from the date of communication of this Order.

27.6) I impose the penalty of Rs.10,000/- (Rupees Ten thousand only) or Rs.200/- (Rupees Two hundred only) per day during the period of failure to obtain registration continues, whichever is higher, under Section 77(1)(a) of the Act.

27.7) I impose the penalty of Rs.10,000/- (Rupees Ten thousand only) under Section 77(2) of the Act.

27.8) I refrain from imposing any penalty under Section 76 of the Act, in view of leviability of penalty under Section 78 of the Act."

2.1 Acting on intelligence developed by Data Analysis and Research Cell of Service Tax Mumbai-I Commissionerate, to the effect that appellants were engaged in providing services as agent and were getting commission which were covered under definition of *"Business Auxiliary Services"* matter was investigated and a show cause notice dated 15.10.2013 was issued to the Appellants in terms of Section 73of Finance Act, 1994 demanding service tax from the appellants in respect of Business Auxiliary Services and Management of Business Consultant Services as per the details below:

Financial Year	Commission 'Rs	Professional Fees ' Rs	Total	Service tax (including cess)	
				Rate	Amount 'Rs
2008-09	3678485	0	3678485	12.36	454661
2009-10	2055625	636510	2692135	10.30	277290
2010-11	2901461	0	2901461	10.30	298850
2011-12	4925782	0	4925782	10.30	507356
2012-13	2985480	0	2985480	10.30	369005
				Total	1907162

2.2 Show cause also demanded interest under section 75 and proposed penalties under Section 77(1)(a) and 77(2) ibid.

2.3 The Show Cause Notice was adjudicated by the Additional Commissioner as per his order referred in para 1, supra. Aggrieved by the order, Appellants filed the appeal before Commissioner (Appeal) which has been dismissed.

2.4 Aggrieved by the order of Commissioner (Appeals) appellants are in appeal before Tribunal.

3.1 In their appeal, Appellants have assailed the impugned order stating that-

i. The order ignores the fact that Show Cause Notice itself admits that they were required to assist the buyer of grey fabrics in getting it processed and that the appellant was not engaged by the buyer of the fabrics.

ii. The lower authorities have failed to appreciate that they provided certain services on behalf of grey fabrics manufacturer/seller on irrelevant consideration. The processing of grey fabrics is a post sale activity and should not negate that the appellant's services are hired for providing assistance for processing.

iii. The conclusion arrived in the impugned order that the services were provided by them on behalf of the grey manufacturer/seller is based on incorrect and irrelevant grounds.

iv. In any case the benefit of exemption notification No 14/2004-ST is admissible to them. The phrase “in relation to” used in the notification as has been interpreted by the Apex Court in case of Doypack Systems (P) Limited [1988 (36) ELT 0201 (SC)] is wide enough to cover the activities undertaken by them.

v. Exemption could not have been denied merely for the reason that exempted activity is combined with sale of goods. It is settled law that principles of classification are not relevant for interpreting the notification. {Mewar Bartan Nirman Udyog [2008 (089) RLT 319 (SC)]}

vi. Service Tax demanded under category of Management or Business Consultants Services rendered to Prathmesh Investment, is exempted under Notification No 6/2005-ST, since excluding the turnover in respect of exempted/ non taxable services of ‘Business Auxiliary Services” their turnover will be less that the prescribed limit of Rs 10 lakhs, for determining the service tax liability.

vii. Since they were under bonafide belief that activities undertaken by them are not leviable to service tax, extended period of limitation cannot be invoked in the present case for demanding the service tax. Hence demand is barred by limitation {Pushpam Pharmaceutical Company [1995 (78) ELT 401 (SC)], Padmini Products [1989 (43) ELT 195 (SC)], Cosmic Dye Chemical [1995 (75) ELT 721 (SC)], Surat Textile Mills [2004 (167) ELT 379 (SC)], HMM Limited [1995 (76) ELT 497 (SC), Tamil Nadu Housing Board [1994 (74) ELT 9 (SC)], Chemphar Drugs and Liniments [1989 (40) ELT 276 (SC)], South India Carbonic gas Industries [1994 (72) ELT 168 (T)]

viii. Penalties and interest are not imposable as they were under bonafide belief, and there was no fraud, misstatement, suppression of fact on their part.

4.1 We have heard Shri Suyog Nawal, Advocate for the Appellants and Shri D M Shinde, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellant learned counsel while reiterating the submissions made in appeal submitted-

i. They do not dispute the nature of activities as recorded in the show cause notice

ii. They have never submitted on records that they were engaged in providing agency service to the buyers of the grey fabrics. Adjudicating authority has predetermined to reject their claim for exemption under notification No 14/2004-ST.

iii. They had never claimed exemption in terms of clause 'a' of the Notification but their claim was under clause 'c' of the notification.

iv. Trade Notice No 12/2004-ST dated 13.09.2004 also clarifies that *"18.3 ……..However the services in relation to agriculture, printing, textile processing and education would remain exempt even if provided by such service providers (refer Notification No 14/04-ST dated 10.09.2004)."*

v. Reliance is placed on the decision of Tribunal in case of Arvind A Traders [2016 (44) STR 264 (T-Chennai)], Texyard International [2015 (40) STR 322 (T-Chennai)].

vi. The contention raised by the authorized representative that activities undertaken by them were not in relation to textile processing is not sustainable. The decisions of Tribunal in case of Shree Ranie Gums and Chemicals Pvt Ltd [2017 (4) GSTL 340 (T-Del)] distinguishing the decision in case of Texyard International is clearly distinguishable.

4.2 Arguing for the revenue, learned Authorized Representative while reiterating the orders of lower authorities submitted that-

i. Activities undertaken by the appellant were not in relation to textile processing and hence they were not eligible to exemption under Notification No 14/2004-ST.

ii. The decision in case of-

    - Arvind A Traders was in respect tax demand under reverse charge mechanism and the facts of case with respect to Notification No 14/2004-ST are not forth coming in the order. Hence distinguishable.
    - Texyard International, was a case were the person was engaged in all activities from procuring yarn, dyes/ chemicals and other raw material to the manufacturer of textile made up. Thus it was held that that activities was predominantly of textile processing (para 4). In the present case the service recipient was only a grey fabric manufacturer and was not carrying out any processing of textile/ grey fabrics. Thus ratio of this decision is not applicable.
    - The decisions of tribunal in case of Texyard International has been distinguished by the tribunal in case of Shree Ranie Gums and Chemicals Pvt Ltd.

5.1 We have considered the impugned order along with the submissions made in appeal, during the course of arguments and in written submissions.

5.2 The undisputed fact as recorded in para 2 of Show Cause Notice and admitted by the appellants in relation to the activities undertaken by them are-

- Development of prospective customers for grey fabrics;
- This require them to approach a prospective customer;
- Suggest a suitable textile process house to the buyer;
- Coordinate between the supplier of the grey fabrics, the customers and the process house;
- Maintain account of outstanding payments;
- Ensure recovery of payments from the buyer.

Further the show cause notice records the contention of party stating that *"it is further stated by the noticee that the activities undertaken by them are in relation to "textile processing" and are incidental or ancillary to the clauses (a) to (c) of the Notification No 14/2004-ST and their activity is exempted from payment of service tax."*

5.3 There is also no dispute about the fact that appellants are acting on behalf of the manufacturer of grey fabrics, for affecting the sale of grey fabric to various customers identified by the appellant. For the purpose of affecting such sale, commission is paid by the manufacturer of grey fabric to the appellants. No service is provided by the appellant to the purchaser of the grey fabric for which any consideration is paid by the purchaser. In the present case, undisputedly the commission is paid by manufacturer of grey fabric for effecting the sale of its goods.

5.4 As per Section 65(19) of the Finance Act, 1994, *"Business Auxiliary Service"* means any service in relation to-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) "Commission Agent" person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person - means any

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "Excisable Goods" ....;

(c) "Manufacture" ………;

5.5 From the undisputed activities undertaken by the appellants it is quite evident that the activities undertaken by them will qualify as *"Business Auxiliary Service"* as defined by Section 65(19) ibid. In the present case having determined the service provided by the appellants, we have also no hesitation in holding that appellants are providing the services to the manufacturer of grey fabrics and also receiving the consideration, "commission" from them. They are not providing any services to the buyer and not receiving any consideration from them.

5.6 Appellants claim that they entitled to benefit of exemption under Notification No 14/2004-ST dated 10.04.2009 (*as amended by Notification No 19/2005-ST dated 07.06.2005 and Notification No 19/2006-ST dated 25.04.2006)*. The relevant excerpts from the notification are reproduced below:

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service provided to a client by any person in relation to the business auxiliary service, in so far as it relates to,-

(a) procurement of goods or services, which are inputs for the client;

(b) production of goods on behalf of the client;

(c) provision of service on behalf of the client; or

(d) a service incidental or auxiliary to any activity specified in (a) to (c) above,

and provided in relation to agriculture, printing, textile processing or education, from the whole of service tax leviable thereon under section 66 of the said Finance Act:"

5.7 For determining the eligibility to this exemption notification the first thing to be determined is the service provider and the client of service provider. In the present case the services of commission agent are provided by the appellant to their client i.e. grey fabric manufacturer. As a part of the service provided by the appellant to its client, customer development is part of service being provided. In the process of customer development they also arrange/ suggest a suitable process house to the customer. However this suggestion or coordination with the process house is not any independent service provided by the appellant to the customers of grey fabric. Also there is no consideration received by the appellants for these activities from the customer of grey fabrics. Thus customers of grey fabrics are not the clients of the appellants.

5.8 From the plain reading of the notification 14/2004-ST, it is clear that the said notification exempts the services provided in relation to business auxiliary services provided by any person (service provider) to his client subject to fulfillment of the conditions specified in clause 'a' to 'd' of the said notification. Further the exemption is admissible, only if the services provided are in relation agriculture, printing, textile processing or education. Thus only services provided by the person (service provider) to his client if they fulfill the other conditions specified by the notification are only exempted. In the present case the services provided by the appellant to their client i.e. grey manufacturers are in respect of sale of their goods and do not fall within the four categories specified by clauses "a" to "d" in the notification.

5.9 The reliance place by the appellants on the decision of Apex Court in case of Doypack Industries, supra for interpretation of the phrase *"in relation to"* do not advance the case of appellants any further. For claiming the benefit of exemption the person claiming the exemption has to establish that services provided by him fall within those exempted. Independently it has to be shown that the activities undertaken by the appellants for their clients fall within the clauses “a” to “d” of the said notification. Admittedly the services provided by the appellants to their clients is for sale of the goods manufactured by them and in no way fall within any of category specified in the said four clauses. With reference to the activities like “suggesting a suitable textile process house to the buyer” and “coordinating between the supplier of grey fabrics, the customer and the process house” adjudicating authority has in his order in para 20.5 and 20.6 observed as follows:

“20.5) Except for the two activities at iii) & iv) above all other activities at i), ii), v) & vi) above are for the benefit of the Grey Fabric manufacturer and not the Grey Fabric buyer. The said two activities at iii) & iv) viz. providing information and assistance to the buyer regarding process houses, is undertaken by the Noticee in his own interest for attracting the prospective and inducing him to execute the transaction of “buying” of grey fabric through him. Noticee has expressly admitted that they are engaged and get paid by the Grey Fabric manufacturer and not the buyers (para 7.2 of Noticee’s reply refers). It is pertinent to note here that Noticee gets paid by the Grey Fabric manufacturer for bringing him a buyer where his “sale” is materialized and not for the transaction of “fabric processing” that my take place between the buyer and the process house. It is those activities which are directed towards the benefit of the Grey Fabric manufacturer, therefore, are the primary and governing activities which give the essential character to Noticee’s all above activities as a whole.

20.6) Getting buyers for the Grey Fabric manufacturer and ensuring payments, therefore, forms the essence of Noticee’s activities and is the most specific description of the same. Amongst the two competing description of service viz. “promotion of sale” and “Provision of service *on behalf of client", Noticee's activities are most appropriately classifiable as "Promotion of sale" in terms of the provisions of Section 65A(2)(a)&(b) of the Act."*

5.9 It is also settled principle in law that exemption clauses need to be construed strictly and in case of any ambiguity the ambiguity should be interpreted in favour of revenue. Reference in this respect is made to the decision of Constitutional Bench of Hon'ble Apex Court in case of Dilip Kumar & Company [2018 (361) ELT 577 (SC)] wherein following has been held:

"52. *To sum up, we answer the reference holding as under -*

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

5.9 Since we have held that services provided by the person (service provider) to the client are only exempted in terms of the said notification, and services provided by the appellant to their clients do not fall within the any of the clauses referred at 'a' to 'd' in the said notification the benefit of exemption will not be admissible to the appellants.

5.10 We also do not find merits in the submissions made by the appellants relying on the decision of Apex Court in case of Mewar Bartan Nirman Udyog as in the present case it is not the principle of classification used for interpreting the exemption notification but the notification is interpreted in terms of the language used in notification.

5.12 The decision of tribunal in case of Texyard International and Arvind A Traders, supra is decision passed by the tribunal much before the decision of the Apex Court in case of Dilip Kumar & Company, supra. Further the services which were being provided were in relation to the procurement of orders from overseas buyers, for manufacture and processing of textiles. The facts in the present case are entirely distinguishable. The case was in respect of demand of service tax on reverse charge basis from the textile manufacturers in respect of the services provided by the overseas commission agent. The bench held as follows:

"6.2 *The lower authorities denied the exemption merely on the ground that the said services are not used for textile processing. On careful reading of the above notification, it is evident that service tax was exempted during the relevant period for the services provided under Business Auxiliary Service if it relates to agriculture, printing, textile processing or education. The appellants are Textile manufacturer and exporters. The word "textile processing" referred in the notification is to be understood in a broader sense. The dictionary meaning of "textile processing" means sequence of operations or changes undergone and the definition of "textile" includes fabrics, fibre, yarn suitable for weaving into fabric. The exemption of service tax under BAS was allowed in relation to four industries namely agriculture, printing, textile processing and education. Therefore, the appellant being textile industry, it is covered under the category "textile processing" in the notification.*

6.3 *Commission paid to the overseas agents is in respect of service provided by that agent to the appellant to export* *its goods and thereby sales is promoted. That is an activity incidental or auxiliary to processing of textile goods and covered by Business Auxiliary Service and Clause (d) of the notification extracted above covers the case of the appellant bringing the export promotion activity abroad as incidental and auxiliary to the activity of production as is meant by Section 65(19) of Finance Act, 1994. Appellants are accordingly entitled to the benefit of exemption Notification No. 14/2004 and not liable to the payment of service tax under reverse charge."*

In case of N-Teek Financials [2014 (36) STR 649 (T-Del)] relied upon by Commissioner (Appeal) [para 9 of impugned order]following was held:-

"5. *The agreement between the M/s. TFL and the Appellant clearly provides that the Appellant will inter alia undertake the following activities :-*

"(a) Explore and promote potential markets for vehicle finance scheme of TFL.

(b) Approach, interview and market to persons who would probably be inclined to and/or interested to avail vehicle finance scheme offered by TFL.

(c) Provide potential applicants with information brochures and pamphlets and explain to them the salient features of the products and vehicle finance scheme.

(d) ------------------------------"

(e) Provide the Designated Officer, in the form as specified by TFL, with the names, address, telephone numbers and other relevant information relating to the persons who have expressed an interest or inclination or desire to wither obtain more information on the Vehicle Finance Scheme of TFL.

(f) ------------------------------"

Thus it is clear that the Appellants were to provide services which clearly fell under the scope of promotion and *marketing and the services were provided to M/s. TFL and not on behalf of M/s. TFL. M/s. TFL paid them for the services so provided to them. The Appellants had no agreement of any type with the potential loan seekers. There is no basis or evidence whatsoever to uphold the contention of the Appellants that they were providing services on behalf of the client (M/s. TFL). Thus, their services cannot be covered under the scope of the expression "provision of services on behalf of the client". The Appellants claimed exemption under Notification 14/2004-S.T., dated 10-9-2004/25/2004-S.T., dated 10-9-2004 by claiming their services to be covered under the scope of "provision of services on behalf of the client"."*

Thus in the case under consideration Commission Agents were procuring the orders as per which the textile materials was to be manufactured and supplied hence bench concluded that the activities undertaken were incidental and auxiliary to the auxiliary to the activity of production. In the present case appellants do not provide any service in relation to textile processing to their clients and hence we do not find any support in favour of the appellants from the said decision of Tribunal.

5.13 In respect of the services, provided by the appellants under the category of *"Management and Business Consultancy"* services the entire defence of the appellants is that if the turnover in respect of Commission Agent services, which as per them is exempted under Notification No 14/2004-ST is excluded then their total turnover will be less then Rs 10 Lakhs and they will be exempted under Notification No 6/2005-ST. Since we do not agree with the contention of the appellants that the services provided by them as commission agent are exempt from payment of service tax the entire defence set up for getting this demand set aside collapses.

5.14 Now coming to the issue of demand being hit by limitation. Appellants have relied upon series of case laws to argue that since they were under bonafide belief that they were not liable to pay service tax, extended period of limitation should not be invoked against them. The principle laid down in the said decisions is very clear and loud. We do not dispute the same. However the issue that is required to be considered, is whether such a bonafide belief existed and what could have been the basis for such bonafide belief. We do not find anything placed on record to show the existence of such a bonafide belief. Further while dealing with issue of limitation adjudicating authority has in para 22.2 of his order recorded as follows:

"22.2) It is further seen in this regard that Noticee had not only paid the said service tax of Rs.19,07,162/- under "Business Auxiliary Service" or "Management and Business Consultancy" service for the period 2008-09 to 2012-13 against the impugned activities of Sales promotion and Consultancy, demanded in the subject Notice dated 15.10.2013, on due dates but also not declared these facts to the department by filing a ST-3 return, incorporating these facts, for the relevant period as required under Section 70 of the Chapter V of the Finance Act, 1994, read with Rule 7 of the Service Tax Rules, 1994. This undoubtedly amounts to suppression of facts with intent to evade payment of service tax. Noticee's reliance on various judgments in support of the time-bar contention is, therefore, misplaced and irrelevant to the subject case. Extended period under proviso to Section 73(1) of the Chapter V of Finance Act, 1994, had been correctly invoked in the Notice."

In the case of M/s. Interscape [2006 (198) E.L.T. 275], it was held that *"bona fide belief is not blind belief and a belief can be said to be bona fide only when it is formed* *after all the reasonable considerations are taken into account".*

Further in case of Continental Drugs Company Pvt Ltd. [2015 (39) STR 154 (T-Mum)] tribunal has held-

5.2 *……….. As regards the claim of the appellant that they had not suppressed any facts and therefore, extended period time cannot be invoked, the appellant has not brought on record any evidence to prove their bona fides. Bona fide belief is not blind belief but has to be based on reasonable measures taken to entertain such belief. There is nothing in the records to show that the appellant consulted either the department or obtained any legal opinion as their liability towards service tax. In the absence of any such evidence, it is difficult to accept this contention. Inasmuch as the appellant did not obtain any registration nor did they follow any of the statutory procedures, the appellant had clearly suppressed the facts from the department with an intent to evade service tax. In these circumstances, the confirmation of duty demand invoking the extended period of time along with interest thereon cannot be faulted. Consequently, the appellant is also liable to penalty under the provisions of the Finance Act, 1994.*

In case of Kala Sagar [2015 (38) STR 1017 (T-Mum)], third member has on the matter being referred to him recorded as follows:-

"14. *I have considered the submissions of both sides as also the orders recorded by my two learned brothers. Extended period of limitation is invoked under the proviso to Section 73(1) of the Finance Act. The said proviso reads as under:-*

"PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

(a) fraud; or

(b) collusion; or

(c) wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

There can be no doubt that for invoking the proviso to Section 73(1), one or more of the five situations enumerated in the said proviso is required to be satisfied in the case. In the present case, the undisputed facts are that the appellant has not taken the service tax registration nor filed any service tax return or paid any service tax. Taking of the registration, filing of the return and payment of service tax are the requirements under the Finance Act, 1994/Service Tax Rules. These documents only provide the facts, information and other details about the activities of a service provider to the service tax authorities. Therefore, under the circumstances there can be no doubt that there was suppression of facts and also contravention of various provisions of the Service Tax Law. The main contention of the learned Advocate is based upon bona fide belief, interpretation of the statute, knowledge of the department and revenue neutrality. I find that none of these concepts find any mention in the said proviso. The Hon'ble High Court of Gujarat in the case of Neminath Fabrics [2010 (256) E.L.T. 369 (Guj.)] [quoted by learned Member (Technical)] has held as follows :-

"The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has

been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal."

The above observation of the Hon'ble High Court is with reference to the knowledge of the department. However, I find the similar thing would be applicable not only to the knowledge to the department but to the bona fide belief or interpretation of statute or to the revenue neutrality. All the four concepts are not mentioned in the proviso to Section 73 and, therefore, as observed by the Hon'ble High Court, import of such concept in proviso to Section 73 of the Act or the proviso thereunder would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any court leave alone the statutory provision. These can at the most have in some cases impact on determining the five situations enumerated in proviso to Section 73. Even for sake of argument, if it is assumed that these are relevant, even then the appellant's arguments have no merits. The first reason quoted for bona fide belief is that Section 65(25b) is applicable to construction of new building. The word "new" or "old" is not mentioned in the said definition. In fact a plain reading of clauses (c) and (d) would clearly indicate that the said clauses are applicable to the activities being carried out by the appellant. In fact there can be no doubt for this to a layman or persons engaged in the field of such services. Repair or renovation are not carried out in new building. Similarly, repair and renovation are always carried out in part of building. In *fact, interpretation suggested will make entries redundant. The other reason quoted is that the appellant was paying VAT on the same amount. It is noted that the appellant was paying VAT as works contract. Works contract by very nature consists of two parts i.e. supply of goods and material and services. While providing the services, the material also gets consumed and both the services and material are handed over to the recipient. The fact that the appellant was paying VAT under works contract would indicate that they were providing some service. Obviously, the appellant should have kept track whether their service would, at any time, become a taxable service. The least that could have been expected was that the appellant start paying service tax after the introduction of works contract service under the Service Tax Law. Even this was not done. The other reason advanced is that there was excise litigation with respect to same activity. The appellant was litigating and not agreeing that their activity amounts to manufacture and, therefore, is not chargeable to excise duty should have made them believe that their activities involve services and would be liable to payment of service tax. In view of this position, I do not find any merit whatsoever in the appellant's contention that they had bona fide belief. In fact, conduct only indicates wilful intention. As far as their contention relating to interpretation of statute, the first contention is that initially the department raised the demand on the said activity on various assessees under 'interior decorator service' and later on under 'commercial or industrial construction service'. Thus, there was difference of opinion within the department itself. I find that this argument is not correct. 'Interior decorator service' was introduced in 1998 much before the introduction of 'commercial or industrial construction service' (in 2005). There are entities who only provide the advice consultancy relating to interior decoration. There are also entities which not only provide* *the advice consultancy but also execute such advice consultancy. Therefore, it was natural that the department in the initial phases was also trying to cover both types of entities under the interior decorator service. However, after the introduction of 'commercial or industrial construction service', the executory activity was specifically listed therein and this dispute vanished. The period under dispute is after the introduction of commercial or industrial construction service under which there was no difference of opinion within the department. As far as covering the activity under the Central Excise Act, 1944 is concerned, the very fact that the appellant was disputing that their activity does not amount to manufacturing furniture and hence not liable to excise duty should lead them to believe that the said activity also involves services and would get covered under Service Tax. In view of this position, I do not find any substance in the contention of the learned Advocate that the issue involved is interpretation of statute. From 2005 onwards, after the introduction of 'commercial or industrial construction service', the activities of the appellant are very specifically covered under the said provision and there can be no two opinions about the coverage of the same after 2005 whatever the difference of opinion or anything can be is for the period prior to 2005. As far as knowledge of the department is concerned, I agree with the learned AR that the Service Tax Law and Excise Law are two different laws and are implemented by two different set of officers having their own jurisdictions and enforcing the respective laws. The appellant has not shown any evidence whatsoever that the jurisdictional Service Tax officials were informed about the activities of the appellant and, therefore, they were fully aware about them. The jurisdictional Central Excise officials may be aware of the ongoing litigation but there is no evidence to indicate that the Service Tax officials were aware of* *appellant's activities. On the contrary, the appellant would be knowing the same and should have approached the Service Tax official for registration and inform of all the facts relating to their activities. The last contention is relating to revenue neutrality. I do not find any substance whatsoever in the argument of the learned Advocate. If such a theory is accepted, it will lead to a situation wherein the final consumer of goods or services only should be taxed or charged and all other irregularities by various manufacturers or service providers would become non-taxable. It is also noted that service tax authorities issued summons in February 2006 but appellant did not co-operate. Appellant also did not take registration. It was only in 2010, after lot of persistence that details could be obtained. Conduct of the appellant cannot be considered as bona fide."*

Thus in view of the above decisions we hold that demands made by invoking the extended period of limitation as provided by Section 73 of the Finance Act, 1994 are sustainable.

5.15 Since we have upheld the demand of service tax, the demand of interest under Section 75 is natural corollary. While demanding the interest adjudicating authority has relied upon the provisions of Section 75 and also the following decisions:

i. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]

ii. TCP Limited [2006 (1) STR 134 (T-Ahd)]

iii. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]

iv. Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

Thus we do not have any reason to differ with the findings recorded in respect of demand of interest.

5.16 Since service tax has been demanded invoking extended period of limitation under Section 73 of Finance

Act, 1994, penalty under Section 78 will follow as has been held by the Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] and Dharmendra Textile Processors [2008 (231) ELT 3 (SC)].

5.17 Since appellant have failed to take registration and pay the service tax, penalties under section 77(1)(a) &77 (2) of Finance Act, 1994 to are justified and sustained.

6.1 In view of discussions as above we do not find any merit in the appeal filed by the Appellant and dismiss the same.

(Order pronounced in the open court on 07.06.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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