(2010) 09 P&H CK 0472

High Court Of Punjab And Haryana At Chandigarh

Case No: STA No. 40 of 2010

Punjab Ex-Servicemen Corporation		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: Sept. 27, 2010

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35G
- Finance Act, 1994 - Section 65(105), 65(40), 67(5), 68, 73

Citation: (2012) 25 STR 122

Hon'ble Judges: Ajay Kumar Mittal, J; A.K. Goel, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Adarsh Kumar Goel, J.
This appeal has been preferred by the assessee u/s 35G of the Central Excise Act, 1944 (for short, ''the Act'') against order dated 11-11-2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi 2009 (13) S.T.R. 529 , proposing to raise following substantial questions of law :-

A. Whether the learned Tribunal is justified in rejecting the appellant''s contention that the appellant is not a ''commercial concern'' and therefore does not fall within the scope of the definition of the term ''security agency'' as defined in Section 65(40) of the Finance Act, 1994?

B. Whether the test laid down and applied by the learned Tribunal for rejecting the appellant''s contention that the appellant is not a commercial concern is in the teeth of the Hon''ble Supreme Court Constitution Bench judgment reported as Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers

Association,

C. Whether Section 15(2) of the FESCO Act is a charter of functions of the appellant as held by the learned Tribunal or it confers powers upon the appellant to effectuate the object provided u/s 15(1) of the PESCO Act?

D. Whether the learned Tribunal, in facts and circumstances of the case, is justified in holding that longer period of limitation of five years is available to the revenue u/s 73(1) of the Finance Act, 1994?

E. Whether the learned Tribunal is justified in putting up a new case of the revenue by holding that it is Section 73 of the Finance Act, 1994, as it existed prior to 10-9-2004 will apply?

F. Whether the learned Tribunal is justified in upholding the invocation of larger period of limitation of five years by travelling beyond the scope of the show cause notice and also the order of Commissioner Appeals?

G. Whether the learned Tribunal in the facts and circumstances of the case is justified in holding that it is Section 73 of the Finance Act 1994 as it existed prior to 10-9-2004 will apply and not the substituted Section 73 of the Finance Act 1994?

The assessee is a statutory Corporation under the provisions of the Punjab Ex-Servicemen Corporation Act, 1978 (PESCO Act). Its activities are of deploying Ex-servicemen by way of providing Security Agency Service. The said service is covered under the definition of taxable service u/s 65(105) (w) (Sr. No. of sub sections has changed from time to time) of the Finance Act, 1994 ("the Act") and is taxable u/s 66. Security Agency Service became taxable w.e.f. 16-10-1998. The appellant applied for registration under the Act and was issued the registration certificate on 7-12-1998. Inspite of registration, the appellant neither paid service tax nor filed return. Notice dated 29-7-1999 was issued requiring it to file the return and after correspondence, it was clarified that even if the appellant did not have profit motive and was not ''commercial concern'', it was liable to pay Service tax. Finally, vide letter dated 8-8-2003, the appellant was asked to pay service tax for the period from October 1998 to March 2003 with interest. The appellant paid the service tax but the amount paid was deficient. Vide order dated 29-11-2004, order-in-original was passed by the adjudicating authority creating demand of tax with effect from the said date which was upheld by the Commissioner (Appeals) vide order dated 25-4-2005 and by the Tribunal on 6-10-2006. The said order was reiterated vide impugned order dated 11-4-2007 after considering further contention raised on behalf of the appellant in pursuance of order of this Court dated 19-2-2007 in a writ petition filed by the appellant. The Tribunal held that the appellant was covered by the levy of service tax and the turn over received by the appellant for providing security agency service was taxable. However, levy of penalty was set aside. Relevant observations of the Tribunal are :-

...Therefore, in our view, the test for determining as to whether a concern is a "commercial" concern would be as to whether it charges fully commercial price for the goods or services sold by it and monitor its commercial performance by preparing annual balance sheet and profit and loss account. From mere objectives of an organization - like welfare of ex servicemen or other sections of the society requiring help, promotion of sports etc., it cannot be concluded that it is not a commercial concern. The appellant corporation is charging fully commercial price from its clients which includes besides the salaries of the security personnel, its commission to cover the administrative expenses and profit. It prepares annual profit and loss account and balance sheet. It is expected to generate resources to sustain itself and not fall into insolvency. It is free to deploy its funds in carrying out its functions which included marketing, processing, supply and storage of agricultural produce, small scale industry, building, construction, transport and other business, trade or activity, as approved by the Government and it can invest the surplus funds generated in Government securities or in such other manner as it may decide. The appellant corporation therefore functions like a commercial concern.
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Tribunal in the case of 2006 (106) ECC 408 and Panther Detective v. C.C.E. reported in 2006 (4) S.T.R. 116 and Hon''ble Madras High Court in the case of GDA Security Private Limited and Another Vs. The Union of India and Others, has held that the assessable value of the security agency services provided by a security agency is the gross amount charged including the salary of the security personnel provided. Hon''ble Madras High court in the case of CDS Security Pvt. Limited (supra) in para 10 of its judgment, while upholding the constitutional validity of the inclusion of expenditure incurred while providing taxable service, in Section 67(5) of the Finance Act, 1994, observed that nature of the tax is not to be ascertained on the basis of its measure and no fault can be found with the taxing provision with reference to the measure of the tax.

2. We have heard learned counsel for the appellant.

3. Learned counsel for the appellant has raised following contentions:-

i. Profit motive was essential before case of an assessee is covered by the service tax. Reliance has been placed on judgment of the Hon''ble Supreme Court in Commissioner of Sales Tax Vs. Sai Publication Fund,

ii. The authority could not have invoked the extended period of limitation. Normal period of limitation for raising demand of service tax which may have escaped assessment is one year from the relevant date. However, under the proviso, the demand could be raised within five years if condition laid down therein was fulfilled. Prior to 10-9-2004, proviso to Section 73 did not require existence of fraud, collusion or willful misstatement or suppression of facts and only requirement was that

escapement should be by reason of omission or failure on the part of the assessee to make return or disclose material facts. Since the impugned order in original in the present case was dated 29-11-2004, the amended provision was applicable and in absence of finding of the requisite mens rea, as per amended provision invocation of extended limitation was without jurisdiction.

4. We are unable to accept these submissions. As regards absence of profit motive, we find that the charging provision u/s 68 of the Act provides for levy of service tax on the value of taxable service on every service provider. Value of taxable service has been defined u/s 67 to be gross amount charged by the service provider as consideration. There is no requirement that the service provider should provide service for profit motive.

5. In the definition of security agency u/s 65(94), security agency is defined as a commercial concern engaged in business of rendering services relating to security of property of persons. Learned counsel submitted that the expression business implies that there must be profit motive while the appellant was a statutory corporation created for helping the ex-servicemen by employing them in security agency services.

6. Use of the word business in the definition of security agency is not enough to hold that service provider must have profit motive. The word business does not necessarily imply requirement of profit motive. The expression is used in a taxing statute in the sense of occupation or profession which occupies time, attention and labour normally with the object of making of profit as against support or pleasure. In State of Andhra Pradesh Vs. Abdul Bakhi and Bros., it was observed :-

4. We are unable to agree with this view of the High Court. A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression "business" though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure.

7. In State of Tamil Nadu and Another Vs. Board of Trustee of the Port of Madras, , it was held that whether profit motive was essential ingredient in a particular taxing statute depended upon the legislative intent as expressed in the statutory scheme.

8. In Sai Publication Fund, as per statutory scheme under Bombay Sales Tax Act, 1959, the definition of dealer u/s 2(11) required profit motive. It was held that if in predominant activity, profit motive was absent, incidental business of such an assessee was excluded. As per definition of security agency u/s 65(94) service provider should be engaged in the business rendering specified service. There is no warrant for reading therein requirement of profit motive. The word business would

denote that service should not be gratis or casual but for consideration and as regular activity.

9. As regards applicability of 2004 amendment, contention raised is that since order was passed after the amendment, limitation law applicable at the time of decision of a matter will apply- No doubt, limitation law as in force at the time of decision may apply but subsisting cause of action does not get affected. In MOI Engineering Limited v. State of Punjab, (2008) 32 PHT 476 (P&H) relied upon by learned counsel for the appellant, after referring to "Principles of Statutory Interpretation" by Justice G.P. Singh, it was held that a statute of limitation did not have the effect of extinguishing a right of action subsisting on the date of the amendment. The relevant passage quoted in the judgment relied upon is as under :-

....Statutes of limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operation for enforcing causes of action accrued earlier, but they are prospective in the sense that they neither have the effect of reviving a right of action which is already barred on the date of their coming into operation nor do they have the effect of extinguishing a right of action subsisting on that date.

10. In view of above, no substantial question of law arises. The appeal is dismissed.