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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **SERTA 23/2018 & CM No.34017/2018**

COMMISSIONER OF CENTRAL TAX GST DELHI EAST

..... Appellant

Through: Mr.Amit Bansal, Advocate.

versus

TEAM HR SERVICES LTD.

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

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24.08.2018

The Revenue's appeal under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 seeks to urge a question of law with respect to the correctness of the Tribunal's ("CESTAT") order to the effect that in the overall circumstances of the case, the impugned order, insofar as it held that the extended period of limitation invoked by the Revenue under proviso to Section 73(1) of the Finance Act, 1994, could not have been sought recourse to.

We feel that the admitted facts in the present case are that the assessee was issued show cause notice on 23.07.2008 proposing assessment of service tax for the period 01.07.2003 to 09.09.2004. It was noticed that the definition of "*business auxiliary service*" under Section 65 (19) of the

Finance Act, 1994, meant various services which included the kind of service that the assessee has provided, i.e. marketing of car loans and other retail finance products viz. two-wheelers, personal loans, etc. The assessee resisted the notice including the invocation of the extended period. After adjudication, the Order-in-Original (by the concerned Commissioner), confirmed the demand for the period 01.07.2003 to pare down the quantification of demand; interest towards levy. The Commissioner was of the opinion that in the overall circumstances of the case, invocation of the extended period was proper and appropriate. In doing so, he was influenced in large measure, by the conditions of the agreement which the assessee entered into with its service recipients; that had adverted to levy of tax @ 5%.

The CESTAT, to whom the assessee approached, confirmed the Commissioner's order to the extent of levy of demand. However, invocation of the extended period was set aside. The levy was confirmed to the extent that the assessee had filed returns under the head "*business support service*" which was introduced w.e.f. 01.04.2006. The CESTAT held that the extended period, in these circumstances, was unwarranted and that the assessee could not be faulted given the widespread confusion with respect to the differentiation vis-à-vis "*business auxiliary service*" on the one hand and "*business support service*" on the other.

It is urged that the CESTAT fell into error in holding, as it did, that the extended period could not be invoked in the facts and circumstances of the case. Mr. Amit Bansal, learned counsel for the appellant points out that

the assessee was aware of its liability and it appropriately factored it, when entering into contracts with its clients by cautioning that 5% service tax could be collected. It was submitted that the CESTAT's decision that no misrepresentation was resorted to in this case, was not correct.

The CESTAT was influenced – as is apparent from the reading of the order, by the prevailing confusion between the nature and content of the two taxable incidents i.e. the definition between “*business auxiliary services*”, which insisted from 2003 and “*business support services*”, which was a fresh levy introduced w.e.f. 01.05.2006. Concededly, the assessee was filing his assessment returns after 01.05.2006 when business support service was introduced.

In these circumstances, the mere advertence to the possibility of service tax – without any material or evidence – or even a finding that such service tax had been collected by the assessee during the past, cannot *per se* amount to a conclusion that it had practiced fraud or misrepresentation. It has been repeatedly emphasized by the Supreme Court in *Uniworth Textiles Ltd. v. Commissioner of Central Excise*, 2012 (9) SCC 753, *Pushpam Pharmaceuticals Co. v. Commissioner of CE*, 1995 Supp. (3) SCC 462, and *Commissioner of Central Excise Chemiphar Drugs*, 1989 (2) SCC 12 that mere omission to fulfil one's tax liability cannot automatically lead the authorities to conclude that the assessee had practiced fraud or misrepresentation. The CESTAT's impugned order confirms to that extent.

In view of the above discussion, we find no reason to interfere with

the impugned order; the question of law does not arise in the present case.

This appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

ANU MALHOTRA, J

AUGUST 24, 2018

SSC