

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Service Tax Appeal No. 51632 of 2019

(Arising out of Order-in-Original No. D-III/ST/IV/16/Hqrs/Adjn./PVR Blu-O/156/20176248 dated 31.01.2019 passed by the Commissioner, Central Goods and Service Tax (Audit-II), New Delhi)

M/s Smaaash Leisure Limited

2nd Floor, Oasis Complex, PB Marg,
Lower Parel, Mumbai, Mumbai City
Maharashtra, India, 400013.

...Appellant

VERSUS

**Commissioner of Central Goods
& Service Tax, New Delhi**

Audit-II, 1st Floor, EIL Annexe Building,
Bikaji Cama Place, R.K. Puram,
New Delhi - 110066

...Respondent

APPEARANCE:

Mr. V. Lakshmikumaran, Ms. Shagun Arora and Mr. Kunal Aggarwal,
Advocates for the Appellant

Mr. Rajeev Kapoor, Authorized Representative for the Department

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing: 07.11.2023

Date of Decision: 01.04.2024

FINAL ORDER No. 55455/2024

JUSTICE DILIP GUPTA:

The order dated 31.01.2019 passed by the Commissioner, Central Goods and Service Tax (Audit-II), New Delhi¹ has been assailed by M/s. Smaaash Leisure Limited² in this appeal. The Commissioner has, by the said order, confirmed the demand of service tax for the period from 2012-2013 to 2015-2016 under the

1. the Commissioner
2. the appellant

proviso to section 73(1) of the Finance Act, 1994³ with interest and penalty.

2. The appellant is engaged in operating 'Blu-O Centres'⁴ at five locations. The appellant claims that the Centre provides recreational facilities to customers by offering bowling alley, video and other fun games, restaurant facility, sale of socks and supply of shoes; all the said facilities are independent of each other and chargeable separately, depending on the services availed by the customer; such recreational facilities have a proper demarcation for access; as an example it has been stated that a customer may choose to access only restaurant services at the dining section of the Centre in which case he would be invoiced only for the food and/or beverages consumed by him; and separate entry/admission fee is not collected for entering the Centre.

3. The tax treatment undertaken by the appellant in respect of the activities undertaken by it at the Centre has been stated to be as follows:

i.	Income from Bowling Alley	No service tax was paid till 30.06.2015 on charges received against access provided to bowling alley facility as the access to such amusement facility was covered under the Negative List of services. With effect from 01.06.2015, service tax was paid at the applicable rate as the services provided by way of access to amusement facilities was deleted from the Negative List.
ii.	Restaurant services	Service tax was paid by the appellant
iii.	Sale of socks	VAT was paid by the appellant

3. the Finance Act

4. the Centre

4. A show cause notice for the period from 01.07.2012 to 31.01.2017 was issued to the appellant proposing to recover service tax on the income earned by the appellant from the bowling alleys alleging:

- (i)** Section 66D(j) of the Finance Act covers admission to an amusement facility. The term 'amusement facility' has been defined under section 65B of the Finance Act. Since the appellant provides bowling alley, video/fun games, restaurant services facilities in common premises with a single entry and exit gate, it would not qualify as an 'amusement facility'. Accordingly, service tax was recoverable on the income from bowling alley along with interest;
- (ii)** The appellant had intentionally and wilfully suppressed fact of receipt of payment for bowling alley with an intent to evade payment of service tax. Hence, the extended period of limitation was invocable under the proviso to section 73(1) of the Finance Act; and
- (iii)** Penalties would also be imposable under sections 76, 77(2) and 78 of the Finance Act.

5. The appellant filed a reply denying the allegations made in the show cause notice.

6. The impugned order passed by the Commissioner has confirmed the demand holding that:

- (i)** Only the activity of admission to entertainment events or access to amusement facilities is covered under section 66D(j) of the Finance Act. Charges collected for any other activity would not be covered under the said entry. Since the appellant was not charging any entry/admission fee

for entering the Centre, income earned from bowling alley would not be covered under section 66D(j) of the Finance Act as such income pertained to an activity other than 'access to amusement facilities';

- (ii)** A place where 'other services' are also provided will not qualify as an 'amusement facility' in terms of section 65B(9) of the Finance Act, and would, accordingly, be excluded from the Negative List. Since the appellant is providing facilities including bowling alley, video/fun games, restaurant services in common premises having a single entry and exit, the facility will not qualify as an 'amusement facility' and would not be covered under the Negative List. Accordingly, service tax is payable on bowling income with interest;
- (iii)** Cum-tax benefit is not extendible as there is nothing on the record to show that service tax was not recovered by the appellant on the income; and
- (iv)** The appellant suppressed material information by not declaring income from bowling alleys in the returns. Hence, invocation of extended period of limitation was warranted and penalty under section 78 is imposable.

7. Shri V. Lakshmikumaran, learned counsel for the appellant assisted by Ms. Shagun Arora and Mr. Kunal Aggarwal made the following submissions:

- (i)** Bowling alley income is covered under section 66D(j) of the Finance Act;
- (ii)** Neither the show cause notice nor the impugned order have provided any basis for arriving at the allegations/conclusions. Thus, the vagueness in the

demand is apparent, leading to unsustainability of the demand;

- (iii)** The understanding of the department is incorrect to the extent it has disallowed the appellant from being covered under the scope of section 66D(j) of the Finance Act since it provides services other than amusement activities at the Centre. The definition of 'amusement facility' does not disqualify a facility from being covered under its scope only because services other than fun or recreation are provided in any part or place of such facility. The definition only excludes such other places from the scope of amusement facility, which means that charges recovered for access to the excluded premises would continue to be taxable;
- (iv)** 'Amusement facility' has been defined as facility where recreational or fun is provided by means of bowling alleys. However, a place within such facility where other services are provided (other than fun or recreation by means of rides, gaming devised or bowling alley) is not covered under the definition of 'amusement facility'. The word 'where' in the last portion of the definition of 'amusement facility' means the 'place' where other services are provided, and not 'facility'. Once the 'bowling alley' qualifies as a facility, only a place within such bowling alley where other services are provided would not be covered under the definition of amusement facility, but the bowling alley itself would be covered;
- (v)** The appellant earmarked space for fun or recreation (such as bowling alley/video games). In such area, other services are not provided. Further, charges to such areas

are also separate. Hence, the provision of access to such facility (bowling alley) would be covered under the Negative List;

- (vi)** The impugned order has incorrectly treated bowling income as charges for 'playing bowling alley';
- (vii)** Cum-tax benefit has wrongly been denied. Since the appellant was under a bona fide belief that access to bowling alley was not subject to levy of service tax, the question of recovering such tax from the customers does not arise;
- (viii)** The invocation of the extended period of limitation was not warranted. The appellant extended full cooperation to the department during the investigation and explained the nature of revenue earned from the bowling alley. It was also clarified that income from bowling alley was treated as non-taxable in terms of section 66D(j) of the Finance Act, due to which it was not reflected in the returns. Considering that such revenue was not required to be furnished, non-reflection in the returns cannot be treated as suppression. Hence, the demand is barred by limitation till April 2014; and
- (ix)** Since the demand is not sustainable, no penalty can be imposed. In any case, considering the bona fide of the appellant, the present case would also be covered under section 80 of the Finance Act for waiver of penalties.

8. Shri Rajeev Kapoor, learned authorized representative appearing for the department, however, supported the impugned order and submitted that the contention of the appellant that during the disputed period service relating to 'admission of entertainment

events or access to amusement facilities' was included under the Negative List of services provided under section 66D(j) of the Finance Act is incorrect as the service provided by the appellant does not qualify to be 'amusement facility' defined under section 65B(9) of the Finance Act. Learned authorized representative also submitted that the extended period of limitation was correctly invoked and the cum-tax benefit was also correctly denied.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

10. The contention of the appellant is that the bowling alley income is included in the Negative List under section 66D(j) of the Finance Act.

11. The impugned order holds that a place where 'other services' are also provided will not qualify as an 'amusement facility' under section 65B(9) of the Finance Act, and would be excluded from the scope of 'amusement facility'. The impugned order also holds that only the activity of admission to entertainment events or access to amusement facility is covered under section 66D(j) of the Finance Act. The relevant portions of the order passed by the Commissioner on this aspect are reproduced below:

"10.I find that there is no dispute on the issue that the Noticee is providing Services other than bowling income as well as services of bowling income. I also find that there is no dispute regarding taxability of service other than bowling income. Also, there is no dispute about non-coverage of services other than bowling under negative list of service.

A perusal of Clause (j) of Section 66D of Finance Act, 1994 suggests that it exempted only the activity of admission to entertainment events or access to amusement facilities from Service Tax. Therefore, the charges if any, collected from the customers for any activity other than access or admission charges to enter that place, will not be covered under the said entry. Therefore, the claim of the Noticee seeking exemption under this entry is without merit. **Further, it also emerges from the definition of 'Amusement facility' that the place where other services are also provided, are excluded from negative list of service and the same is chargeable to service tax.**

11. In the instant case, I find that the Noticee is providing recreation facilities by way of bowling alleys, other video games/other fun games and facility of restaurant services and all the aforesaid services at the same premises at "Blu-O Centre" however these services are independent of each other and there are separate charges for each of the facility offered with no entry/ admission fees for entering into Blu-O centre, as stated by Sh. Amit Kr Goyal in his statement.

13. I also find that as per the Noticee letter dated 14th July, 2015, the Noticee had paid entertainment tax on charges recovered from the customer to allow access to bowling alley and claimed that service tax on such activity is not payable as the same is covered under clause (j) of section 66D. I am of the view that Levy of entertainment tax on any activity does not affect the levy of service tax on services covered by The Finance Act, 1994 as amended.

I find that the instant case is different from the above clarification inasmuch as no charges for access to amusement facility are being collected in this case. Rather, this is an undisputed fact that no charges for access/admission to the facility were being collected by the Noticee i.e. entire collection from the visitors is

from services which are other than "Admission to entertainment events or access to amusement facilities" which only is exempted. Therefore, the reliance on this clarification is irrelevant and is not applicable to the case in hand."

17. From the above facts, I find yet another reason for non coverage of Noticee under the said entry. **The Noticee is providing recreation facility by way of bowling alley and also, providing other services within same place/ premises having common entry or exist point. Further, the Noticee has indivisible tenancy right which is used for all of the activities. Also, the Noticee is not collecting any access or admission fees to enter into such place while the Noticee is collecting charges for playing bowling alley on which the Noticee is not paying Service Tax.** Since, the said charges do not cover under clause (j) of Section 66D of Finance Act, 1994 as these are separate charges other than admission or entry fees.

18. From the above, I find that the Noticee's contention that the services provided by the Noticee are covered under the negative list of service is not sustainable."

(emphasis supplied)

12. It would be appropriate at this stage to reproduce section 66D(j) of the Finance Act and it is as follows:

"66D. The negative list shall comprise of the following services, namely:-

(j) admission to entertainment events or access to amusement facilities."

13. 'Amusement facility' has been defined in sub-section (9) of section 65B of the Finance Act and it is as follows:

“65B(9) “amusement facility” means a facility where fun or recreation is provided by means of rides, gaming devices or bowling alleys in amusement parks, amusement arcades, water parks, theme parks or such other places but does not include a place within such facility where other services are provided”

14. Section 66B of the Finance Act provides that there shall be levied service tax @14% on the value of all services, other than those services specified in the Negative List. Under section 66D(j) of the Finance Act, as it stood during the relevant period, ‘admission to entertainment events or access to amusement facility’ was included in the Negative List. Thus, keeping in mind the definition of amusement facility under section 65B(9) of the Finance Act, what is included in the Negative List in the context of the present case is access to amusement facilities where fun or recreation is provided by means of bowling alley in amusement parks, amusement arcades, water parks, theme parks or such other places, but does not include a place within such facility where other services are provided.

15. As noticed above, the Centre provides recreational facilities to customers by way of offering bowling alley, video and other fun games, restaurant facility, sale of socks and supply of shoes. According to the appellant, the aforesaid facilities are independent of each other and are chargeable separately, depending on the services being availed by the customers. The appellant further claims that there is a clear demarcation between such recreational facilities, and that separate entry/admission fee is not collected for entry into the Centre.

16. The order has disallowed the appellant from being covered under the scope of section 66D(j) of the Finance Act as it provides services other than bowling alley activity also at the Centre. The definition of 'amusement facility' does not disqualify a facility from being covered under its scope only because services other than fun or recreation are provided in any part or place of such facility. The definition only excludes such **other places** from the scope of amusement facility, which means that charges recovered for access to the excluded premises would continue to be taxable. 'Amusement facility' has been defined to mean a facility where recreation or fun is provided by means of bowling alleys. However, a place within such facility where services other than bowling alley are provided would not be covered under the definition of 'amusement facility'. The word 'where' in the last portion of the definition of 'amusement facility' means the 'place' where other services are provided, and not 'facility'. Once 'bowling alley' qualifies as a facility, only a place within such bowling alley where other services are provided would not be covered under the definition of amusement facility. However, the bowling alley itself would be covered. In an amusement park or amusement arcade, there may be numerous rides and other places of fun, and there may also be designated areas for food and beverages or conference hall. In such cases, access to such restaurant or conference hall would be excluded from the Negative List and the amount charged towards access to fun or recreation facilities would be taxable. The appellant earmarked space for fun or recreation such as bowling alley or video games. In such an area, no other services are provided. Further, charges to such areas are also separate. Thus,

provision of access to such a facility (bowling alley) would be covered under the Negative List.

17. The impugned order also hold that since 'bowling income' pertains to an amount charged for 'playing bowling' and not towards access or admission to the amusement facility, such income would not be covered under section 66D(j) of the Finance Act.

18. A bowling alley is understood as a facility where the sport of bowling is played. It needs to be remembered that no one 'plays bowling alley'. One only plays in the bowling alley. Thus, a person is charged to have access to a bowling alley to play the sport of bowling. In a bowling arcade, amount is charged for entering the bowling premises. Once such entry fee or access charge is paid, the customer is free to bowl in the available alley. The appellant had not collected charges for 'playing bowling alley'.

19. This apart, section 66D(j) of the Finance Act covers admission to an amusement 'facility' from the levy of service tax. 'Amusement facility' has been defined as a 'facility' where fun or recreation is provided. None of the provisions state that admission or access to a 'place' would only be excluded from the levy of service tax. Once an amount has been recovered for accessing a facility, such as a bowling facility, the same would be covered under section 66D(j) of the Finance Act.

20. Section 65B(9) of the Finance Act uses two different words in the same entry i.e. '**admission to** entertainment events or **access to** amusement facilities'. The use of the phrase 'access to' cannot be equated to 'admission to'. The meaning of 'access to' is the right to

use the facility. This is clear from the dictionary meaning of the term 'access' in Cambridge Dictionary:

- to be able to use or obtain something such as a service
- the method or way of approaching a place or person, or the right to use or look at something
- access to something can also mean the opportunity or ability to use it
- the right or opportunity to use or received something

21. Accordingly, 'access to' an amusement facility would also mean the permission to use such facility against payment of an amount.

22. This understanding is also strengthened from the clarification provided in the Education Guide issued by CBEC under paragraph 4.10.2 wherein it has been stated:

"4.10.2 Would a standalone ride set up in a mall qualify as an amusement facility?

Yes. A standalone amusement ride in a mall is also a facility in which fun or recreation is provided by means of ride. Access to such amusement ride on payment of charges would be covered in the negative list."

23. In view of the aforesaid discussion, it has to be held that the income received by the appellant from bowling alley would be covered under section 66D(j) of the Finance Act and, therefore, would not be leviable to service tax.

24. It would, therefore, not be necessary to examine the other contentions raised by the learned counsel for the appellant, including

the contention that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

25. The impugned order dated 31.01.2019 passed by the Commissioner, therefore, deserves to be set aside and is set aside.

The appeal is, accordingly, allowed.

(Order Pronounced on **01.04.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

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APPEARANCE:

Mr. V. Lakshmikumaran, Ms. Shagun Arora and Mr. Kunal Aggarwal,
Advocates for the Appellant

Mr. Rajeev Kapoor, Authorized Representative for the Department

**CORAM: HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 07.11.2023
Date of Decision: 01.04.2024**

ORDER

Order pronounced on 01.04.2024.

**BINU TAMTA
MEMBER (JUDICIAL)**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**