

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**Judgment reserved on 13/08/2019****Judgment delivered on 08/11/2019****TAXC No.25 of 2019**

M/s. Chhattisgarh Steel Castings (P) Ltd., 33-C Light Industrial Area, Bhilai-490026.

---- Appellant**Versus**

1. Union of India, through Central Board of Indirect Taxes & Customs, Ministry of Finance, New Delhi.
2. Commissioner, Central Excise & Service Tax, Raipur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur, Chhattisgarh.

---- Respondents

For Appellant	:	Mr. Abhyuday Singh, Advocate
For Respondent/Revenue	:	Mr. Maneesh Sharma, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****C A V JUDGMENT****Per Parth Prateem Sahu, Judge**

1. This appeal under Section 35-G of the Central Excise Act, 1944 (hereinafter referred to as 'the Act of 1944') has been preferred by appellant-M/s. Chhattisgarh Steel Castings (P) Ltd. against the finding recorded by Adjudicating Authority and confirmed by Appellate Authorities i.e. Commissioner (Appeals-II) Customs, Central Excise and Service Tax and Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') questioning the saddling with liability of

payment of service tax with interest and further imposition of penalty of equal amount of tax under Sections 77 and 78 of the Finance Act, 1994 (hereinafter referred to as 'the Act of 1994').

2. Appellant-M/s. Chhattisgarh Steel Castings (P) Ltd. is having service tax registration No.ST/JML-/332/CSCPL/GTA/2005 as appellant being liable to pay service tax on 'Transportation of Goods by Road' as goods transport agency being recipient of service and also registered under the category of 'Business Auxiliary Service' as provider of service. The main business of appellant was of steel casting and other collateral smelting industries.

3. During the course of audit of the accounts of appellant-noticee, it revealed that income shown in balance sheet for the year 2006-07 under the head of 'income' of Rs.2,67,98,881/- and similarly for the year 2005-06 under the head of 'other income', it has been shown as Rs.2,87,72,791/-. In the balance sheet under the head of 'other income' during the year 2006-07, they have also shown income of Rs.1,84,86,132/- and during the year 2005-06, Rs.2,50,00,000/-. On query being made by the Authority, it was informed that the 'other income' for the year 2006-07 amounting to Rs.1,62,81,450/- has been generated from the sale of agricultural plot. The area of the agricultural plot appearing in the documents i.e. sale agreement and registered deed of sale has been shown to be 0.405 hectare or 43560 sq.ft. of land situated at village Jora, Teshil and District Raipur.

With reference to aforementioned transaction, appellant produced the document of sale i.e. sale deed, which shows that one of the Directors, namely, Shri Deepak Agrawal entered into an agreement for purchase of land from one Hukum Chand Jain on non-judicial stamp paper dated 24/07/2006. The total consideration has been agreed between the parties was of Rs.32,00,000/-, out of which, Rs.1,00,000/- has been given in advance and balance amount is to be paid before the Registrar at the time of execution of sale deed. Subsequently, on 02/02/2007, the said agricultural plot has been sold to Raipur Entertainment World Pvt. Ltd. called "Assignee" and got the sale deed executed in favour of Assignee on consideration of Rs.1,93,81,450/-, out of which, Rs.1,61,81,450/- was received by the appellant. The sale deed was executed on 15/02/2007.

4. Similarly, during the year 2005-06, appellant shown income of Rs.2,50,00,000/- in the balance sheet as 'other income' and during the course of enquiry, it revealed that said income is also with respect to transactions relating to immovable property of 22.58 acres at village Chorhata in District Rewa (M.P.). The agreement of said property was signed on 01/04/2004 between the owner of M/s. Ken Electricals and M/s. Chhattisgarh Steel Castings (P) Ltd. for a total consideration of Rs.2,76,25,625/-. The validity period of agreement was for two years. The terms of agreement allows the appellant to get the sale deed executed by owner in favour

of someone else directly. Pursuant to this, on 05/04/2004, the sale deed was executed in favour of M/s. Hariyog Builders (P) Ltd. Rewa for a total consideration of Rs.5,26,25,625/-, out of which, Rs.2,76,25,625/- was paid to M/s. Ken Electricals and M/s. Chhattisgarh Steel Castings (P) Ltd. and difference amount of Rs.2,50,00,000/- has been transferred to the appellant.

5. From the aforementioned information gathered during the course of auditing of books of account of appellant a show cause notice was issued to the appellant as to why the service tax cannot be imposed on him for engaging himself in service of a "Real Estate Agent" during the year 2005-06 and 2006-07. The appellant did not reply to notice and on being given personal hearing after seeking several dates, one Chartered Accountant appeared on his behalf, in which, he raised a defence that income has been shown in the books of account of the appellant; the accounts have been produced before the authorities, therefore, there was no question of suppression of facts. He submitted that period of assessment is of 2005-06 and 2006-07 whereas show cause notice has been issued on 22/01/2010, therefore, the notice is barred by limitation and the noticee is nowhere involved in any activities of nature bringing him within the definition of "Real Estate Agent". The appellant dealt with purchase and sale of land only in the capacity of 'buyer and seller' and hence, there cannot be any service tax liability on the noticee. The demand itself does not survive on

merit and limitation, therefore, there is no occasion for imposition of penalty.

6. The Adjudicating Authority after taking into consideration the material available before it as well as after considering the relevant provisions as mentioned in the Act of 1994, arrived at a finding that the demand raised by the Revenue is not time barred and activities of appellant comes within the definition of “Real Estate Agent”. The Adjudicating Authority also reached to the finding that noticee is not “Purchaser or Seller” of property, but was covered under the services of “Real Estate Agent” and held liable for payment of service tax of Rs.44,41,774/- and education cess of Rs.88,835/- as well as imposed penalty under Sections 77 and 78 of the Act of 1994.

7. The aforementioned order passed by the Adjudicating Authority was made to challenge before the Appellate Authority. The Appellate Authority after considering the grounds raised by the appellant and also considering the facts and circumstances of the case, dismissed the appeal and upheld the order passed by the Adjudicating Authority for the reasons recorded therein.

8. Against the order passed by the Appellate Authority, the appellant preferred an appeal before the CESTAT. The CESTAT also dismissed the appeal and upheld the order passed by Adjudicating Authority as well as Appellate Authority.

9. Dismissal of appeal filed by the appellant before the CESTAT, cause to file this appeal before this Court under Section 35-G of the Act of 1944.

10. Learned counsel appearing for the appellant submitted that Assessing Officer has not taken into consideration that there was no material to prove that there was willful suppression before invoking extended period of limitation; the appellant has disclosed and declared the income received from sale of immovable properties in his books of account and he did not act as an agent of real estate. He further submitted that non-payment of service tax is with bonafide belief that he did not render any service which comes within the purview of "Real Estate Agent". He further submitted that appellant was not engaged in the act of "Real Estate Agent", some properties have been purchased and sold and difference of the value of property received by him by selling the immovable properties was received towards 'profit' and not against any 'fees or commission'. He further submitted that he has paid income tax on the profit received by him as income has been shown in his books of account, which was audited. He further submitted that Assessing Officer had wrongly invoked the extended period of limitation for issuance of notice; though the alleged transaction for the year 2005-06 and 2006-07 and notices have been issued only in the year 2010; the Revenue failed to prove that appellant was aware of its liability for payment of service tax as

“Real Estate Agent” or he deliberately and willfully suppressed the payment of service tax for evading tax, therefore, there was no question for invoking extended period of limitation. In view of aforementioned arguments, he submitted that as non-payment of service tax was not intentional or willful, no penalty can be imposed under the Act of 1994. He further submitted that the appellant entered into an agreement for purchase of land at village Chorhata in District Rewa (M.P.) and the property was being purchased for the purpose of extension of its industry, therefore, there was no occasion for him to enter into the business of real estate and to provide service of Real Estate Agent. He lastly submitted that the service tax with interest has already been deposited and he is only challenging the imposition of penalty.

11. Learned counsel for the appellant relied upon the judgments passed by the Customs, Excise Service Tax Appellate Tribunal, West Zonal Bench Mumbai in the matters of **Sarjan Realities Ltd. v. Commissioner of Central Excise, Pune-III** reported in **2014 (36) S.T.R. 877 (Tri – Mumbai)** and **Commissioner of Central Excise Nashik v. M/s Viraj Estates Pvt. Ltd.** reported in **2017 SCC Online CESTAT 3036**. He further relied upon the judgment passed by the Customs Excise and Service Tax Appellate Tribunal in the matter of **CCE Raipur v. Shri Banke Bihari Ispat Pvt. Ltd.** reported in **2018 SCC Online CESTAT 2369**. He also placed reliance in the matter of

Bharat Hotels Limited v. Commissioner, Central Excise (Adjudication) passed by the **High Court of Delhi** in **CEAC25/2017, C.M.No.31344/2017** decided on **29/11/2017**, **Premium Real Estate Developers Rajat Yadav v. C.S.T. Service Tax-Delhi** passed by the **Customs, Excise and Service Tax Appellate Tribunal, New Delhi** in **Appeal No.ST/50103-50104/2014-(DB)** decided on **27/11/2018**.

12. Per contra, learned counsel appearing for the Respondent/Revenue submitted that the business, in which, appellant is engaged is the business of steel castings and other collateral smelting industries, but on 01/04/2004, he entered into an agreement for purchase of land situated at village Chorhata in District Rewa (M.P.) for a total consideration of Rs.2,76,25,625/- and sold the said land before getting it registered in his favour to M/s. Hariyog Builders (P) Ltd. Rewa for total consideration of Rs.5,25,25,625/- within few days of entering into sale agreement with the owner of property. The payment to owner of the land i.e. M/s. Ken Electricals was made to the tune of Rs.2,76,25,625/-, which was as per agreement to sale and purchase between M/s. Ken Electricals and M/s. Chhattisgarh Steel Castings (P) Ltd. i.e. appellant and the difference amount of Rs.2,50,00,000/- has been shown to be income of appellant. He further submitted that similarly one of the Directors of the appellant-company entered into the purchase of land measuring 43560 sq.ft. situated at village Jora,

Teshil and District Raipur on 24/07/2006 for consideration of Rs.32,00,000/- and got the sale deed executed from original owner of land in favour of third party i.e. Raipur Entertainment World Private Limited for a total consideration of Rs.1,93,81,450/-. Out of Rs.1,93,81,450/-, an amount of Rs.1,61,81,450/- has been shown as income. He further submitted that act of appellant cannot be said to be simple purchase and sale of the land. He further submitted that aforementioned income earned by the appellant comes within the purview of definition of "Real Estate Agent" and he supported the impugned order passed by the CESTAT.

13. We have heard learned counsel appearing for both the parties.

14. Before proceeding with the case, it will be beneficial to have a glance of some of the relevant definitions as provided under the Act of 1994. Sections 65(88), 65(89) and 65(105)(v) of the Act of 1994 reads as under :-

"65(88) Real Estate Agent- A person engaged in rendering any service in relation to sale, purchase, leasing, renting of a real estate and includes a real estate consultant.

65(89) Real Estate Consultant- A person who renders in any manner, either directly or indirectly advice consultancy or technical assistance in relation to evaluation, conception, design, development,

construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.

65(105)(v) Taxable Service- Any service provided or to be provided to any person, by a real estate agent in relation to real estate.”

15. From perusal of facts of the case, it is clear that appellant entered into an agreement to purchase of land from the original owner, but did not execute the sale deed in its favour. The appellant got sale deed executed in favour of third party directly from the original owner of land. The appellant first entered into an agreement with the registered owner of land and paid a nominal amount as advance. It was mentioned in the agreement that he is having rights to sell the land to some other person from the date of execution of sale agreement. It was also mentioned that if the appellant in lieu of agreement executed by him with the original owner enters into an agreement with any other person/third party, then, the said agreement will be binding on the land owner and owner of the property will execute sale deed in his favour directly. On the difference of amount, the first purchaser/appellant only will have his rights.

16. From the aforementioned documents and materials, it cannot be accepted that transaction of sale and purchase of land is a simple sale and purchase of immovable property. When a person from the first day enters into an agreement to

purchase some property with an intention to sell it to some other person, it cannot be said that the transaction was of a transaction of simple sale and purchase of immovable property, in fact, the said act attracts the definition of “Real Estate Agent” and the participation of appellant in view of aforesaid transaction comes within the purview of “Service Provider”.

17. The other ground raised by learned counsel for the appellant is that as the difference of amount of sale and purchase of immovable properties in the year 2005-06 and 2006-07 have already been shown in his books of account, which was placed for audit before the Department, then, there was no suppression much less willful suppression and, therefore, invocation of extended period as provided under Section 73 of the Act of 1994 is not justifiable.

18. In the instant case, appellant has only mentioned the amounts of Rs.2,50,00,000/- and Rs.1,61,81,450/- under the heading of 'other income' and during the course of enquiry, it was brought to the notice of the Revenue that the said income is from the sale of immovable properties. On further asking from them, they have produced the agreement and sale deed, by which, it came to the notice of the Department that there was suppression of facts. The liability of payment of income tax and service tax are two different and separate statutory liability to be discharged by the persons engaged in business. The appellant who is already registered under the service tax for

'transportation of Goods by Road' as well as 'Business Auxiliary Service', therefore, it cannot be said that appellant was not aware about the liability of payment of service tax on the income so received from the transactions, which make's him liable for payment of service tax. The appellant did not get himself registered as a "Real Estate Agent" and paid service tax on the amount of income received by him.

19. The act of appellant clearly shows that he suppressed the facts, therefore, the period of limitation is to be counted from the date of knowledge of the Departmental Authority as provided under sub-section 3(ii) of Section 11A of the Act of 1944. The word "suppression of facts" has been dealt with by the Hon'ble Supreme Court in the matter of **Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay** reported in **1995 Supp (3) SCC 462**.

20. The Adjudicating Authority has considered the issue of 'suppression of fact' in detail with respect to date of knowledge in paragraphs-17.1 and 17.2, which is reproduced herein-below :

17.1 The contention of the Noticee in this regard is not correct in view of the Hon'ble High Court of Gujrat in the case of **COMMISSIONER OF C. EX., SURAT-I Versus NEMINATH FABRICS PVT. LTD.** Reported in **[2010 (256) E.L.T. 369 (Guj)]** wherein it has been held as under :-

Termini from which period of **“one year” or “five years” is computed is relevant date** as defined in sub-section (3)(ii) of Section 11A of Central Excise Act, 1944-**Concept of knowledge of departmental authority entirely absent-** Importing of said concept in Section 11-A(i) *ibid* or the proviso *ibid* would tantamount to rewriting statutory provision and rendering defined term “Relevant date” nugatory-Reasoning, that once knowledge acquired by Department there is no suppression, fallacious as once suppression admitted, merely because Department acquires knowledge of irregularities, suppression not obliterated-impugned Tribunal order introducing novel concept of date of knowledge contrary to provisions of Section 11A *ibid*, hence quashed and set aside.

Demand-Limitation-Extended period-knowledge of Department, effect-Suppression admitted but Tribunal held demand as barred by limitation importing concept of knowledge of Department, as submitted- Proviso to Section 11A(i) of Central Excise Act, 1944 provides for a situation where under provisions of sub-section (i) *ibid* recast by legislature extending period within which SCN issued-Proviso cannot be read to mean that because there is knowledge, suppression which stands established disappears-Concept of knowledge, by no stretch of imagination, can be read into the provisions-Suppression not obliterated, merely because Department

acquired knowledge of irregularities.

Demand-Limitation-Extended period-Period of limitation cannot by reason of any decision of court or even by subordinate legislation be either curtailed or enhanced- importing of concept of knowledge in sub-section (1) of Section 11A of Central Excise Act, 1944 tantamount to rewiring statutory provision-Not open to superior court/Tribunal either to add or substitute words in Statute.

Interpretation of Statute-Jurisdiction of Court/Tribunal -Not open to superior court or statutory/Tribunal either to add or substitute words in Statute - No canon of interpretation permits exercise of rewriting statutory provision.

Appellate Tribunal's order-Demand-Limitation -Extended period- knowledge of Department, effect-Tribunal introduced novel concept of date of knowledge and imported into proviso to Section 11A(1) of Central Excise Act, 1944, a new period of limitation of six months from date of knowledge-Reasoning that once knowledge acquired, there is no suppression, fallacious as merely because Department acquires knowledge, suppression not obliterated - Tribunal order contrary to provisions of Section 11A *ibid* and not sustainable - Order quashed and set aside.

17.2 Further the Hon'ble Supreme Court in the case of **CCE Visakhapatnam vs. Mehta & Co.** reported in **[2011 (264) ELT 481 (SC)]** held that "Demand-Limitation-Relevant date for computation of extended period for show cause

notice - **Cause of action is date of knowledge-**
 Department came to know of manufacture of furniture from information provided by buyer in 1997-Date of knowledge is attributable to 1997-Reply sent by respondent on 27/02/1997 for letter from Department-Limitation if computed from such date, show cause notice issued on 15/05/2000 within prescribed period of limitation of five years-Section 11A of Central Excise Act, 1994.”

21. In the light of the law as laid down by Hon'ble Supreme Court and provisions of the Act, if facts of the case is considered, it is apparent that the appellant is a private limited company engaged in business and already registered for service tax is aware about the requirement of law for its registration and payment of service tax. The fact of nature of act attracting definition of 'Real Estate Agent' revealed during course of enquiry only. The appellant has not shown specific source from which the income was received though income was showed in books of account which is a clear act of suppressing correct facts. For the aforementioned reason, the limitation will be counted from the date of knowledge.

22. So far as the ground of imposition of penalty is concerned, as we have held that there was suppression of facts on the part of appellant, which was only gathered during the course of audit and further enquiry from assessee, the Assessing Officer for making the appellant liable for penal action under Sections 77 and 78 of the Act of 1994 has recorded the finding, which is

reproduced herein-below :-

“20. The Noticee also did not get registered themselves as a real estate agent and did not file any S.T.-3 returns for the service so rendered as a real estate agent as prescribed under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 nor paid service tax in terms of the Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994. The Noticee suppressed the fact that they had during the years 2005-06 and 2006-07 received Rs.4,11,81,450/- in excess to the sale value of the real estate. This amount was received by them for their engagement in rendering service in relation to sale of real estate. This fact was gathered from the records of the Noticee by the audit and further investigations carried out in the case, the Noticee had also suppressed the fact from the department to avoid payment of Service Tax as a “Real Estate Agent” which is leviable on them as per Section 65(88) of the Finance Act, 1994 read with Section 65(105)(v) of the Finance Act, 1994 during the year 2005-06 the service tax payable by the Noticee on services rendered as above is Rs.25,50,000/- and the service tax payable by the Noticee during the year 2006-07 for services as above is Rs.19,80,609/- as a Real Estate Agent as detailed in pre-paras. The Noticee evaded the payment of service tax by suppressing of facts and done in contravention of the Rule 6 and 7 of the Service Tax Rules, 1994 and Section 70 and Section 68 of the Finance Act, 1994. They had not taken registration under the Category of a Real

Estate Agent as provided under Rule 4 of the Service Tax Rules, 1994 read with Section 69 of the Finance Act, 1994. They also had not filed S.T.-3 returns under Rule 7 read with Section 70 of the Finance Act, 1994 towards services of real estate agent. Therefore, they are liable for penal action under Section 77 and 78 of the Finance Act, 1994.”

23. The finding recorded by the Assessing Officer for imposition of penalty under Sections 77 and 78 of the Act of 1994 has been affirmed by the Appellate Authority as well as the CESTAT. We are of the considered view that there is no error or infirmity in the said findings recorded by the Assessing Officer and affirmed by the Appellate Authority and the CESTAT.

24. On a specific query made by this Court, the appellant placed on record the minutes of meeting of the Board of Directors to show that they have entered into an agreement to purchase of land at village Chorhata in District Rewa (M.P.) for extension of their business establishment. The minutes of meeting dated 04/04/2004 shows that they have agreed to sell the land within three days of meeting, but they have not assigned any reason for doing so or it is nowhere mentioned that they have got some better land or property for extension of their business.

25. In view of aforementioned facts emerging in the minutes of meeting placed on record, the ground raised by learned

counsel for the appellant that they have entered into an agreement for purchase of land at village Chorhata in District Rewa (M.P.) for extension of their business and their act of sale was also bonafide is not sustainable.

26. The case laws of **M/s Viraj Estates Pvt. Ltd.** (supra), **Shri Banke Bihari Ispat Pvt. Ltd.** (supra) and **Sarjan Realities Ltd.** (supra), relied by the learned counsel for appellant to support his contention that the definition of 'Real Estate or Consultant' is not attracted are on different facts and do not help in any manner to the appellant.

27. So far as case law of **Premium Real Estate Developers** (supra), relied upon to support the contention that in the facts of the case invocation of extended period of limitation is uncalled for is concerned, in the said case, it was recorded that:-

“31. As discussed above, since the exact amount of remuneration for providing any service, if any, has not been quantified at the same time since most of the MOU remained to be fully executed and therefore the exact amount of remuneration, which was the difference in amount paid to the seller of land and average price decided in MOU, could not be finalized and therefore we feel that taxable value has not reached finality and therefore demanding service tax on the entire amount paid to the appellant for acquisition of land is not sustainable in law in view of the discussion in the preceding paras.”

The Tribunal considering that there was no suppression as transaction is duly recorded exact amount of service is not quantified and held extended period was not applicable whereas in the case at hand, the transaction though shown was not specifically recorded in books showing exact source but was shown as 'other income'. The nature of transaction got clarified during the course of enquiry after notice which is a suppression and therefore, the case of **Premium Real Estate Developers** (supra) is on different fact and not applicable to the case of appellant.

28. The other case law of **Bharat Hotels Limited** (supra), relied on by the counsel for appellant to support his contention that penalty clause cannot be invoked in the facts of the case is concerned, in that case, the appellant therein was providing so many services and also receiving the services, but out of those, for some they registered with service tax and for some, they could not register as they were not aware that those services are also taxable and immediately coming to the knowledge during the enquiry itself, service tax with interest was deposited and in those facts of the case, it was held that the assessee was not having any intention to evade payment of service tax whereas in the case at hand as held that there was suppression of source of income and therefore, the ruling of **Bharat Hotels Limited** (supra) is not applicable to the facts of the case.

29. For the foregoing reasons and in view of aforementioned

discussions, we do not find any question of law much less substantial question of law to be involved in this appeal. The appeal being devoid of substance, is liable to be and is hereby dismissed.

Sd/-
(P. R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh