M/s Chaque Jour Outsourcing Solutions (Pvt.) Limited Vs Commissioner, Central Excise, Panchkula

Service Tax Appeal No. 55704, 55936 of 2013

Court: Customs, Excise And Service Tax Appellate, New Delhi

Date of Decision: Oct. 1, 2024

Acts Referred:
Finance Act, 1994 â€" Section 65, 65(105)(k), 66, 67, 69, 70, 73(1), 75, 77, 78#Central Excise Act, 1944 â€" Section 11(A), 11A(4)#Service Tax (Determination of Value) Rules, 2006 â€" Rule 5, 5(1), 6(1)

Hon'ble Judges: Dilip Gupta, President (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: A.K. Batra, Sakshi Khanna, Anand Narayan

Final Decision: Allowed

Judgement

,,,,,

Dilip Gupta, J",,,,,

1. These two appeals seek the quashing of the order dated 10.10.2012 passed by the Commissioner, Central Excise, Panchkula, the Commissioner.",,,,,

Though the said order extends the benefit for cum-tax, but it confirms the demand of Rs. 12,80,19,061/- in respect of the first show cause notice dated",,,,,

22.10.2010 and the demand of Rs. 1,24,50,127/- in respect of the second show cause notice dated 19.10.2011. The order also directs for payment of",,,,,

interest under section 75 of the Finance Act, 1994, the Finance Act and imposes penalties under sections 77 and 78 of the Finance Act.",,,,,

2. M/s. Chaque Jour Outsourcing Solutions Pvt. Ltd., the appellant claims to be engaged in various activities like manpower recruitment, housekeeping,",,,,,

data entry, customer service, data sorting, data processing and other allied activities and to achieve this purpose, it entered into agreements with the",,,,,

clients to perform such activities for a consideration.,,,,,

3. According to the appellant, for better efficiency of the work it has to send its personnel to the clients place for performance of work. These",,,,,

personnel perform their work under the supervision and direction of the appellant and not as per the supervision and direction of the service recipient.,,,,,

For providing such services to the clients, the appellant charges the clients and discharges payment of service tax. Apart from services charges, the",,,,,

appellant is reimbursed for the expenses incurred by the appellant towards the salary paid to the personnel deployed.,,,,,

4. An audit was conducted by the department and it was observed that the appellant had entered into agreements with clients to supply manpower as,,,,,

per the requirement of the clients and under the terms and conditions of the agreements, the staff was not employed by the recipients of services, but",,,,,

serve under their directions. The audit team also noted that the appellant was not discharging service tax on the full consideration, but it paid service",,,,,

tax only on the service charges and not on the reimbursements claimed. The audit believed that reimbursements would also be taxable under rule 5 of,,,,,

the Service Tax (Determination of Value) Rules, 2006, the 2006 Rules read with section 67 of the Finance Act.",,,,,

5. A show cause notice dated 22.10.2010 for the period 16.06.2005 to 31.03.2010 and a show cause notice dated 19.10.2011 for the period 2010-11,,,,,

were, therefore, issued to the appellant proposing demands of Rs. 14,31,42,787/- and Rs. 1,37,32,490/-, respectively, with interest and penalty.",,,,,

6. The appellant filed detailed replies to the show cause notice and denied the allegations made therein.,,,,,

7. An order dated 10.10.2012 was passed by the Commissioner adjudicating both the show cause notices. These two appeals have been filed to assail,,,,,

the order dated 10.10.2012 passed by the Commissioner.,,,,,

8. Shri A.K. Batra, learned chartered accountant appearing for the appellant assisted by Ms. Sakshi Khanna submitted that:",,,,,

(i) The Commissioner committed an error in classifying the services under the taxable category of Ã¢â‚¬Å“manpower recruitment servicesÃ¢â‚¬ and so the,,,,,

entire demand is liable to be dropped on account of misclassification of services;,,,,,

(ii) In the present case, the staff is under the control, supervision and direction of the appellant and it is the appellant that is responsible for completion",,,,,

of the jobs assigned as would be apparent from the agreements;,,,,,

(iii) Both the show cause notices are liable to be quashed as they were issued under rule 5(1) of the 2006 Rules, which rule has been declared to be",,,,,

ultra vires sections 66 and 67 of the Finance Act by the Delhi High Court in Intercontinental Consultant and Technocrats Pvt. Ltd. vs. Union of India,",,,,,

2013 (29) S.T.R. 9 (Del.) against which the appeal filed by the department before the Supreme Court was dismissed and the judgment of the Supreme,,,,,

Court is reported in 2018 (3) TMI 357- Supreme Court, Union of India vs. Intercontinental Consultant and Technocrats Pvt. Ltd.",,,,,

(iv) The reimbursements are not taxable under the Finance Act for the period prior to 19.04.2006. Thus, service tax amounting to Rs. 81,76,886/- is",,,,,

not taxable;,,,,,

(v) The extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act is not applicable to the facts of the present,,,,,

case as there is no suppression of facts with intent to evade payment of service;,,,,,

(vi) No interest can be charged under section 75 of the Finance Act; and,,,,,

(vii) Penalty under section 78 of the Finance Act cannot be imposed as there is no fraud, collusion, willful misstatement, or suppression of facts by the",,,,,

appellant with an intention to evade payment of service tax.,,,,,

9. Shri Anand Narayan, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it",,,,,

does not call for any interference.,,,,,

10. The submissions advanced by the learned chartered accountant for the appellant and the learned authorized representative appearing for the,,,,,

department have been considered.,,,,,

11. The appellant has paid service tax under Ã¢â‚¬Å“manpower recruitment or supply agency servicesÃ¢â‚¬ on the value charged for providing such services,,,,,

i.e. the commission received by it. The department is seeking to impose service tax on reimbursement amount based on rule 5(1) of the 2006 Rules.,,,,,

The issue that would arise for consideration is whether the reimbursement amount can be subjected to levy of service tax for a period prior to May,",,,,,

2015.,,,,,

12. It needs to be noted that section 67 of the Finance Act deals with valuation of taxable services for charging service tax. Sub-section (1) and,,,,,

Explanation (a) are reproduced below:,,,,,

Ã¢â‚¬Å“67(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then",,,,,

such value shall, Ã¢â‚¬"",,,,,

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such",,,,,

service provided or to be provided by him;,,,,,

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as,",,,,,

with the addition of service tax charged, is equivalent to the consideration;",,,,,

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the",,,,,

prescribed manner.,,,,,

(2) *****,,,,,

S.

No.",Period,ST-3 filing date,"Due date to serve the

show cause notice",Remarks,Demand

1.,"01.10.2005 to

31.03.2006",25.04.2006,24.04.2007,Time barred,"8,21,87,032

2.,"01.04.2006 to

30.09.2006",25.10.2006,24.10.2007,,

3.,"01.10.2006 to

31.03.2007",25.04.2007,24.04.2008,,

4.,"01.04.2007 to

30.09.2007",24.10.2007,23.10.2008,,

,,,,,

5.,"01.10.2007 to

31.03.2008",23.04.2008,22.04.2009,,

6.,"01.04.2008 to

30.09.2008",25.10.2008,24.10.2009,,

7.,"01.10.2008 to

31.03.2009",25.04.2009,24.04.2010,,

8.,"01.04.2009 to

30.09.2009",25.10.2009,24.10.2010,,

9.,"01.10.2009 to

31.03.2010",25.04.2010,24.04.2011,Within time,"5,82,82,158

10.,"01.04.2010 to

30.09.2010",25.10.2010,24.10.2011,,

11.,"01.10.2010 to

31.03.2011",25.04.2011,24.04.2012,,

E.L.T. 401 (S.C.). The Supreme Court observed that section 11A(4) empowers the Department to reopen the proceedings if levy has been short,,,,,

levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power,,,,,

within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the",,,,,

Supreme Court observed that the act must be deliberate to escape payment of duty. The relevant observations are:,,,,,

Ã¢â‚¬Å“2. ****** The Department invoked extended period of limitation of five years as according to it the duty was shortlevied due to,,,,,

suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.,,,,,

*****,,,,,

4. A perusal of the proviso indicates that it has been used in company of such strong works as fraud, collusion or willful default. In fact it is",,,,,

the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean,,,,,

any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed",,,,,

deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done,,,,,

and not that he must have done, does not render it suppression.Ã¢â‚¬â€<",,,,,

(emphasis supplied),,,,,

23. This decision of the Supreme Court in Pushpam Pharmaceuticals was followed by the Supreme Court in Anand Nishikawa Co. Ltd. vs.,,,,,

Commissioner of Central Excise, Meerut, (2005) 7 SCC 749 and the relevant paragraph is as follows:-",,,,,

Ã¢â‚¬Å“27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE we find that,,,,,

Ã¢â‚¬Å“suppression of factsÃ¢â‚¬ can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty.,,,,,

When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not",,,,,

render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act,,,,,

from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate",,,,,

intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central",,,,,

Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm",,,,,

opinion that where facts were known to both the parties, as in the instant case, it was 7 (2005) 7 SCC 749 11 E/52953/2018 not open to",,,,,

CEGAT to come to a conclusion that the appellant was guilty of Ã¢â‚¬Å“suppression of facts.Ã¢â‚¬â€<,,,,,

(emphasis supplied),,,,,

24. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in Uniworth Textiles Ltd. vs. Commissioner of Central,,,,,

Excise, Raipur, 2013 (288) E.L.T. 161 (S.C.) and the relevant portion of the judgment is reproduced below:",,,,,

Ã¢â‚¬Å“12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior",,,,,

counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of,,,,,

duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail",,,,,

to understand which form of nonpayment would amount to ordinary default? Construing mere non-payment as any of the three categories,,,,,

contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the",,,,,

Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression",,,,,

of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of",,,,,

the appellant as fit for the applicability of the proviso.Ã¢â‚¬â€‹,,,,,

(emphasis supplied),,,,,

25. In Raydean Industries vs. Commissioner CGST, Jaipur, Excise Appeal No. 52480 of 2019 decided on 19.12.2022 the Tribunal in connection with",,,,,

the extended period of limitation, observed that even in the case of self assessment, the department can always call upon an assessee and seek",,,,,

information and it is the duty of the proper officer to scrutinize the correctness of the duty assessed by the assessee. The Division Bench also noted,,,,,

that departmental instructions issued to officers also emphasise that it is the duty of the officers to scrutinize the returns. The relevant portion of the,,,,,

decision is reproduced below:,,,,,

Ã¢â‚¬Å“24. It would be seen that the ER-III/ER-I returns filed by the applicant clearly show that the applicant had categorically declared that it,,,,,

had cleared the final products by availing the exemption under the notification dated 17.03.2012. The applicant had furnished the returns,,,,,

on the basis of self assessment. Even in a case of self assessment, the Department can always call upon an assessee and seek information. It",,,,,

is under sub-rule (1) of rule 6 of the Central Excise Rules, 20028 that the assessee is expected to self assess the duty and sub-rule (3) of rule",,,,,

12 of the 2002 Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under",,,,,

sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee.",,,,,

Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for,,,,,

verification as and when required by such officer. Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty",,,,,

assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not",,,,,

possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed,,,,,

a proper assessment return under rule 6 of the Rules.,,,,,

25. Departmental instructions to officers also emphasise upon the duty of officers to scrutinize the returns. The instructions issued by the,,,,,

Central Board of Excise & Customs on December 24, 2008 deal with Ã¢â‚¬Å“duties, functions and responsibilities of Range Officers and Sector",,,,,

OfficersÃ¢â‚¬â€‹. It has a table enumerating the duties, functions and responsibilities and the relevant portion of the table is reproduced below:",,,,,

*****,,,,,

26. The Central Excise Manual published by CBEC on May 17, 2005, which is available on the website of CBEC, devotes Part VI to",,,,,

SCRUTINY OF ASSESSMENT.,,,,,

*****,,,,,

27. It is thus evident that not only do the 2002 Rules mandate officers to scrutinise the Returns to verify the correctness of self assessment,,,,,

and empower the officers to call for documents and records for the purpose, Instructions issued by the department also specifically require",,,,,

officers at various levels to do so.Ã¢â‚¬â€‹,,,,,

(emphasis supplied),,,,,

26. In Commissioner of C. Ex. & Customs vs. Reliance Industries Ltd. 2023 (385) E.L.T. 481 (S.C.), the Supreme Court held that if an assessee",,,,,

bonafide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render",,,,,

such a belief of the assessee to be malafide. If a dispute relates to interpretation of legal provisions, it would be totally unjustified to invoke the",,,,,

extended period of limitation. The Supreme Court further held that in any scheme of self-assessment, it the responsibility of the assessee to determine",,,,,

the liability correctly and this determination is required to be made on the basis of his own judgment and in a bonafide manner. The relevant portion of,,,,,

the judgment is reproduced below:,,,,,

Ã¢â‚¬Å“23. We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it,,,,,

was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does,,,,,

not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division,,,,,

Bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-,,,,,

exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation",,,,,

by considering the assesseeÃ¢â‚¬â„¢s view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the,,,,,

assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona,,,,,

fide manner.,,,,,

24. The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law. xxxxxxxxxxx. On the question of,,,,,

disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate",,,,,

letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there",,,,,

was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for,,,,,

exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on",,,,,

exports. There was therefore nothing wrong with the assesseeÃ¢â‚¬â„¢s action of including the value of deemed exports within the value of,,,,,

domestic clearances.Ã¢â‚¬â€œ,,,,,

(emphasis supplied),,,,,

27. In the present case, as noticed above, the Commissioner observed that the appellant had received certain amount as reimbursement but",,,,,

deliberately avoided payment of service tax on the said amount with an ulterior motive to defraud the government. The Commissioner also observed,,,,,

that the appellant had abused the facility of self-assessment. It is for this reason that the Commissioner found that the appellant had suppressed facts,,,,,

with intention to evade payment of service tax.,,,,,

28. These issues have already been dealt with in the aforesaid decisions. The Commissioner, therefore, could not have confirmed the demand of",,,,,

service tax for the extended period of limitation as the requirements of the proviso to section 73(1) of the Finance Act are not satisfied. This part of,,,,,

the order of the Commissioner, therefore, also deserves to be set aside.",,,,,

29. The impugned orders dated 10.10.2012, therefore, deserves to be set aside and are set aside. The two appeals are, accordingly, allowed.",,,,,

(Order Pronounced on 01.10.2024),,,,,