CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Cross-Objection No. 85246 of 2018

in

Service Tax Appeal No. 87156 of 2017

(Arising out of Order-in-Appeal No. MUM-SVTAX-002-APP-107-17-18 dated 09.06.2017 passed by Commissioner (Appeals), Service Tax –II, Mumbai)

N Kumar Associates International **.....Appellant**
Starlink, Navalkunj Building, Linking Road,
Bandra (West), Mumbai-400 050.

VERSUS

Commissioner of Service Tax-IV, Mumbai **.....Respondent**
12th Floor, Lotus Infocenter, Parel Station Road,
Parel (E), Mumbai-400 012.

Appearance:

Ms Nivedita Sinha, Advocate for the Appellant
Shri S. B. P. Sinha, Authorized Representative for the Respondent

WITH

Service Tax Appeal No. 87564 of 2017

(Arising out of Order-in-Appeal No. MUM-SVTAX-002-APP-107-17-18 dated 09.06.2017 passed by Commissioner (Appeals), Service Tax –II, Mumbai)

Commissioner of Central Goods and Service tax-Mumbai West **.....Appellant**
Mahavir Jain Vidyalaya, CD Burfiwala Lane,
Andheri (West), Mumbai 400 058.

VERSUS

N Kumar Associates International **.....Respondent**
Starlink, Navalkunj Building, Linking Road, Bandra
(West), Mumbai-400 050.

Appearance:

Shri S. B. P. Sinha, Authorized Representative for the Appellant
Ms Nivedita Sinha, Advocate for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86767-86768/2023

Date of Hearing: 11.04.2023
Date of Decision: 10.10.2023

PER : S. K. MOHANTY

Feeling aggrieved with the Order-in-Appeal No. MUM-SVTAX-002-APP-107-17-18 dated 09.06.2017 (for short, referred to as 'the impugned order') passed by the learned Commissioner (Appeals), Service Tax-II, Mumbai, both the assessee appellant as well as the Revenue have preferred these appeals before the Tribunal.

2. Briefly stated, the facts of the case are that the assessee appellant is engaged in providing taxable service under the category of 'outdoor catering' service, defined under Section 65(76a) read with Section 65 (105) (zzt) of the Finance Act, 1994. During the disputed period, the appellant had entered into the agreements with Indian Institute of Technology (IIT), Kanpur for providing the mess services. The salient features in both the agreements, relevant for consideration of the present dispute are itemized herein below:

"(i) Agreement dated 06.08.2007 (for the period July 2007 to November 2009)

a. The mess premises comprising cooking and dining facilities, furniture, food/raw material containers, utensils, electricity and water shall be provided by the Institute free of cost.

b. Raw material, food articles, cooking fuel, clearing/washing, materials/tools and man power shall have to be arranged by the contractor at his cost.

c. Contractor shall ensure that sufficient man power is deployed for preparation and service of each meal including cleaning, washing and overall upkeep of mess assets and premises.

d. Persons, other than the hostel residents, may also be allowed to use the mess facility by buying coupons. The responsibility of issuing coupons shall lie with the contractor.

e. Rate for providing 3 meals per day per student was at the cost of Rs.52/-

f. The rates so fixed are inclusive of all taxes (other than UPTT and UPDT, duties and levies imposed by the State/Central Govt. and Local Bodies as on the date of award of work. However, if any new tax is imposed, enhanced by the Govt. subsequent to the award of work, the shame shall be reimbursed along with UPTT/UPDT on production of proof of payment.

(ii) Agreement dated 23.11.2009 (for the period December 2009 to March 2012)

In the amended agreement dated 23.11.2009, the raw materials and other necessary items was to be provided by the institute free of cost. The contractor was assigned with the following task:

a. Cooking and serving three meals.

b. Facilitate procurement of raw material on behalf of the hostel.

c. Coupon sales for extra items.

d. The mess premises comprising cooking and dining facilities, furniture, food/raw material containers, appliances, utensils, electricity and water shall be provided by the institute free of cost. However, cleaning washing material and manpower shall be arranged by the service provider.

e. The charges for providing operational services in the mess shall be at the cost of Rs.3,10,000 per month from December 2009 to November 2010 and later it was increased to Rs.3,75,000 per month from December 2010 to March 2012.

f. The rates so fixed are inclusive of all the taxes (other than UPTT and UPDT, duties and levies imposed by the State/Central Govt. and Local Bodies as on the date of award of work. However, if any new tax is imposed, enhanced by the Govt. subsequent to the award of work, the shame shall be reimbursed along with UPTT/UPDT on production of proof of payment."

2.1 An inquiry was initiated by the Central Preventive Unit of Kanpur Commissionerate against the assessee-appellant, on the basis of an intelligence that they were providing taxable services without obtaining Registration certificate and were not paying appropriate service tax on such services. Based on the investigation, the department had initiated

show cause proceedings against the assessee-appellant, seeking for confirmation of the service tax on provision of the taxable service i.e., outdoor catering services. The Show Cause Notices (SCNs) dated 17.10.2013 and 23.10.2012 were adjudicated by the learned Joint Commissioner of Service Tax-IV, Mumbai vide Order-in-Original dated 05.05.2016. In respect of the SCN dated 17.10.2013, the learned adjudicating authority had confirmed service tax demand of Rs.9,11,946/- along with interest and also imposed penalties under Sections 76 and 77 *ibid*. With regard to the SCN dated 23.10.2012, the adjudication order had confirmed service tax demand of Rs.21,84,055/- along with interest and also imposed penalties under Sections 77 and 78 *ibid*. The adjudication order dated 09.05.2016 was appealed against by the assessee-appellant before the learned Commissioner (Appeals), Service Tax-II, Mumbai. The appeal was disposed of by the learned Commissioner (Appeals) vide the impugned order dated 09.06.2017, in the following manner:

Serial No.	**Demands confirmed in the adjudication order (in Rs.)**	**Status in the impugned order**
1.	21,84,055/-	Allowed the appeal in favour of the assessee-appellant, holding that SCN issued for the period 2007-08 to 2011-12 is barred by limitation of time in terms of the proviso to sub-section (1) of Section 73 *ibid*.
2.	9,11,946/-	Dropped the demand confirmed in the adjudication order for the period 01.07.2012 to 31.03.2013, holding that the services provided by the assessee-appellant were exempted service in terms of Notification No.25/2012-ST dated 20.06.2012 read with CBEC Circular No.172/7/2013-ST dated 19.09.2013.
3.	Not quantified	Impugned order has modified the original order passed in respect of SCN dated 17.10.2013, with a direction to the original authority to calculate the service tax liability for the period 01.04.2012 to 30.06.2012 and accordingly to impose penalties under Section 76 and 77 *ibid*.

3. Revenue has assailed the impugned order *inter alia,* on the ground that the show cause proceedings are not barred by limitation of time; that payment of VAT by considering the transaction as sale would not absolve the assessee from payment of service tax on provision of taxable output service; that benefit provided under Notification dated 01.07.2012 read with Circular dated 19.09.2013 shall not be available to the assessee inasmuch as the exemption from payment of service tax is available only to the educational institution, providing the auxiliary education service and not to catering service provided by the assessee-appellant.

4. Assessee-appellant have filed the present appeal, by assailing the impugned order on the ground that for the period 01.04.2012 to 30.06.2012, they were not liable to pay any service tax in view of the fact that the services provided by them were not covered under the scope and purview of the definition of taxable service. In this context, the assessee-appellant has referred to the adjudication order No. 39/STC-I/ADDL-SD/ Asha Ctrs/13-14 dated 30.09.2013 passed by the learned Additional Commissioner of Service Tax, Mumbai-I, in dropping the show cause notices issued under identical set of facts. Further, it has also been contended that the said order dated 30.09.2013 was not appealed against and has attained finality.

5. Heard both sides and examined the case records, including the written note of submission filed by the learned Advocate for the assessee-appellant during the course of hearing the appeals.

6. On perusal of the case records, we find that there were various correspondences exchanged between the department and the assessee-appellant with regard to payment of service tax on running of student's mess at IIT, Kanpur. In the letter dated 17.09.2008, the assessee-appellant had informed the department the grounds on which they were not paying service tax by considering the transaction as taxable service and that they have treated the transaction as sale of goods and accordingly, were discharging the VAT liability. On close reading of the correspondences available in the case file, we find that the entire activities undertaken by the assessee-appellant within the premises of IIT, Kanpur were known to the department way back in 2008. However, the SCN in this case was issued on 18.10.2013, after a gap of almost 5 years form the date of acquiring the knowledge regarding the activities undertaken by the assessee-appellant. Sub-section (1) of Section 73 *ibid*, deals with the situation for recovery of service tax, which was not-levied or not-paid or short-levied or short-paid. It has been mandated that in such an eventuality, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax, requiring him to show cause, as to why he should not pay the amount specified in the notice. However, in the proviso clause appended to Sub-section (1) of Section 73 *ibid*, it has been provided that in case of non-levy or non-payment or short-levy or short-payment of service tax, owing to the reason of fraud; or collusion; or wilful mis-statement; or suppression of facts; or contravention of any of the provisions of this Chapter-V *ibid*, or the Rules made thereunder, with an intent to evade payment of service tax, instead of the period of eighteen months, the show cause notice shall be issued within a period of five years from the relevant date. On reading of the said statutory provisions, it is amply clear that proposal for recovery of service tax in

normal circumstances should be confined to eighteen months only; whereas, under exceptional circumstances, the said period can be extended upto a period of five years, subject to fulfilment of the conditions that the ingredients itemized in the proviso clause were satisfied. In other words, issuance of the notice within the normal period is the rule and invoking the extended period is the exception and in such an event, the onus entirely lies with the department to prove that in fact the notice can be issued by invoking the extended period of limitation. In the present case, the entire modus operandi adopted by the assessee-appellant of providing the mess facilities at IIT, Kanpur were known to the department through the exchange of various communication between both the sides. Further, the contents of the agreements, referred *supra*, were also known to the department well in advance. Since, no additional documents were relied upon by the department for confirmation of the adjudged demands beyond the normal period, we do not find any substance in the appeal filed by the Revenue that the show cause proceedings are not barred by limitation of time.

6.1 In this context, the Hon'ble Supreme Court, in the case of *Pushpam pharmaceuticals Company Vs. Collector of Central Excise, Bombay* 1995 (78) ELT 401 (SC) have ruled that when the Revenue authorities were aware of the facts about the assessee's activities, then issuance of show cause notice should be confined to the normal period. The relevant paragraph in the said judgement is extracted herein below:

> *"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even*

otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

6.2 Further, in the case of *Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut* 2005 (188) ELT 149 (SC), the Hon'ble Supreme Court have dealt with the identical situation of time limit of issuance of the show cause notice. The relevant paragraphs in the said judgement are quoted below:

"26. In Tata Iron & Steel Co. Ltd. v. Union of India & Ors. [1988 (35) E.L.T. 605 (S.C.)], this Court held that when the classification list continued to have been approved regularly by the department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the Excise authorities and only in the year 1995, the department found that there was "suppression of facts" in the matter of post-forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17-5-1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts'' of the CEGAT cannot be approved by us. This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held :-

"In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik v. Collector of Central Excise [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts". This view was also reiterated by this Court in Collector of Central Excise, Baroda v. LMP Precision Engg. Co. Ltd. [2004 (9) SCC 703]."

6.3 The above referred judgements, though were delivered in context with Section 11A of the Central Excise Act, 1944, but the ratio is squarely applicable to the case in hand, inasmuch as Section 11A *ibid*, is *pari materia* with the provisions of Section 73 *ibid*. Further, we also find that under identical situation, the Additional Commissioner of Service Tax, Mumbai vide Order dated 07.10.2013 had dropped the show cause proceedings initiated against the similarly placed assessee M/s Asha Caterers, who had provided the mess catering service to IIT, Kanpur, holding that the proceedings are entirely barred by limitation of time. Furthermore, we also find that the said order dated 07.10.2013 had not been appealed against by the Revenue, meaning thereby that the statutory interpretation placed in the said order has been accepted by the competent authorities in the department. Thus, under such circumstances, the department cannot adopt pick and choose method to confirm the service tax on one assessee and to drop the same in case of the other. The Hon'ble Supreme Court in the case Commissioner of

Central Excise, Allahabad Vs. Surcoat Paints (P) Ltd., reported in 2008 (232) E.L.T. 4 (S.C) has held that once the department accepts the non-payment of taxes in any one case, then it cannot agitate the same issue for subsequent assessee(s).

6.4 In view of the foregoing discussions, we are in complete agreement with the impugned order passed by the Commissioner (Appeals) that the show cause proceedings initiated by the department for the period 2006-2007 to 2010-2011 are barred by limitation of time. Therefore, appeal filed by Revenue on such ground is dismissed.

7. The Central Government vide Notification No.25/2012-ST dated 20.06.2012 has exempted the services including auxiliary educational services from payment of service tax provided to an educational institution. Clause 2(f) in the said notification has defined the term *"auxiliary educational services"* means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge - enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.

7.1 The scope of the notification dated 20.06.2012 (supra), with regard to "auxiliary educational service" was clarified by the CBEC vide Circular No. 172/7/2013-ST dated 19.09.2013. Such phrase was explained therein to mean "*any services relating to imparting any skill,*

knowledge, education or development of course content or any other knowledge-enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution."

7.2 On reading of the above circular issued by the CBEC, it is brought out clearly that the catering service provided to the students in the educational institution should qualify for the exemption as per the notification dated 20.06.2012. Though the said circular had considered provision of catering services under any mid-day meals scheme, but such scope is extendable to the case of the appellant inasmuch as such phrase in the circular preceded with the phrase 'included'. The term 'includes' in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. In this context, the law is well settled that the term 'includes' widens the scope of definition, which enhances the scope of the definition as it is inclusive in nature; and therefore, the definition cannot be taken as one of restrictive approach.

7.3 In view of the above, we do not find any infirmity in the impugned order insofar as it has allowed the appeal of the appellants in dropping the adjudged demands for the period from 01.07.2012 to 31.03.2013, by placing reliance on the notification dated 20.06.2012 (supra) and circular of CBEC dated 19.09.2013 (supra). Therefore, appeal filed by

Revenue on this ground is also liable for dismissal and accordingly, we dismiss the same.

8. The learned Commissioner (Appeals) vide paragraph 11 in the impugned order has modified the adjudication order and remanded the matter to the lower authority for computation of service tax liability for the period from 01.04.2012 to 30.06.2012 and for consideration of penalties under Section 76 & 77 *ibid.* In this context, the assessee-appellant has contended that the adjudged demands cannot be confirmed for the said period in view of the order dated 07.10.2013 passed by the learned Additional Commissioner of Service Tax, Mumbai-I in favour of M/s. Asha Caterers, who had provided the self-same services to IIT Kanpur. We find substance in the submissions made by the assessee-appellant. It is an admitted fact on record that the order dated 07.10.2013 (supra) has not been appealed against by the department before the appellate forum. In the said order dated 07.10.2013, the original authority had framed the following questions of law and answered positively by dropping the show cause proceedings:

> *(i) Whether the impugned activities of the Noticee viz. Cooking, Supplying & Serving of Food, at the Residence Halls at IIT, Kanpur, for the period September, 2007 to March, 2012, are taxable activities under the category of 'Outdoor Caterer Service' as provided under Section 65(76a) r/w 65(105)(zzt) of the Act, or exempted being in the nature of Restaurant like Services as contended by the Noticee?*
>
> *(ii) Whether Noticee, in view of their new contract for only cooking & serving for the period after December, 2009, is exempt from payment of service tax under 'Outdoor Catering Service'*
>
> *(iii) Whether the demand beyond normal period of one year is time-barred as contended by the Noticee*
>
> *(iv) Whether Noticee are liable to pay interest under Section 75 of the Act and penalty under the Sections 76, 77 & 78 of the Act.*

8.1 Though in the case of Asha Caterer (supra), the period involved is from September, 2007 to March, 2012, but there is no change in the statutory provisions, dealing with the subject issue. Therefore, the said order dated 07.10.2013 would be applicable in the case of the appellant for dropping of the adjudged demands. The department has not disputed the fact that the said order dated 07.10.2013 has not been appealed against by Revenue. Thus, the said order had attained finality insofar as the Revenue is concerned and they cannot agitate the matter subsequently in some other cases for a decision differently. The law in this regard is well settled by the Hon'ble Supreme Court, in the case of *Commissioner of C. Ex., Hyderabad Vs. Novapan Industries Ltd.* – 2007 (209) E.L.T. 161 (S.C.) as follows:

> **"***12. The Tribunal in its order has relied upon its earlier judgment in ICI India Ltd. v. CCE, Hyderabad [2000 (91) ECR 152 (T)] in which the similar issue was involved and the Tribunal had taken the view that interest being inbuilt in the price which had not been charged separately, was deductible from the assessable value. The portion of the said judgment is extracted below:*
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> > *".....The facts recorded by the Hon'ble Supreme Court clearly show therefore that interest element was inbuilt in the price and that this price with the interest element inbuilt was under consideration by the Apex Court. When these facts under consideration by the Hon'ble Apex Court are read with the final judgment in the recalled order as in 1995 (77) E.L.T. 433 (para-66) = 1995 (58) ECR 385 (SC), it is clear that it was held by the Hon'ble Apex Court that such a deduction was admissible under the Act.*
> >
> > *9. We find that as against this the ld. Commissioner (Appeals) has recorded that this element when inbuilt in the price and claimed as a deduction to be in the nature of an abatement and as therefore concluded that such a claim for abatement was not considered by the Hon'ble Supreme Court in the MRF case supra We find that this conclusion is erroneous and has perhaps reached without reading the para-16 of the original judgment of the Supreme Court and para-66 of the judgment on recall of the Supreme Court noted above. We have already held that such an inbuilt cost on this account of interest on sundry debtors was clearly considered as deductible by the Apex Court in the issue. Therefore, we find that on this aspect alone, the Order-in-Appeal is not a fully speaking order".*
>
> *13. Counsel for the Revenue fairly concedes mat the Department did not file an appeal against the decision of the Tribunal in ICI India's case (supra). Thus, the same has attained finality.*

14. In view of a catena of decisions of this Court, it is settled law that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases [See: Birla Corporation Ltd. v. CCE [2005 (186) E.L.T. 266 (S.C.)], Jayaswals Neco Ltd. v. CCE, Nagpur [2006 (195) E.L.T. 142 (S.C.)] etc.]

15. The point in issue being concluded by the decision of this Court in MRF case (supra) and the fact that the Revenue did not file an appeal against the order of the Tribunal in ICI India case (supra), we do not find any merit in these appeals and dismiss the same with no order as to costs."

8.2 In view of the settled position of law as above, we are not in agreement with the impugned order that the assessee-appellant is liable to pay the adjudged demand of service tax along with interest and penalties for the services provided during the period 01.04.2012 to 30.06.2012. Therefore, the impugned order to such extent is set aside and the appeal is allowed in favour of the assessee-appellant.

9. In view of our discussions and findings at paragraphs 6 to 8 above, the appeal filed by Revenue is dismissed and the appeal filed by the assessee-appellant is allowed. Cross-objection filed by Revenue is disposed off.

(Order pronounced in the open court on 10.10.2023)

(S. K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

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