CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Service Tax Appeal No. 88223 of 2019

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/76/19-20 dated 12.09.2019 passed by the Commissioner of CGST & Central Excise (Appeals-I), Mumbai)

M/s. Asmita Chitra **Appellant**
201, Matoshri Height, D.L. Vaidya Road,
Shivaji Park, Mumbai 400 028.

Vs.

Assistant Commissioner, Mumbai Central **Respondent**
4th floor, GST Bhavan,
115, M.K. Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri Nilesh P. Sawant, Advocate, for the Appellant
Shri Dilip Shinde, Assistant Commissioner, 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/85097/2022

Date of Hearing: 05.01.2022
Date of Decision: 05.01.2022

PER: SANJIV SRIVASTAVA

This appeal is directed against the order-in-appeal No NA/CGST/A-I/MUM/76/19-20 dated 12.09.2019 of the Commissioner (Appeals) CGST & CX, Mumbai. By the impugned order, the Commissioner (Appeals) has held as follows:

"8. In view of the foregoing findings, I uphold the impugned Order in Original No Refund/VH/92/2017-18 dated 07.12.2017 passed by the Assistant Commissioner, CGST & CX, Mumbai Central and reject the appeal filed by the appellant"

1.2 By his order in original referred in the impugned order, Assistant Commissioner has held as follows:

"I hereby reject the refund of Rs 33,93,004/- (Rupees Thirty Three Lacs Ninety Three Thousand and Four only) to M/s Asmita

Chitra under the provision of Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax matters under Section 83 of Chapter V of Finance Act, 1994"

2.1 Appellant is proprietorship concern of Ms Smita Avinash Talwalkar and was providing taxable services classifiable under category of Advertising Agency and TV or Radio Programme Production.

2.2 She opted for the VCES, and made the declaration on 24.12.2013 as required in terms of the said scheme, declaring the service tax liability of Rs 61,12,144/- for the period 01.10.2008 to 31.12.2012. The said liability was discharged as detailed in table below.

S No	Date	Nature	Amount Paid
1	27.12.2013	Service Tax	20,00,000
2	22.01.2014	Service Tax	3,00,000
3	26.03.2014	Service Tax	7,00,000
4	30.12.2014	Service Tax	31,12,144
5		Interest	2,80,860
Total			63,93,004

2.3 She expired on 06.08.2014.

2.4 Legal heir of Ms Smita Avinash Talwalkar has relied on the decision of the Hon'ble Apex Court in the case of Shabina Abraham [2017 (50) S.T.R. 241 (S.C)], to claim refund of amount deposited after her expiry.

2.5 Refund claim filed by the legal heir was rejected by the Assistant Commissioner as per the order in original referred in para 1 above. The appeal filed by the appellant against the said order, was dismissed by the Commissioner (Appeals) as per the impugned order.

2.6 Hence this appeal.

3.1 We have heard Shri Nilesh P Sawant, Advocate for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the appellant learned counsel relying on the decision of Hon'ble Apex Court in the case of Shabina Abraham [2017 (50) S.T.R. 241 (S.C)], argued that refund claim in respect of the amounts paid after expiry of the proprietor should have been adjudicated in their favour.

3.3 Arguing for the Revenue, learned authorized representative referred to the provisions of VCES, specifically Section 109 of Finance Act, 2013 and submitted that the amounts deposited in terms of this scheme cannot be refunded for any reason.

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

4.2 In the present case the refund claim has been filed in terms of Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax vide Section 83 of the Finance Act, 1994. The provision of Section 11B (1) which provides for filing of the refund claim are reproduced below:

"(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:"

4.3 In the present case the application under the said Section has been filed legal heir of the proprietress claiming the refund the of amount paid by the proprietary concern after the expiry of proprietress, in respect of the amount due in terms of VCES introduced by the "Chapter VI: Service Tax Voluntary Compliance Encouragement Scheme, 2013" vide Section 104 to 114 of the Finance Act, 2013**.**

4.4 In this context the letter dated 24.04.2015 of the legal heir is reproduced below, wherein there is admission to the effect that the amounts have been paid voluntarily by the proprietress in terms of the scheme.

1

Amber Talwalkar

201, Matoshri Height, D.L. Vaidya Road, Shivaji Park, Dadar, Mumbai - 400 028

To,
The Assistant Commissioner of Service Tax (Anti Evasion)
Service Tax - III, Mumbai,
Lotus Info Tech Park,
Parel (East),
Mumbai - 400 012

Date: 24/04/2015

Respected Madam,

Sub: - Enquiry against M/s. Asmita Chitra - Reg.

Ref: - Letter F.No. ST-3/AE/AC/026/2014-15/35 dated 18-04-2015.

With regards to your notice received Dated: 18/04/2015 and our letter submitted on 20/04/2015 we submit here with this letter following details and documents as asked by your good self.

1. Interest Calculation sheet of Rs.2,80,860/- paid on 31/12/2014 is attached in **Annexure - 1**

2. It could be noted that Late Smita Avinash Talwalkar had applied under VCES for her proprietary concern M/s Asmita Chitra. She had declared total Service Tax payable of Rs. 61,12,144/- out of which Rs.20,00,000/- was paid on 27/12/2013 itself.

   As you are aware that Late Smita Avinash Talwalkar was a cancer patient and was going through many treatments for more than four years (Copy of Doctor's Certificate attached) and because of her illness and treatments she was unable to pay 50% of the tax declared. She was sort by only Rs.10,56,072/- that too is paid along with interest before 31/12/2014.

   However it could be further noted that even after going through all painful treatment of her Cancer she kept paying Service Tax, date wise payment details of which is attached in Annexure - 1 along with interest calculation

   Unfortunately on 06/08/2014 she passed away but she ensured that service tax liability should be paid to the government and on 31/12/2014 final o/s amount of Rs. 31,12,144/- was paid along with interest amounting to Rs.2,80,860/- photo copies of all tax paid challans and interest challan is attached here with for your ready reference.

3. As we mentioned above that Late Smita Avinash Talwalkar had applied for VCES Scheme she has not filed ST-3 return for the period 2009-10 to till date. As the ST-3 was not filed for the period under consideration she had declared the dues in VCES. As the ST-3 returns itself were not filed reconciliation / comparison with ST-3 is not done

Without prejudice to the above, kindly note that the assessee expired on 06/08/2014 after a severe terminal illness and hence we request your good self to take humanitarian view and stop further investigation on this case as the principle tax payment is made by the assessee.

Kindly oblige. But this act of kindness I shall ever remain grateful.

Thanking you,

Yours truly,

For Asmita Chitra

Legal Heir
Amber Talwalkar

the SCN was already been now submitted may be indicating

4.5 Section 109 of the Finance Act, 2013 reads as follows**:**

"109. Any amount paid in pursuance of a declaration made under sub-section (*1*) of section 107 shall not be refundable under any circumstances."

4.6 In view of the said specific provisions made by the Section 109 referred above, we are not inclined to accept the submissions of the appellant that the amount can be claimed by them as refund under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act 1994.

4.6 Further we also observe that present case is not in respect of any assessment or recovery proceedings of the tax due. Hence the decision of Shabina Abraham as referred above would not apply to the present case. Further even in case of case of Shabina Abraham, Hon'ble Apex Court has observed as follows:

":22. Learned counsel for the revenue, however, strongly relied upon M/s. Murarilal Mahabir Prasad and Others v. Shri B.R. Vad and Others, (1975) 2 SCC 736, a case arising under the Bombay Sales Tax Act, 1953. Since this judgment has been relied upon as the sheet anchor of the revenue's case, it is important to deal with it in some detail.

23. The question that arose in the aforesaid case was whether a dissolved firm could be re-assessed to sales tax in respect of its pre-dissolution turnover. By a two to one (2:1), decision, this Court held that the Bombay Act contained the necessary provisions to re-assess such a dissolved firm in respect of its pre-dissolution turnover. The majority judgment referred to the definition of "dealer" in the Bombay Act of 1953 and referred to this Court's judgment in State of Punjab v. M/s. Jullunder Vegetables Syndicate (supra). We find that the majority judgment of this Court relied heavily on the fact that dishonest persons may dissolve a firm in order to escape liability to assessment of taxes legitimately due from them but which have escaped assessment. In paragraph 19, the majority held :

"It is plausible that a distinction ought to be made between the death of an individual and the dissolution of a firm. Human beings, as assessees, are not generally known to court death to evade taxes. Death, normally, is not volitional and it is understandable that on the death of an individual, his liability to

be assessed to tax should come to an end unless the statute provides to the contrary. With firms it is different, because a firm which incurs during its existence a liability to pay sales-tax may, with a little ingenuity, evade its liability by the voluntary act of dissolution. The dissolution of a firm could therefore, be viewed differently from the death of an individual and the partners could be denied the advantage of their own wrong. But we do not want to strike this new path because the Jullundur case (supra) and the two cases which follow it have likened the dissolution of a firm to the death of an individual. Let us therefore, proceed to examine the other provisions of the 1953 Act."

It then went on to quote Section 15(1) of the Bombay Sales Tax Act, 1953 and then arrived at this conclusion :

"22. Section 15(1) contains an important clause that action thereunder can be taken by the Collector after giving a notice to the assessee under Section 14(3) of the Act within the prescribed period. Once such a notice is given, the Collector gets the jurisdiction to assess or re-assess the amount of tax due from the dealer and all the provisions of the Act "shall apply accordingly as if the notice were a notice served under" Section 14(3). Section 14(3) speaks of the power of the Collector to assess the amount of tax due from the dealer after giving notice to him, if the Collector is not satisfied that the returns furnished are correct and complete. The jurisdiction to assess or reassess which is conferred by section 15(1) is thus equated with the original jurisdiction to assess the dealer under section 14. By this method, the continuity of the legal personality of the assessee is maintained in order to enable the assessment of turnover which has escaped assessment. It is no answer to a notice under Section 15 that the partners having dissolved the firm, the assessment cannot be reopened. It puts a premium on one's credulity to accept that having created a special jurisdiction to assess or reassess an escaped turnover, the Legislature permitted that salutary jurisdiction to be defeated by the device of dissolution. The argument of the appellants really comes to this : suppress the turnover, evade the sales-tax, dissolve the firm and earn your freedom from taxation."

The Court then went on to add :

"24. Section 15A confers on the Collector analogous powers to asses or re-assess a dealer for taxes due prior to November 21, 1956 when the States were reorganised, if either no assessment was made for the prior period or if any turnover had escaped assessment. This provision, like the one contained in Section 15, is of general application and makes no exception in favour of dissolved firm. Therefore, if a firm was not assessed prior to the re-organisation of States or if any part of its turnover had escaped assessment, it is competent to the Collector to assess or re-assess the firm notwithstanding its subsequent dissolution. This is the necessary implication of Section 15A. It must follow as a corollary that the power to rectify a mistake apparent from the record can be exercised by the Collector under Section 35 of the Act of 1953 even after the dissolution of an assessed firm, though on conditions specified in the section. The section contains a compelling implication that evident errors can be corrected no matter whether the firm is in existence or is dissolved. Dissolution is not a panacea for liability to pay sales-tax."

It also added in paragraph 32 :

"It is indisputable that the first appellant firm was liable to be charged to sales tax on its business turnover. The charging provisions are contained in Chapter III of the Act of 1953 and Chapter II of the Act of 1959. In this appeal, we have to construe the machinery provisions of those Acts. In accordance with the view taken in the cases cited above, the machinery sections ought to be construed so as to effectuate the charging sections. The construction which we have placed on the machinery provisions of the 1953 Act will give meaning and content to the charging sections, in the sense that our construction will effectuate the provision contained in the charging sections. The resourcefulness and ingenuity which go into well-timed dissolution of firms ought not to be allowed to be used as convenient instruments of tax evasion. As observed by Lord Dunedin in Whitney v. Commissioners of Inland Revenue :

"A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission of clear direction makes that end unattainable."

Far from there being any crucial omission or a clear direction in the present case which would make the end unattainable, the various provisions to which we have drawn attention leave it in no doubt that a dissolved firm can be assessed on its pre-dissolution turnover."

24. It is clear that on a conjoint reading of these paragraphs this Court found that the machinery provisions contained in the Bombay Sales Tax Act, 1953, were sufficient to reassess a dissolved firm in respect of income that had escaped assessment before its dissolution. A distinction was drawn between an individual who dies and a firm that is dissolved as a device to evade tax. The Court laid great stress on the provision contained in Section 15(1) of the said Act by which the jurisdiction to assess or reassess under Section 15(1) is equated with the original jurisdiction to assess the dealer under Section 14. By this method, the Court found the continuity of the legal personality of the assessee is maintained in order to enable the assessment of turnover which has escaped assessment. The crucial difference, therefore, between Section 15(1) of the Bombay Sales Tax Act, 1953 and Section 11A of the Central Excises and Salt Act is that Section 11A does not contain any such provision as is contained in Section 15(1) which equates the jurisdiction to assess or reassess with the original jurisdiction to assess the dealer in the very first place. Further, this Court also construed Section 19 of the Bombay Sales Tax Act, 1959 which would throw light on the earlier Bombay Sales Tax Act, 1953, as containing the necessary machinery provisions to assess dissolved firms in respect of escaped turnover pre-dissolution. Hence, this Court added :

"35. It is relevant, though we did not refer to this aspect while dealing with the provisions of the 1953 Act, that section 19(3) of the 1959 Act contains a clear indication that the legislature intended that a dissolved firm could be assessed under the 1953 Act also. Section 19(3) speaks of the liability of partners for the tax due from a dissolved firm and provides that they shall be jointly and severally liable to pay the tax due from the firm under the Act of 1959 or "under any earlier law", whether such tax has been assessed before or after dissolution. Section 2(12) of the 1959 Act defines "earlier law" to mean, inter alia, the

Bombay Sales Tax Act, 1953. Thus, one of the postulates of section 19(3) at any rate is that a dissolved firm could be assessed under the 1953 Act. Such a postulate accords with the principle that if the legislature provided for a charge of sales-tax, it could not have intended to render that charge ineffective by permitting the partners to dissolve the firm, an easy enough thing to do. Nothing, in fact, would be easier to evade a tax liability than to declare that the firm, admittedly liable to pay tax, has been dissolved. Section 19(3) of the 1959 Act not only makes clear what was necessarily implied in the 1953 Act, but it throws additional light on the true construction of the earlier law. But we thought it advisable to keep section 19(3) of the 1959 Act apart while construing the 1953 Act because it is the Courts, not the legislature, who have to construe the laws of the land authoritatively. As said in Craies on Statute Law :

Except as a parliamentary exposition, subsequent Acts are not to be relied on as an aid to the construction of prior unambiguous Acts. (6th Ed., p. 146).

The limited use which may be made of the language of Section 19(3) of the 1959 Act, though such a course is unnecessary, is for saying that it serves to throw some light on the Act of 1953, in case the argument is that the Act of 1953 is ambiguous.

36. Section 19(3) being quite clear and explicit, it is unnecessary to dwell on the other provisions of the Act of 1959 in order to show that a dissolved firm can be assessed under it. We may only point out that the Act of 1959 contains provisions similar to those in Sections 15, 15A and 35 of the Act of 1953 on which we have dwelt at some length. Those provisions can be found in Sections 35, 35A and 62 of the Act."

25. A reading of the ratio of the majority decision contained in Murarilal's case (supra) would lead to the conclusion that the necessary machinery provisions were already contained in the Bombay Sales Tax Act, 1953 which were good enough to bring into the tax net persons who wished to evade taxes by the expedient of dissolving a partnership firm. The fact situation in the present case is entirely different. In the present case an individual proprietor has died through natural causes and it is nobody's case that he has maneuvered his own death in order to *evade excise duty. Interestingly, in the written submissions filed by revenue, revenue has argued as follows :-*

"It is pertinent to mention that in the present case, Shri George Varghese (predecessor in interest of the appellants herein) was doing business in the name of manufacturing unit namely M/s. Kerala Tyre & Rubber Company and after the death of Shri George Varghese, his legal representatives (appellants herein) might have been in possession of the plant, machinery, stock, etc., and continuing the same business, but might be in some other name in order to avoid the excise duty chargeable to the previous manufacturing unit."

26. It is clear on a reading of the aforesaid paragraph that what revenue is asking us to do is to stretch the machinery provisions of the Central Excises and Salt Act, 1944 on the basis of surmises and conjectures. This we are afraid is not possible. Before leaving the judgment in Murarilal's case (supra), we wish to add that so far as partnership firms are concerned, the Income Tax Act contains a specific provision in Section 189(1) which introduces a fiction qua dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income Tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in M/s. Murarilal's case (supra)."

4.7 From the above it is observed that the decision of Shabina Abraham was rendered taking note of the absence of machinery provisions for continuance of proceedings under Section 11A, etc after the expiry of the proprietor. Same is not the case as no such proceeding is there but refund claim has been made in respect of the amounts deposited in terms of the VCES, and as per Section 109 of the Finance Act, 2019 no refund of the amounts paid under the said scheme will be refunded under any circumstances.

5.1 The impugned order is upheld and the appeal is dismissed.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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