IN THE HIGH COURT OF GUJARAT

AT AHMEDABAD

Tax Appeal No. 2196 of 2010

THE ANKLESHWAR TALUKA ONGC LAND LOOSERS TRAVELLES CO.OP.

Vs

COMMISSIONER OF CENTRAL EXCISE, SURAT-II

Akil Kureshi and Sonia Gokani, JJ

Dated: March 02, 2012

Appellant Rep by: Mr Devan Parikh Sr. Counsel
Respondent Rep by: Mr Gaurang H Bhatt

JUDGEMENT

Per: Sonia Gokani:

Being aggrieved by the order of the Customs, Excise & Service Tax Appellate Tribunal (for short "CESTAT") dated 06/01/2009 as well as dated 23/09/2009, the present appeal is preferred under section 35 (G) of the Central Excise Act in the following factual back ground.

The appellant is a Co-operative Society rendering rent-a-cab service to M/s ONGC since many years. This service was provided under the contract agreement dated 21/12/99. Initially, as there was no levy on rent-a-cab service at the relevant date of agreement, there was no condition relating to payment of service tax in the contract. With effect from 1/4/2000, levy of service tax was introduced on rent-a-cab service. This being a new levy, it is the case of the appellant that they were unaware of legal provisions and moreover, there was confusion regarding such liability of the appellant. Thus, on both the grounds the applicability of the service tax and the liability to pay the same being an ambiguity, no service tax was paid at the relevant point of time.

In the year 2001, the appellant received such letter from the department pointing out its liability in respect of the services provided to the ONGC. In absence of such clause in the agreement, the ONGC denied to pay service tax w.e.f. 1/4/2000. It is the say of the petitioner that it was impossible for the petitioner to pay service tax as the same was not reimbursed by the ONGC. In view of the negotiation and arbitration, the order was passed in fa+vour of the appellant directing the ONGC to pay the amount for the period in dispute. However, the amount of Rs. 16,57,321/- was to be first paid by the appellant and then the same was to be reimbursed by ONGC.

In these circumstances, it is the say of the appellant that dues of the department could not be deposited in time. However, after obtaining its registration on 23/10/2002, the payment of service tax has been made on regular basis.

The show cause notice was issued by Deputy Commissioner of Central Excise for the period from 1/4/2000 to 30/9/2004 proposing the recovery of service tax to the tune of Rs. 45,06,576/- with further penalty under section 75(A), 76, 77 and 78 as well as interest under Finance Act, 1994.

It was conveyed by the appellant Co-operative Society that the entire disputed amount was paid. For the period of 1/4/2000 to 28/2/2002, they have paid the amounts vide chalans and from 1/3/2002 after the registration with the department, the payment of service tax has been regular.

Order in original did not pay heed to such request of the appellant. The Tribunal passed an order imposing service tax for the entire period for show cause notice along with interest and penalty.

The appellant challenged this order before Commissioner (appeals), who confirmed the judgment to the extent of Rs. 16,57,321/- vide order dated 12/5/2008-16/5/2008 for the period from 1/4/2000 to 28/2/2002. However, the penalty is also confirmed for the said period.

Being aggrieved by the order of penalty, the appeal was preferred before the CESTAT, which rejected the appeal of the appellant on 6/1/2009. Therefore, ROM 564/2009, being an application for rectification of the said order was preferred which met the same fate as appeal.

Both the impugned orders have been challenged on various grounds raised in this appeal and proposing following questions as substantial question of law for our consideration:

"(i) Whether the order of the Honourable Tribunal is rendered unsustainable and unreasoned as the Honourable Tribunal failed to deal with the submissions pertaining to penalty?

(ii) Whether or not the Honourable Tribunal has failed in law in appreciating that no penalty can be imposed on Co-operative Society when the levy itself is on commercial concern and Co-operative Societies are not covered under the service tax head?

(iii) Whether the Honourable Tribunal erred in imposing penalty without arriving at a conclusion and whether demand is barred by limitation or not?

(iv) Whether or not the Honourable Tribunal erred in not granting benefit of Section 80 of the Finance Act, 1994 in the context of imposition of penalty in the facts and circumstances of the present case?"

Heard learned senior counsel Mr. Deven Parikh for the appellant, who has fervently made submissions on behalf of the appellant. It is admitted that the challenge in this appeal is restricted to the imposition of the penalty as duty has already been paid. It is urged by learned counsel that the demand made is barred by limitation and the period of limitation begins from one year from the relevant period, when intent of fraud is noticed.

It is further urged that there was a fixed rate of contract with the ONGC of the appellant and from 1/4/2000 service tax has been made applicable to rent-a-cab service. Not only this was disputed by the ONGC for there being no such provisional contract but there was a need for conciliation and/or arbitration. Moreover, there was a bona fide belief on the part of the appellant that they were not liable to pay service tax being a Co-operative Society and this being an extended period of limitation, levy will not apply. He urged the Court that the appellant from very nomenclature is a Co-operative society of those land owners who have lost their lands in setting up the plant of the ONGC. The huge amount of penalty in the matter like this, when the demand itself is not sustainable under law, is not warranted and the appeal be allowed.

Learned counsel Mr. Gaurang Bhatt appearing for the Revenue on issuance of the notice for final disposal submitted that there was no financial difficulty with the appellant nor was there any confusion and as is apparent from the record since it was in dispute with the ONGC, who were customers, members of the society never paid service tax. Therefore, minimum amount of the penalty levied by the Tribunal should not be interfered with considering clear facts emerging from the record.

Before reverting to the facts of the instant case, decisions sought to be relied upon by learned counsel Mr. Parikh are as under:

"(i) case of Commissioner of Service Tax, Banglore Vs. Vee Aar Secure reported in 2011 (22) S.T.R. 517 (Kar) **= (2011-TIOL-771-HC-KAR-ST)**.

(ii) The Principal Bench of CESTAT, New Delhi in case of R.S. Travels Vs. Commissioner of Central Excise, Meerut reported in 2008 (12) S.T.R. 27 (Tri. Del.) **= (2008-TIOL-1311-CESTAT-DEL)**.

(iii) case of Kuldip Singh Gill Vs. Commissioner of Central Excise, Jalandhar reported in 2005 (186) E.L.T. 373 (Tri. Del) **= (2005-TIOL-908-CESTAT-DEL)**.

(iv) By the CESTAT, West Zonal Bench, Ahmedabad case of Sunil Metal Corporation Vs. Commr. Of C.Ex., & Cus., Rajkot reported in 2009 (16) S.T.R. 469 (Tri. Ahmd.) **= (2009-TIOL-681-CESTAT-AHM)**.

(v) case of Jaiprakash Industries Ltd VS. Commissioner of C. Ex., Chandigarh reported in 2002 (146) E.L.T. 481 (S.C.) **= (2002-TIOL-633-SC-CX)**.

(vi) case of Singh Brothers VS. Commissioner of CUS. & C.Ex., Indore reported in 2009 (14) S.T.R. 552 (Tri. Del) **= (2009-TIOL-189-CESTAT-DEL)**.

(vii) case of Sonal Vyapar Ltd VS. Commissioner of Central Excise, Salem reported in 2010 (19) S.T.R. (Tri. Chennai) **= (2009-TIOL-757-CESTAT-MAD)**."

These are all the judgments of the Tribunal except two of them.

In case of *Commissioner of Service Tax, Banglore Vs. Vee Aar Secure reported in 2011 (22) S.T.R. 517 (Kar)* **= (2011-TIOL-771-HC-KAR-ST)**., the Court found that the branch office was under bona fide belief that their head office had paid service tax on their behalf. However, subsequently a separate registration was obtained and entire service tax was paid with interest. The Court found that the security agency was bona fide, as it paid the amount with interest before show cause notice. Therefore, it was rightly found that there was no case for penalty. The Court also found that there was no substantial question of law arising in that Tax Appeal.

The Principal Bench of CESTAT, New Delhi in case of *R.S. Travels Vs. Commissioner of Central Excise, Meerut reported in 2008 (12) S.T.R. 27 (Tri. Del.)* **= (2008-TIOL-1311-CESTAT-DEL)** was dealing with a Rent-a-cab Operator service and service tax levied thereon. It was held by the Tribunal from the facts of the case that the appellant therein had informed the department about his activities in November, 2000 and there was no suppression of fact nor was any intent to evade the payment of service tax even though service tax returns were not filed. Therefore, it permitted only normal limitation period under section 73(1) of the Finance Act for the recovery of non paid service tax and not extended period of limitation.

In another case of *Kuldip Singh Gill Vs. Commissioner of Central Excise, Jalandhar reported in 2005 (186) E.L.T. 373 (Tri. Del)* **= (2005-TIOL-908-CESTAT-DEL)**, where the CESTAT, Principal Bench, New Delhi opined that the rent-a-cab Operator service, which attracted the service tax at the rate of 5% was not applicable to the case of the appellant and the cab was not leased out for any interval of time, for use by Corporation according to its discretion. That service tax under the heading does not cover all manner of transport or vehicle hire services and in absence of rent-a-cab service, the demand was not found sustainable.

In the CESTAT, West Zonal Bench, Ahmedabad in case of *Sunil Metal Corporation Vs. Commr. Of C.Ex., & Cus., Rajkot reported in 2009 (16) S.T.R. 469 (Tri. Ahmd.)* **= (2009-TIOL-681-CESTAT-AHM)** relied upon the decision of larger Bench in case of *Medpro Pharma Pvt. Ltd VS. Commissioner reported in 2006 (3) S.T.R. 355* **= (2006-TIOL-848-CESTAT-DEL-LB)**, wherein it was held that consignment agent is not liable to pay tax as clearing and forwarding agent. It also further held that it is well settled law that when favourable or contradictory decisions are holding the field, entertaining bona fide belief by an assessee can not be faulted upon. Therefore, the demand of notice beyond normal period of limitation was not found justifiable and penalty under section 78 of the Finance Act was also set aside under provisions of section 80.

The Apex Court in case of *Jaiprakash Industries Ltd VS. Commissioner of C. Ex., Chandigarh reported in 2002 (146) E.L.T. 481 (S.C.)* **= (2002-TIOL-633-SC-CX)** considered the issue of limitation in case of bona fide doubt as to non excisability of goods due to divergent view of the High Courts and held that the extended period of five years was not invocable as in absence of any fraud, collusion, wilful misstatement or suppression of fact available with the department. It also held that mere failure or negligence in not taking license was not sufficient to invoke extended period as per section 11(A) of Central Excise Act, 1944.

The CESTAT, Principal Bench, New Delhi in case of *Singh Brothers VS. Commissioner of CUS. & C.Ex., Indore reported in 2009 (14) S.T.R. 552 (Tri. Del)* **= (2009-TIOL-189-CESTAT-DEL)** has dealt with the case where service tax was introduced from 16/7/2002 on Cargo Handling service, it was a bona fide belief that activities undertaken are not covered under service tax. Therefore, the show cause notice which was issued for the period from 21/8/2002 to 2/5/2006 was held substantially time barred and when suppression by the appellant was not found, extended period was not held invocable and penalty is also not imposed.

The CESTAT, South Zonal Bench, Chennai in case of *Sonal Vyapar Ltd VS. Commissioner of Central Excise, Salem reported in 2010 (19) S.T.R. (Tri. Chennai)* **= (2009-TIOL-757-CESTAT-MAD)** do not hold extended period invocable in case of service tax, which was need to be paid whenever freight was incurred by the Customs House Agent (CHA) on goods transport service. The appellants were under the bona fide belief that liability to pay the tax is on CHA, not upon them. In such circumstances, in absence of any suppression on the part of the appellants, the Court did not allow the extension of period of limitation nor the penalty.

In light of the discussion of the decisions pressed into service by the appellant herein although those decisions which were of the Tribunal will have only persuasive value, but the appellant thereby succeeded in pointing out that levying of service tax on rent a cab service was comparatively a recent levy by the statute. Therefore, if the appellants were of the bona fide belief that they were not required to pay the service tax on such service rendered to the ONGC, extended period of limitation would not be available to the department even for levying the duty as same would be barred by law of limitation, particularly when there is a complete absence of any allegation of suppression on the part of the appellant society.

However, it needs to be noted here that this challenge is made by the appellants by pressing into service all those authorities, the counsel of the appellants stated that the challenge to the demand of service tax is not pressed before this Court and the only issue is with regard to the penalty imposed in the order-in-original and confirmed by both i.e. the Commissioner of Appeals and CESTAT.

Considering fact that the levy of service tax was w.e.f. 1/4/2000 on rent a cab service it is not surprising that there may be unawareness with regard to this new levy of tax. It would also not to be difficult to comprehend that there was a confusion over applicability of this levy in case of the appellant being a cooperative society rendering service to M/s ONGC under the Contract for many years.

Learned counsel for the revenue urged that there was no confusion and it was only on the ground of dispute with ONGC with regard to reimbursement of service tax for there being a complete absence of such clause in the agreement which was holding in the field prior to the levy of service tax on rent a cab service that the said amount was not paid.

We are unable to appreciate this contentions of the revenue mainly on three grounds. Firstly, this was comparatively new levy and therefore, unawareness and confusion both are quite possible particularly considering the strata to which the members of the appellant society belong to. They were essentially agriculturists, who lost their lands when plant of ONGC was set up, and therefore, had created society and for many years they were providing rent-a-cab service to the ONGC. Secondly, as pointed out by the learned counsel for the appellant, there were divergent views of different benches of Tribunal, which may have added to such confusion and thirdly if the appellant had persuaded their right of reimbursement of payment of service tax with the ONGC by way of conciliation and arbitration that ipso facto can not negate them the defence of bona fide belief of applicability of service tax.

The Apex Court in case of Jay Prakash (supra) who were engaged in construction activities and appears to be group of industries, which would have possibly availability of legal advice did not permit to extend period of limitation when it held that there was bona fide doubt as to the non excisability of goods due to divergent view of the High Courts. Moreover, in absence of any evidence of fraud, collusion, wilful mis-statement and suppression made available by the department, the Court did not found that mere failure or negligence is sufficient for invoking the period.

To that extent, we are of the firm opinion that both Commissioner (appeals) and Tribunal committed error in not accepting the plea of bona fide belief of the appellant. As there was a correspondence earlier on 24/1/2001 intimating the department that the appellant was unable to discharge the liability on the ground of non payment of the service tax by the ONGC and being Co-operative Society expected to protect interest of land losers of ONGC, the society has not resorted to pay amount in absence of any provisions to collect the tax. The Tribunal was of the opinion that there was no valid ground for disputing the penalty at the stage of tribunal and there was no financial difficulty also pleaded before the Tribunal. The tribunal was also influenced by the fact that there was a minimum penalty imposed to the tune of Rs. 16,57,321/- and therefore, there is no cause for interference.

Believing it for a moment that the appellants were unable to pay the amount on the ground of dispute with the ONGC though they were aware of the levy of service tax in absence of any fraud, misrepresentation, collusion or wilful mis-statement or suppression, there is no justification in levying the penalty. Moreover, when the entire issue for levying of the tax was debatable, that also would surely provide legitimate ground not to impose the penalty. Adjudicating authorities could also have considered

the fact that this was a society of persons, which was created in the interest of land loosers, who had lost their lands. With the ONGC setting up its plant in the area and operating without any profit model. In such circumstances also submissions of the appellant ought to have been appreciated in light of overall circumstances.

In the aforementioned premise, we are of the firm opinion that the appellant has made out the case to interfere with the order of tribunal imposing the penalty of Rs. 16,57,321/- vide its order dated 23/9/2009 as well as confirming the same for dismissing rectification of mistake application by order dated 6/1/2009. Resultantly, both these orders are quashed and set aside, by allowing this appeal and answering substantial questions of law (i), (iii) & (iv) in favour of appellant. Question no. (ii) of these substantial question of law concerns levy of service tax on rent-a-cab service is no more in dispute for having conceded. Therefore, consequent challenge of penalty on that ground does not survive. Appeal stands disposed of in the aforementioned terms. With no order as to costs.