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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 51260 of 2022 (SM)

(Arising out of Order-in-Appeal No. 338/CRM/ST/JDR/2021 dated 28.10.2021 passed by the Commissioner (Appeals), CGST, Jodhpur.)

M/s Babulal Gurjar **Appellant**
Jasnagar, Teh. Riyanbadi,
Nagaur, Rajasthan
341518

VERSUS

Commissioner, CGST-Jodhpur **Respondent**
G-105, New Jodhpur
Industrial Area,
Jodhpur Rajasthan
302003

APPEARANCE:

Mr. O.P. Agrawal, Chartered Accountant for the Appellant
Shri Mahesh Bhardwaj, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51085 / 2022

Date of Hearing: 14.10.2022
Date of Decision: 21.11.2022

ANIL CHOUDHARY:

The appellant is engaged in civil construction/works contract service etc. and registered with the department w.e.f. 25/11/2016. Appellant had filed ST-3 returns from and the period October 2016 to March 2017 and April 2017 to June 2017, and also paid the admitted tax.

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2. Acting upon information received from Income Tax Department, that during the period 01/04/2014 to 30/09/2016, the appellant had a gross turnover of Rs. 98,86,917/-, accordingly, revenue called for information from the appellant, with regard to his service tax liability during the said period. As no information was submitted by the appellant, it appeared to revenue that it is not possible to as certain the nature of services provided by the appellant. Accordingly, show cause notice dated 16/10/2019 was issued invoking the extended period of limitation based on the information received from Income Tax Department like copy of ITR/26AS**,** demanding services including cess Rs. 13,77,282/- for the period 2014-15, up to September 2016. It was further alleged that appellant have wilfully suppressed the facts from the department with intent to evade payment of tax. Further interest and penalty was also proposed. Vide *ex parte* Order-in-Original dated 28/02/2020, the Assistant Commissioner confirmed the proposed demand of Rs. 13,77,282/- on the gross turnover as per IT records, of Rs. 98,86,917/- alongwith equal amount of penalty under Section 78. Penalty was also imposed under Section 77 (1)(a) 10,000/-, 77(1)(C) 10,000/- and 77(2) Rs. 10,000/-.

3. Being aggrieved the appellant preferred appeal before the Commissioner (Appeals) *inter alia* on the ground that the demand is not sustainable for want of classification of the service. Demand have been raised merely based on 3rd party information. Classification of service goes to the root of the matter for determining the correct liability, as each class of service is entitled to abatement/exemption as the case may be. The assessing officer have observed that the assessee have provided taxable services which are not covered in the

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negative list of services, nor in the Mega Exemption Notification. It was also urged that without classification of service, the demand is not sustainable. Further urged that the onus of classification of service was on the revenue, it was further urged that merely because TDS (income tax) was deducted did not lead to the conclusion that the services were taxable. It was also urged that there is failure on the part of revenue to exercise jurisdiction in collection of information from the appellant. Revenue had all the powers of discovery of information like summons, inspection, search etc.. It was also urged that the demand is hit by limitation, as extended period of limitation is not invokable. Show cause notice have been issued after more than 36 months. The basis of show cause notice is, the records and accounts maintained by the appellant-assessee in normal course of business. Admittedly, appellant had filed their IT returns, which is the basis of information. Further evidently, the appellant had taken registration w.e.f. 25/11/2016, and had started making compliance. At the relevant time, revenue never asked for any information for previous period. It is not the case that the appellant having knowledge that his turnover from service was taxable, have deliberately not paid the service tax. This is more evident from the fact that appellant had taken suo moto registration in November 2016 with the service tax department. It is also urged that mere failure to declare without intent to evade tax, does not amount to wilful suppression. The relevant data of turnover was also disclosed by the appellant in the balance sheet & profit and loss account. It is also urged that during the relevant period, the appellant have provided service to the manufacturing industry, within the factory premises for manufacture of dutiable goods. Thus the

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service provided in the course of manufacture inside the factory is not liable to service tax. It is also urged that the situation is wholly revenue neutral as whatever service tax appellant would have paid, the same would have been available as Cenvat credit to the recipient-manufacturer, it was also urged that in the facts and circumstances, no penalty is imposable, there have been no deliberate default. The Commissioner (Appeals) recorded findings that the appellant is rendering Works Contract Service. Although, no such proposal was there in the show cause notice, nor the Commissioner (Appeals) served any notice upon the appellant for classification of service. Agreeing with the other findings of the Order-in-Original, the appeal was dismissed. Being aggrieved the appellant is before this Tribunal.

4. Learned Counsel for the appellant Mr. O.P. Agrawal, Chartered Accountant urges that the demand is not sustainable for failure to classify the service rendered in the SCN. Further Commissioner (Appeals) have also erred in classifying the service without giving any opportunity of hearing as required under law. The Commissioner (Appeals) was required to issue notice for classification of the service, as there was no such proposal in the show cause notice to classify the service under works contract head. It was further urged that it is the onus of the revenue to determine the classification under the particular head of service. Reliance is placed on the ruling of this Tribunal in Balaji Contract or Vs. CCE-2017-52-STR-259, wherein this Tribunal held the tax entry of each type of service have legal implication with reference to tax liability, quantification, exemption, abatement etc.. An assessee is required to be put to notice about classification under which demand is sought to be made, so that the defence may be made

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by the assessee. In absence of proposal to classify the service under a particular head, it was held that impugned order travelled beyond the scope of show cause notice and was not sustainable.

5. It is further urged that from the copy of the work orders enclosed with the appeal memo, it is evident that the appellant had provided JCB-machinery on monthly charges basis for 'packing plant maintenance job' inside the factory premises of Shree Cement Ltd. (manufacturer of cement). The activity carried out inside the factory premises of the recipient manufacturer was or in relation to the manufacture of final products, which was dutiable. Without the repair and maintenance, the manufacture of dutiable goods would not be commercially possible. Thus, such service being used for manufacturing activity, is outside the scope of service tax as per Section 66D. The fact of providing service to Shree Cement Ltd is also evident from Form-26AS (annual tax statement).

6. It is further urged that the activity of shifting/transportation, raw material, waste material and finished products from one place to another, inside the plant does not attract service tax, as such activities are in relation to manufacture of excisable goods. Reliance is placed on ruling of Jharkhand High Court in Modi Construction Company 2011 (23) STR 6. It is further urged that revenue were aware activity of the appellant as the appellant had written letter dated 29/01/2016 to the department and given various information. Subsequent to that, the appellant had taken *suo moto* registration in November 2016 and had started making compliance from 01/10/2016. Thus, the issue of show cause notice after more than 3 years is hit by limitation.

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7. It is further urged that the appellant is also eligible for SSI exemption under Notification No. 6/2005-ST. Accordingly, the learned Counsel urges for allowing the appeal and setting aside the impugned order.

8. Learned AR for the revenue Mr. Divey Sethi relies on the findings of the court below.

9. Having considered the rival contentions, I find that the appellant had taken *suo moto* registration in November 2016 and had started making compliance by filing Return and depositing admitted tax w.e.f. 01/10/2016. Further, the appellant have maintained proper records of its transactions and turnover. They have also filed their IT-returns. Further, the appellant had admittedly taken suo moto registration under Service tax provision. In the circumstances, I find that there is no suppression or failure on the part of the appellant to make compliance under the service tax provisions. Rather revenue have chosen to not make any enquiry for the period prior to 01/10/2016, soon after taking of registration in November 2016. Thus, allegation of revenue that appellant have concealed its particulars of turnover from service tax department, and revenue came to know upon receipt of information only in 2019 on the basis of data received from the Income Tax Department is vague and frivolous. Thus, I hold that the show cause notice is bad for invocation of extended period of limitation.

10. I further find that during the period under dispute, almost the whole turnover for providing service is in respect to work done in packing plant-maintenance job for Shree Cement Ltd- manufacturer of

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cement. Admittedly, service has been provided inside the factory premises by providing JCB. The work order issued by Shree Cement Ltd dated 09/10/2015, provides- hiring of JCB for packing plant maintenance job, for operating/doing the work for nine hours each day or 240 hours per month on monthly charges of Rs. 48,000/-. Further the fuel was to be provided by the service recipient whereas lubricants and maintenance was to be provided by the appellant. Thus, the appellant was to provide competent operating staff to operate the JCB. Further, the JCB was to be operated as per the guidance and instructions of the engineer of the service recipient. Further, the appellant have received the hire charges for JCB, through bank and have also maintained proper records. I further find that Clause (f) of Section 66D provides that services by way of carrying out any process amounting to manufacture or production of goods, falls under the negative list and is exempted from the levy of service tax.

11. I further find that the classification of service under Works Contract Service by the Commissioner (Appeals) is beyond the scope of show cause notice, and is held to be bad.

12. In view of my aforementioned findings and observations, I allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits in accordance with law.

(Order pronounced in the open Court on 21.11.2022)

Anil Choudhary
Member(Judicial)

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