CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86998 OF 2016

[Arising out of Order-in-Original No: 73/ST/COMMR/2016 dated 3rd March 2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Garware Polyester Ltd
Aurangabad-Pune Road, Post: Waluj
Dist: Aurangabad - 431133 … ***Appellant***

versus

Commissioner of Central Excise, Customs & Service Tax
N-5 Town Centre, CIDCO, Aurangabad - 431030 ***…Respondent***

APPEARANCE:

Shri Jay Chheda, Advocate and Shri Aniket Barve, Chartered Accountant for the appellant

Shri Ajay Kumar Shrivastava, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85204/2025

DATE OF HEARING: 21/08/2024
DATE OF DECISION: 19/02/2025

PER: C J MATHEW

Having been fastened with tax liability of ₹ 43,70,920, under section 73 of Finance Act, 1994 read with section 111 of Finance Act, 2013, along with interest thereon under section 75 of Finance Act, 1994, in addition to penalty of like amount under section 78 of Finance Act, 1994, M/s Garware Polyester Ltd is before us with the submission that the rejection of their declaration under Voluntary Compliance Encouragement Scheme (VCES), 2013, in terms of section 107 of Finance Act, 2013, was erroneous and that the order[1] of Commissioner of Central Excise and Customs, Aurangabad had, instead of accepting their declaration of tax due of ₹ 8,58,164 for the period from 2008-09 to 2011-12 charged them with tax of ₹ 35,12,757 on activities that were excludible from tax according to section 66B(44) of Finance Act, 1994.

2. We have heard Learned Counsel for the appellant and Learned Authorised Representative and we find that the controversy has arisen in relation to the alleged tax liability on remuneration paid to part-time directors of the company that, flowing from rule 2(1)(d)(i)(EE) of Service Tax Rules, 1994, was sought to be fastened on the appellant.

3. Briefly, the appellant, having ascertained that some part of tax liability had not been discharged, took advantage of the said scheme and rendered its declaration on 9th October 2013 which, instead of

[1] [order-in-original no. 73/ST/COMMR/2016 dated 3rd March 2016]

being accepted, was responded to with communication, dated 29th September 2014, about non-payment of tax to the extent of ₹ 35,12,756 on the said remuneration for the period from August 2012 to December 2012 and, consequently, denied the benefit of the scheme.

4. It is common ground that there are two types of directors and that tax on 'sitting fees' paid to all the part-time directors had been duly discharged and it was only the remuneration of ₹ 2,84,20,362, for the period from August 2012 to December 2012 contracted to Managing Director and the whole-time directors, that was the cause for discard of their claim for eligibility under the scheme as well as consequent fastening of additional tax liability on them. In the impugned order, the finding against the appellant is that

> *'36. As per Rule 2(1)(d)(i)(EE) of Service Tax Rules, 1994, if service provided or agreed to be provided by a director of a company to the said company, the recipient of such service is required to pay Service tax. Further, as per Notification No. 30/2012-S.T. dated 20.06.2012, amended by Notification No. 45/2012-S.T. dated 07.08.2012 (at Sr. No. 5A of the table), 100% liability of the service tax in respect of Director's remuneration falls upon the service recipient As such, it is very clear that service provided or agreed to be provided by a director of a company is taxable and the Service Tax Rules or the aforesaid notification nowhere mentions that Managing Director/whole-time Directors are excluded for payment of Service tax. The noticee is taking shelter that service provided by an employee to the*

employer in the course of or in relation to his employment is not a "service" in terms of Section 65B (44) of the Finance Act,1994. In the instant case, Managing Director/ Wholetime directors provide service through their expertise in, formulation of strategies and policies to achieve the objectives of the company and hence in any sense can not be called as employee of the noticee. I find that the services of the directors are taxable under Service Tax Law w.e.f. 01.07.2012, as these services are not part of the services of the Negative list of Section 66D of the Finance Act, 1994 and payment of Directors are chargeable to service tax under Section 66B of the Finance Act, 1994. As per Notification No. 30/2012-S.T. dated 20.06.2012, amended by Notification No. 45/2012-S.T. dated 07.08.2012 (at Sr. No. 5A of the table), 100% liability of the service tax in respect of Director's remuneration falls upon the service recipient. Therefore, the noticee is required to pay Service Tax on amount of director's remuneration being recipient of service.

37. The noticee's contention that the whole-time directors are employee and amount paid to them are nothing but salaries is not sustainable. The company is a legal person and business of company is run by the Board of Directors. The directors are empowered to run the business of the company for which they conduct meetings and pass resolutions as per the Companies Act The Managing Director or whole-time Directors are part of the Board of Directors and entire authority and powers of the Board of Directors are given for running the business who exercise the same on behalf of the Board of Directors. So, it is clear that Managing Director is acting as representative of Board of Directors and running the business for which he is getting remuneration. It appears *that by merely exercising the authority of Board of Directors, the Managing Director does not become employee of the company and remain as one of Directors of Board of Directors and by virtue of delegation of authority by the Board of Directors to the Managing Director, he becomes most powerful Director. Hence, it appears that remuneration paid to the Managing Director and/or whole-time Directors is taxable as there does not exist relation of employee and employer. The relation of Managing Director and/or whole-time Directors to the company is same as of Directors of the company to the company and the same is not of employee-employer even after work of company affairs is entrusted by the Board of Directors to the Managing Director and/or whole-time Directors.*

38. It is provided under Notification No. 30/2012-ST dated 20.6.2012 as amended (Sr. No. iva) that Taxable services provided or agreed to be provided ***by a director of a company or a body corporate to the said*** *company* ***or the body corporate"*** *the recipient of said service is required to pay service tax under reverse charge mechanism (RCM). This notification did not specify about the category of director, whether full time or part time or executive or non-executive director service is taxable under RCM. The plain, reading of wording of above notification, clearly envisage that the services of any kinds of director (whether full time or part time / executive or non-executive) is taxable under RCM and company or body corporate is required to pay Service Tax 100% under RCM being service recipient. However, "a* ***provision of service by an employee to the employer in the course of or in relation to his employment" is excluded from the definition of "service"*** *in terms of Section 65(B)(44) of the Finance*

Act, 1994. Thus, the service of employee to his employer provided during the course of employment is out purview of service. If the service provided by director as an employee during his employment, then such service did not come under the ambit of taxable service. However, the service provided by the Directors cannot be considered employee's service unless there is any evidence on record showing employee and employer relation i.e. Article of Association indicating employee & employer relation of the Managing Director / Executive Director with the company, letter of appointment, terms and conditions of employment etc.

39. I find that as per provisions of Company Act, 1956, the Directors are elected through shareholders of the Company; the decision making powers and management of the company affairs are looked after by the Board through Directors; the Directors of a company are performing management functions on behalf of the company through Managing Director; the directors are having share and are members of the Board of Directors; they are appointed as per Board's Resolutions; the Directors are responsible for deciding strategies and policies to be implemented; the Directors cannot be terminated except through resolutions of the Board of Directors whereas employees have no such privileges like Managing Director / Executive Directors and no resolution is required for their termination of the employees from the job of the company. As such, it appears that the Managing Director / Executive Directors are not employee of the company.

40. I find that the Board of Directors is constituted as per the provisions of the Company Act, 1956, to look after the

> *management functions of the company which is an artificial person and gets the work of management of company done through the directors. The main purpose of the company is to earn profit and Board of Directors provides services of top management and sets strategies and policies to achieve the objectives of the company. As such the Directors of a company are performing management functions on behalf of the company and hence its directors are not employee.'*

5. It is evident that the adjudicating authority has neither perused the terms of employment of the said directors nor examined the scope for appointment of whole-time employees as directors in the statutory framework governing companies. It is also not the case of the adjudicating authority that the whole-time directors were being remunerated with sitting fees in addition to contractual compensation. The additional tax liability has been fastened after the 'negative list regime' was made operational and influenced, unduly so, by the definition of 'person liable for paying the service tax' in Service Tax Rules, 1994 which is nothing but a machinery provision stemming from statutory delegation under section 68 of Finance Act, 1994. Such machinery provision is of significance to the tax scheme only upon determination of tax liability. The tax liability in the present instance could not have been determined unless with, and except by, reference to the contract of employment. In the absence of such enquiry, and further finding thereof in the impugned order, the determination that the claim under the Voluntary Compliance

Encouragement Scheme (VCES), 2013 is false, and, thereby, warranting discard is not tenable. Such casual and peremptory discard of relevant aspects of compensation detracts from the validity of the findings. It falls to the adjudicating authority to consider this aspect and upon determination that the said amount should have been included in the taxable service with section 2(1)(d)(ii)(EE) of Service Tax Rules, 1994 to be invoked for fastening tax liability attendant upon discard of claim for privilege under the scheme to enable which the proceedings will have to be restored to the original authority.

6. Accordingly, impugned order is set aside and the matter remanded to back to the original authority.

(Order pronounced in the open court on 19/02/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*