

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51425 OF 2017

(Arising out of Order-in-Original No. DLI-SVTAX-003-COM-85-16-17 dated 22.05.2017 passed by Commissioner of Service Tax, Delhi)

**M/s. Central Registry of Securitisation,
Asset Reconstruction and Security
Interest of India (CERSAI),** **...Appellant**

versus

Principal Commissioner CGST, **...Respondent**
South, Delhi

APPEARANCE:

Shri B.L. Narasimhan and Ms. Poorvi Asati, Advocates for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 21.03.2023
Date of Decision: 10.04.2023

FINAL ORDER NO. 50439/2023

Justice Dilip Gupta:

M/s. Central Registry of Securitisation, Asset Reconstruction and Security Interest of India¹ has filed this appeal to assail the order dated 22.05.2017 passed by the Commissioner, Service Tax, Delhi-III Commissionerate² by which the demand has been confirmed with interest and penalty by invoking the extended period of limitation contemplated under section 73 of the Finance Act 1994³.

1. the appellant
2. the Commissioner
3. the Finance Act

2. The issue involved in the present appeal relates to demand of service tax on the fees received by the appellant from banks/financial institutions for registration of transactions of securitization, asset reconstruction and security deposits under the category of 'business support service'⁴ and 'online information and database access or retrieval service'⁵.

3. The appellant, a company incorporated under section 8 of the Companies Act, was set up by the Central Government by a notification dated 31.03.2011 as a central registry in terms of section 20 of The Securitisation and Reconstruction Financial Assets and Enforcement of Securities Interest Act, 2002⁶. The appellant was incorporated on 05.03.2011 with an objective of operation and maintenance of a 'registration system' for the purpose of registration and maintenance of public records of all the transactions of securitization, asset reconstruction of financial assets and creation of security interest in relation to any property of any bank or any financial institution, as contemplated under Chapter IV of the SARFAESI Act. To achieve purpose, the appellant provided an online platform for the aforesaid registration and for such registration of transactions as well as for the search of records maintained by the appellant, a fee was collected from the banks/financial institutions in terms of section 20 of the SARFAESI Act, read with rule 7 of the Securitisation and Reconstruction Financial Assets and Enforcement of Securities Interest (Central Registry) Rules, 2011⁷.

4. The department, however, believed that the appellant had failed to pay service tax in respect of such services provided by it

4. BSS
5. OIDARS
6. SARFAESI Act
7. SARFAESI Rules

and, accordingly, a show cause notice dated 26.08.2015 proposing a demand of service tax of Rs. 5,35,77,143/- along with interest and penalties was issued to the appellant with the allegations that:

- (i) The appellant has provided the services to the banks, financial institutions, NBFCs, etc. by providing the platform for filing registration of transactions of securitization, asset reconstruction and security interest, which falls under the categories of 'BSS' and 'OIDARS'⁸; and
- (ii) As the appellant had intentionally and wilfully suppressed the fact of provision of such taxable services by it from the department, the extended period of limitation was invokable.

5. The appellant filed a detailed reply to the above show cause notice on 08.12.2015. The Commissioner, by the impugned order dated 22.05.2017, confirmed the demand of Rs. 5,35,77,143/- under the categories of 'BSS' and 'OIDARS' along with interest and penalties.

6. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

- (i) Service tax cannot be proposed and confirmed under two different heads/categories of service for one single activity. The show cause has proposed the demand of service tax on the fees received from banks/financial institutions for registration of transactions under the category of 'BSS' and 'OIDARS'. The impugned order has

8. OIDAR service

also confirmed the demand of service tax on the fees collected by the appellant from the banks/financial institutions under both the categories of 'BSS' and 'OIDARS';

(ii) Fees collected by the appellant is not liable to service tax under 'BSS';

(iii) Appellant is not providing any service of 'OIDARS'; and

(iv) The extended period of limitation could not have invoked in the facts and circumstances of the case.

7. Shri Rajeev Kapoor, learned authorized representative appearing for the Department, however, supported the impugned order and submitted that it does not call for any interference.

8. Two principal submissions have been made by learned counsel for the appellant for setting aside the impugned order. The first is that to the extended period of limitation under the proviso to section 73(1) of the Finance Act could not have been invoked in the facts and circumstances of the case and the second is that service tax cannot be proposed and confirmed under two different heads of service for one single activity. These two issues are, therefore, being considered.

Extended period of limitation

9. The contention of the learned counsel for the appellant is that the necessary ingredients for invoking the larger period of limitation contemplated under the proviso to section 73 (1) of the Finance Act, namely wilful suppression of facts with an intent to evade payment of service tax, do not exist and, therefore, the extended period of limitation could not have been invoked.

10. In order to appreciate this contention, it would appropriate to reproduce section 73 of the Finance Act as it stood at the relevant time. This section deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded and it is as follows;

"73.(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

11. It would be seen from a perusal of sub-section (1) of section 73 of the Finance Act that where any service tax has not been levied or paid, the Central Excise Officer may, within one year from the relevant date, serve a notice on the person chargeable with the service tax which has not been levied or paid, requiring him to show cause why he should not pay amount specified in the notice.

12. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "one year", the word "five years" has been substituted.

13. It is correct that section 73 (1) of the Finance Act does not mention that suppression of facts has to be "wilful" since "wilful" precedes only misstatement. It has, therefore, to be seen whether even in the absence of the expression "wilful" before "suppression of facts" under section 73(1) of the Finance Act, suppression of facts has still to be willful and with an intent to evade payment of service tax. The Supreme Court and the Delhi High Court have held that suppression of facts has to be "wilful" and there should also be an intent to evade payment of service tax.

14. In **Pushpam Pharmaceutical Co. vs. Commissioner of Central Excise, Bombay**⁹, the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11A of the Excise Act. The proviso to section 11A of the Excise Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of which was

9. **1995 (78) E.L.T. 401 (SC)**

suppression of facts. It is in this context that the Supreme Court observed that since “suppression of facts” has been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

“4. Section 11A empowers the Department to re-open proceedings if the 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.** The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful 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.”

(emphasise supplied)

15. The Delhi High Court in **Bharat Hotels Limited vs. Commissioner of Central Excise (Adjudication)**¹⁰ also examined at length the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Finance Act and held as follows;

10. 2018 (12) GSTL 368 (Del.)

"27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in Uniworth (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. **In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.**

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Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention."

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The Revenue has not been able to prove an intention on the part of the Appellant to avoid tax by suppression of mention facts. In fact it is clear that the Appellant did not have any such intention and was acting under a bonafide belief."

(emphasis supplied)

16. It would be useful to examine how this aspect has been considered in the show cause notice and the order passed by the Commissioner.

17. The show cause notice, while invoking the extended period of limitation, states:

"7. Whereas it further appears that the assessee by doing so, had intentionally and willfully suppressed the facts of receipt of payment with intent to evade payment of Service Tax and did not pay the due amount of Service Tax as applicable on such services and did not file prescribed ST-3 returns. **Thus, by not disclosing the entire facts**

to the Department, the said value has escaped the assessment for Service Tax liability, resulting into contravention of various provisions of the said Act and the said Rules mentioned aforesaid due to the assessee's intention to evade payment of impugned Service Tax. The fact of rendering of these services would not have come to the notice of the department but for the inquiry conducted by the department. Thus, it appears that the proviso to Section 73(1) of the Act *ibid* can be invoked and demand and recovery can be made for non-payment of Service Tax for five years from the relevant date.”

(emphasis supplied)

18. The Commissioner, in the impugned order, examined this aspect in the following manner:

“5.2.3. **Further, as alleged in the impugned SCN, had it not been for the investigation conducted by the Anti-Evasion Branch of the Service Tax Commissionerate, New Delhi, the non-payment of service tax would have gone unnoticed.** Therefore, the extended period of five years as provided for in the section 73 of the Act is invokable in this case for suppressing the material facts from the department.

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5.2.5. The various case laws referred by the Noticee are not applicable to the present case as the facts and circumstances are different. It is needless to recapitulate that this case has arisen out of the investigation conducted by the officials of the Department. Had they not investigated the case, the evasion of tax would not have been unearthed. **Thus, it is evident that the Noticee did not disclose the material facts by itself through the prescribed returns, whereby the said values have escaped appropriate assessment for levy and payment of service tax.”**

(emphasis supplied)

19. Learned counsel for the appellant submitted that in the first instance the ingredients set out for invocation for the extended period of limitation do not exist in the facts and circumstance of the case and even otherwise no malafide intention can attributed since the appellant is a government company.

20. As noticed above, suppression of facts must be deliberate with intention to evade payment of duty. It connotes a positive act on the part of the assessee to avoid excise duty and mere omission to pay duty without the presence of such an intention is not sufficient. This apart, it has been repeatedly held that when a government company is involved there will be a rebuttable presumption regarding non-existence of any of the ingredients mentioned in the proviso to section 73(1) of the Finance Act.

21. This issue was examined by a Division Bench of the Tribunal in **Krishi Upaj Mandi Samiti vs. Commissioner of C. Ex. & S.T., Jaipur-I & II¹¹**. It was held that since Krishi Upaj Mandi Samiti was a government organisation and its functions were regulated by the Act and the Rules made thereunder, there will be a rebuttable presumption regarding non-existence of any of the ingredients mentioned in the proviso to section 73(1) of the Finance Act and the relevant paragraph is reproduced below:

“16. The appellants also contested the demand wherever issued invoking extended period of time. Proviso to Section 73(1) can be invoked only, where the Service Tax has not been paid or levied or short-paid or short levied, by reason of fraud; or collusion; or wilful misstatement; or suppression of facts; or contravention of any of the provisions of Chapter V of Finance Act, 1994 or rules made thereunder with intent to evade payment of Service Tax by the person chargeable with Service Tax. If any one of the

11. 2017 (4) G.S.T.L. 346 (Tri.- Del.)

ingredients are present, then the demand for not paid or short paid Service Tax can be made invoking extended period of limitation of 5 years, from the relevant date. **Admittedly, the appellants are a Government Organisation; their functions are regulated by the said enactment and the rules. In such situation, it is clear that there will be a rebuttable presumption regarding non-existence of any of these ingredients on the part of the appellant.** We have perused the reasons recorded by the lower authorities to sustain the demand for longer period. We are not convinced with the findings as there is no evidence of the appellants' mala fide act to evade Service Tax liability by resorting to conduct, which will attract any of the serious allegation listed in the proviso to Section 73(1) of the Act."

(emphasis supplied)

22. In **Airport Authority of India vs. Commissioner of Service Tax, Delhi¹²**, the Tribunal held:

"7. The appellants are a Government of India organization and there could be a general, rebuttable, presumption regarding non-existence of a malafide intend to evade tax. The Revenue has to rebut such presumption with specific evidences."

23. The show cause notice merely alleges that by not disclosing the entire facts in the ST3 returns, the assessee had an intention to evade payment of service tax and this is what has also been recorded by the Commissioner while adjudicating the show cause. The appellant is a government company and, therefore, there is a rebuttable presumption regarding non-existence of any of the ingredients mentioned in the proviso to section 73(1) of the Finance Act. The show cause notice does not rebut the presumption. In such circumstances, the extended period of limitation could not have been invoked. As the entire demand that has been confirmed is for the

12. 2017 (4) G.S.T.L. 346 (Tri.- Del.)

extended period of limitation, the order confirming the demand cannot be sustained.

24. It has also been submitted by the learned counsel for the appellant that service tax cannot be proposed and confirmed under two different heads of categories of service for one single activity.

25. As noticed above, the show cause notice proposed the demand of service tax on the fees received from banks/financial institutions for registration of transactions under the category of 'BSS' and also 'OIDARS'. The impugned order has also confirmed the demand of service tax under both the categories.

26. A Division Bench of the Tribunal in **Ess Gee Real Estate Developers Pvt. Ltd. vs. Commr. of C. Ex., Jaipur**¹³, after placing reliance upon the decision of the Tribunal in **CMS India Operation and Maintenance Company Pvt. Ltd. vs. Commissioner of Central Excise, Puducherry**¹⁴, observed as follows:

"23. xxxxxxxxxxxx. It is very difficult to really cull out from the show cause notice as to which particular category of service was intended to be taxed. The show cause notice should have clearly indicated whether the service of "real estate agent" or "site formation" was leviable to tax, for this is the requirement of section 65A of the Act. This confusion is maintained in the impugned order."

27. The Civil Appeal filed by the department to assail the aforesaid order of the Tribunal in **Ess Gee Real Estate Developers** was dismissed on 17.12.2019 and the decision is reported in **Commissioner vs. Ess Gee Real Estate Developers Pvt. Ltd.**¹⁵.

28. Thus, for this reason also, the impugned order cannot be sustained.

13. 2020 (34) G.S.T.L. 486 (Tri.-Del.)

14. 2017 TIOL- 1491- CESTAT-MAD

15. 2020 (34) G.S.T.L. J93 (S.C.)

29. The order dated 22.05.2017 passed by the Commissioner, therefore, for the reasons stated above, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **10.04.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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