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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 57 OF 2017

The Commissioner of Service Tax-IV, Mumbai Commissionerate … Appellant
Versus
M/s. Rochem Separation Systems (I) Pvt. Ltd. …Respondents

Mr. Pradeep Jetley, with Mr.J.B. Mishra, for the Appellant.
Mr. Prakash Shah, with Mr. Jas Sanghavi i/b. PDS Legal for the Respondents.

CORAM: M.S.SANKLECHA & RIYAZ I. CHAGLA, JJ.
DATED: 17TH SEPTEMBER, 2018.

PC:-

1. This Appeal under Section 83 of the Finance Act, 1994 (the Act) read with Section 35G of the Central Excise Act, 1944 challenges order dated 10th December, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal).

2. The Revenue urges following two questions of law for our consideration:-

> ***(a) " Whether the service provided by M/s. Rochem AG Swizerland to the Respondent herein is covered under the "Intellectual Property Right Service' falling under Clause (zzr) of Section 65(105)"?***
> ***(b) Whether the provisions of extended time period laid down in Section 73(i) are invokable in the present case"?***

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3. **Re. Question No.(a):-**

(i) We find that this question on merits as proposed is academic in the facts of this case. This in view of the fact that the impugned order of the Tribunal dated 10th December, 2014 is *inter alia* records as follows:-

> ***"We have held above that the Commissioner has failed to establish that the entire demand is sustainable on merits. However, as we have held that the demand is time barred, we are deciding the matter only on the basis of limitation".***

(ii) Thus in our view this question become academic as it is undisputed that the show cause notice has been issued on 1st February, 2010 seeking to recover service tax for the period 2007-08.

(iii) The occasion to decide on merits would not arise as the Tribunal on facts found that demand is barred by limitation. This as the Supreme Court in the case of ***Commissioner of Customs, Mumbai Vs. B.V. Jewels[1],*** has held that where the Tribunal finds that the demand by the Revenue is barred by limitation. There is no need to go into the merits of the controversy.

1 2004 (172) E.L.T. 3. (S.C.)

(iv) In the above view, the question (a) as proposed does not give rise to any substantial questions of law being academic. Thus not entertained.

4. **Re. Question No.(b)**:-

(i) The Respondent is registered under the Act. During the course of audit it was found that the Respondent had paid Royalty of Rs.6 Crores on account of technical know how charges to a foreign party.

(ii) On 12 January 2010 a show cause notice was issued to the Respondent demanding Rs.73.44 lakhs as taxable value of Rs.6 Crores for the period 1 April 2004 to 31 March 2009. The notice invoked the extended period of limitation under Section 73(1) of the Act. This for not declaring the payment of royalty for receiving Intellectual Property Right service from a foreign party. The demand of Rs.73.44 lakhs only pertains to period 2007-08 as is evident from the annexure to the notice.

(iii) The Commissioner of Service Tax by an order dated 4th January, 2013 upheld the demand holding that the Respondent was liable to pay tax under the Act for the royalty paid. This under the reverse charge mechanism by invoking the extended time period of limitation under the proviso to Section 73(1) of the Act. However, no penalties were imposed by the order dated 4 January 2013 of the Commissioner of Service Tax.

(iv) Being aggrieved, the Respondent filed an Appeal to the Tribunal. The impugned order of the Tribunal recorded the fact that there are two issues which arise for consideration viz. (1) whether the service received by the Respondent was covered under the Intellectual Property Rights Service; and (2) whether extended period can be invoked.

(v) The impugned order after deliberating on issue (1) above, finally rested its order only on the issue (2) i.e. limitation. With regard to issue (1) the impugned order does record that the Commissioner had not analysed the case on merits. However, as the Tribunal found that the demand would be barred by limitation as the issue of charging service tax on reverse charge under Section 66A of the Act was pending in litigation before various Courts. Further it also records that when penalties under Section 78 of the Act were waived by the Commissioner on the ground that there was confusion with regard to taxibility under reverse charge mechanism at the relevant time of import of service, the same should apply to tax demand also. Thus on facts the impugned order of the Tribunal holds that the demand was barred by limitation. Thus allowed the application of the Respondent.

(vi) Mr. Jetley submits that the the decision on merits would be very relevant to decide whether or not the extended period of limitation is involved. It is further submitted that the conditions for waiving penalty under Section 80 of the Act is different from the invoking extended period of limitation. Therefore, the mere fact that Section 80 of the Act has been invoked by the Commissioner not to impose penalty, would not *ipso facto* make the demand made by the Revenue time barred.

(vii) We find that the impugned order of the Tribunal has held that the demand time barred on account of the fact that at the relevant time, the position in law was not clear. This as observed by the Commissioner in his order dated 4 January 2013 while not imposing penalty as this issue was pending adjudication before various judicial forums. The

Tribunal further records that Section 78 of the Act and the proviso to Section 73(1) of the Act are similarly worded. Therefore, once it is held that no penalty under Section 78 of the Act is imposable, as non payment of tax was not for wilful misstatement or collusion etc. i.e. identical to the ingredients for invoking the extended period, then the same is to be applied and the demand for extended period be set aside. This is particularly as the Revenue has accepted the order dated 4 January 2013 of Commissioner of Service Tax holding that no penalty is imposable as there was a reasonable case for non-payment of service tax. We find that the view taken by the Tribunal on facts is a possible view and would not merit interference.

(viii) In the above view question (b) as does not give rise to any substantial question of law. Thus not entertained.

7. Accordingly, Appeal is dismissed. No order as to costs.

(RIYAZ I. CHAGLA J.) **(M.S.SANKLECHA, J.)**