

Allied Instruments Pvt. Ltd. Vs. Commissioner of Cus. and C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-24-2002

Reported in : (2002)LC634Tri(Mum.)bai

Judge : J Balasundaram

Appellant : Allied Instruments Pvt. Ltd.

Respondent : Commissioner of Cus. and C. Ex.

Judgement :

1. All the above appeals involve common issues for determination and are hence heard together and disposed off by this common order.
2. The brief facts of the case are that Service Tax was imposed on the services provided by goods transport operator in relation to carriage of goods.
3. Rule 2(1)(d)(xvii) of the Service Tax Rules, 1994 was amended so as to provide that service tax would be paid by a person availing of such services w.e.f. 16-11-1997, Show cause notices were issued requiring the appellants to pay service tax for goods transport operator's service provided to them during the period 16-11-1997 to 1-6-1998 since they had neither applied for registration with the Central Excise authorities nor paid the service tax, hence contravening the Sections 68 and 70 of the Finance Act, 1994, directing them to furnish quarterly return in Form ST-3 and proposing recovery of interest for delayed payment of tax and proposing penal action under Sections 76, 77 and 79 of the Finance Act, 1994.

4. Prior to the issue of the notices, the validity of Rule 2(d)(xvii) of Service Tax Rules, 1994 was challenged before the Hon'ble Supreme Court and prior to the adjudication of the notices, the Apex Court held in the case of *Laghu Udyog Bharti v. Union of India* - 1999 (112) E.L.T.365 (S.C.) that the Rule was ultra vires of the Act and accordingly quashed the Rule. In view of the Supreme Court judgment, the Deputy Commissioner, vide the various orders-in-original, dropped the show cause notices. The Commissioner of Central Excise directed issue of notices for revision of the orders of the Deputy Commissioner, in view of the retrospective amendment of Service Tax Rules by Section 117 of the Finance Act, 2000, which states that notwithstanding anything contained in any judgment, decree or order of any Court, Tribunal or other authority, Sub-clause (xii) and (xvii) of Clause (d) of Sub-rule (1) of Rule 2 of Service Tax Rules/1994 as they stood immediately before the commencement of the Service Tax (Amendment) Rules, 1998 shall be deemed to be valid as if the said sub-clause had been in force at all material times. In the present impugned orders, the Commissioner has held that in view of the retrospective validation of the Service Tax Rules, all the appellants were required to pay service tax on the gross amount of the transport charges excluding insurance charges paid by them to the goods transport operator. He directed the appellants to work out the tax payable and pay the same along with interest. The appellants worked out the amounts payable and applied for waiver of pre-deposit and stay of recovery along with appeals against such order.

6. The issue of recovery of service tax for the period 16-11-1997 to 1-6-1998 stands settled by a series of decisions of the Tribunal including those in the cases of :*Anil Chemicals and Industries Ltd. v. CCE, Raipur* - 2002 (146) E.L.T. 147 (T) = 2002 (51) RLT 1037 *Rewa Gases Pvt. Ltd. v. CCE, Raipur* 4. *Apollo Tyres Ltd. v. CCE, Vadodara* - 2002 (146) E.L.T. 91 (T) = 2002 (52) RLT 660 7. The arguments raised before me by the learned counsels have already been dealt with in the above decisions, particularly in the case of *Apollo Tyres Ltd. v. CCE* cited supra. The plea raised before me that Section 117 of the Finance Act, 2000 only validates the collections already made and provides for recovery of refunds already made but does not authorise recovery of tax where it has already been levied or collected has been dealt with in paragraph 8 of the *Apollo Tyres* judgment which is reproduced below : "8. A perusal of Section 117 reveals that it

validates any action taken or anything done during the period from 16-7-1997 to 12-5-2000. The Section further provides that any service tax refunded in pursuance of any judgment or order shall be recoverable within a period of 30 days from the date on which the Finance Act, 2000 received the assent of the President. Thus Section not only provides for the recovery of the service tax which had been refunded in pursuance of any judgment or the Order but also validates the action taken or anything done notwithstanding anything contained in any judgment decree or order of any Court, Tribunal, or other authority. The Section also provided that Sub-clause (xii) and (xvii) of Sub-rule (1) of Rule 2 of Service Tax Rules, 1994 shall be deemed to be valid at all material times. This position is also apparent from the notes on clauses of the Finance Bill, 2000 wherein it was mentioned that Clause 113 (which was enacted as Section 117) of Finance Bill, 2000 seeks to give retrospective effect to the said sub-clauses of Service Tax Rules so as to validate the levy and collection of service tax on services rendered by goods transport operators and clearing and forwarding agents from the users of such services. It was also mentioned in the notes of clauses that section also seeks to deny refund of service tax to the users of such services consequent to overcome certain judicial pronouncements and for recovery of refunds already granted consequent thereto.

Accordingly there is no substance in the submissions of the learned Advocate for the Appellants that Section 117 of the Finance Act, 2000, only seeks to deny refund of Service Tax to the users. As the show cause notice for collection of service tax and imposition of penalty has been issued on 18-2-1999 the period which falls within the period mentioned in Section 117 of the Finance Act, 2000 the action has been taken by the Revenue for levying service tax on the Appellants. In view of this position there is no force in the submissions of the Appellants that fresh assessment proceedings have been initiated against them. After the enactment of Section 117 of the Finance Act, 2000 the Commissioner of Central Excise, exercising his powers under Section 84 of the Finance Act, 1994 has revived the show cause notice dated 18-2-1999 which was dropped by the Dy.

Commissioner following the Supreme Court decision in *Laghu Udyog Bharti* case. The decision in the case of *Distt. Mining Officer and Ors. v. Tata Iron & Steel Co.*

and Anr., - 2001 (7) SCC 358 is not applicable to the facts of the present matter. The CESS and Other Tax on Minerals (Validation) Act, 1993 was enacted by the Parliament as it thought that on account of the judgment of the Supreme Court, the State Government would be liable to make refund of CESS and other taxes collected by them, which was likely to have serious impact on the State Revenue and to prevent the liability of refund, the Parliament intended to validate collection of levy already made by the State Government up to 4-4-1991. It was observed by the Supreme Court that the said conclusion was based on not only the language used in Section 2(1) but also the Statement of Objects and Reasons. In the light of these facts it was held by the Supreme Court in TISCO case that "Validation Act cannot be construed to have conferred a right to make levy and collection of CESS or taxes which were collectable up to 4-4-91. It has been observed by us earlier that the Revenue in the present matter has already taken the steps for levy or imposition or collection of the service tax from the Appellants by way of issuing the show cause notice which is must under the provisions of law as well as in compliance with the principle of natural justice. As in the present matter the imposition has already been made and action has been taken to recovery the service tax and for imposing penalty, we are not in agreement with the learned Advocate that the directions by the Commissioner under the impugned order is not correct." 8. In view of the above, the plea that other sections of the Finance Act, 2000, namely, Section 109, 110 and 112 relating to validation of past actions of other subject matters also provides for recovery of duties not collected whereas Section 117(2) of the Finance Act, 2000 does not contain similar provision, is not acceptable.

9. The contention of the appellants that Section 69 relating to registration and Section 70 relating to filing of returns were to be complied with during the period in question, only by the service provider and not by the service receiver is also without substance as both these sections stipulate that the person responsible for collecting the service tax shall apply for registration and furnish prescribed returns, and the person responsible for collecting the service tax in relation to services provided by a goods transport operator has been defined in Rule 2(1)(d)(xvii) as "every person who pays or is liable to pay the freight either himself or through his agent for the transportation of the goods by road in a goods carriage." Further

Rule 4 of the Service Tax Rules, 1994 providing for registration also casts liability for application for registration on "every person responsible for collecting the service tax." This being so, the submissions of the appellants that Form ST-1 relating to application for registration and Form ST-3 in which the return on service tax was to be filed during the material time was impossible of compliance by a service tax availer as Form ST-1 was required to be submitted separately for each premises from which taxable premises were provided and Form ST-3 required showing value of taxable services realised, loses significance as the liability under the law to apply for registration and file returns is cast upon the person who receives the services.

10. The case law cited by the learned counsel for the appellants to support the argument that Section 112(1) of the Finance Act, 2000 validates only refunds already granted and does not validate recovery and collection in cases where such collection has not been made and hence the Tribunal cannot fill up the lacuna by liberal construction, is distinguishable. *Hira Devi and Ors. v. District Board, Shahjahanpur* - AIR 1952 Supreme Court 362 the Apex Court was concerned with the question as to whether the resolution passed for suspension of the plaintiff, who was an employee of the District Board of Shahjahanpur was valid and binding on him or, in other words whether it was competent for the Board to pass the resolution for suspension after it had passed the resolution for his dismissal under Section 71 of the U.P. District Board Act, 1922. Section 71 as it originally stood provided for sanction of local government for punishment or dismissal of the Secretary in certain cases. The section was amended in 1933 and did not contain any such provision. Section 90 of the Act provided for suspension either as a punishment or as a suspension pending enquiry or orders. The trial judge held that the two resolutions, namely, one for dismissal and the other for suspension of the Secretary passed by the Board on 19-1-1940 was properly passed, that the resolution for dismissal was valid and binding upon the plaintiff but the resolution for suspension was not legal. In the result he decreed the plaintiff claim inter alia for arrears of salary. The Board appealed to the High Court, the plaintiff died during the pendency of the appeal and his widow and sons were brought on record as legal representatives. The High Court concurred with the trial Court that there is no irregularity or illegality in the procedure followed but disagreed with the

trial Court's finding that suspension resolution was ultra vires of the District Board. It thus dismissed the plaintiffs suit. The heirs and legal representatives of the plaintiff obtained leave to appeal and matter came to be heard by the Supreme Court constituted in 1950.

The Supreme Court held as under : "(14) We are afraid we cannot agree with this line of reasoning adopted by the High Court. The defendants were a Board created by statute and were invested with powers which of necessity had to be found within the four corners of the statute itself. The powers of dismissal and suspension given to the Board are defined and circumscribed by the provisions of Section 71 and 90 of the Act and have to be culled out from the express provisions of those sections.

When express powers have been given to the Board under the terms of these sections it would not be legitimate to have resort to general or implied powers under the law of master and servant or under section 16 of the U.P. General Clauses Act. Even under the terms of section 16 of that Act, the powers which are vested in the authority to suspend or dismiss any person appointed are to be operative only "unless a different intention appears" and such different intention is to be found in the enactment of sections 71 and 90 of the Act which codify the powers of dismissal and suspension vested in the Board. It would be an unwarranted extension of the powers of suspension vested in the Board to read, as the High Court purported to do, the power of suspension of the type in question into the words "the orders of any authority whose sanction is necessary". It was unfortunate that when the Legislature came to amend the old Section 71 of the Act it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression "orders of any authority whose sanction is necessary". No doubt it is the duty of the court to try to harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act.

(15) Reading the present Section 71 of the Act along with Section 90 of the Act we are of the opinion that the power of suspension of the nature purported to be exercised by the Board in the case before us was not the power of suspension contemplated in Section 90 Sub-section (3) of the Act. If the plaintiff allowed the period of one month to expire without preferring an appeal against the resolution to the Government or if the Government passed orders dismissing his appeal, if any, the resolution for his dismissal would become effective without any sanction of the Government. The words used therefore in Section 90, Sub-section (3) "pending the orders of any authority whose sanction is necessary for his dismissal" are inappropriate to the present facts and could not cover the case of a suspension of the nature which was resorted to by the Board on the 29th January, 1940. We are therefore of the view that the resolution for suspension which was passed on the 29th January, 1940, was ultra vires the powers of the Board." In the present batch of cases the situation is entirely different as relevant sections read with the definition of "person responsible for collecting service tax" in relation to service provided by goods transport operator, make it clear that the service receiver is liable to pay tax, apply for registration and file returns.

In the case of *Pokhardas Meghraj v. The State of Bombay and Anr.* [1957] 008 STC 0758 the issue before the Hon'ble Bombay High Court was whether the provisions in the Bombay Sales Tax Rules, 1952 that purchase price is to be included in the taxable turnover of the purchasing period was ultra vires the rule making power. The High Court struck down the proviso to Rule 5(1)(vii) as well as Rule 5(ix)(II) of the Bombay Sales Tax Rules, 1952. The Court held that the word "sale" in Rule 5(1)(vii) means sale in Bombay and if there is no sale in Bombay there is a breach of the condition on which the goods attracted the deduction under that Rule. The Court applied the definition of sale in the Bombay Sales Tax Act, 1963 which defines the sale of goods made within the State of Bombay. The Court held that even if Section 51 of 1953 Sales Tax Act validated rules providing for inclusion of purchase price in the taxable turnover of the purchasing period, the Rule was still invalid on other grounds and therefore no tax can be levied on the petitioners under the rules under which the tax is purported to be levied.

The facts in the above cases are entirely different from the present case and further the argument of partial validation has not been accepted by the Tribunal in the case of Apollo Tyres Ltd. v. CCE, Vadodara which has considered the decision in the case of District Mining Officer and Ors. v. Tata Iron & Steel Company Ltd. - 2001 (7) SCC 358.

The case of Modern Fibotex India Ltd. & Another v. Commissioner of Income-tax [1995] 212 1TR 496 relied upon by the appellant to support the plea that the goods transport service availers could not have known that they would be held to be persons responsible for collecting service tax and therefore cannot be imputed with clairvoyance, is also without substance. It is not a question of clairvoyance at all. The appellants admittedly availed of goods transport services and the law makes them responsible for complying with the requirement of registration, filing returns, etc., which is very different from the factual position in the decision cited supra of the Hon'ble Calcutta High Court, which is that the assessee in that case could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to assessee's income ceased to be operative by reason of retrospective legislation.

11. In the light of the above I hold that the appellants are liable to apply for registration and file returns. However, on the question of demand of service tax the appellants are entitled to succeed in the light of the Tribunal's decision in Markfed Oil & Allied Industries v. CCE, Chandigarh - 2002 (146) E.L.T. 466 (T) = 2002 (53) RLT 276 wherein the Commissioner's order for payment of service tax with interest was set aside on the ground that the show cause notice was not issued under Section 73 of the Finance Act, which provides for issue of notice if the value of taxable service has escaped the assessment due to omission or failure on the part of the assessee to make the return under Section 70, but it was issued only under Section 77 for imposition of penalty on account of failure to file returns. The relevant paragraph of the Tribunal's order is reproduced below : "4. We have considered the submissions of both sides. Section 73 of the Finance Act, 1994 provides for issuing of a show cause notice to the assessee, if the value of taxable service has escaped the assessment by reason of omission or failure on the part of the assessee to make the return under Section 70 of any particular period.

Further, Section 72 empowers the proper officer to make the assessment of the value of taxable service to the post of his judgment and determination the same payable by the assessee after he fails to make the return under Section 70 of the Act. A perusal of the show cause notice dated 12-5-1999 clearly reveals that the Appellants were only to called upon to show cause to the Assistant Commissioner as to why the penal action against them be not taken for non-filing, the quarterly returns. The Appellants were not put on notice at all for non-making the Service Tax which has been since paid by them; that however, this fact of non-payment was duly mentioned in the show cause notice. As such the learned Advocate has rightly submitted that there was no proposal for payment of Service Tax, which was not paid by them. Section 84 of the Finance Act, 1994 empowers the Commissioner to call for the record of the proceedings which has been taken by the Assistant Commissioner/Deputy Commissioner and makes such inquiry and pass such orders as he thinks fit. As the record of the proceedings did not contain any proposal and any Order of making the payment of Service Tax, the Commissioner in exercise of the revision powers cannot demand the payment of Service Tax with interest. It is settled law that the revisionary Authority cannot travel beyond the show cause notice.

This was the view taken by the Tribunal in the case of Extrusion Process P. Ltd. V. CCE Bombay-II, 1994 (69) E.L.T. 144 (Tri). In the case of Dasaunda Singh, Waryam Singh, relied upon the learned Advocate, Punjab & Haryana High Court held that as the assessing authority did not invoke its jurisdiction for levying the penalty, the revisionary authority has no jurisdiction to invoke the revisionary power and remanded the case to the adjudicating authority with a direction to re-decide the matter. In the present matter, as the notice was not issued under Section 73 of the Finance Act and it was issued only under Section 77 for imposing penalty on account of failure to file returns, the Commissioner cannot under the Revisionary powers pass an Order for making payment of Service Tax with interest. Accordingly, the Appeal is allowed to the extent." 12. In this batch of cases also the notice was issued only under Sections 76, 77 and 81 and not under Section 73 of the Finance Act, 1994. Hence following the ratio of the Markfed Oil & Allied Industries's order cited supra I set aside the impugned orders-in-revision and allow the appeals.

