

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Service Tax Appeal No. 85892 of 2016

(Arising out of Order-in-Original No. PUN-SVTAX-000-COM-039-15-16 dated 09.12.2015 passed by the Principal Commissioner of Service Tax Commissionerate, Pune)

Principal Commissioner, Service Tax, PuneAppellant
ICE House, 41/A, Sassoon Road,
Pune

Vs.

M/s. National Institute of Bank ManagementRespondent
NIBM Post Office,
Kondhwe Khurd, Pune

APPEARANCE:

Shri Nitin M. Tagade, JC, Authorised Representative for the appellant
Shri Kaustubh D Khairnar, Advocate for the respondent

CORAM: Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/86238 / 2022

DATE OF HEARING : 30.08.2022
DATE OF DECISION : 22.12.2022

PER: C J MATHEW

The short point in this appeal of Revenue against order-in-original no. PUN-SVTAX-000-COM-039-15-16 dated 9th December 2015 of Principal Commissioner of Service Tax, Pune is the impropriety of dropping the proceedings initiated in show-cause notice dated 15th April 2014 for the period from 2008 to 2012 on the

ground of being inconsistent with bar of limitation prescribed in section 73 of Finance Act, 1994.

2. The proceedings against M/s National Institute of Bank Management, the respondent herein, to fasten liability for having provided 'taxable services'

'(zzc) – to any person, by commercial training or coaching centre in relation to commercial training or coaching'

in section 65(105) with 'commercial training and coaching centre' defined in section 65(26) and 65(27) of Finance Act, 1994 as applicable to 'post-graduate course in management' offered by them and which, according to the grounds of appeal referring to letter no. 354/91/2005-TRU dated 22nd August 2005 of Central Board of Excise & Customs (CBEC) and several judicial rulings, was well within their knowledge.

3. Learned Authorised Representative explained the several grounds enumerated in the appeal for our benefit.

4. Learned Counsel for respondent submitted that the proceedings had been dropped by the adjudicating authority for not being in compliance with the pre-requisite enabling the invoking of extended period.

5. We must state, at the outset and in no uncertain terms, that while lack of knowledge could be a defence in such proceedings, it is not the knowledge or awareness that is on trial but the suppression of fact/wilful misstatement/ fraud which must be evinced in the notice issued in pursuance of section 73 of Finance Act, 1994. Mere non-payment of tax or non-discharge of the liability does not suffice to alienate the responsibility of the 'proper officer' to offer convincing reasons for the belief that the ingredients for invoking extended period are evident. We see from the records that show-cause notice for the period from October 2003 to September 2008 dated 6th April 2009 on the same issue had been adjudicated and was carried to the Tribunal who, while upholding the default, had held that the demand was liable to be restricted only to the normal period in section 73 of Finance Act, 1994. An appeal against this order of the Tribunal, though admitted, is, as yet, pending before the Hon'ble Supreme Court.

6. We find that the demand for October 2003 to September 2008 has been, thus, curtailed and the present demand leading to the impugned order relates to the period thereafter till 2012 for which show-cause notice was issued on 15th April 2014. We also find from the impugned order that the adjudicating authority has relied upon the decision of the Hon'ble Supreme Court in *Nizam Sugar Factory v. Collector of Central Excise, A.P.* [2006 (197) ELT 465 (SC)] holding that

‘8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of *P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise* reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :

“14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period.”

This judgment was followed by this Court in the case of *ECE Industries Limited v. Commissioner of Central Excise, New*

Delhi reported in (2004) 13 SCC 719 = 2004 (164) E.L.T. 236 (S.C.). In para 4, it was observed :

“4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked.”

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in [2004 (166) E.L.T. 151 (S.C.)]. It was observed in para 6:

“..... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct.”

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.

10. For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No. 6261 of 2003 filed by the assesseees are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals @ Special Leave Petition (C) Nos. 9271-9278 of 2003 filed by the department are dismissed. Questions of classification and marketability are left open. Parties shall bear their own costs. '

7. Considering the judgment of the Hon'ble Supreme Court *supra*, this appeal of Revenue seeking recovery as proposed in the demand by invoking of the extended period for subsequent period of time is not correct in law. Accordingly, the appeal of Revenue is dismissed.

(Order pronounced in open court on 22.12.2022)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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