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Future Link India vs.the Commissioner of Central Excise, Delhi Ii

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Court : Delhi

Decided On : Dec-06-2016

Appellant : Future Link India

Respondent : The Commissioner of Central Excise, Delhi Ii

Judgement :

$~8 * IN THE HIGH COURT OF DELHI AT NEW DELHI + SERTA312016, C.M. APPL.44560/2016 Decided on:

06. 12.2016 FUTURE LINK INDIA ..... Appellant Through : Sh. C. Hari Shankar, Sr. Advocate with Sh. Paras Chaudhary, Advocate. versus THE COMMISSIONER OF CENTRAL EXCISE, DELHI II ..... Respondent Through : Sh. Sanjeev Narula, Sr. Standing Counsel with Sh. Abhishek Ghai, Advocate. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE NAJMI WAZIRI MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT) % Admit.

1. The following question of law arises for consideration: Did the CESTAT and the authorities below fall into error in holding that penalty under Section 78 of the Finance Act, 1994 (the Act) imposed was justified and appropriate?. 2. Issue notice of appeal. Sh. Sanjeev Narula, Sr. Standing Counsel accepts notice. With the consent of counsel, the appeal was heard today, finally.

3. The facts of the case are that the assessee provides business auxiliary services and has been functioning since long. It became liable to file service SERTA312016

Page 1 tax returns and deposit amounts towards that levy, with effect from 10.09.2004. It, however, claims ignorance of its duties in that regard and eventually in 2009 it registered itself as a service tax assessee, and started filing returns. The proceedings culminated in a Show Cause Notice (SCN) under Sections
of the Finance Act, 1994 and Section 11A of the Central Excise Act, 1944 asking the appellant to show cause why assessments for the years that it had not filed returns (by invoking the extended period) should not be completed. During the course of these proceedings, the assessee admitted its liability and, of the demand for`44,04,621/-, it appears to have deposited `28 lakhs. These facts are not in dispute. What the assessee did, however, was to contest its liability under Section 78 of the Finance Act, 1994, which enjoins a mandatory penalty of 100% of the tax demanded. It, however, did not succeed on this score. Both the Commissioner (Service Tax) and the CESTAT ruled against the appellant.

4. Learned senior counsel for the appellant, Mr. Hari Shankar, urges that the controlling expression applicable - and found in both Section 78 of the Act and second proviso to Section 11A is fraud, collusion, wilful mis- statement, suppression of facts or contravention of any of the provisions.....with intent to evade payment.... It was submitted that the use of such expressions has, in the past, in the decisions of the Supreme Court, been construed as not authorizing the authorities to invoke the extended period for mere omission to register and pay duty which is otherwise payable. In this regard, learned counsel relied upon the judgment reported as Collector of Central Excise v. HMM Limited 1995 Supp(3) SCC322 SERTA312016 Page 2 Padmini Products v. CCE1989(4) SCC275and the latest judgment in Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur 2013 (288) ELT161(SC). It was alternatively suggested that in the event the Court is not persuaded with this interpretation, the possibility of invoking third proviso to Section 78(1) may be also considered.

5. Mr. Sanjeev Narula, learned counsel for the revenue, argued that having regard to the facts, the question of any penalty other than what was imposed in this case does not arise. He points out that under proviso to Section 78 (1), the assessee has limited option of paying up the amount demanded with interest levied, within

30 days resulting in reduction of penalty to 25%. In default of such compliance, the assessee would have to suffer 100% penalty. It was also contended that once the period is over, the authorities are powerless to waive the amount or reduce it; in support of this proposition, reliance was placed on the judgments reported as Exotic Associates vs. The Commissioner of Central Excise 2010 (252) ELT49(Guj); K.P. Pouches (P) Ltd. vs. Union of India (UOI) 2008 (238) ELT31(Del);Commissioner of Central Excise, Raigad vs. Castrol India Ltd.2012 (286) ELT94 Sri Sai Enterprises & Anr. vs. Commissioner of Central Excise 2013 (288) 40; Commissioner of Customs & Central Excise vs. M/s. Majestic Auto Ltd.2013 (289) 95 (All). All these were considered by this court in an elaborate judgment, reported as Principal Commissioner of Service Tax v Top Security 2016[41].S.T.R.612(Del.). It was therefore, submitted that the question of leniency cannot arise; in the facts of this case, whatever be the reason, since the assessee did not comply with the condition of depositing the entire amount demanded with interest within the stipulated SERTA312016 Page 3 mandatory period, it could not avail the lighter penalty. Mr. Narula therefore, urged that this court should not interfere with the order of the Tribunal (CESTAT).

6. The preceding discussion on facts reveals that even though the assessee had established its business earlier, it started filing service tax returns only in 2009, i.e. more than three years after the levy was introduced for the first time. Concededly, this case does not concern itself with the post 2009 conduct but rather with what the assessee did after receipt of notice under Sections 75/78. The SCN received by the assessee culminated in an order, dated 07.05.13 by the Additional Commissioner. In reply to the show cause notice, the assessee did not dispute its liability; however, its reply stated that there was no awareness about its liability before 2009 and that it did not indulge in suppression or misstatement of fact. The reply stated inter alia, as follows: Sub: Reply to Show Cause notice dated 23.04.2012 Sir, With reference to the above said subject in the matter of Future link India, it is submitted as under:

1. M/s Future Link India is my proprietorship concern. I am doing business of Direct Sales Agent for the products of ICICI Bank (Home Finance). This was my first business venture for livelihood of myself and my family.

2. Like me several other Direct Sales Agents were appointed by ICICI HFC (referred to as 'IHFC' in short) and by several other banks. IHFC asked me to sign an agreement for becoming a Direct Sales Agent which I complied. My job was to meet people and convince those regarding products of IHFC SERTA312016 Page 4 Receipts Rs.) 27,46,886.00 for and on procuring business the bank, I was paid remuneration. I worked very hard and was able to create a good clientele for IHFC.

3. Year The total receipts from ICl CI bank were as under: (in 63,32,702.00 79,34,629.00 83,38,468.00 2006- 07 2007- 08 2008- 09 2009- 10 There were lot of expenses incurred on procuring business and the profit was not high.

4. When I had signed the agreement with IHFC for this business it was not in my knowledge that these services were covered under Business Auxiliary Services (in short BAS) under Service Tax. I am a graduate in Arts and did not know legal provisions. However, it was the duty of ICICI Bank to inform me that these services were taxable as BAS and I would have been advised to charge service tax invoices separately or include the same in the invoice. Due to lack of proper professional advice and lack of personal knowledge I did not include service tax or any other tax in the invoices raised by me on IHFC.

5. As a law abiding Citizen I never failed to file my income tax returns and in my knowledge I was supposed to file only income tax return. If I had known in the beginning that Service Tax was payable I would have taken registration and charged service tax and paid tax accordingly. I came to know of the SERTA312016 Page 5 applicability of Service Tax on these services in year 2009 and then immediately got registered with Service Tax in my personal name vide no STCAYQP59048ESTOO1 under Business Auxiliary Services, w.e.f. 10.09.2009.

6. Since I had not charged Service Tax in the invoices raised on IHFC for the period prior to 10.09.2009 and liability to pay Service Tax for the past period was huge it became really difficult for me to pay taxes in lump sum. From my bank statement it was obvious that I did not 7. have sufficient funds to pay service tax. This was an unexpected liability to pay tax for a mistake if at all committed bona fide. It was a big loss to me. Therefore I needed time to discuss with IHFC and pay

the same. I can say that it was a bona fide mistake of law. Since 8. Service Tax Law was complicated and I could not believe that term 'Business Auxiliary Service' would include the type of business I was doing therefore this mistake happened. Even IHFC never informed me during their frequent meetings that these services were covered under Service Tax provisions and I should include Service Tax in the Invoices raised on them.

9. I can say that I had no intention of evading Service Tax and I have paid following amount of Service Tax and filed the Returns: S.N Year o. Rate of Tax Period Receipt Tax Due Tax Paid Taxabl e Amoun t Tax Pendin g of s inclusi ve Tax 707042 .00 203984 4.00 424652 7.00 223539 7.00 1. 2.

3.

4. 2006- 07 2006- 07 2007- 08 2011- 12 09.200 6 03.200 7 09.200 7 09.201 1 12.36 % 12.36 % 12.36 % 10.3% 591500 .00 179970 0.00 377939 4.00 202665 1.00 73109. 00 222444 .00 467133 .00 208746 .00 77109. 00 222444 .00 468741 .00 226782 .00 0.00 0.00 0.00 0.00 SERTA312016 Page 6 5. 2011- 12 03.201 2 919395 .00 10.3% 833540 .00 85855. 00 87143. 00 0.00 10. It is submitted that there is no cause for making best judgment assessment. I am ready to produce all the documents required for the purposes of assessment. I am ready to pay service tax with a prayer that interest may be waived and penalty may not be imposed. the aforesaid facts and It fide mistake committed circumstances and inadvertently interest on tax may be waived and no penalty be imposed. It is further prayed that I may be given time to produce all the required documents and given personal hearing. that considering the bona is Prayed Place: New Delhi Dated:

20. 12.2012 For Future Link India Sd/- (Rajiv Sharma) 7. The adjudicating authority who considered the show cause notice and the reply thereto, however, declined the explanation furnished. It was held, in the order-in-original that: 5.3.8 It was also evident that the party had admittedly not disclosed the amount recovered. Further there was nothing on record produced or referred to by the party substantiating the element of bonafide in the correct applicability of Service Tax. There was no evidence on record which suggest that the department was made ever known about the difficulties in understanding the levy and payment of

service Tax regarding the Impugned services. Further, it was the self-assessment procedure by virtue of which the party was required to assess to assess the taxability of impugned services vis-a-vis the legal provisions. Hence, it was imperative on the part of the party to ensure correct legal interpretation and application of SERTA312016 Page 7 provisions in his case. The evasion of Service Tax by the party detected by the department does not automatically construe to be arising out of bonafide element. Moreover, he never disclosed that he was providing the taxable services under 'Business Auxiliary Services'. In fact he did not submit the information/details when called for. All this clearly points out the intention of the party not to discharge their service tax liability. Hence, it is concluded that the party had contravened the said provisions with the intention not to pay Service Tax at the appropriate time. 5.3.9 So far as "suppression of facts" is concerned, the phrase implies that with-holding of information is suppression of facts. P. Ramanatha Aiyar's Concise Law Dictionary [1997 Edition Repent 2003 - page 822]. defines the phrase very lucidly and accurately as - Where there is an obligation to speak, a failure to speak will constitute the "suppression of fact" but where there is no obligation to speak, silence cannot be termed "suppression", The Party had an obligation to comply with the statutory provisions and to furnish the information as required there under. Section 68(1) of the Act, as stood during the relevant period, provides that every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed, Section 66 provides the rate of tax as well as levy of the tax on the services specified therein. Undoubtedly, the Party has abused the facility of self-assessment provided under Section 70, which directs that every person liable to pay the Service Tax shall himself assess the tax due on the services provided by him and shall furnish the periodical returns as prescribed. Thus, the afore mentioned statutory provisions of service tax cast an obligation upon the noticee to get registration; to pay service tax: and to file proper periodical returns. All these facts narrated above go to show that the noticee did not discharge the proper Service Tax liability by non-compliance of the obligations cast upon them by the statutory provisions. SERTA312016 Page 8 5.3.10 It is needless to recapitulate that this case has arisen out of information leading to inquiry about the activities of the noticee. Had the inquiry not conducted the

evasion of tax would not have been unearthed. This finds support from the ratio of the judgment and order delivered in the matter of Dugal Tetenal India Ltd. Vs. CCE reported in 2002 (147) ELT578(Tri-Del), wherein the Hon'ble Tribunal particularly mentioned that there was no evidence on record to show that the material fact relating to ownership of the brand name was known to the Department till their investigative results were available. In a Service Tax case, the Hon'ble Tribunal, in the matter of Insurance and Provident Fund Department Vs. CCE the reported contentions of the appellants that they, being a Government organization, had no Intention to evade payment or duty and therefore, there was no mis-statement or suppression of facts so as to attract a longer period for confirming the demand; and that the extended period for demand could only be applied when some positive signals other than mere inaction or failure on the part of the Party were proved. 5.3.11 In the case of Bharti Cellular Ltd. Vs. Commissioner of Central Excise, Delhi reported in 2005 (179) E.L.T. 334 (Tri.Dal.), the Hon'ble Tribunal did not accept the contentions of the appellants raised on the issue of limitation. The Hon'ble Tribunal has held that: in 2006 (2) STR369(Tri-Del), negated "However, the third contention of the counsel on the question of limitation can not be accepted. The argument of the Ld. Counsel that the appellants were under bonafide belief that the sale of SIM card to the subscriber was not taxable and they have been filing the Service Tax returns regularly and the department never pointed out any deficiency therein and as such extended period of limitation, can not be invoked, in our view, deserves to be rejected. It is difficult to accept, the appellants did not know that the service of SIM cards being' provided by them to the subscribers was not taxable under Service Tax law. In their returns in ST-3 form they never gave the SERTA312016 Page 9 details and mode of computation of service tax, being paid by them, during the period in dispute i.e. 27-9-1995 to 18-12-1997. There was rather apparently suppression of material facts by them from the department and as such extended period of limitation has rightly been invoked against them for raising demand of Service Tax for the period in dispute through show cause notice dated 3-6-1998. The ratio of law laid down in Pushpam Pharmaceuticals Co. v. CCE, Bombay [1995 (78) E.L.T401(S.C.)]. and MIs Ultra Flax (P) Ltd. v. CCE, Faridabad [2004 (167) E.L.T. 354 (Tri. Del.)].referred by the Counsel, is not attracted to the facts of the present

case. There cases were under the Central Excise Act and there was material on record to suggest therein that there was no suppression of facts by the party from the department. But such is not the position in this case. 5.3.12 In the case of Mysore Rolling Mills Private Limited Vs. Collector of Central Excise, Belgaum reported in 1987(28) E.L.T. 50 (S.C.), the appellant manufactured aluminum wire rods out of duty paid E.C. grade aluminum ingots on job basis on behalf of various customers. Between September 1974 and May 1977, it recovered a sum of more than Rs. 6 lakhs as handling charges from customers by issue of debit notes over and above under regular invoices, which were includible in the assessable value being pre-manufacturing cost. Accepting the findings at the lower authorities, the Hon'ble Supreme Court field that non-disclosure of receipt of those handling Charges amounted to suppression of facts and the extended period of 5 years was applicable. This judgment squarely covers the present case. 5.3.13 In view of the above discussions, I am of the view that the extended period as provided in proviso to Section 73 (1) of the Act ibid has rightly been invoked in this case and no portion of demand is beyond a period of five years from the relevant date. SERTA312016 Page 10 8. As is evident, the adjudicating authority adopted a strict view disregarding the explanation furnished by the appellant. The assessee- which did not dispute its liability, was aggrieved by the direction to pay 100% penalty and approached the Commissioner (Appeals) and the CESTAT- both unsuccessfully. In somewhat similar circumstances, in Commissioner of Central Excise and Customs, Daman v. R.A. Shaikh Paper Mills Pvt. Ltd. 2010 (259) ELT53(Guj), it was held that if the assessee does not dispute its liability, the milder penalty prescribed by the proviso to Section 78 can be imposed by the High Court since the appellate proceedings are an extension of original proceedings. The respondents however, point out that this court is powerless to grant any relief to the appellant, if, in the first instance, it did not or could not avail the option of paying the entire tax arrears with interest, within 30 days. In that eventuality, the mandatory penalty of 100% would have to be borne; they rely on the decisions cited by them.

9. Section 78 of the Finance Act, 1994, reads as follows:

"Section78. Penalty for suppressing, etc., of value of taxable services. (1) 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 there under with the intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refunds, as determined under sub-section (2) of section73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to SERTA312016 Page 11 9. that where true and complete details of the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded. Provided the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short-paid or erroneously refunded. Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be twenty-five per cent of such service tax; Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso. Provided also that in case of a service provider whose value of taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days."

The first issue is whether the appellant is right in contending that there was no suppression of material facts, or fraud or collusion, justifying invocation of the extended period of 5 years in this case. The court is here of the opinion that there is some substance and merit in the argument; in Uniworth (supra) there is an elaborate discussion about what constitutes fraud or willful suppression or misrepresentation in regard to short payment or non-payment of duty. The assessee in this case registered itself with the service tax authorities in 2009, i.e about 3 years before the issuance of the notice. Its defense regarding no knowledge about the inclusion of its SERTA312016 Page 12 business activity in

the statute is quite probable; in any event there is no material pointing to deliberate inaction. At the same time, this court also notices that in all the decisions cited by the revenue, the assessees were aware of their liability; they were called to book for not disclosing the true figures or production in most cases, unlike in the present case, where the appellant claims not to have been aware of its liability before its registration, in 2009. However, at the same time, having regard to the phraseology of Sections 76 and 77 of the Finance Act, this court is unable to disturb the findings of the authorities below on this aspect.

10. However, the limited relief that can be granted is through the fourth proviso to Section 78(1) of the Finance Act. In K.P. Pouches (supra) this court had directed all adjudicating officers to expressly state in their orders, the option available under Section 11AC of the Central Excise Act (which is in pari materia to Section 78 of the Finance Act). However, there is one significant difference: the period of 90 days is to be given in the order in respect of service tax, given that the fourth proviso to Section 78 (1) requires that period to be given. In the present case, however, the adjudicating officer did not grant that time, although the amount demanded (` 44 lakhs) fell within the limit indicated by proviso to Section 78 (1), as is evident from the following order of that authority: I Impose a Penalty of Rs. 44,04,621/- (Rupees Forty four lac four thousand six hundred and twenty one only) under Section 78 of the Finance Act, 1994 for suppressing of facts with the intention to evade payment of due Service Tax. M/s Future Link India, New Delhi can, however, avail of the benefit of the proviso to Section 78 of the said Act wherein if has been laid down that if the party deposits the entire amount of Service tax SERTA312016 Page 13 along with the interest within 30 days from the date of the communication of the Order, then the penalty amount under Section 78 shall be reduced to 25% provided the reduced penalty is also paid within the same time frame as specified above. Although the non compliance with Section 78 of the Act does not per se invalidate the penalty, at the same time, given that the option was not granted, and also that the appellant had deposited a substantial amount at the stage of adjudication and did not contend that it was not liable, we are of the opinion that limited relief in terms of that provision is justified in the peculiar circumstances of the case. The CESTATs impugned order is hereby modified. The assessee/appellant has the option to deposit the balance service tax together with

accumulated interest and penalty of 25% of the entire tax due, within the period indicated in the third proviso to Section 78(1). It goes without saying that in the event of default of balance, the order of the service tax authorities as upheld by the CESTAT can be executed. The impugned order is modified to the above extent. The appeal is, therefore, allowed in the above terms. DECEMBER6 2016 S. RAVINDRA BHAT (JUDGE) NAJMI WAZIRI (JUDGE) SERTA312016 Page 14

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