CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 85290 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-168-15-16 dated 01.12.2015 passed by the Commissioner of Service Tax (Appeals), Pune)

M/s. Shri Chatrapati SSK Ltd. **Appellant**
Bhavaninagar, Tal. Indapur,
Dist. Pune 413 104.

Vs.

Commissioner of Cus. & Cen. Excise, Pune **Respondent**
41-A, ICE House, Sassoon Road,
Pune 411 001.

WITH

Service Tax Appeal No. 87886 of 2017

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-176-177-17-18 dated 01.09.2017 passed by the Commissioner of Central Tax (Appeals), Pune)

M/s. Shri Chatrapati SSK Ltd. **Appellant**
Bhavaninagar, Tal. Indapur,
Dist. Pune 413 104.

Vs.

Commissioner of Central Excise & ST, Pune **Respondent**
41-A, ICE House, Sassoon Road,
Pune 411 001.

AND

Service Tax Appeal No. 87891 of 2017

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-176-177-17-18 dated 01.09.2017 passed by the Commissioner of Central Tax (Appeals), Pune)

M/s. Shri Chatrapati SSK Ltd. **Appellant**
Bhavaninagar, Tal. Indapur,
Dist. Pune 413 104.

Vs.

Commissioner of Central Excise & ST, Pune **Respondent**
41-A, ICE House, Sassoon Road,
Pune 411 001.

Appearance:

Shri J.N. Somaiya, Advocate, for the Appellant
Shri Vinod Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 20.10.2022
Date of Decision: 20.10.2022

FINAL ORDER NO. A/86037-86039/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-in-Appeal No. PUN-SVTAX-000-APP-168-15-16 dated 01.12.2015 passed by the Commissioner of Service Tax (Appeals), Pune and Order-in-Appeal No. PUN-CT-APPII-000-176-177-17-18 dated 01.09.2017 passed by the Commissioner of Central Tax (Appeals), Pune. By the impugned order, the Commissioner (Appeals) has held as follows:-

Order-in-Appeal No. PUN-SVTAX-000-APP-168-15-16 dated 01.12.2015

"*ORDER*

The Order-in-Original No. PUN/STC/DIV III/AC/009/2014-15, dated 25.03.2015 passed by the Assistant Commissioner, Service Tax - Division-III, Service Tax Commissionerate, Pune is upheld as legal and proper. The Appeal is rejected in toto."

Order-in-Appeal No. PUN-CT-APPII-000-176-177-17-18 dated 01.09.2017

"*ORDER*

I uphold both the Orders-in-original passed by the adjudicating authority as detailed in the Table-1 above and reject the respective appeals."

1.2 The Assistant Commissioner, Service Tax-I, Pune vide Order-in-Original No. PUN/STC/DIV III/AC/009/2014-15 dated 25.03.2015 has held as follows:-

"<u>ORDER</u>

"16. (i) I confirm the demand of Service Tax (including Edn. Cess and SH Edn Cess) amounting to Rs.44,803 Rupees forty-four thousands eight hundred and three only) for the period u1/04/2009 to 31/03/2014) under the provisions of Section 73 (2) of the Act, payable by M/s Chhatrapati Sahakari Sakhar Karkhana Limited, Bhavaninager, Tal Indapur, Dist. Pune.

(ii) I confirm the demand of interest on the above amount of Service tax, under Section 75 of the Act.

(iii) I impose a penalty of Rs. 10,000/- on the Noticee under Section 77(2) of the Act.

(iv) I impose a penalty of Rs 22,402 (ie 50% of the Service Tax amount payable by the Notices) on the Noticee under Section 78 of the Act, as the true and complete details of transactions are available in the specified records maintained by the Noticee. If the Noticee pays the Service Tax, Interest and all penalties including reduced penalty within 30 days from the date of communication of the order, this penalty will be reduced to Rs 11,201/-.

No penalty is imposed under section 76 on the Noticee, as the penalty is imposed under Section 78 of the Act.

17. This order is issued without prejudice to any other action that may be taken under the provisions of the Finance Act, 1994 and the Rules framed there under or any other law for the time being in force in the Republic of India."

The Superintendent, Service Tax, Pune vide Order-in-Original No. Range X/02/2016-17 dated 27.12.2016 has held as follows:-

"ORDER

16. (i) I confirm the demand of Service Tax (including Edn. Cess and SH Edn. Cess) amounting to Rs. 12, 798 (Rupees twelve thousands seven hundred and ninety eight only) for the period

01/04/2015 to 31/03/2016) under the provisions of Section 73 (2) of the Act, payable by M/s Chhatrapati Sahakari Sakhar Karkhana Limited, Bhawani Nagar, Tal. Indapur, Dist. Pune.

(ii) As regards recovery of Interest on the above Determined Service Tax liability of Rs. 12,798/ the Recovery of interest is corollary to the demand. Once Demand is upheld, automatically the recovery of Interest is to follow suit. Since the assessee has not deposited the above determined service tax as found recoverable from them within stipulated time, which ought to have been legitimately paid by them to the central excise/ service tax Department. I hold that Interest at appropriate rate is Recoverable from them under section 75 of the Act, till the Date of actual payment of dues. In the case of Pratibha Processors Vs. UOI 1996 AIR SCW 4299-88 ELT 12 (SC) it was observed by the Hon'ble supreme court that interest is compensatory in character and is imposed on the notice who has withheld payment of any tax as and when it is due and Payable

(iii) As regards Penalty under section 76 of the Act. I find the Assessee has not paid Service Tax on Mandap Keeper Service collected while providing the value of rent of utensils providing the said service to their clients. Then the Assessee is liable for penalty action under section 76 of the Act."

2.1 Appellant is having a hall which they gave on rent to their clients and pays service tax on the rent under the category of mandap keeper services.

2.2 During the course of audit, it was observed that along with the hall, the appellant is also giving utensils to their clients on rent. However, the rent amount collected against the renting of utensils was not included in the taxable value while determining the quantum of service tax paid. Accordingly show cause notices dated 14.10.2014 and 7.10.2016 were issued to the appellant asking them to show cause as to why:-

<u>Show cause notice dated 14.10.2014</u>

"i. The Service Tax amounting to Rs.44,803/- (Rs. Forty Four Thousand Eight Three only) short paid due to non-inclusion of the amount of rent received on account of Hundred and utensils should not be demanded and recovered during the period from April,2009 to March,2014, under the provisions of the first proviso to Section 73 (1) of the Act, as detailed in Annexure-A to the Show Cause Notice;

ii. The interest at appropriate rate on the above demand, should not be demanded and recovered under Section 75 of the Act;

iii. Penalty under Section 76 of the Finance Act, 1994 should not be imposed upon the noticee for the reasons discussed in the notice;

iv. Penalty under Section 78 of the Finance Act, 1994 should not be imposed upon them for the reasons discussed in the notice;

v. Penalty under Section 77(2) of the Finance Act, 1994, should not be imposed upon them for contravention of Section 67 of the Finance Act, 1994."

Show cause notice dated 07.10.2016

"i) The total Service Tax amounting to Rs. 12798/- (inclusive of ED. Cess & SHE) (Rs. Twelve thousand Seven hundred & Ninety Eight only) should not be demanded and recovered during the period from April, 2015 to March, 2016 under the provisions of Section 73 (1) of the Act, as detailed in Annexure-A to the Show Cause Notice, which was short paid due to non-inclusion of the amount of Rent received on account of utensils,

ii) The interest at appropriate rate on the above demand, should not be demanded and recovered under Section 75 of the Act;

iii) Penalty under Section 76 of the Finance Act, 1994 should not be imposed upon the notice for the reasons discussed in the notice."

2.3 These show cause notices were adjudicated as referred to in para 1.2 above and the orders of the adjudicating authorities were upheld by the Commissioner (Appeals) as per the impugned orders.

3.1 We have heard Shri J.N. Somaiya, Advocate for the appellant and Shri Vinod Kumar, Assistant Commissioner, Authorised Representative, for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- The deemed sales transactions are excluded from the definition of service and hence in such transactions the assessee is not liable to pay service tax. In the above said transactions also since the appellants have already paid VAT on the rent of utensils (considering the same as deemed sale transaction), there is no question of again asking them to pay service tax on the said rent of utensils. In support, he relied upon the following decisions:-
    - Imagic Creative Pvt. Ltd. [2008 (9) STR 337 (SC)]
    - Kolhapur Auto Works [2017 (10) TMI 748]
    - Aims Pharma Pvt. Ltd. [2019 (5) TMI 240]
    - Compucom Software Ltd. [2019 (2) TMI 262]
    - Brindavan Bottlers Ltd. [2019 (27) GSTL 354]
    - Bhaurao Chavan SSK Ltd. [2020 (2) TMI 1205]
- It is now well settled that mere non payment of tax/non filing of returns etc. by itself is not sufficient to invoke extended period of limitation and the department is under obligation to adduce concrete evidence about the guilty knowledge/malafide intention on the part of the assessee behind the said omissions and in absence of that the extended period of limitation is not invokable. He relied upon the following decisions:-
    - Uniworth Textiles Ltd. [2013 (288) ELT 161 (SC)]
    - Hyundai Heavy Indus. Co. Ltd. 2018 (361) ELT 837 (Bom.)] affirmed by Hon'ble Supreme Court as reported in [2018 (361) ELT A 225]

- Roma Henny Security Services Pvt. Ltd. 2018 (8) GSTL 239 (Del.)

- Appellants remained under the bonafide belief that as they are paying VAT on the rent of utensils (considering the same as deemed sale transaction), they are not required to pay service tax on the said rent of utensils. Thus it is clear that the issue involved is capable of different interpretation and in the light of various decisions of the Tribunal the extended period of limitation is not invokable in the cases where issue involved is of interpretation. Following decisions are relied upon by him in support:-
  - MR Utility Products Pvt. Ltd. [2017 (7) GSTL 248]
  - Fortune Park Hotels Ltd. [2017 (49) STR 567]
  - Bharti Airtel Ltd. [2016 (43) STR 400].

3.3 Arguing for the Revenue, learned AR submits that the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of Tamil Nadu Kalyana Mandapam Association [2006 (3) STR 260 (SC)]. Accordingly he submits that the appeal may be dismissed.

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

4.2 In the case of Tamil Nadu Kalyana Mandapam Association [2006 (3) STR 260 (SC)], Hon'ble Apex Court has held as follows:-

*"**42.** As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand.*

1. M/s. J.K. Jute Mills Co. Ltd. v. The State of U.P. & Anr. [1962] 2 SCR 1;

2. M/s. Gannon Dunkerley & Co. and Ors. v. State of Rajasthan & Ors. (1993) 1 SCC 364;

3. The State of Madras v. Ganon Dunkerley & Co. (Madras) Ltd. [1959] SCR 379;

4. The Sales Tax Officer, Pilibhit v. M/s. Budh Prakash Jai Prakash [1955] 1 SCR 243;

5. M/s. George Oakes (P) Ltd. v. State of Madras [1962] 2 SCR 570.

***43.** In regard to the submission made on Article 366(29A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.*

***44.** The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel and Restaurant v. Union of India & Ors. (supra) ought to have appreciated that in that matter Article 366(29A)(f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.*

50. *Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels etc. which provide limited access to property for specific purpose."*

4.3 Accordingly we do not find any merits in the submission of the appellant on the merits of the case. However, in respect of invocation of extended period, Commissioner (Appeals) has observed as follows:-

"9. The principle of self-assessment is in vogue in Central Excise & Service Tax," under which the Appellant have been operating. This requires the submission of self-assessed. Returns and the entire responsibility of compliance with the statutory provisions is of the taxpayer Appellant). In other words, it is the responsibility of the Appellant to assess their Service Tax liability correctly and pay the taxes correctly. In this case, even if the Appellant were not aware of the legal provisions, they cannot escape from the consequences of that ignorance, as it is settled law that ignorance of law is never an acceptable defence and it does not grant any immunity, and more so in the current regime of self assessment of Central Excise & Service Tax revenue administration, which casts the entire responsibility for the correct payment of tax and for the compliance with the law on the taxpayer. In this regard, the only conclusion which emerges is that as the Department was not aware of the activities of the Appellant and the same were detected, by Officers of the Department. Thus, this case does not even involve any suo moto disclosure of true facts by the Appellant. Self-assessment by the Taxpayer and Audit by the Department the two pillars on which the trust based regime of non-invasive tax administration is standing. Any suppression of facts resulting in wrong self-assessment causing evasion of tax, which gets detected during Audit by departmental officers, attracts invocation of extended period of five years under Section 73 (1) of the Act, as in the present case. The same also leads to imposition of penalty under Section 78 of the Act. The non-payment of the amount of service

tax, leads to the conclusion that the Appellant have scant regard for law thereby betraying the trust reposed on them in the current era of self-assessment. In view of the above conclusion, I find that the decision of the Ld. Adjudicating Authority to impose penalty under Section 78 of the Act is legal and proper."

4.4 Extended period can be invoked only if it should have been shown that the appellant was in knowledge about the requirement to pay the tax and had evaded the payment of service tax by suppressing, misdeclaring etc. as provided under the proviso to Section 73(1) of Finance Act, 1994.

4.5 We do not find any such ingredients. On the contrary there is a reason for the appellant to bonafidely believe that no service tax was payable as they were paying VAT on the rent so collected treating it as a deemed sale. In view of the bonafide belief entertained, we are not in a position to uphold invocation of extended period of limitation in the present case for demanding service tax. Further since the ingredients for invocation of extended period are not available in the present case, we do not find any reason for imposing penalties under Section 78 of the Finance Act, 1994.

4.6 Accordingly the impugned order needs to be modified to the extent of invocation of the extended period and setting aside the penalties imposed under Section 78.

5.1 With the above modifications, the impugned orders are upheld.

5.2 Appeals are partly allowed as per para 4.6 above.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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