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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.3.2015

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MR.JUSTICE R.KARUPPIAH

C.M.A.No.3292 of 2009

The Commissioner of Service Tax
No.692, MHU Complex
Anna Salai, Nandanam
Chennai – 600 035. .. Appellant

Vs.

1. Vijay Television (P) Ltd.
   No.15, Jaganathan Road
   Janakiram Nagar, Perambur
   Chennai – 600 001.

2. The Customs, Excise and Service Tax
   Appellate Tribunal, South Zonal Bench
   Shastri Bhavan Annexe
   First Floor, 26, Haddows Road
   Chennai – 600 006. .. Respondents

PRAYER: Appeal under Section 35G of the Central Excise Act, 1944 read with Section 93 of the Finance Act, 1994 against the Final Order No.1098 of 2008, dated 30.7.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai.

For Appellant : Mr.V.Sundareswaran
Standing Counsel

For Respondents : Mr.Raghavan Ramabadran
for 1st respondent

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J U D G M E N T

(Delivered by *R.SUDHAKAR, J.*)

This appeal is filed by the department under Section 35G of the Central Excise Act, 1944 read with Section 93 of the Finance Act, 1994 against the Final Order No.1098 of 2008, dated 30.7.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai.

2. Though notice of admission was ordered on 10.12.2009, this appeal was not admitted till date. The department intends to raise the following questions of law:

> "(i) Whether the decision of the Tribunal is correct in setting aside the demand of service tax for the period beyond the normal period of limitation prescribed under Section 73 of the Finance Act on the ground that the department was aware of the 'SLOT SALE AGREEMENT' entered into by the first respondent with M/s.Vijay Broadcasting Company (P) Limited?
> (ii) Whether the Tribunal is justified in law in vacating the penalties imposed under Sections 76 and 78 of the Finance Act, 1994 on the ground that the issue involved is predominantly and legally interpretative in nature?"

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3.1. The facts in a nutshell are as under: On 1.8.2001, the first respondent entered into a Slot Sale Agreement with M/s.Vijay Broadcasting Company (P) Ltd., (for brevity, "*the Broadcasting Company*") the owner of the channel "*Vijay TV*". The first respondent was buying broadcasting time from the Broadcasting Company and selling slots thereof to various clients, namely sponsors of television programmes, who wanted their advertisements to be shown to the public.

3.2. Consequent to the investigation conducted by the Headquarters Preventive Unit, Chennai-II Commissionerate, which was a result of exchange of series of correspondence between the first respondent and the department prior to the enquiry, it ultimately turns out that the department wanted to demand service tax on the first respondent for the period from 16.7.2001 to 30.4.2005 in respect of the "*Broadcasting Service*" provided them. The department considered the first respondent to be a "*broadcasting agency or organization*" as defined under Section 65(15) of the Finance Act, 1994 and held that they have rendered "*broadcasting service*" to the advertisers/sponsors as a taxable service under Section 65(105)(zk) read with the first part of the definition of "*broadcasting*" given under Section 65(14) of the Act as amended.

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3.3. As per the Slot Sale Agreement dated 1.8.2001, the first respondent was given 18 hours time per day to get their programmes telecast by the Broadcasting Company. It appears that the first respondent allots time slots to their own sponsors/advertisers against payment of consideration. The demand of service tax is on the amounts collected by the first respondent from the sponsors/ advertisers as consideration for the time slots allotted to them.

3.4. On this premise, the department issued a show cause notice on 5.10.2006. The show cause notice also proposed to demand service tax for the period beyond the normal period of limitation prescribed under Section 73 of the Finance Act, 1994. The relevant portion of the said show cause notice reads as under:

> "13. Whereas it also appears that-
>
> (i) (a) VTPL had been rendering taxable service under the category of Broadcasting Service and had been earning income towards the same w.e.f. 16.07.2001, without taking out Registration under Service Tax, payment of appropriate Service Tax and filing periodical ST-3 Returns.
>
> (b) The facts relating to the said business transactions and income earned there from which

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are liable to be taxed under the provisions of Chapter V of the Finance Act, 1994, and the Rules made there under, would not have come to light, but for the initiation of Departmental action.

(ii) VTPL by not disclosing the facts relating to their business activities and by not following the procedure of Law by suppression of facts and contravention of the provisions of Chapter V of Finance Act, 1994, and the Rules made thereunder with intent to evade payment of Service Tax, have rendered themselves liable to pay the Service Tax in terms of proviso to Section 73(1) of the said Act, and they have rendered themselves liable for penalty under Section 76, 77 & 78 of the said Act, as amended.

14. Now, therefore M/s.Vijay Television Private Limited are hereby required to show cause to the Commissioner of Service Tax, Service Tax Commissionerate, No.692, MHU COMPLEX, VI Floor, Anna Salai, Nandanam, Chennai – 600 035, within thirty days from the date of receipt of this notice as to why-

(i) the services rendered by VTPL of programme selection, programme scheduling and causing the said programmes to be telecast should not be classified under the category of Broadcasting service as per Section 65(15) of the Finance Act, 1994, as amended.

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(ii) VTPL should not be treated as Broadcasting Agency or Organization as per Section 65(16) of the Finance Act, 1994, as amended, for having rendered such services as programme selection, programme scheduling, causing the said programmes to be telecast, sale of time slots & sale of Advertisements.

(iii) A sum of Rs.6,16,28,954/- (details as per Annexure-II) being the service tax on the taxable service "Broadcasting" should not be demanded from them for the period from 16.07.2001 to 30.04.2005, as per first proviso of Section 73 of the said Act, read with Section 68 of the said Act and Rule 6 of the said Rules.

(iv) Education Cess of Rs.3,60,794/- (Annexure-II) on the Service Tax payable by them from 10.09.2004 to 30.04.2005, should not be demanded, as per first proviso of Section 73 of the Finance Act, 1994 read with Chapter VI of Finance Act, 2004.

(v) Interest at appropriate rate should not be demanded under Section 75 of the said Act till the date of payment of Service Tax and Education Cess under "Broadcasting" service for such services rendered from 16.7.2001 to 30.4.2005.

(vi) Penalty under Section 76 of the said Act as amended should not be imposed on them for the failure to pay Service Tax and Education Cess as

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per the provisions of Section 68 read with Rule 6 of the Service Tax Rules, 1994 as amended.

(vii)Penalty under Section 77 of the said Act as amended should not be imposed on them for their failure to file the periodical ST-3 Returns under "Broadcasting" service category.

(viii)Penalty under Section 78 of the said Act as amended should not be imposed on them in as much as they have suppressed the facts of having rendered the said taxable services to the Department and also contravened the provisions of Chapter V of Finance Act, 1994, and the Rules made there under with intent to evade payment of Service Tax."

3.5. The first respondent submitted reply to the show cause notice and thereafter, adjudication order was passed confirming the entire demand and the proviso to Section 73(1) of the Finance Act was also invoked. The operative portion of the adjudication order reads as under:

"21. VTPL failed to register themselves with Service Tax department, and also failed to pay Service Tax and Education Cess due and file S.T.3 Returns for the value of taxable service realized by them. *They have contravened the provisions of Section 68, 69 & 70 of the Finance Act, and suppression of facts and willful intent to evade payment of Service Tax and Education*

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Cess by VTPL are well established. Therefore, the Service Tax and Education Cess are liable to be demanded under proviso to Section 73(1) of the Finance Act. They are also liable for penal action under Sections 76, 77 & 78 of the Finance Act, 1994, for the above said contravention apart from payment of interest on the Service Tax and Education Cess demanded.

I, therefore, pass the following order:

ORDER

(i) I hold that the services rendered by VTPL of programme selection, programme scheduling and causing the said programmes to be telecast under the category of "Broadcasting service" as per Section 65(15) of the Finance Act, 1994, as amended.

(ii) I also hold that VTPL should be treated as Broadcasting Agency or Organization as per Section 65(16) of the Finance Act, 1994, as amended, for having rendered such services as programme selection, programme scheduling, causing the said programmes to be telecast, sale of time slots & sale of Advertisements.

(iii) I demand a sum of Rs.6,16,28,954/- (Rupees Six Crores sixteen lakhs twenty eight thousand nine hundred and fifty four only) being the service tax on the taxable service "Broadcasting" from VTPL for the period from 16.07.2001 to 30.04.2005, as per first proviso of Section 73 of the said Act,

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read with Section 68 of the said Act and Rule 6 of the said Rules.

(iv) I demand Education Cess of Rs.3,60,794/- (Rupees Three lakhs sixty thousand seven hundred and ninety-four only) on the Service Tax payable by VTPL from 10.09.2004 to 30.04.2005, as per first proviso of Section 73 of the Finance Act, 1994 read with Chapter VI of Finance Act, 2004.

(v)I demand interest at appropriate rate under Section 75 of the said Act till the date of payment of Service Tax and Education Cess under "Broadcasting" service for such services rendered from 16.7.2001 to 30.4.2005.

(vi)I impose a penalty of Rs.200/- (Rupees Two Hundred only) per day on VTPL from the due date of payment of Service Tax and Education Cess till the actual date of payment of the above demand under Section 76 of the said Act. However, the penalty imposed under this Section shall not exceed the Service Tax and Education Cess demanded in this order.

(vii)I impose penalty of Rs.1,000/- (Rupees One Thousand only) under Section 77 of the said Act as amended on VTPL for their failure to file the periodical ST-3 Returns under "Broadcasting" service category.

(viii)I also impose penalty of Rs.6,19,89,748/- (Rupees Six Crores nineteen lakhs eighty nine

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> thousand seven hundred and forty-eight only) under Section 78 of the said Act on VTPL."
>
> (*emphasis supplied*)

3.6. The assessee appealed to the Tribunal and the Tribunal after going through the relevant provisions of the Finance Act, 1994, more particularly, the definition of the term "*broadcasting*" as defined under Sections 65(14) of the Finance Act, 1994 (as amended by the Finance Act, 2001) and Section 2 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990; and the term "*broadcasting agency or organization*" as defined under Section 65(15) of the Finance Act, 1994, came to the conclusion that the services rendered by the first respondent/assessee fall under the service tax net and observed as under:

> "5. After giving careful consideration to the submissions, we find that the appellants have not made out any case on merits. The 'Broadcasting Company' was engaged in the business of operating 'VIJAY' television channel and was registered with the department for providing 'broadcasting service'. M/s.Vijay Television (appellants), under an agreement, purchased specific time slots from 'Broadcasting Company' against payment of monetary consideration. These time slots were used for the telecast of programmes which were got produced under

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agreements between M/s.Vijay Television and producers of TV serials and other programmes. M/s.Vijay Television prepared the schedules and decided the programmes to be telecast during the time slot. As per the definition of 'broadcasting' as amended by the Finance Act, 2001, with retrospective effect from 16.7.2001, programme selection, scheduling or presentation of sound or visual matter on a television channel would constitute 'broadcasting'. This position is clear from the first part of the amended definition of 'broadcasting' given under Section 65(14).

....

M/s.Vijay Television undertook the activities of selection, production and scheduling of programmes for telecast and collected money from their sponsors/advertisers by sale of time slots for such telecast. The activity of selling time slots for the telecast of programmes, obtaining sponsorships etc. is covered by the second part of the definition of 'broadcasting'. *By all these activities, they were providing a service to their clients in relation to 'broadcasting' and such service was exigible to levy of service tax.*”

(emphasis supplied)

On merits, therefore, the Tribunal held against the first respondent/ assessee. However, on the plea of limitation, the Tribunal was of the view that the Slot Sale Agreement between the first respondent and the broadcasting company was very much known to the department

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and in this regard, gave a specific finding on fact that there was no suppression of material facts by the first respondent before the department with intent to evade payment of service tax. The Tribunal also found fault with the adjudicating order and observed that the except making a bald statement that "*suppression of facts and wilful intent to evade payment of service tax and education cess by VTPL are well established*", no speaking order has been passed on the issue of limitation. We set out the relevant portion of the said observation for better clarity:

> "8. .... We find that these and other provisions of the SLOT SALE AGREEMENT between the appellants and the Broadcasting Company were within the knowledge of the department and the same were enough for the department to find out that the appellants were engaged in the activity of producing, selecting and scheduling of programmes to be telecast by the Broadcasting Company and were collecting money from advertisers and sponsors for such programmes for what constituted 'broadcasting service' defined under Section 65(14) of the Finance Act, 1994. In the circumstances, it cannot be said that the appellants suppressed material facts before the department with intent to evade payment of service tax. This apart, we have not found any reasoning in the Commissioner's order for holding that M/s.Vijay Television suppressed facts with intent to evade payment of service tax. *The*

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> *order merely contains an averment reading 'suppression of facts and wilful intent to evade payment of service tax and education cess by VTPL are well established'. We have not found a speaking order on the limitation issue. In the circumstances, the demand of service tax and education cess for the extended period of limitation is liable to be set aside, and we do so. The Commissioner may requantify the amount for the normal period of limitation and recover the same from the party.*"
>
> (*emphasis supplied*)

Consequently, the penalty imposed under Sections 76 to 78 of the Finance Act, 1994 was set aside by the Tribunal following the decision of the Delhi Tribunal in *Zee Telefilms v. Commissioner, 2004 (166) ELT 34*. In this regard, the Tribunal held as under:

> "9. The lower authority has imposed penalties on the appellants under Sections 76 to 78 of the Finance Act, 1994. After considering the arguments of both sides on this aspect, we are of the view that the penalties are not justifiable in the peculiar nature of the present case. *Firstly, a major part of the demand is covered by the extended period which is not invocable in this case. Secondly, the dispute in this case has arisen, by and large, out of rival interpretations of the relevant provisions of Section 65 of the Finance Act, 1994. A predominantly legal issue has been agitated before us by the assessee and the Revenue. In such circumstances, according to us, it will not be justifiable*

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> *to impose any penalty on the assessee*. We note that, in similar circumstances, penalty was vacated by this Tribunal in the case of Zee Telefilms Ltd. (supra)."
>
> (*emphasis supplied*)

3.7. Assailing the said order, the Department has filed this appeal.

4. We have heard Mr.V.Sundareswaran, learned Standing Counsel appearing for the department and Mr.Raghavan Ramabadran, learned counsel appearing for the first respondent.

5. The department attempts to controvert the finding of fact rendered by the Tribunal contending that the department was not aware of the Slot Sale Agreement, as the first respondent did not make it as an issue in the appeal before the Tribunal and there was no material for the Tribunal to render such a factual finding. Thus, the department justifies the appeal stating that the Tribunal erred in setting aside the demand of service tax for the extended period of limitation, as the department had no knowledge about the Slot Sale Agreement.

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6. At the outset, it is to be seen that the original adjudication order, which has been filed in the typed set filed by the department and extracted supra, as has been observed by the Tribunal, merely states that "*suppression of facts and willful intent to evade payment of Service Tax and Education Cess by VTPL are well established. Therefore, the Service Tax and Education Cess are liable to be demanded under proviso to Section 73(1) of the Finance Act".* There is no discussion on suppression of fact and wilful intent to evade payment of service tax. This finding is bald and bereft of reasons.

7. Even otherwise, in the appeal filed by the first respondent/ assessee, on fact, the Tribunal has gone into the Slot Sale Agreement dated 1.8.2001 and based on the plea taken by the first respondent herein, the Tribunal came to the conclusion that there was material before the department to show that they were in the know of activities undertaken by the first respondent. Though the learned counsel for the first respondent wanted to file certain documents to show that there was series of correspondence exchanged between the department and the first respondent, we do not want to enter upon further controversy on fact. Nevertheless, we find that in the order of the Tribunal there is a finding on fact that there is no suppression of material facts by the first respondent before the department. There is

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also a finding that the provisions of the Slot Sale Agreement between the first respondent and the broadcasting company were within the knowledge of the department and, therefore, the department could have proceeded for levy of service tax on the premise that the nature of activity rendered by the first respondent/assessee is a taxable service.

8. The plea now raised by the department that no such grounds have been raised by the first respondent in the appeal before the Tribunal and that the assessee has never intimated the department about their activity under the Slot Sale Agreement cannot be accepted by any stretch of imagination, as it is incumbent on the department to establish that no such material was available with the Tribunal and no such plea was taken by the first respondent before the Tribunal. Failure to do so, in our considered opinion, is fatal to the appeal of the department.

9. The first question of law that has been proposed by the department is on the very face of it not a question of law, but a question of fact. To answer that question necessarily one has to delve into the facts and find out whether such material was available or not. The finding of the Tribunal, which is the final fact finding authority,

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cannot be overturned merely based on a plea made in the appeal by the department. This view is fortified by a decision of the Supreme Court in *Kushal Fertilisers (P) Ltd. v. Commissioner of Customs & Central Excise, Meerut, 2009 (238) ELT 21 (SC).* In the said decision, while dealing with Section 11-A of the Central Excise Act and the proviso thereto, which is pari materia to Section 73 of the Finance Act, 1994 and the proviso thereof, the Supreme Court held as under:

> "16. The order of the Tribunal having been passed on 3rd March, 2005 an appeal was maintainable to the High Court in terms of the substituted provision and not a reference. Whereas a reference could be made on a question of law, Section 35G of the Act, as it stands, provides for an appeal on a substantial question of law. Such a question of law is required to be formulated by the High Court itself. Even otherwise the question of law purported to have been referred to by the learned Commissioner of Central Excise would have been maintainable provided a substantial question of law arose for consideration of the High Court and not otherwise.
>
> 17. *Whether non furnishing of information was willful and would amount to suppression of material fact in terms whereof the extended period of limitation as provided for in Section 11-A of the Customs Act, 1944 could be invoked or not, in our opinion, was not a substantial question of law. The finding of fact arrived*

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at by the Tribunal should have been treated to be final. It would be binding on the High Court while exercising its appellate jurisdiction. A 'substantial question of law' would mean - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with -technical, of no substance or consequence, or academic merely. (See Boodireddy Chandraiah v. Arigela Laxmi, [(2007) 8 SCC 155]).

18. The High Court has not said that the finding of fact arrived at by the High Court was perverse and/or was based on applying wrong legal principles etc. The High Court proceeded on the basis that the failure on the part of the appellant to submit required declaration or application for licence for establishment, would amount to concealment of facts from the department. We will assume to be so. But, as we have noticed earlier, requisite information was not only furnished on 22nd January, 1991, indisputably the officers of the Central Excise Department made inspection of the factory and the books maintained by the appellant, including the production register, which must have disclosed the nature of the products from the factory in question. If the requisite information had been given to the authorities on 22nd January, 1991, the question which should have been posed and answered was as to whether despite such knowledge, the Commissioner of Central Excise could have proceeded on the basis that

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there had been a suppression on the part of the appellant.

19. Section 11-A of the Central Excise Act, 1944 provides for penalty. It, therefore, requires strict consideration. Period of limitation provided for in the Act bars the jurisdiction of the Commissioner to initiate a proceeding for imposition of penalty on the expiry thereof. The proviso appended to Section 11-A(1) of the Act makes an exception to the said Rule, the ingredients whereof are thus required to be established for invoking the extended period of limitation. If on the materials produced by the parties, the Tribunal had arrived at a finding of fact that there had been no suppression on the part of the appellant after 22nd January, 1991, the question of invoking the extended period of jurisdiction did not arise. The show cause notice dated 28th March, 1994 thus having been issued after the expiry of the period prescribed under Section 11A of the Act, was clearly barred by limitation.

20. In any view of the matter, whether a party is guilty of suppression of fact or not is essentially a question of fact. It does not per se give rise to substantial question of law per se. [See Commissioner of Central Excise, Chandigarh v. Punjab Laminates (P) Ltd, [(2006) 7 SCC 431] and M/s. Larsen and Toubro Ltd. v. The Commissioner of Central Excise, Pune-II, [2007 (6) SCALE 524]."

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(*emphasis supplied*)

10. We, therefore, find no reason as to why the order of the Tribunal should be overturned on the plea now raised by the department.

11. Apropos the second question of law raised by the department regarding penalties under Sections 76 to 78 of Finance Act, 1994, the Tribunal observed that a major part of the demand is covered by the extended period which is not invocable and moreover, there is a dispute on interpretation of the relevant provisions of Section 65 of the Finance Act, 1994. Therefore, the Tribunal, placing reliance on the decision of the Tribunal in *Zee Telefilms case*, referred supra, vacated the penalty.

12. In view of the finding rendered by us that there is no suppression of material facts with an intent to evade payment of service tax and education cess, we hold that the Tribunal was justified in vacating the penalty imposed by the adjudicating authority.

Resultantly, these appeals are dismissed finding no question of law arising for consideration. No costs. Consequently, M.P.No.1 of

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2009 is closed.

(R.S.J.) (R.K.J.)
19.3.2015

Index : Yes
Internet : Yes

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To:

The Assistant Registrar,
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(sasi)

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