

In the High Court of Judicature at Madras

Dated : 23.8.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.35 of 2018 and CMP.No.441 of 2018

The Principal Commissioner of GST
& Central Excise, Chennai North
Commissionerate, No.121,
Nungambakkam High Road, Chennai-34.Appellant

Vs
C.KamalakaranRespondent

APPEAL under Section 35G of the Central Excise Act, 1944
against final order No.40715 of 2017 on the file of the Customs,
Excise and Service Tax Appellate Tribunal, South Zonal Bench,
Chennai dated 18.5.2017 in Appeal No.ST/41802/2016-SM.

For Appellant : Mr.T.L.Thirumalaisamy, SPC
For Respondent : Mr.N.V.Balaji

Judgment was delivered by T.S.SIVAGNANAM, J

This appeal filed by the Revenue is directed against the
order passed by the Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench, Chennai in Appeal
No.ST/41802/2016-SM in Final Order No.40715 of 2017 dated
18.5.2017.

2. The above appeal is admitted on the following substantial
question of law :

"In the facts and circumstances of the
case, in the absence of documentary evidence
to show that the assessee had acted in bona
fide belief and in the light of evidence of
his non registration, non payment and non
filing of returns, which were statutorily
required to be complied, whether the
Tribunal was justified in holding that there

was no suppression of facts and that the issue of show cause notice was hit by limitation?"

3. The Department issued the show cause notice dated 19.10.2012 stating that the respondent - assessee received commission for promoting, marketing and selling the goods produced by M/s.Herbalife International India Private Limited and that the assessee is one of the independent distributors of multi-level marketing company. The assessee had obtained service tax registration on 17.7.2012 for providing taxable services mentioned in 'other than negative list'.

4. In the said show cause notice, after examining the nature of transaction between the assessee and the principal, the Original Authority stated that the principal raised bills on the sale of products to their distributors by raising sale invoices and charges and value added tax on them. However, the distributors did not raise any separate sale document in respect of subsequent sales made by them and did not charge sales tax/VAT on such sales and thus, they acted as a commission agent on behalf of the principal by promoting their products.

5. On scrutiny of the records furnished by the assessee, the Original Authority stated that the assessee is not registered with the Department till 17.7.2012 whereas he received commission charges for the services provided under the category 'business auxiliary service' from 2007-08 to 2011-12. However, the assessee did not disclose the actual amount received as commission as reflected in his balance sheets in the ST-3 returns filed on 24.8.2012 for the period from 2007-08 to 2011-12.

6. It appears that certain clarifications were obtained by the assessee and a statement was also recorded and ultimately, the assessee was called upon to show cause as to why the service tax along with cess should not be demanded from him under the Proviso to Section 73(1) of the Finance Act, 1994 for the period from 2007-08 to 2011-12; as to why the amount paid by him on 16.8.2012 should not be appropriated towards the demand of service tax; as to why interest applicable should not be demanded; and as to why penalty should not be imposed.

7. The assessee filed his reply, which was rejected and the proposals made in the show cause notice were confirmed vide the Order-in-Original dated 17.10.2014. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Central Excise (Appeals). The First Appellate Authority, by order dated 30.6.2016, rejected the appeal, against which, the assessee preferred an appeal before the Tribunal.

8. One of the grounds raised in the appeal filed before the Tribunal was as to whether the Adjudicating Authority could have levied penalty under Section 78 of the Finance Act, 1994, since the case of the assessee is squarely covered under Section 73(3) of the Finance Act, 1994 since there is no fraud or suppression of facts, etc., and the entire service tax along with interest was paid before the Department and the Department had any clue that the appellant was providing taxable service and before issuance of the said show cause notice and that therefore, they were covered under Section 73(3) of the Finance Act, 1994. Apart from the above contention, the assessee also advanced other contention on facts and relied upon certain judicial precedents.

9. The Tribunal, vide final order dated 18.5.2017, disposed of the appeal in favour of the assessee by setting aside the order passed by the Adjudicating Authority as well as the First Appellate Authority and held that the demand beyond the period of limitation would not be sustainable. Hence, the Revenue is on appeal before us as against order of the Tribunal.

10. We have heard Mr.T.L.Thirumalaisamy, learned Senior Panel Counsel appearing for the appellant and Mr.N.V.Balaji, learned counsel for the assessee.

11. The question, which falls for consideration, is as to whether the Department was justified in invoking the extended period of limitation and also imposing penalty.

12. The Tribunal, while considering the correctness of the order passed by the First Appellate Authority, referred to the decision of their New Delhi Bench in the case of Charanjeet Singh Khanuja Vs. CST, Indore [reported in (2016) 68 Taxmann.com 60] and held that if two findings are possible, the longer period of limitation under the Proviso to Section 11A(1) cannot be invoked. There is no dispute with regard to the fact that the decision in Charanjeet Singh Khanuja has attained finality and that the Department has not preferred any appeal against the said decision.

13. The law on the subject as to whether the extended period of limitation could have been invoked when there were two views within the Department itself i.e. when certain Original Authorities hold that the services are taxable services and certain Appellate Authorities hold otherwise, the Hon'ble Supreme Court, in the case of Continental Foundation Jt. Venture Vs. CCE, Chandigarh-I [reported in (2007) 216 ELT 177] considered the expressions used under the Proviso to Section 11A of the Central Excise Act, 1944 and held as follows:

"10. The expression 'suppression' has been used in the Proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

11. Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent Larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly

qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the Proviso to Section 11A. Mis-statement of fact must be wilful.

13. That being so, the adjudicating authorities were not justified in raising the demand and CEGAT was not justified in dismissing the appeals.

14. On the ground of adjudication beyond the normal period of limitation and non-availability of the extended period of limitation, the appeals are allowed."

14. In the instant case, there was no allegation of fraud or suppression or wilful mis-statement against the assessee. The Department, even in the said show cause notice, stated that the assessee was liable to pay service tax and get himself registered from the year 2007-08 whereas he got himself registered only in the year 2012. The Tribunal, in the decision in Charanjeet Singh Khanuja, considered an identical issue in a batch of cases and pointed out that when, on the issue involved in the batch of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assessee was taxable under Section 65(105) (zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. Thus, it held that when there is scope for doubt in the mind of the assessee on a particular issue, the longer period under the Proviso to Section 11A of the Central Excise Act, 1944 cannot be invoked.

15. The operative portion of the order in the decision in Charanjeet Singh Khanuja reads as follows :

"Another plea raised in these appeals is regarding limitation. It is the contention of the assesseees that there was absolutely no suppression or mis-statement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to

evade payment of service tax. The Department's contention, on the other hand, is that the assessee neither obtained service tax registration nor did they declare their activities to the jurisdictional Service Tax Authorities nor did they file ST-3 return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of the Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assessee did not apply for service tax registration or did not file ST-3 returns or did not declare their activities to the jurisdictional Central Excise Authorities, it cannot be inferred that this was a wilful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals), after analysing the activities of the assessee, had taken the view that the same is not covered by the definition of 'business auxiliary service' under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994. When, on the issue involved in these group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assessee was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of Continental Foundation Joint Venture Vs. CCE [(2007) Taxmann.com 532], when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period under Proviso to Section 11A(1) cannot be invoked and in our view, the ratio of this judgment of the Apex Court is applicable to the facts of these cases. Therefore, the longer limitation period of five years under Proviso to Section 73(1) of the Finance Act, 1994 would not be invocable and duty can be demanded for normal limitation period of one year from the relevant date."

16. In the impugned order, the Tribunal had followed the decision in Charanjeet Singh Khanuja, which has attained finality. The Revenue does not dispute the fact that there were two views on the issue within the Department itself and this was considered by the New Delhi Bench of the Tribunal in a batch of appeals, which consisted of both appeals filed by the Department against the orders passed by the Commissioner (Appeals) as well as appeals filed by the assessee as against the orders of the Commissioner (Appeals). Thus, in our view, the Tribunal rightly held that the extended period of limitation could not have been invoked. There is no error in the order passed by the Tribunal.

17. Accordingly, the above civil miscellaneous appeal filed by the Revenue fails and is dismissed and the substantial question of law framed is answered in favour of the assessee and against the Revenue. No costs. Consequently, the connected MP is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, No.26, Shastri Bhavan Annexe Building, Haddows Road, Chennai-6.

+1cc to Mr.N.V.Balaji, Advocate, S.R.No.57631

+1cc to Mr.T.L.Thirumalaisamy, Advocate, S.R.No.57482

सत्यमेव जयते

CMA.No.35 of 2018&
CMP.No.441 of 2018

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GSP(17/09/2018)

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