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IN THE HIGH COURT OF DELHI AT NEW DELHI

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SERTA 3/2017 & CM 19834 of 2017

**ROMA HENNY SECURITY SERVICE PRIVATE
LIMITED**

..... Appellant

Through: Mr. J. K. Mittal with Mr. Rajveer Singh,
Advocates.

Versus

COMMISSIONER OF SERVICE TAX, DELHI Respondent

Through: Mr. Sanjeev Narula, CGSC with
Mr. Abhishek Ghai, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

17.10.2017

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Dr. S. Muralidhar, J.:

1. This is an appeal by the Assessee under Section 35G of the Central Excise Act, 1944 read with Section 83 of Chapter V of the Finance Act, 1994 ('FA') challenging an order dated 2nd March 2017 passed by the Customs, Excise & Service Tax Appellate Tribunal ('CESTAT').

2. **Admit.** The following substantial questions of law are framed for consideration:

(i) Whether in the facts and circumstances of the case, the impugned order dated 2nd March 2017 passed by the CESTAT is perverse and

without application of mind?

(ii) Whether in the facts and circumstances of the case, the CESTAT was right in holding that the extended period of limitation in terms of clause (d) of the proviso to Section 73 of the FA has been rightly invoked?

3. This Court has heard the submissions of Mr. J.K. Mittal, learned counsel for the Appellant Assessee and Mr. Sanjeev Narula, learned counsel for the Respondent Service Tax Department ('Department').

4. The background facts are that the Assessee was granted licences by the Airports Authority of India ('AAI') for sale of airport entry tickets to visitors to the IGI airport, Delhi and the Chhatrapati Shivaji International Airport, Mumbai on 13th December 2001 and 20th August 2004 respectively.

5. The Assessee states that it was not allowed by the AAI to collect service tax on the entry tickets during the period from 20th September 2004 to 1st March 2005. The AAI granted the Assessee the authority to collect service tax by a letter dated 2nd March 2005 whereupon the Assessee got itself registered and started collecting service tax from 2nd March 2005 onwards. The fact that the Assessee has been collecting and depositing the service tax on entry tickets sold by it with the Government from 2nd March 2005 is not in dispute.

6. After the Assessee obtained registration it was issued summons on 31st May 2005 by the Department. The case of the Assessee is that in response to

the above submission it submitted a reply on 14th July 2005 in which *inter alia* it provided the details of services rendered at various stages along with the agreements with the AAI, statements of bank accounts from 1st April 2004 to 31st March 2005 and also complete ledger account for the sale of entry tickets.

7. During the course of hearing today Mr. Narula, learned counsel for the Department, doubted whether the aforementioned reply dated 14th July 2005 was in fact received by the Department. According to him, the subsequent show cause notice ('SCN') issued to the Assessee on 4th March 2008 did not specifically refer to such reply. The Court will advert to this aspect in a short while.

8. Continuing the chronology of events, on 7th November 2005 another summons was issued by the Department to the Assessee. In response thereto, a reply was furnished by the Assessee on 19th November 2005 enclosing the following documents:

- (i) Copy of licence agreement entered into with the AAI.
- (ii) Details of all payments made to the AAI.
- (iii) Details of payment made to contractors for services created and maintained at the airport.
- (iv) Details of services provided to organizations other than those of AAI.
- (v) Copies of income tax returns along with details of balance sheet

9. As far as the above response is concerned, para 2 of the SCN dated 4th March 2008 acknowledges it and states as under:

“2. Pursuant to the intelligence gathered, the authorized person of the company was summoned on 8th November 2005 and asked to furnish relevant documents (RUD-1). In response, the company submitted copy of Licence Agreement dated 13th December 2001 and dated 20th August 2004 signed by them with the Airport Authority of India, license fee paid to the Airports Authority of India and Balance Sheet for the fiscal year 2004-05 (RUD-II).

10. It appears that after the above response of the Assessee for almost a year nothing transpired. From para 5 of the SCN it appears that on 4th December 2006 and 26th March 2007, the “voluntary statements” of the Manager of the Assessee were recorded by the Department. The SCN further notes that on 16th March the Assessee took ‘Centralized Registration’ at Commissionerate of Service Tax, Delhi’ in respect of airport services and that by its letter dated 18th October 2007 it supplied the month-wise sales and service tax collected/deposited from all the sites from 10th September 2004 to March 2005.

11. The SCN dated 4th March 2008 was issued to the Assessee for its failure to collect service tax during the period from 10th September 2004 to 1st March 2005 by invoking the extended period of limitation under clause (d) of the proviso to Section 73 (1) of the FA. The specific averment to this effect is to be found in para 13.2 of the SCN which reads as under:

“13.2 It further appears that the company has never disclosed the fact of providing taxable service to the department at any point of time and suppressed the facts with intent to evade payment of service tax, hence provision of Section 73 of the Act to demand service tax for an extended period of five years from the relevant date are applicable in the instant case.”

12. Therefore, one of the main questions that arises in the present case is

whether the Department was justified in invoking the extended period of limitation under clause (d) of the proviso to Section 73 (1) of the FA?

13. The SCN ended in an adjudication order dated 6th May 2009 being passed by the Additional Commissioner of Service Tax (ACST). In para 3 of the said order it was noted that summons was issued to the Appellant on 7th November 2005 pursuant to which the Assessee had submitted a copy of the licence agreements dated 13th December 2001 and 20th August 2004 entered into with the AAI, apart from the licence fee paid to the AAI and the balance sheet for the financial year 2004-05.

14. As regards the contention of the Assessee that the SCN was barred by limitation, the ACST held that the failure of the Assessee to pay service tax for the above period amounted “to non-disclosure of facts to the Department, resulting into contravention of various provisions of the Act and said Rules aforesaid with intent to evade payment of service tax and education cess as applicable

15. The date of the aforementioned order, i.e. 6th May 2009, is significant because prior thereto on 19th December 2007 in ***P.C. Poulose v. Commissioner of Customs & Central Excise (Appeals), Cochin 2008 (10) STR 335 (Tri. Bang)***, the South Zonal Bench of the CESTAT at Bangalore held in similar circumstances, that the ultimate liability to collect service tax rested with the AAI which was actually providing the services. It was held by the CESTAT that “a person who simply collects the entrance fee cannot be equated with the service provider.” However, the ACST in the above adjudication order distinguished the aforesaid decision and held it to be

inapplicable.

16. Aggrieved by the above adjudication order, the Assessee went before the Commissioner (Appeals), Service Tax (CAST) who by an order dated 6th January 2011 dismissed the appeal and concurred with the ACST. The CAST observed that “even if the appellant was not empowered to collect the Service Tax from the visitors, then also he was supposed to pay the appropriate tax, considering the amount collected as inclusive of tax and the demand has been calculated accordingly only the clarification was received by the appellant from the Airport Authority to the appellant on 02.03.2005.” It was further observed that “the Appellant company was well aware about their liability but visitor suppressed the facts from the department in that equation.”

17. By the time the CAST decided the appeal, another development that took place was that on 10th July 2009 in ***Commissioner of Central Excise v. P.C.Paulose 2010 (19) STR 487 (Ker.)*** the Kerala High Court reversed the decision of the CESTAT in ***P.C. Poullose v. Commissioner of Customs (supra)*** and held that the Respondent in that case being the service provider was in fact liable to pay service tax.

18. Aggrieved by the orders of the ACST as well as the CAST the Assessee went before the CESTAT. It appears that there was an issue raised by the Department regarding the maintainability of the above appeal before the CESTAT. The counsel for the Assessee filed detailed written arguments before the CESTAT on 25th November 2014 with an advance copy to the learned counsel for the Department. In para 2 of the said written submissions

the Assessee adverted to the fact that it had in response to the summons dated 31st May 2005 replied to the Department by its letter dated 14th July 2005 enclosing copies of the license agreements with the AAI, the bank statements as well as details of the sale of entry tickets. A reference was also made to the subsequent summons issued on 7th November 2005 and the reply thereto on 19th November 2005. It appears that the said written submissions were not replied to by the Department.

19. Thereafter on 16th December 2014 the CESTAT passed a detailed interim order which reads as under:

“Before dealing with the stay application, we have gone through the order dated 19.11.2014. On the said date, Revenue took the objection that the appeal filed by the applicant is beyond the period of limitation, therefore, the appeal is non-maintainable. The matter was argued at length on the same day and this Tribunal observed that having regard to the fact that the appeal filed in March, 2013 is still pending adjudication for stay application, we direct Revenue, if do so desire to file appropriate petition along with supporting documents by 16.12.2014. If no such application is filed by Revenue, we will proceed on the principle of non-traverse, to the pleadings regarding receipt of the impugned order only on 06.02.2013.

2. No application has been filed by Revenue till date. Therefore, proceed to consider the stay application holding that the impugned order is received by the applicant only on 06.02.2013 and thereafter the appeal is filed within the period of limitation.

3. Brief facts of the case are that the applicant is engaged in the activity of sale of tickets for visitors at IGI Airport, New Delhi. From 10.09.2004, levy of service tax came on the activity of Airport Services, litigation was going on between the Airport Authority of India (AAI) and Service Tax Department whether on the services provided at airport are taxable or not and the applicant was not allowed by AAI to collect the service tax. Therefore, the applicant did

not collect the service tax during the period 10.09.2004 to 01.03.2005. As and when the AAI allowed the! applicant to collect service tax w.e.f. 02.03.2005, the applicant took service tax registration and from that day onwards paying the service tax on the activity of sale of tickets to the visitors. After taking the registration, Revenue started proceedings against the applicant asking the details of services provided prior to 02.03.2005, on which the applicant replied and after completion of the investigation against the applicant, a Show Cause Notice was issued to them on 04.03.2008 to demand the service tax for the period 10.09.2004 to 01.03.2005. Thereafter, the Show Cause Notice was adjudicated and demand of service tax along with interest and various penalties were confirmed by way of impugned order. At this stage, the applicant is seeking waiver of pre-deposit. The first appellate authority has confirmed the demand, which was levied by the adjudicating authority.

4. Ld. counsel for the applicant submits that there was a dispute of levy of service tax during the impugned period. Therefore, under bonafide belief they are not liable to pay the service tax. In these circumstances, the extended period of limitation is not invocable. He also submits that in the case of ***P.C. Paulose Vs. CCE (Appeals) Cochin [2008 (10) STR 335 (Tri. - Bang.)]***, the Tribunal held that on sale of tickets to visitors, service tax is not leviable. Ld. counsel fairly admits that the said decision was reversed by the Hon'ble High Court of Kerala vide its order dated 10.07.2009 and the Hon'ble Apex court also held that the service tax is leviable on the said activity vide order dated 13.01.2011 ***[2011 (21) STR 353 (S.C.)]***. In these circumstance, he pleaded as the applicant was under bona fide belief that the activity was not leviable for service tax, therefore, they did not pay the service tax during the impugned period and sought waiver of pre-deposit.

5. On the other hand, ld. Departmental Representative opposed the contentions of the ld. counsel and submitted that on merits, it is an admitted fact that during the impugned period, applicant was received the payments and are liable to pay service tax. It is further submitted that the dispute between the AAI and the Service Tax Department has nothing to do with the liability of the applicant to pay the service tax. Therefore, the applicant be directed to make the pre-deposit at this

stage. She further submitted that the extended period of limitation was rightly invoked as they have provided the details only in 2007.

6. We have considered the submissions made by both the sides. Prima facie, we are of the view that as per the decision of the Tribunal in the case of *P.C. Paulose*, (supra), the activity of sale of tickets for visitors is not leviable to service tax. Therefore as there are contrary views in that case, allegation and suppression cannot be alleged against the applicants. In these circumstances, extended period of limitation is not invokable. Therefore, prima facie, the applicant has made out a good case for complete waiver of pre-deposit. Accordingly, we waive the pre-deposit and stay the recovery of impugned adjudicated liability during the pendency of the appeal.”

20. It is significant that in para 3 of the above interim order the CESTAT took note of the fact that it was the Assessee’s case that it had not been permitted by the AAI to collect service tax for the period from 10th September 2004 to 1st March 2005 and that as soon as the AAI allowed the Assessee to do so with effect from 2nd March 2005, the Assessee obtained service tax registration and from that date onwards was paying service tax. It was observed by the CESTAT in the context of the decision of the CESTAT, Bangalore which was reversed by the Kerala High Court that the Supreme Court had subsequently affirmed the Kerala High Court and since there were contrary views, suppression cannot be alleged.

21. The Court finds that the CESTAT has in the impugned final order dated 2nd March 2017 committed errors, some of which may be inadvertent but not all. For instance, the impugned order mentions the date of final hearing as 14th February 2013 whereas the interim order itself was passed on 16th December 2014. Obviously the appeal was heard only thereafter.

22. Even if the above error could be said to be inadvertent, what is perplexing is that in para 6 of the impugned order the CESTAT purports to set out para 5 of the decision of the Supreme Court in *P.C. Paulose, Sparkway Enterprises v. Commissioner of Central Excise & Customs (2011) 21 STR 353* whereas it has in fact set out para 5 of the CESTAT's order in that case which in fact was in favour of the Assessee. This is an obvious instance of non-application of mind by the CESTAT.

23. The central issue that had to be addressed by the CESTAT was whether the Department was justified in invoking the extended period of limitation of five years in terms of Clause (d) of the proviso to Section 73 (1) of the FA. On this aspect the CESTAT appears to have failed to note certain important dates and therefore came to the erroneous conclusion that the invocation of extended period of limitation by the Department was justified.

24. It may be recalled that the period for which the SCN was issued was 10th September 2004 to 1st March 2005. In terms of Section 73 (1) of the FA which states that the period within which the Assessee had to be served the notice for failure to collect service tax was one year from 1st March 2005, i.e., 28th February 2006. Within this period a series of events took place. One was that the Appellant obtained service tax registration on 2nd March 2005 and commenced collecting and depositing service tax. The Department was obviously aware of this fact. It issued summons to the Assessee on 31st May 2005 which was replied to by the Assessee on 14th July 2005.

25. As noted earlier, Mr. Narula doubted whether the Department had in fact received the aforementioned reply dated 14th July 2005 of the Assessee .

However, Mr. Narula is unable to dispute that the Department did issue summons to the Appellant on 7th November 2005 which was replied to 19th November 2005. The Assessee did furnish with the said reply the agreements, payments made to AAI , payments to contractors, copies of ITRs, details regarding sale of entry tickets etc. pursuant to the licence agreement with the AAI to the Department. This was sufficient for the Department to proceed under Section 73 (1) of the FA within the period of one year. In any event, therefore, there was no question of the Assessee suppressing any material facts regarding the sale of entry tickets and its failure to collect service tax thereon for the above period from 10th September 2004 to 1st March 2005.

26. The Assessee does not deny that it did not collect service tax for the above period. But it has a valid explanation for not doing so. It is right in questioning the invocation by the Department of the extended period of limitation under clause (d) of the proviso to Section 73 (1) FA since the above facts, far from being suppressed, were known to the Department before the one year period from 1st March 2005 expired.

27. Mr. Narula then argued that the mere failure to pay the service tax was by itself is sufficient to conclude that there was suppression of material facts by the Assessee. That contention stands negated by the decision of the Supreme Court in *Uniworth Textiles Limited v. Commissioner of Central Excise, Raipur 2013 (288) ELT 161 (SC)* where in para 12 the Supreme Court observed as under:

“12. We have heard both sides, Mr. R.P. Bhatt, learned senior counsel appearing on behalf of the Appellant, and Mr. Mukul Gupta, learned

Senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. **The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso.”** (emphasis supplied)

28. Consequently, the Court is not satisfied in the present case that the Department was justified in invoking the extended period of limitation under clause (d) of the proviso to Section 73 (1) of the FA.

29. Resultantly, Question (i) framed by the Court is answered in favour of the Assessee and against the Department by holding that the impugned order dated 2nd March 2017 passed by the CESTAT is without application of mind. Question (ii) is also answered in favour of the Assessee and against the Department by holding that the CESTAT erred in holding that the extended period of limitation in terms of the proviso to Section 73 (1) of the FA was rightly invoked by the Department.

30. The impugned order dated 2nd March 2017 of the CESTAT, the order dated 6th May 2009 passed by the ACST, the order dated 6th January 2011 passed by the CAST and the SCN dated 4th March 2008 are hereby set aside.

31. The appeal is accordingly allowed but in the facts and circumstances of the cases, no orders as costs. The application is disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

OCTOBER 17, 2017

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