

IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL

SOUTH ZONAL BENCH AT BANGALORE
COURT - I

Appeal No: E/258/2011

(Arising out of Order-in-Appeal No.23/2010 (H-III) (D) CE dated 20.10.2010 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals-III), Hyderabad.)

Date of Hearing: 06.11.2012

Date of decision: 06.11.2012

1.

Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

No

2.

Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

Yes

3.

Whether their Lordship wish to see the fair copy of the Order?

Seen

4.

Whether Order is to be circulated to the Departmental authorities?

Yes

Maganti Rama Rao
Appellant

Vs.

The Commissioner of Central Excise
Hyderabad-III Commissionerate
Hyderabad.
Respondent

Appearance

For the appellants : None

For the respondents: Dr. J.N. Nigam, Additional Commissioner (AR)

ORDER

1. This appeal was filed by the proprietor of Hotel Alankar. There is no representation for the appellant despite notice, nor any request of his for adjournment.

2. On a perusal of the records, I find that, in adjudication of a show-cause notice dated 6.1.2009, the original authority had passed the following order:

"1. I confirm the demand of Service Tax of Rs. 1,96,184/- (ST-192161+E.Cess-4022) as detailed in Annexure- I to this order, towards service tax not paid under Section 66 of Finance Act, 1994. I further, appropriate the amount of Rs. 1,96,184/- from the amount already paid i.e., Rs. 3,69,459/- paid by the assessee on 8.11.2008 & 19.12.2008.

2. I also confirm the demand of interest of Rs. 59,678/- on the service tax payable @ 13% PA till the date of actual payment as detailed in the annexure- I to this order. I further appropriate the amount of Rs. 59,678/- from amount already paid i.e., Rs. 3,69,459/- paid by the assessee on 8.12.2008 & 19.12.2008.

3. I refrain from imposing any penalties under Section 76 or Section 78 of Finance Act, 1994 drawing powers from Section 80 of Finance Act, 1994.

4. An amount of Rs. 1,13,597/- is paid in excess by the assessee as detailed in the annexure- I to this order. This may be adjusted towards any future liability of the assessee."

The show-cause notice had demanded total service tax of Rs. 3,68,727/- from the assessee for the period from September 2004 to December 2006 in respect of outdoor catering service. The demand was worked out after allowing abatement to the extent of 50% of the total catering charges. The adjudicating authority took the view that the assessee did not have tax liability for the period prior to 16.6.2005 and hence the demand of service tax of Rs. 1,96,184/- confirmed against the assessee. Equal amount was appropriated from the amount of Rs. 3,69,459/- already paid by the assessee. Interest on service tax was also appropriated from the said amount of Rs. 3,69,459/- already paid by the assessee. The remainder was allowed to be adjusted towards "any future liability". The adjudicating authority also invoked Section 80 of the Finance Act, 1994 to drop all penal proposals raised in the

show-cause notice. The order-in-original was reviewed in the department and accordingly an appeal preferred to the Commissioner (Appeals). Accepting all the grounds raised by the department, the learned Commissioner (Appeals) passed the following order:

"(i) The Service Tax amount of Rs. 3,68,727/- for the entire period involved i.e., from 10.09.2004 to 12/2006, is liable to be paid and hence confirmed accordingly under Section 73(2) of FA. The service tax amount of Rs. 3,68,497/- stand appropriated against the above redetermined service tax amount.

(ii) The demand for interest under Section 75 ibid is confirmed in respect of the above service tax amount, pertaining to the entire period 19.09.2004 to 12/2006.

(iii) I impose a penalty of Rs. 200/- per day or 2% of the service tax involved per month, whichever is highest, from the first day after the due date till date of actual payment of the outstanding amount of service tax, but subject to a maximum of the service tax involved; on the respondents, under Section 76 of the FA.

(iv) I impose a penalty of Rs. 3,68,727/- under Section 78 of the FA, on the respondents."

The present appeal of the assessee is directed against the above order of the Commissioner (Appeals).

3. On a perusal of the records, I find that the appellant was rendering catering service to M/s. Dr. Reddy's Laboratories Ltd. during the above period, but he was not paying service tax. From an audit note prepared by the Accountant General's auditors on the accounts of Dr. Reddy's Laboratories Ltd. in September 2006 as also from the appellant's response to the queries issued by the department on the basis of the said audit note, it appeared to the department that the appellant was rendering outdoor catering service to Dr. Reddy's Laboratories Ltd. without obtaining registration, filing returns, paying service tax, etc. Hence the aforesaid show-cause notice was issued to the appellant. The proposals in that show-cause notice were contested by the party and the adjudicating authority passed the aforesaid order. The grounds on which that order was reviewed in the department were accepted by the appellate authority who passed the impugned order.

4. On a perusal of the grounds of this appeal and hearing the learned Additional Commissioner (AR), I have not found any substance in the challenge set up by the appellant. One of the issues raised in this case is whether the appellant can claim exemption from payment of service tax for the period prior to 16.6.2005. Section 65(76a) of the Finance Act, 1994 defined "outdoor caterer" as follows for the period prior to 16.6.2005:

"(76a) "Outdoor Caterer" means a caterer engaged in providing services in connection with catering at a place other than his own".

4.1 After an amendment of the definition by the Finance Act, 2005, the definition reads as follows:

"(76a) "Outdoor Caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services".

5. In my considered opinion, the appellant fell within the ambit of "outdoor caterer" as defined at all times inasmuch as he was admittedly catering food to Dr. Reddy's Laboratories Ltd. at a place owned by the latter and it is not the case of the appellant that he was the owner of those premises. In this view of the matter, it is held that the appellant was liable to pay service tax prior to 16.6.2005 also. For the period from 16.6.2005, there is no room for doubt inasmuch as the amended definition is explicit. Accordingly it has to be held that the appellant was liable to pay service tax under the head "outdoor catering service" on the catering charges collected from Dr. Reddy's Laboratories Ltd. for the entire period.

6. The appellant has strongly pleaded limitation against the impugned demand of service tax. After considering the relevant grounds and the submissions made by the learned Additional Commissioner (AR), I find that the factum of the above service having been provided to the client was never disclosed by the appellant to the department. It was from the AG's audit note and the connected letters of the appellant that the department gathered the relevant information. This happened during the period from September 2006 to December 2008. The show-cause notice was issued in January 2009 invoking the proviso to Section 73(1) of the Finance Act, 1994 on the alleged ground of 'suppression with intent to evade payment of service tax'. I have not found any valid point in the grounds raised by the appellant against invocation of the said proviso. The plea of limitation is therefore rejected.

7. The show-cause notice had invoked Sections 76 and 78 for imposing penalties on the party but the adjudicating authority chose to refrain from imposing such penalties. It held that the assessee's failure to pay duty was due to "the dilemma whether the service tax was payable or sales tax was payable". On this basis, the benefit of Section 80 of the Finance Act, 1994 was given to the assessee by the adjudicating authority.

8. As I have already indicated, the statutory definition of "outdoor caterer" at all times has been clear enough for any prudent person to believe that anyone engaged in providing services in connection with

catering at a place other than his own would fit in the definition. The appellant as a prudent person could not have entertained any doubt about this. It was not open to him to plead ignorance of law as an excuse for not getting registered with the department, not filing service tax returns, not paying service tax, etc. Therefore, the plea of bona fide belief raised in this appeal is not acceptable vis-a-vis the penalties imposed on the appellant. I am of the view that the facts and circumstances of this case did not provide any ground for the appellant to claim the benefit of Section 80 of the Finance Act, 1994. Therefore the original authority was not right in avoiding the penalties and the Commissioner (Appeals) appears to have correctly decided the penalty-related issue.

9. In the result, the appeal is rejected.

(Pronounced and dictated in open Court)

(P. G. CHACKO)

Member (J)

rv

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