

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 1555 of 2011

[Arising out of Order-in-Original No. 48/ST/CHD-II/2011 dated 26.07.2011 passed by the Commissioner, Central Excise commissionerate, Chandigarh II]

**M/s GSKCH Employees Co-OperativeAppellant
Canteen Ltd.**

Glaxo Smithkline Consumer Healthcare Pvt Ltd. Patiala
Road, Nabha

VERSUS

**Commissioner of Central Excise,Respondent
Chandigarh II**

C.R Building, Plot No. 19. Sector 17-C, Chandigarh
160017

APPEARANCE:

Present for the Appellant: Ms. Krati Singh and Shreya Khunteta Advocates

Present for the Respondent: Ms. Shivani and Shri Aneesh Dewan ,

Authorized Representatives

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.

60236/2023

DATE OF HEARING: 28.07.2023

DATE OF DECISION:02.08.2023

PER S. S. GARG

The present appeal is directed against the impugned order dated 26.07.2011 passed by the Ld. Commissioner of Central Excise and Service Tax, Chandigarh whereby he confirmed the demand of service tax amount to Rs. 55,66,971/- by invoking the extended period of limitation under Section 73(1) of the Finance Act, 1994 and appropriated the whole amount paid by the appellant. The Ld.

Commissioner also imposed equal penalty under Section 78 of the Act along with penalty under Section 77. The demand of interest also confirmed under Section 75 of the Act.

2. Briefly the facts of the present case are that the appellant is a co-operative society registered under the Punjab Co-operative Societies Act, 1961. The Appellant is engaged in providing the canteen services to M/S GlaxoSmithKline Consumer Healthcare Pvt. Ltd. ('GSKCH Ltd.') pre 19.09.2002. The employees of GSKCH Ltd. formed the present co-operative society i.e., the Appellant for supply of meals and light refreshments to the employees of GSKCH Ltd. All the employees of GSKCH Ltd. are members of the Appellant society. The Appellant is registered as a 'service provider' under 'outdoor catering services' and also under VAT. For the purposes of operation of the Appellant's canteen, GSKCH Ltd. provided space within the factory premises for running the canteen and also some materials and fixed assets to the Appellant. Also, in cases of losses in any particular financial year, the Appellant often receives subsidy from GSKCH Ltd. The Appellant serves the food items to the employees of GSKCH Ltd. in consideration of some money on which VAT was duly discharged by the Appellant during the Relevant Period. Also, on the amount received as subsidy, no service tax was deposited by the Appellant in light of the settled law in sales tax regarding non-leviability of VAT on amounts received as subsidy.

3. On these allegations, a show cause notice was issued to the appellant proposing to recover service tax of Rs. 57,66,971/- for the applicable services of outdoor catering services along with applicable interest and penalty by invoking the extended period of limitation.

4. After following the due process, the Commissioner of Central Excise and Service Tax confirmed the demand by the impugned order. Hence, this appeal.

5. Heard both the parties and perused the record.
6. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. She further submitted that in the present appeal the appellant is not contesting the demand of service tax which they have already paid along with applicable interest. She further submitted that the appellant is only contesting the imposition of penalty under Section 77 and 78. She further submitted that the appellant has already paid service tax demand along with interest suo-moto prior to the issuance of the show cause notice and without any insistence from the department and therefore the extended period of limitation invoked by the department under Section 73(3) of the Act is not applicable as the appellant has not suppressed the facts with the intention to evade the payment of service tax. She further submitted that the appellant being a Co-operative society was providing services to its members only and was under bona-fide belief that subsidy received by them is not subject to service tax as the same is a source of finance. She further submitted that the decision of the Apex Court in the case of ***Tisco General Office Recreation Club Vs. State of Bihar 2002 (126) STC 547*** wherein it was held that subsidy given for running a canteen is not subject to sales tax as it is not a consideration for sale. Accordingly, the appellant had a bona-fide belief that no service tax would be levied on the subsidy received from GSKCH. She further submitted that upon gaining knowledge of potential liability of such amount received as subsidy, the appellant got itself registered under 'Outdoor

Catering Services' on 25.06.2009 and deposited the appropriate amount of service tax along with the appropriate interest on the subsidy received from 16.06.2005 to 30.09.2009 and the said amount was deposited suo-moto without any insistence by the department and the same was also disclosed in its return filed on 24.10.2009 and also intimated the same to the department vide letter dated 09.11.2009. She further submitted that the Tribunal in catena of this decision has held that when there is no suppression or intention to evade payment of tax, no penalty can be imposed. For this, she relied upon the following decisions:

- **Commissioner Of Central Excise, Customs And Service Tax Versus M/S. StumppSchuele&Somappa Pvt Ltd 2018 (5) TMI 609 - CESTAT Bangalore**
- **Commr. Of S.T., Bangalore Versus C Ahead Info Technologies India P. Ltd. 2011 (8) TMI 1260 - Karnataka High Court**
- **CST, Kolkata Versus M/S TIL Ltd. 2018 (7) TMI 2190 - CESTAT Kolkata**
- **Popular Motor Corporation Versus Commissioner Of Service Tax Bangalore Service 2018 (6) TMI 1359 - CESTAT Bangalore**
- **Commissioner Of Central Excise And Service Tax Versus M/S Adecco Flexione Workforce Solutions Ltd 2011 (9) TMI 114 - Karnataka High Court**
- **YCH Logistics (India) Pvt. Ltd. Versus C.C.E & C.S.T. - Bangalore Service Tax- I2020 (3) TMI 809 - CESTAT Bangalore**
- **M/S. Servocraft HR Solutions Private Limited Versus Commissioner Of Central Excise And Service Tax, Chennai 2023 (3) TMI 442 - CESTAT Chennai**
- **The Lalit Ashok Versus Commissioner Of Central Tax, Bangalore North 2018 (12) TMI 1295 - CESTAT Bangalore.**

7. She further submitted that they have good case on merit also but they are not pressing for it as they have already paid the duty along with interest.

8. On the other hand, Ld. AR reiterated the findings of the impugned order and submitted that the appellant is liable to pay service tax on subsidy received by them. She further submitted this issue has been considered by the Tribunal and held against the assessee in the following decisions:

- L. & T. Grahak Sahakari Sansthan Maryadit Vs. C.S.T. Mumbai-II -2017 (49) S.T.R. 561 (Tri.-Mumbai).

- Alfa Laval (I) Ltd. Employees Co-Op Consumers Society Vs. C.C.E Pune-I -2015 (40) S.T.R. 255 (Tri.- Mumbai)

- Indian Coffee Workers Co-Op. Society Ltd. Vs. C.C.E Allahabad – 2014 (33) S.T.R. 266 (Tri.-Del.)

- Indian Coffee workers' Co-OP. Society Ltd. Vs. C.C.E & S.T. Allahbad – 2014 (34) S.T.R. 546 (All.).

9. After considering the submissions of both the parties and perusal of the provisions of Section 73, 77 and 78 of the Finance Act. We find that in the present case the prayer is only confined to the imposition of penalty as the appellant has already paid the service tax along with interest much before the issuance of show cause notice. Even the audit on the appellant has not been conducted and no audit objection was raised. Further, here we think it appropriate to reproduce the provisions of Section 73 which is as under:

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words " one year , the words "five years" had been substituted.

Explanation: Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

(1A) Where any service tax has not been levied or paid or has been short-levied or short- paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made thereunder, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon under section 75 and penalty equal to twenty-five per cent. of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Provided that where such person has paid the service tax in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notices are served under sub-section (1) shall be deemed to be concluded:

Provided further that where such person has paid service tax in part along with interest and penalty under sub-section (1A), the Central Excise Officer shall determine the amount of service tax or interest not being in excess of the amount partly due from such person

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

Provided that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of one year referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1: For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer, but for this sub-section.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means,-

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid-

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund."

10. On perusal of Section 73(3) shows that if a tax is paid along with interest before the issuance of show cause notice then in that case show cause notice shall not be issued and in the present case also, we find that the contention of the appellant that they had bona-fide belief that they are not liable to pay service tax but when they realised on their own, they immediately paid the service tax along with interest which is admitted in the impugned order itself.

11. Further, we find that in the case of **YCH Logistics (India) Pvt. Ltd. Versus** cited (Supra), this Tribunal in identical facts has held in para 5 as under:

"After considering the submissions by both the parties and perusal of the provisions of Section 73, 77 and 78 of the Finance Act, 1994 and the various decisions relied upon by the appellant cited supra, we find that

Section 73(3) is very clear as it says that if a tax is paid along with interest before the issuance of show cause notice, then in that case show cause notice shall not be issued. In the present case, we find that the contention of the appellant that they bona fidely believed that they are not liable to pay service tax but when the audit party raised the objection that they are liable to pay service tax, then they immediately paid the service tax along with interest which is admitted in the impugned order, is justified. Further except mere allegation of suppression, the Department did not bring any material to prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in our considered view, the imposition of penalty under Section 77 & 78 is not justified and bad in law. Hence, we set aside the penalty imposed on the appellant by allowing the appeal of the appellant”.

Similarly, in the case of *The Lalit Ashok Vs. Commissioner of Central Tax, Bangalore* has observed in para 6 as under:

6. After considering the submissions of both sides and perusal of records, we find that after the audit raised the objection, the appellant reconciled his accounts and paid the service tax along with interest much before the issuance of the show-cause notice. Assessee has also accepted that the CENVAT credit was wrongly taken on account of clerical mistakes committed by the officers who were handling Service Tax matters and the Finance Manager of the unit who was handling the service tax matter had also resigned. Further we find that in view of the various decisions relied upon by the appellant cited supra wherein it has been consistently held that if the service tax is paid along with interest before the issuance of the notice, then under Section 73(3) of the Finance Act, the Department is precluded from issuing the show-cause notice. Further we find that show-cause notice was issued merely on audit objections and in view of the various decisions cited supra, no suppression can be alleged merely on audit objections. Further we find that the Hon'ble Delhi Higr Court in the appellant's own case reported in 2018-TIOL-178-HC-DEL-ST under similar

facts and circumstances dropped the penalty, Relevant para 31 of the judgment is quoted herein below:

31. The provisions relating to penalty have been discussed by various benches of the Appellate Tribunals (Sangam Palace V CCE, 2006 (2) STR 537-2002-TIOL-200 CESTAT-DEL, ETA Engineering Ltd. V CCE, 2006 (3) STR 429-2004-TIOL-959-CESTAT-DEL-LB: Vinaya Travols V Commissioner of Service Tax, Bangaloro, 2009 (13) S.TR 31 and Majestic Mobikes V. CCE S.TR. 609 (Tn.). In the present case, the appellant was under a bona fide belief that it was not liable to pay service tax for the Mandap Keeper Service and Management. Maintenance and Repair Services as discussed earlier. The conduct of the appellant of prompt payment of service tax during the enquiry and after gaining knowledge about its liability to pay service tax, is sufficient reason to believe that the assessee did not have an intention to evade the payment of service tax. Therefore, no penalty can be imposed on the appellant”.

12. Further, we find that the case laws relied upon by the Ld. DR is not applicable in the facts and circumstances of the present case because in those decisions the assessee has challenged the levibility of service tax on outdoor catering services which was adjudicated by the authorities below whereas in this case the appellant suo-moto without being pointed by the department paid the service tax along with interest much before the issuance of show cause notice hence the issue of imposition of penalty is covered by the various decisions cited (supra) in favour of the appellant.

13. By following the same, we hold that the appellants are not liable to pay penalty under Section 77 & 78 hence we allow the appeal of the appellant by setting aside the penalties on the appellant.

(Order pronounced in the open court on 02.08.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash