CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 87833 of 2014

(Arising out of Order-in-Original No. PUN-EXCUS-003-COM-054-13-14 dated 31.03.2014 passed by Commissioner of Central Excise & Service Tax, Pune-III)

M/s Chanakya Mandal Pariwar .....**Appellant**
1557 Sadashiv Peth,
Near NaviPeth Vithal Mandir,
Pune-411030

VERSUS

Commissioner of Central Excise, Pune - III .....**Respondent**
ICE House 41-A, Sasson Road,
Opp. Wadia College,
Pune-411001

Appearance:

Shri Arun Jain, Advocate for the Appellant
Shri Dilip Shinde, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87619/2019

Date of Hearing: 09.04.2019
Date of Decision: 09.04.2019

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant is an educational institution, engaged in imparting training/coaching to students for various competitive examinations, by charging fees thereon. During the disputed period, the officers of service tax department conducted inquiry into the activities of the appellant with intent to evaluate, whether any of the courses imparted by it is covered under the service tax net or not. Upon investigation into the matter, the department concluded that the services provided by the appellant would fall under taxable category of 'Commercial Training and Coaching Service', defined under Section 65 (105)(zzc) of the

Finance Act, 1994. Since, the appellant was not registered with the service tax department and did not discharge the service tax liability for the period October 2005 to March 2011, the department initiated show cause proceedings against it, which culminated into the adjudication order dated 31.03.2014 (for short, referred to as the 'impugned order'), wherein service tax demand of Rs.52,63,542/- was confirmed along with interest and penalties under Section 77 & 78 *ibid* were imposed on the appellant. Besides, the impugned order also imposed late fee under Section 70 *ibid* read with Rule 7C of the Service Tax Rules, 1994. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellant submitted that the educational courses provided by the appellant were not liable to service tax up to 01.05.2011 inasmuch as the appellant's institute is a public charitable trust, established with the objective of not earning any profits and thus, the activities undertaken by it during the disputed period was outside the scope and ambit of the taxable entry under Commercial Training or Coaching Centre. The learned Advocate further submitted that the proceedings initiated by the department are barred by limitation of time and in this context, has relied upon the judgment of Hon'ble Bombay High Court in the case of Pr. Commr. of Service Tax V/s. Shree Chanakya Education Society, reported in - 2018 (362) E.L.T. 741 (Bom.) and Hon'ble Punjab & Haryana High Court in the case of Ajay Kumar Gupta V/s. CESTAT reported in - 2015 (39) S.T.R. 736 (P & H).

3. On the other hand, the learned AR appearing for Revenue reiterated the findings recorded in the impugned order. He further submitted that as per the explanation clause inserted by Finance Act, 2010 to Section 65(105)(zzc) *ibid*, irrespective of the constitution of the training centre or institute, the same should be considered as commercial training or coaching centre for the purpose of levy of service tax with retrospective effect from 01.07.2003. In this context, he has placed reliance on the Circular No. 334/1/2010-TRU dated 26.02.2010 issued by the CBEC. Thus, he contended that the adjudged demands confirmed by the department is in conformity with the service tax statute.

4. Heard both sides and perused the records.

5. The phrase 'Commercial Training or Coaching' has been defined in Section 65 (26) *ibid*, to mean any training or coaching provided by a commercial training or coaching centre. The taxable entry under such category of service has been defined in Section 65(105) (zzc) *ibid* to mean service provided or to be provided to any person, by a commercial training or coaching centre in relation to commercial training or coaching. Usage of the word 'commercial' in the above definition clause created confusion on the issue, whether non-commercial institutions having no motive to earn profit should also fall under the taxable entry or not. To bring about clarity in the definition of commercial training or coaching centre, an explanation was inserted by Finance Act, 2010 (14 of 2010) dated 08.05.2010 in the definition of the taxable service. The *explanation* clause inserted in the statute book reads as under :

> "Explanation : For the removal of doubts, it is hereby declared that the expression "commercial training or coaching centre" occurring in this sub-clause and in clauses (26), (27) and (90a) shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive and the expression "commercial training or coaching" shall be construed accordingly".

6. The above changes made in service tax statute in Union Budget 2010-11 were clarified by the CBEC vide Circular dated 26.02.2010, stating that when training or coaching is provided for a consideration, irrespective of the presence or absence of any profit motive, then such institution or organisation would be termed as commercial entity for the purpose of payment of service tax. In the present case, it is an admitted fact on record that for imparting training/coaching, the appellant had received the consideration amount from the students. Therefore, the arguments placed by the appellant that since there is no profit motive in providing the training or coaching service and that the appellant is recognised as a public charitable trust for non-levy of service tax, are not appreciated by us in view of clear and

unambiguous explanation contained in the definition clause provided in Rule 65(105)(zzc) *ibid*. Hence, the impugned order, insofar as it has held that the activity conducted by the Noticee is taxable service under the category of 'Commercial Training and Coaching' cannot be faulted with.

7. The period of dispute involved in this case is from 01.10.2005 to 31.03.2011. On perusal of the explanation clause appended to the definition of taxable service under the category of Commercial Training or Coaching in Section 65 (105)(zzc) *ibid* and the clarification furnished vide Circular dated 26.02.2010, it transpires that owing to the reason of use of the phrase 'commercial' in the definition of taxable service, there were lot of confusions with regard to payment of service tax under such category of service and even the tax payers also resisted in paying service tax on such ground. Thus, the scope and ambit of the definition was clarified by the Central Government by way of insertion of the explanation clause in Section 65 (105)(zzc) *ibid.* The reason behind insertion of the explanation clause with retrospective effect from July 2003 was with a view to resolve the disputes pending at different levels of the dispute settlement system. Under the facts and in the circumstances of the case, there is no doubt that the service tax has been short levied or short paid by the appellant, which was liable to be recovered under Section 73 of the Finance Act, 1994. However, the recovery can only be effected within the normal period prescribed under sub-section (1) of Section 73 *ibid* and the proviso appended thereto cannot be invoked for such recovery inasmuch as there was no element of fraud, collusion, wilful misstatement or suppression of facts on the part of the appellant, with the intent to defraud the Government revenue. We find that there were divergent views by the co-ordinate Benches of the Tribunal with regard to levy of service tax under Commercial Training or Coaching Service. Considering the debatable issue of subject levy, the Hon'ble Bombay High Court in the case of Pr. Commr. of Service Tax Vs. Shree Chanakya Education Society, reported in – 2018 (362) E.L.T. 741 (Bom.) have held that since the assessee has expressed bona fide belief that service rendered by it was not chargeable for service tax, then in such case, demand should only be restricted to normal period of limitation and

the extended period cannot be invoked for effecting the recovery. Relevant paragraph in the said decision is extracted herein below:-

> "**7.** *We find that it is undisputed before us that the issue of a charitable institution rendering the service of Commercial Training and Coaching being chargeable to service tax under the Act was a debatable issue before the decision in Sri Chaitanya Educational Committee (supra) was rendered on 1st June 2015. In fact reference of the above issue to a third member in Sri Chaitanya Educational Committee (supra) itself evidences that fact that prior to its decision, a party could have a bona fide belief that a charitable institution rendering the service of Commercial Training and Coaching is not chargeable to service tax under the Act. Thus, no fault can be found in the present facts with the impugned order of the Tribunal restricting the demand only to that extent of normal period of limitation and deletion of equivalent penalty under Section 78 of the Act. This as the Tribunal found on facts and on the basis of the law that the respondent was under a bona fide belief that no service tax is payable by a charitable institution rendering the service of Commercial Training and Coaching."*

8. In the present case, the show cause notice dated 19.04.2011 issued by the department for the period October 2005 to March 2011 to the appellant had invoked the proviso to Section 73(1) *ibid*, proposing for confirmation and recovery of service tax demand under the extended period of limitation. Since, non-payment of service tax by the appellant was not attributable to the reason of fraud, collusion, wilful mis-statement etc., the proceedings should have been initiated within the normal period of one year from the relevant date. Thus, the show cause notice issued in this case beyond the normal period is clearly barred by limitation of time.

9. On perusal of the case records, we find that for the period May 2010 to March 2011, the appellant had collected the service tax from the service recipients, but did not deposit such amount into the Central Government account. The assessee is not empowered under the service tax statute to retain the service tax amount collected from the service receivers. Hence, the service tax amount collected by the appellant during the said period is liable for recovery along with interest, which has been appropriately demanded in the impugned order.

9. The learned Adjudicating Authority has invoked the provisions of Section 78 *ibid* for imposition of penalty on the appellant. Insofar as applicability of the said statutory provision is concerned, department has to specifically allege and prove with tangible evidence that the assessee was really indulged into the fraudulent activities, with the intent to swindle the Government revenue. We find that the original authority has not brought on any iota of evidence to substantiate such charges levelled on the appellant. Since, the ingredients mentioned in Section 78 *ibid* are absent in this case, the penalty imposed in the impugned order cannot stand for judicial scrutiny. With regard to invocation of the provisions of Section 78 *ibid,* the Hon'ble Punjab & Haryana Court in the case of Ajay Kumar Gupta Vs. CESTAT, reported in – 2015 (39) STR 736 have held that in absence of wilful suppression of facts, penal provisions contained in Section 78 *ibid* cannot be invoked.

10. In view of the foregoing discussions, the impugned order sustains, insofar as it has confirmed the adjudged demands within the normal period provided under Section 73(1) *ibid*. The extended period of limitation as per the *proviso* appended thereto cannot be invoked and accordingly, the adjudged demands confirmed beyond the normal period is not sustainable and to such extent, the appeal is allowed in favour of the appellant. The penalty imposed under Section 78 *ibid* is also set aside.

11. The appeal is disposed of in above terms.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Judicial)

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