

Santosh

***IN THE HIGH COURT OF BOMBAY AT GOA***  
***WRIT PETITION NO. 213 OF 2018***

Tyresoles India Pvt. Ltd.,  
A Private Limited Company,  
incorporated and registered under the  
provisions of Companies Act, 1956  
and having its registered office at  
13/4-5-3, Matches Goa Complex,  
Savoi Verem Road, Curti, Ponda, Goa  
through its Authorized Signatory  
Shivanand G. Patil, son of Gopal Patil,  
aged 44 years, residing at Belgaum.

..... Petitioner.

Versus

1. The union of India  
represented by its Secretary,  
Ministry of Finance, North Block,  
New Delhi.

2. The Ministry of Finance,  
Government of India,  
Rep. by its Secretary MF (DR)  
New Delhi – 110 011

3. The Commissioner of Customs,  
Central Excise and Service Tax  
Commissionerate of Customs, Central  
Excise and Service Tax, ICE House,  
EDC Complex,  
Patto Plaza, Panaji, Goa 403 001.

4. The Additional Commissioner of  
Customs, Central  
Excise and Service Tax, ICE House,  
EDC Complex,  
Patto Plaza, Panaji, Goa 403 001.

.... Respondents.

Mr. Rajesh Chander Kumar, with Mr. Prashil Arolkar, Advocate for  
the Petitioner.

Ms. Asha Desai, Senior Standing Counsel for the Respondents.

***Coram : M.S. Sonak &  
Prithviraj K. Chavan, JJ.***

***Date : 10 January 2019.***

**ORAL JUDGMENT:** (Per M.S. SONAK, J.)

Heard Mr. Rajesh Chander Kumar, the learned Counsel  
for the Petitioner and Ms. Asha Desai, the learned Senior Standing  
Counsel for the Respondents.

2. The challenge in this Petition is to the order dated 14  
October 2016, made by the Commissioner of Central Excise and  
Service Tax, Goa (Commissioner), confirming the demand of ₹  
186,73,790/- and imposing penalty at the rate of 1% of the  
demanded service tax.

3. In addition, the Petitioner has also challenged the

constitutional validity of Section 35F of the Central Excise Act, 1944 (said Act).

4. On 17 July 2018, when the Petition was heard for admission, Ms. Asha Desai, had raised a preliminary objection by pointing out that the Petitioner has a remedy of instituting an appeal against the impugned order dated 14 October 2016. By a detailed order dated 17 July 2018, this objection was not accepted and Rule was issued in this Petition.

5. Today, when the matter was taken up for final disposal, Ms. Desai, once again, submitted that this Petition ought to be dismissed because the Petitioner has an alternate and efficacious remedy of instituting an appeal against the impugned order dated 14 October 2016. She submitted that the constitutional validity of Section 35F of the said Act, as also the provisions similar to the same, has already been upheld by the Honourable Apex Court, as well as by this Court. She submits that there are factual disputes involved in the present petition and the Appellate Authority constituted under the said Act would be in a better position to resolve the same. For all these reasons, Ms. Desai once again submitted that this Petition be dismissed and the Petitioner be relegated to avail of the alternate remedy available under the said Act.

6. As noted earlier, perusal of our earlier order dated 17 July 2018 makes it clear that the objection, based upon the alternate remedy, was considered, but not accepted by this Court. It is only after consideration of such objection, that the Rule was issued in this matter. The order dated 17 July 2018, nowhere states that the objection based upon the availability of alternate remedy, was kept open to be considered at any subsequent stage of the proceedings. Even, otherwise, we are satisfied that the issue raised in this petition is squarely covered by the decision of the Hon'ble Apex Court in the case of *Safety Retreading Co.(P) Ltd. vs. Commissioner of Central Excise, Salem*<sup>1</sup> concerning this very Petitioner. Therefore, it will be quite futile to relegate the Petitioner before the Appellate Authority. Accordingly, we once again overrule the preliminary objection raised by Ms. Desai on behalf of the Respondent.

7. The Petitioner carries on the activities of re-treading of motor vehicle tyres. The Petitioner is registered for the purpose of payment of service tax under the category "management, maintenance or repair services". It is the case of the Petitioner that the Petitioner also pays the sales tax/VAT on the portion of gross receipts representing the value of goods and materials sold by way of consumption in carrying out the activity of re-treading of motor vehicle tyres in terms of Goa Value Added Tax Act (GVAT).

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<sup>1</sup> 2017 (48) STR 97 (SC)

8. For the period between October 2006 and October 2010, the Petitioner was served with show cause-cum-demand notices, requiring the Petitioner to show cause as to why the value of demanded sale in terms GVAT should not be added to the gross amount of value of taxable service and service tax levied thereon. In addition, the Petitioner was required to show cause as to why penalty and interest be not levied for failure to pay service tax on the basis suggested in the show cause notices. The Petitioner filed detailed responses, mainly urging that deemed sale value could not be exigible to service tax as sales tax and service tax were mutually exclusive taxes and the Central Government did not have the power to tax that portion of the value attributable to sale of goods, whether deemed or actual.

9. The cause shown by the Petitioner did not find favour with the Commissioner, who proceeded to pass an order in original dated 23 November 2015, confirming the demands in the show cause notices.

10. The aforesaid order in original dated 23 November 2015 was, however, set aside by this Court by its Judgment and Order dated 13 June 2016 in Writ Petition No. 233 of 2016 and the matter was remanded to the Commissioner for fresh adjudication, after

giving opportunity of hearing to the Petitioner.

11. The Commissioner, in pursuance of the remand, however, once again, confirmed the demand in the show cause notices, vide order-in-original dated 14 October 2016. It is against this order-in-original dated 14 October 2016 (impugned order) that the present Petition has been instituted.

12. If the impugned order dated 14 October 2016 is perused, then, it is very clear that the same is almost entirely based upon the Judgment and Order dated 4 February 2014 made by the CESTAT, WZB, Mumbai in the proceedings concerning the Petitioner, but relating to the period June 2005 to September 2005. In fact, in paragraph 36 of the impugned order, the Commissioner has quoted the CESTAT's order dated 4 February 2014 and on the said basis, confirmed the demands in the show cause notices issued to the Petitioner.

13. Now, there is no dispute that the Petitioner, by instituting Civil Appeal(s) 6375-6376 of 2014 had questioned the CESTAT's order dated 4 February 2014 before the Hon'ble Apex Court. The Hon'ble Apex Court, vide its Judgment and Order dated 18 January 2017, in case of *Safety Retreading Co. (P) Ltd.* (supra) allowed the appeals instituted by the Petitioner and set aside the

CESTAT's order dated 4 February 2014. The reasoning in the order dated 4 February 2014 was expressly disapproved. As a result of this subsequent development, the very foundation of the impugned order dated 14 October 2016 collapses and the impugned order is required to be set aside on this ground alone.

14. The CESTAT, in its order dated 14 February 2014, and the Commissioner, in his impugned order dated 14 October 2016, had taken a view that the Petitioner was required to pay service tax, taking into consideration the gross amount received in respect of retreading of tyres. These Authorities reasoned that the tread rubber rolls/strips used by the Petitioner for the purpose of retreading of tyres were entirely consumed in the retreading process and, therefore, the Petitioner was not entitled to split the deemed sale component relating to tread rubber and the service portion relating to retreading of tyres and paying VAT on former portion and service tax only on the later portion. Such reasoning came to be expressly disapproved by the Honourable Apex Court in the case of *Safety Retreading Co. (P) Ltd.* (supra).

15. The reasoning of the Honourable Apex Court on the aforesaid aspect is to be found in paragraph 10, which reads thus :

*“11. The exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee*

*had paid taxes under the local Act whereunder it was registered as a works contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service. This, in fact, is what is provided by the Notification dated 20-6-2003 and CBEC Circular dated 7-4-2004, extracted above, subject, however, to the condition that adequate and satisfactory proof in this regard is forthcoming from the assessee. On the very face of the language used in Section 67 of the Finance Act, 1994, we cannot subscribe to the view held by the majority in the Appellate Tribunal that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. The finding of the Appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%.”*

[emphasis supplied]

16. Ms. Desai, however, submits that in the present case, even though the Petitioner was claiming benefits of the exemption under Notification No. 12/2003-ST dated 20 June 2003, the Petitioner had failed to comply with the terms and conditions, subject to which such exemption could be availed. She submits that

the Commissioner, in the impugned order, has quite correctly noted that the exemption under Notification dated 20 June 2003 is available only in cases where the sale of such goods is evidenced and the sale value is quantified and shown separately in the invoice. She submits that the Department, in its letter addressed to the Punjab Colour Lab Association, had made it clear that the exemption under Notification dated 20 June 2003 would be available only if the service provider maintains the records showing the material consumed/sold while providing the taxable service and the value of such material should also be indicated on the bill/invoice in respect of taxable service provided. She submits that the Petitioner, in the present case, has failed to comply with all these conditions. Instead, the Petitioner chose only to produce the Cost Accountant's Certificate which could never have been treated as compliance with the conditions prescribed in the exemption Notification dated 20 June 2003. For these reasons, Ms. Dessai now submits that the impugned order be maintained.

17. In order to appreciate Ms. Dessai's aforesaid contention, reference is necessary to the exemption Notification dated 20 June 2003, which reads thus :

*“In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to*

*do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, **subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.***

*[Provided that the said exemption shall apply only in such cases where -*

*(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or*

*(b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.]*

*2. This notification shall come into force on the 1<sup>st</sup> day of July, 2003.”*

*[emphasis supplied]*

18. The aforesaid exemption Notification dated 20 June 2003 provides that the Central Government, in exercise of the powers conferred by Section 93 of the Finance Act, 1994, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically

indicating the value of the said goods and materials.

19. The proviso makes it clear that the exemption would apply only in such cases where no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004 or where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials. It was not even the case of the Respondents that the conditions in the proviso were not fulfilled by the Petitioner.

20. The exemption under Notification dated 20 June 2003 makes no provision requiring the sale value to be quantified and shown separately in the invoice. The exemption notification nowhere requires the service provider to indicate on the bill/invoice the value of materials consumed/sold while providing taxable service. The exemption notification dated 20 June 2003 *“exempts so much of the value of all taxable services as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the Finance Act, 1994 subject to condition that there is documentary proof specifically indicating the value of the said goods and materials”*. Therefore, the requirement is that there must exist documentary

proof indicating the value of goods and materials which are subject matter of sale/deemed sale. The Commissioner was, therefore, obviously wrong in denying the Petitioner the benefit of the exemption under Notification dated 20 June 2003 by reading into the exemption notification some conditions which do not find place in the same.

21. In the present case, the Petitioner had produced documentary proof by way of Cost Accountant's Certificate, clearly indicating the details and value of the goods and materials which formed the subject matter of sale/deemed sale. Further, in this case, the Petitioner had produced on record documentary proof that sale/deemed sale component corresponding to 70% of the gross value, the Petitioner was in fact assessed to and levied sale tax/VAT to the local Sale Tax/VAT Authorities. The Petitioner also adduced documentary proof regarding payment of such local sales tax/VAT to the State Authorities. As regards this position, in fact, there is no dispute whatsoever. Rather, express cognizance of this aspect has been taken by the Commissioner in paragraph 37 of the impugned order dated 14 October 2016. In such circumstances, therefore, there was absolutely no justification on the part of the Commissioner in denying the Petitioner the benefit of exemption dated 20 June 2003.

22. Incidentally, it is necessary to note that the contention very similar to the one now raised by Ms. Dessai, was also raised before the Honourable Apex Court in the case of *Safety Retreading Co. (P) Ltd.* (supra). There, the learned Additional Solicitor General of India had contended that there was no evidence forth coming from the assessee that the value of goods or the parts used in the contract and sold to the customers amount to 70% of the value of the service rendered which is the taxable component under the State Act. The Honourable Apex Court, however, rejected the said contention by observing that the said contention “*overlooks certain basic features of the case, namely undisputed assessment of the assessee under the local Act; the case projected by the Department itself in the show cause notice; and thirdly the affidavit filed before this Court by one S.S ubramanian, Commissioner of Central Excise, Salem*”. The Apex Court noted that no dispute whatsoever had been raised with regard to the assessment of the appellant on its turn over under the local/State Act, in so far as payment of Value Added Tax on that component (70%) is concerned. Therefore, the reasoning reflected in paragraphs 11, 12 and 13 of the decision of the Apex Court in *Safety Retreading Co. (P) Ltd.* (supra) is sufficient to reject Ms. Dessai's contention relating to the alleged non-compliance with the conditions of the exemption under Notification dated 20 June 2003.

23. Mr. Rajesh Chander Kumar, the learned Counsel for the Petitioner has pointed out that for the period of disputes between April 2009 to March 2010, April 2008 to September 2008, April 2010 to July 2011, August 2011 to March 2012, October 2008 to March 2009, October 2007 to March 2008, October 2006 to September 2007, the respondents on the basis of reasoning now recorded in the impugned order dated 14 October 2016, had required the Petitioner to pay service tax, interest and penalty on the basis of the gross receipts, without giving the Petitioner benefit of the Notification dated 20 June 2003. As against such assessment order, the Petitioner had instituted appeals before the CESTAT which were allowed by the CESTAT vide Judgment and Order dated 13 December 2017, relying entirely upon the decision of the Apex Court in *Safety Retreading Co. (P) Ltd.* (supra). Mr. Rajesh Chander Kumar states that the Judgment and Order dated 13 December 2017 made by the CESTAT for the aforesaid period has not been questioned by the Department. We agree that this is an additional circumstance for allowing the present Petition.

24. Since, we are satisfied that the impugned order dated 14 October 2016 is required to be set aside, there is no necessity of deciding on the constitutional validity of Section 35F of the said Act.

25. Accordingly, we set aside the impugned Order dated 14 October 2016 made by the Commissioner, Central Excise and Service Tax (Annexure D to this Petition) and make Rule absolute in terms of prayer clause (a) of the Petition, which reads thus :

*“(a) Issue a writ of mandamus/certiorari, or any other writ, order or direction as this Hon'ble Court may deem fit and proper, quashing order-in-original in No.GOA-EXCUS-000-ADC-039-2016-17 dated 14.10.2016 Annexure D as being without jurisdiction and thus illegal and untenable in law”*

26. In the facts and circumstances of the case, there shall be no order as to costs.

*(Prithviraj K. Chavan, J.)*

*(M.S. Sonak, J.)*