Commissioner of CGST & Central Excise, Jaipur I Vs M/s. Lotus Cons Build Technocrate Pvt. Ltd.

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

Date of Decision: Jan. 15, 2025

Acts Referred: Finance Act, 1994 â€" Section 44AD, 65B(44), 65B(51), 65(88), 65(89), 65(105)(v), 68(2), 70, 72, 77, 78, 78(1)
Customs Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1992 â€" Rule 13
Service Tax Rules, 1994 â€" Rule 2(1)(d)(i)(F)(a), 2(I)(d)(i)(t)(c)

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

Bench: Division Bench

Advocate: Anand Narayan

Final Decision: Dismissed

Judgement

Dr. Rachna Gupta, J

1. The present appeal has been filed by the department to assail the Order-in-Original (O-I-O) No. 47-17-18 dated 22.03.2018 vide which part of the

proposed demand of service tax has been dropped. The facts in brief, relevant for the purpose of present adjudication are as follows:

1.1 M/s Lotus Cons. Build Technocrat Pvt. Ltd., the respondent, is registered for providing / payment of Renting of Immovable Service, Works

Contract Service, Manpower Recruitment / Supply Agency Service, Sponsorship Service provided by Body Corporate, Security Agency Service Rent

a Cab Scheme Operator Service. The department got an intelligence that the respondent was not discharging their service tax liability on following

services: -

(i) Services relating to development of plots :

The respondent was found engaged in the purchasing the agriculture land from the land owners and surrendering the same to the Jaipur Development

Authority (JDA) for approval under 90B & 90A and after JDA approves the map, they issue patta to booking holder and thereafter on behalf of their

patta, JDA issues patta. On verification of the records the respondent was found to have charged and collected sums from their customers/clients for

the development of land/plots/shops, in addition to the sale value of the plots/shops. These sums were recorded in their books of accounts as Ã¢â‚¬Å“Land

Development Receipt.Ã¢â‚¬ The department formed an opinion that these activities fall under the definition of Ã¢â‚¬Ëœservice Ã¢â‚¬â„¢ as per Section 65B(44) of

the Finance Act, 1994, and considered those as taxable services under Section 65B(51) of the Act.

(ii) Works Contract Services:

The Respondent is a recipient of WorksContract Services where both the service provider and recipient are located in India. As per Section 68(2) of

the Act read with Rule 2(I)(d)(i)(t)(c) of the Service Tax Rules, 1994, and Notification No. 30/2012-ST dated 20.06.2012, as amended, M/s Lotus is

alleged liable to pay 50% of the service tax being a service recipient as a body corporate ,under reverse charge mechanism.

(iii) Miscellaneous income disclosed before the income tax department during survey proceedings under Income Tax Act, 1961:

Department observed that the respondent assisted parties in entering into transactions of purchase and sale of real estate, which resulted in them

earning brokerage/commission for their services. Therefore, their activity prior to July 1, 2012, was considered as Ã¢â‚¬ËœReal Estate Agent Ã¢â‚¬â„¢s

Services Ã¢â‚¬â„¢ taxable under Section 65(105)(v) of the Finance Act, 1994 as they have acted as a Real Estate Agent/Real Estate Consultant as defined

under section 65 (88)/65(89) of the Finance Act 1994 and w.e.f. 01.07.2012 their activity is covered under the definition Ã¢â‚¬Ëœservice Ã¢â‚¬â„¢ as defined

under section 65B(44) of the Act.

(iv) Rent-a-Cab:

M/s. Lotus is a recipient of rent a cab service and both service provider and service recipient are located in the taxable territory (i.e. in India), M/s

Lotus appears liable to pay 100% service tax in terms of Section 68(2) of the Act read with Rule 2(1)(d)(i)(F)(a) of the Service Tax Rules, 1994 and

Notification No. 30/2012-ST dated 20.06.2012 as amended being a service recipient and registered as a body corporate on the amount paid by them to

the service providers under reverse charge mechanism for availing rent a cab service.

1.2 Based on the above said observations, the department alleged that the respondent was liable to pay the service tax under Forward as well as

Reverse Charge Mechanism. From the scrutiny of respondent records for the financial year 2012-13 and 2015-16 the department quantified the

amount of service tax payable by the respondent amounting to Rs.3,34,13,650/- for services relating to development of plots, Rs.1,55,194/- for

providing Works Contract Services, Rs.74,16,000/- on the commission earned for services for sale and purchase of plots / the miscellaneous income

declared to IT department and Rs.4,411/- for receiving rent a cab service.

1.3 With the above observations and the quantification, the department served a Show Cause Notice No. 48/15-16 dated 1.11.2017 upon the

respondent proposing the recovery of service tax amounting to Rs. 4,09,89,255 (Rs. 33413650 + Rs. 155194 + Rs. 7416000) along with the interest

and the penalties under section 77 and 78 of Finance Act 1994. While adjudicating the said Show Cause Notice the original adjudicating authority vide

Order in Original (O-I-O) no. 47-17-18 dated 22.03.2018 had accepted the said proposal except that the demand of Rs. 7416000/- on an amount of

Rs. 6 crores (miscellaneous income received in the disputed period) which was surrendered to Income tax department on the ground of access cash

found from the premises of the respondent during survey by income tax department. With respect to remaining three proposals i.e. demand on

development charges, for providing work contract service and for receiving rent-a-cab service, the original adjudicating authority has held that the

respondent was providing taxable services without discharging their service tax liability. Hence has confirmed the remaining demand. Being aggrieved

of dropping of demand of Rs.74,16,000/-, the department has filed the present appeal.

2. The respondent has not appeared in this matter though the notice of hearing, initially, was unserved upon the respondent however the department

got the same served later. The copy of receipt of notice is placed on record by the department. After the said service, more than four adjournments

were granted awaiting the presence of respondent but respondent failed to appear despite service. Vide order dated 07.06.2024 it was made clear that

the appeal be decided on merits even if the respondent doesnÃ¢â‚¬â„¢t appear. On the subsequent date i.e. on 20.9.2024, since the respondent still not

appeared that he was proceeded ex-parte in terms of rule 13 of CESTAT (Procedure) Rules, 1992. Hence arguments on behalf of department heard.

3. Learned Departmental representative at the outset has reiterated the findings in Review Order dated 26.06.2018 passed by the Committee of the

Chief Commissioners, specifically Para 3.1 to 3.8, of the said review order. It is further alleged that the commissioner has erred in dropping the

demand of service tax of Rs.74,16,000/- on the amount of undisclosed income of Rs.6,00,00,000/- declared by the respondent during the course of

search conducted by the Income tax Department and reflected in their accounts for the year 2012-13. Imposition of penalty under section 78(1) of the

finance act 1994 equal to fifty percent instead of hundred percent of the amount of service tax confirmed for the period beyond 14.05.2015 has also

been challenged. With these submissions the part order in original dropping the demand of Rs.74,16,000/- is prayed to be set aside.

4. Having Heard the Ld. DR and after perusing the entire record of the appeal we observe that the narrow compass of the present appeal is about the

demand dropped by the original adjudicating authority with respect to miscellaneous income received by the respondent during the disputed period

which was later disclosed to the income tax department.

5. We also observe that the original adjudicating authority has dropped the said demand with the following observations:-

4.20 Demand of service tax has simply been proposed because the Noticee did not submit documents relating to sale and purchase of land

such as sale deed, registration documents or agreements. Therefore, in absence of documentary proof of purchase and sale of land, it has

been inferred that the Noticee was engaged in the activity carried out by a Real Estate Agent. I observe that the Noticee had helped various

parties entering into transactions of purchase and sale of land and thereby provided real estate agentÃ¢â‚¬â„¢s services in the impunged Notice

is too harsh and arbitrary. It is all the more strange that the charge has been proposed to be sustained in absence of documentary proof of

purchase and sale of land. The fact of the matter is once the Noticee admitted non-accounted income and declared the same during the

course of survey proceedings (of income Tax Deptt.) they were not under any legal obligation to produce documents. It is simple common

sense that unaccounted for income can be generated only in those cases where the transactions have not been taken on record and,

therefore, seeking documentary proof of what has not been taken on record, it too harsh and arbitrary as the same can never be available

on record. The Noticee has submitted a ledger account of miscellaneous income for the period 01.04.2012 to 31.03.2013 wherein entries of

cash receipts against miscellaneous income have been made. The miscellaneous income pertains to he period 15.04.2012 to 09.08.2012 and

debited to the cash account. Cash receipt vouchers have also been placed on record again reflecting miscellaneous income. Nature of the

source of such income has been declared by the Noticee during the course of assessment proceedings and accepted by the income tax

authorities. The Noticee have also submitted a letter dated 22.09.2017 to the Senior Intelligence Officer, DGCEI, Jaipur Zonal Unit, Jaipur

stating that the miscellaneous income of Rs. 6 crore declared during survey proceedings during the year 2012-13 was earned by the

company by selling and purchase of various agricultural land and the amount earned by this activity was given as advance to various

farmers / parties. It has also been argued in the said letter no service tax should be levied on the said income as the same was earned by

purchasing and selling of agricultural land.

4.21 As per the definition provided under clause (88) of Section 65 of the Finance Act, 1994, Ã¢â‚¬ËœReal Estate AgentÃ¢â‚¬â„¢ means a person

who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant

who has been defined in clause (89) of the said Section 65 to mean 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.

4.22 On going through the records, I find that there is no evidence to indicate that the Noticee has carried out any activity as mentioned in

the clause (88) or (89) of Section 65 of the Finance Act, 1994 in so far as the miscellaneous income of Rs. 6 crore declared by them during

the course of income tax survey is concerned. I observe that the charge of provision of services by the Noticee in the instant case is not at

all based on facts and evidences. I am of the view that such a serious charge of evasion of service tax requires the Department to produce

sufficient and tangible corroborative evidences and it cannot simply be based on presumptions and assumptions. Therefore, in absence of

evidences, it cannot be alleged that the Noticee has rendered assistance to buyers and sellers of land in entering into transactions of

purchase and sale of land and sellers of land and received consideration against provision of such services. In absence of total lack of

evidences to prove charge of provision of Ã¢â‚¬ËœReal Estate AgentÃ¢â‚¬â„¢s ServiceÃ¢â‚¬â„¢ in the case, I have no option but to accept the contentions

of the Noticee that they have purchased and sold agricultural land and earned income as has been accepted by the Income Tax Authorities.

Consequently, the demand of Rs. 74,16,000/- of service tax on Ã¢â‚¬ËœReal Agent AgentÃ¢â‚¬â„¢s ServiceÃ¢â‚¬â„¢ does not sustain and deserves to be

dropped.Ã¢â‚¬â€‹

6. We observe from the above paragraph of O-I-O that the demand in question was dropped on the ground that department had not provided any

evidence to indicate any connection between the miscellaneous income of Rs. 6 crores declared to IT department with any taxable service provided /

receipt by the respondent. We further observe that the present demand was proposed based on the statement of the director of the respondent where

he simply stated that the amount disclosed to IT department was received from construction services. Apparently and admittedly, the respondent was

providing various taxable services the said statement is not admissible in evidence till corroborated by any documentary evidence. Subsequent to the

impugned order also the department has not produced any evidence to prove that the respondent had generated said disputed income / amount

disclosed to IT department on account of providing taxable services. The proposal of demand of service tax on the income declared under survey to

IT department cannot otherwise sustain. The proposal was purely on the basis of assumption and presumption. Hence, we do not find any infirmity in

the part of the order challenged by the department. We draw our support from the decision of HonÃ¢â‚¬â„¢ble Supreme Court in the case titled as

K.T.M.S. Mohd. & Others Vs Union of India reported as AIR 1992 SC 1831 wherein it was held as follows: -

g. Determination of tax under the Income-tax Act cannot be made, as it not incumbent on the income-tax authorities to take into

consideration only the materials made available by the Central Excise Department, but the authorities are bound to make an independent

enquiry, before passing any order, which enquiry has not happened in the present case. There is no provision to simply incorporate the

demand made in the show cause notice issued under the Central Excise Laws for the purpose of computation of tax under the Income Tax

Laws. The provisions under the two laws, viz., the Central Excise Act and the Income-tax Act, operate in two different fields. Without there

being an independent enquiry by the concerned taxing authorities the demand made under the provisions of Central Excise Act cannot be

incorporated as such, more so when the notice of demand has been modified by the adjudicating authority.

In the case of Kipps Education Centre, Bathinda v. CCE, Chandigarh reported in 2009(13) S.T.R. 422 (Tri. Del.), it was held by this

Tribunal that income voluntarily disclosed before the income tax authorities could not be added to the taxable value unless there is evidence

to prove the same. In this case also, there is no evidence to show that the income disclosed is the part of taxable service. Hence I do not find

any infirmity in the impunged order. Accordingly, stay application as well as the appeal are rejected.

7. This tribunal also followed the said decisions in the case of Commissioner of Income tax Trichy vs. Amman Steel and Allied Industries reported as

2015 (330) ELT 130 (Madras). In an another decisionin the case of Deltax Enterprises Vs. Commissioner of Central Excise -Delhi 2018 (10)

G.S.T.L. 392 (Tri. Ã¢â‚¬" Del.) the tribunal held as follows: -

Ã¢â‚¬Å“4 Admittedly, the appellant did not maintain detailed accounts for all the transactions undertaken by them. They have availed the

provision of Section 44AD of Income-tax Act for filing returns. This formed basis for service tax demand as the income shown is much

higher than the declared consideration for taxable service. We not that the appellants categorically asserted that they did not provide any

other service other than those, the details of which have been submitted to the lower authorities. The Revenue also could not print out excess

receipt on these contracts or the taxable service which gave them the consideration escaping the tax. In the absence of specific allegation

with reference to the nature of service or the service recipient it is not tenable to hold an income of the appellant even if it is admitted to be

an actual income, as consideration for a taxable service. The minimum requirement to tax an assessee for service tax is to identify the

nature of their taxable service along with the recipient of such service. In the present case all identified contracts for the identified service

recipients have been examined and concluded by the lower authority. No service tax liability can be fastened on unidentified service for

unidentified service recipient. There is no provision for such summary assumption even under Section 72 of the Finance Act, 1994.

Admittedly, the said section provides for arriving at the taxable value to be based on the Assessing OfficerÃ¢â‚¬â„¢s best judgment in case

where the appellant fails to furnish return under Section 70 or fails to assess the tax in accordance with Finance Act, 1994. In the present

case the appellants did file returns under Section 70 and also made available all the contracts on which service tax liability will arise for

them. As such, we find application of Section 72 cannot be extended based solely on the income tax return without identifying the speci-fic

taxable service or service recipient.Ã¢â‚¬â€‹

8. In the light of above discussion, we upheld the order (O-I-O) dated 22.03.2018) even for dropping the demand of Rs.74,16,000/- of service tax on

miscellaneous income of Rs. 6 crores as was declared to IT department. It is held that without any evidence the said amount of Rs. 6 crores is

wrongly alleged to be an amount received for providing Real Estate Agent Service. The demand which has been confirmed vide the said O-I-O has

not been challenged by the respondent. Resultantly, the order under challenge/O-I-O darted 22.03.2018 is hereby by upheld. Consequent thereto, the

appeal filed by the department is hereby dismissed.

[Order pronounced in the open court on 15.01.2025]