

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51585 of 2019 [SM]

[Arising out of Order-in-Appeal No. 318 (CRM) ST/JDR/2019 dated 02.04.2019 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Dinesh Chandra Dubey

11-Fatehpura, Bedla Road,
Udaipur (Raj.) - 313001

...Appellant

VERSUS

**Commissioner of Central Goods
& Service Tax, Excise and Customs,
Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.)-313001

...Respondent

WITH

Service Tax Appeal No. 51021 of 2021 [SM]

[Arising out of Order-in-Appeal No. 114 & 115 (CRM)ST/JDR/2021 dated 20.05.2021 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Ashok Maru

12, Nand Mahal, Basant Vihar,
Hiran Magri, Sector-14,
Udaipur (Raj.) – 313001

...Appellant

VERSUS

**Commissioner of Central Excise
& CGST, Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.)-313001

...Respondent

WITH

Service Tax Appeal No. 51022 of 2021 [SM]

[Arising out of Order-in-Appeal No. 114 & 115 (CRM)ST/JDR/2021 dated 20.05.2021 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Ashok Maru

12, Nand Mahal, Basant Vihar,
Hiran Magri, Sector-14,
Udaipur (Raj.) – 313001

...Appellant

VERSUS

**Commissioner of Central Excise
& CGST, Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.)-313001

...Respondent

WITH

Service Tax Appeal No. 51023 of 2021 [SM]

[Arising out of Order-in-Appeal No. 118 & 119 (CRM)ST/JDR/2021 dated 20.05.2021 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Azad Jain

12, Nand Mahal, Basant Vihar,
Hiran Magri, Sector-14,
Udaipur (Raj.) – 313001

...Appellant

VERSUS

**Commissioner of Central Excise
& CGST, Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.)-313001

...Respondent

AND

Service Tax Appeal No. 51024 of 2021 [SM]

[Arising out of Order-in-Appeal No. 118 & 119 (CRM)ST/JDR/2021 dated 20.05.2021 passed by the Commissioner of Central Excise & Central Goods and Service Tax (Appeals), Jodhpur]

Azad Jain

12, Nand Mahal, Basant Vihar,
Hiran Magri, Sector-14,
Udaipur (Raj.) – 313001

...Appellant

VERSUS

**Commissioner of Central Excise
& CGST, Udaipur**

142-B, Hiran Magri,
Sector-11, Udaipur (Raj.)-313001

...Respondent

APPEARANCE:

Mr. Bipin Garg, Ms. Kainaat & Ms. Shalini, Advocates for the Appellant
Mr. Mahesh Bhardwaj, Authorised Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: **22.09.2022**

PRONOUNCED ON: **28.10.2022**

FINAL ORDER No. 51020-51024/2022**DR. RACHNA GUPTA**

Present order disposes of five appeals. The issue involved in the appeal being common and all the appellants being the service providers, on commission basis, of M/s. Adarsh Credit Cooperative Society Ltd. (hereinafter called as M/s. ACCSL). The details of appeals are as follows:

Appeal No.	SCN No.	Period involved	Amount demand of	O.I.O.	O.I.A
ST/51585/2019	V(ST)4-17/CGSTD-A/2018/1452 dated 12.04.2018	July, 2012 to March, 2017	Rs.17,60,903/-	66/ST-Dem/CGSTD-A/2018-AC Dated 28.12.2018	318 (CRM)ST/JDR/2019 Dated 02.04.2019
ST/51021/2021	DGGI/JZU/INV/Gr.A/ST-GST/60/2018-19/Pt.XII/7785 dated 09.11.2019	April, 2016 to March, 2017	Rs.4,07,475/-	64/2020-CGST-B (Dem.-ST) dated 09.12.2020	114 & 115 (CRM)ST/JDR/2021 dated 20.05.2021
ST/51022/2021	DGGI/JZU/INV/Gr.A/ST-GST/60/2018-19/Pt.XII/12573 dated 10.02.2020	April, 2017 to June, 2017	Rs.1,22,131/-	65/2020-CGST-B (Dem.-ST) dated 10.12.2020	114 & 115 (CRM)ST/JDR/2021 dated 20.05.2021
ST/51023/2021	DGGI/JZU/INV/Gr.A/ST-GST/60/2018-19/Pt.XX/7782 dated 08.11.2019	April, 2016 to March, 2017	Rs.3,94,053/-	70/2020-CGST-B (Dem.-ST) dated 28.12.2020	118 & 119 (CRM)ST/JDR/2021 dated 20.05.2021
ST/51024/2021	DGGI/JZU/INV/Gr.A/ST-GST/60/2018-19/Pt.XX/1957 Dated 10.02.2020	April, 2017 to June, 2017	Rs. 1,32,124/-	71/2020-CGST-B (Dem.-ST) dated 28.12.2020	118 & 119 (CRM)ST/JDR/2021 dated 20.05.2021

2. The appellants herein were receiving commission from M/s. Adarsh Credit Co-operative Society Ltd. for providing various services including that of 'Consultants'. A specific intelligence was gathered by the Officers of DGGI, Jaipur Zonal Unit about appellants to have received commission from M/s. ACCSL in lieu of providing "Business Auxiliary Services" being provided to said M/s. ACCSL. But the service tax was not being paid by the appellants on the amount of the said commission received. Accordingly, the appellants were enquired vide letters dated 01.02.2018 in Appeal No. ST/51585/2019 and dated 21.06.2018 in Appeal Nos. ST/51021/2021, ST/51022/2021, ST/51023/2021 and ST/51024/2021. The appellants vide their respective separate replies had responded to the query of the department but after several repeated reminders to them. From their responses and from the scrutiny of the documents including Form 26AS and ITRs as were provided by the appellants/service providers, department observed that appellants have received respective commission from M/s. ACCSL for the respective periods as mentioned in the table above for providing 'Business Auxiliary Services'. Though services are taxable post 01.07.2012 but the appellants have not discharged their service tax liability even since then. Accordingly, the appellants herein were served with the respective show cause notices (as mentioned in the table above), proposing the recovery of respective amount of service tax along with interest and the appropriate penalties as mentioned in the table above. The said proposal have been confirmed by both the adjudicating authorities except for some benefit of exemption for a particular period, vide the respective orders in each of these appeals as have also been

mentioned in the table above. Being aggrieved the appellants are before this Tribunal.

3. I have heard Shri Bipin Garg, Ms. Kainaat and Ms. Shalini, learned Counsels for the appellant and Shri Mahesh Bhardwaj, learned Authorized Representative for the department.

4. Learned Counsel for the appellants has submitted that there was much of confusion about the nature of the services being provided by the appellants as far as the taxability thereof was confirmed. Though, the Larger Bench of this Tribunal in the case of **M/s. Pagariya Auto Center Vs. Commissioner of C.Ex., Aurangabad reported as 2014 (33) S.T.R. 506 (Tri.-LB)**, had set aside the said confusion vide Final Order dated 12.09.2013 that the services as the one in question are the taxable services and the provider of 'Business Auxiliary Services' is liable to pay the duty. But despite the said decision, the confusion continued due to which the appellants were under *bona fide* belief that the service tax is not applicable on the services provided by them. The strong reason for such belief is mentioned to be the agents of LIC of India who were also not paying any service tax for providing the services to LIC against receiving commission from LIC. Learned Counsel has impressed upon that the appellants thus had no intention to evade their tax liability, otherwise also, they did not charge any service tax from M/s. ACCSL. They rather had made full disclosure of their entire commission received by them in their respective income Tax Returns filed with Income Tax Department. With these submissions the learned Counsel for the appellant has prayed for impugned

order to be set aside. She also challenged the invocation of extended period of limitation with the submission that order under challenge is rather liable to be set aside on this sole ground. In alternative cum tax benefit has been prayed to be extended to the appellants. The orders under challenge are therefore prayed to be set aside and appeals are prayed to be allowed.

5. While rebutting these submissions, learned DR has impressed upon that the appellants had never taken the service tax registration despite the 'Business Auxiliary Services' have been made taxable w.e.f. 01.07.2012 for the sole reason that these services are not covered under negative list of Section 66B of Service Tax Act (Finance Act, 2012). The registration was taken only after the investigation in this case was initiated and that to the registration was under non-assessee category. Resultantly, there is no registration till date. It is impressed upon that had the investigation in this case would not started, the appellants would still be evading the service tax. While impressing upon no infirmity in the findings about not providing any information at any point of time on their own nor getting themselves registered with the department and nor even filing ST-3 returns during the period covered under show cause notice, learned Counsel has prayed for five of these appeals to dismissed.

6. After hearing both the sides in five of these appeals, I observe that show cause notices in all these appeals have been issued invoking the extended period of limitation. Since the

invocation has been challenged, foremost, the plea of limitation has to be adjudicated.

7. Section 73(1) of the Finance Act, 1994 deals with the recovery of service tax not levied or not paid or short levied or short paid or erroneously refunded. According to which the recovery may be called for by the Central Excise Officer within the period of 30 months. However, the demand could be raised for a period beyond the said period of 30 months to the maximum of 5 years. But for the reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this act or of the rules made there under with intent to evade payment of duty. I draw my support from the decision of Hon'ble Supreme Court in the case of **Continental Foundation Jt. Venture Vs. Commr. Of C. Ex. Chandigarh-I reported as 2007 (216) E.L.T. 177 (S.C.)**, wherein it has been held that the expression 'suppression' as has been used in the proviso to Section 73(1) of the Finance Act, 1994 is accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 73(1) of the Finance Act, 1994 the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful

misstatement. The latter implies making of any incorrect statement with the knowledge that the statement was not correct.

8. Though the proviso to Section 73(1) of the Finance Act, 1994 carves out an exception and permits the authority to exercise their power recovery within 5 years from the relevant date in the circumstances in the proviso, one of it being suppression of facts. I also relied upon the decision of Hon'ble Supreme Court in the case of **Pushpam Pharmaceuticals Company Vs. Collector of C.Ex., Bombay reported as 1995 (78) E.L.T. 401 (S.C.)**, wherein it has been held that the meaning of the word 'suppression' 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 course 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 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. I also draw my support from the decision of the Hon'ble Supreme Court in the case of **Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay reported as 1995 (75) E.L.T. 721 (S.C.)**. It reads as follows:

"6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground" for the purpose of the provision for invoking extended period of limitation. It was clarified that for going beyond the normal period of limitation while issuing show cause notice, mis-statement or suppression of fact must be wilful.

9. Now reverting to the facts of the present case I observe that no doubt in view of **Pagariya Auto Center** (supra), the larger Bench decision, the services in question were held to be taxable. Otherwise also the services of commission agents are not covered under negative list under Section 66D of the Service Tax Act. The same has nowhere been denied by the appellant. Hence, there arises no doubt as far as the liability of the appellant to pay the service tax on the amount of commission received is concerned, however, within the normal period of their respective show cause notices. From the above discussed law it becomes abundantly clear that *mens rea*/the intent to evade the tax liability is the core for invoking the extended period over the normal period. Appellants apparently have mentioned themselves to be under the *bona fide* belief of still not being liable under service tax. Based on the said

belief only they neither had applied the registration nor had ever filed the service tax return. The reason for such *bona fide* belief stands corroborated from the fact that the service tax was neither collected by them from M/s. ACCSL nor accordingly, was paid by the appellant. There is no denial to the fact that appellants have not charged service tax from M/s. ACCSL. There is also no denial to the fact that the entire amount of commission was shown by the appellants in their income tax returns and the tax liability under direct taxes was duly discharged by the appellants. These perusals and undisputed facts are sufficient for me to hold that there was no *mala fide* intent on the part of the appellants to evade the payment of service tax. They rather were under *bona fide* belief. This Tribunal in the case of **Omega Financial Services Vs. Commissioner of C. Ex., Cochin reported as 2011 (24) S.T.R. 590 (Tri.-Bang.)** has held that assessee's *bona fide* belief cannot be doubted and where the assessee proves reasonable cause for such belief and for the failure to not to discharge its liability, the penalty shall not be imposed upon such assessee. This Tribunal had set aside the penalty in that case by invoking Section 80 of Finance Act, 1994.

10. From the entire above discussion, I hold that since there was the scope and belief with the appellants for entertaining the doubt about no liability of theirs to pay the service tax that the application of Section 73(1) of the Finance Act, 1994 the proviso thereof gets ruled out and resultantly, the extended period of limitation is held to have wrongly invoked by the department. The adjudicating

authorities below are held to have wrongly confirmed the demand for the extended period of limitation.

11. As a result, the orders under challenge are hereby set aside, however, if there is any demand for the normal period in any on theses 5 appeals same stands confirmed, rest of the demands set aside. Consequent of these findings, 5 of these appeal are hereby allowed with respect to demands pertaining to the extended period of respective show cause notice.

[Order pronounced in the open Court on **28.10.2022**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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