(2015) 12 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 951, 952 Of 2009

M/s. Ajay Enterprises Pvt. Ltd. — APPELLANT

Vs

C.S.T., Delhi — RESPONDENT

Date of Decision : 04-12-2015

Acts Referred:
Finance Act, 1994 — Section 65(88), 65(105)(v), 67(2), 76, 78

Citation : (2015) 12 CESTAT CK 0004

Hon'ble Judges : G. Raghuram, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : S. K. Pahwa, Rohan Pahwa, Amresh Jain

Final Decision : Allowed

Judgement

1. Appeals have been filed against Order-in-Original dated 07.09.2009 in terms of which the following demands were confirmed:-

(i) Rs.69,51,824/- for the period April 2004 to March 2008 (Show Cause Notice dated 19.11.2008)

(ii) Rs.6,86,467/- for the period April, 2008 to September, 2008 (Show Cause Notice dated 28.01.2008)

The aforesaid demands were confirmed along with interest and penalties on the ground that the appellant provided 'Real Estate Agent' service but did

not pay service tax on the administrative charges/transfer charges recovered by it from its clients. These administrative/transfer charges related to the

service provided by the appellant for changing the name of the owner (last allottee) in its records whenever any sale/purchase took place prior to

execution of sale deed in favour of the buyer.

2. The appellant has contended that (i) these administrative/transfer charges were not in relation to sale, purchase, leasing or renting of real estate and

therefore was not liable to service tax. (ii) The adjudicating authority vide its order dated 31.08.2009 did not treat such charges to be in relation to Real

Estate Agent' service. Indeed the appellant was under bona fide belief that these charges were not liable to service taxable under 'Real Estate Agent'

service and therefore the extended period is not invocable. It cited Commissioner's order No.49/AKM/CST(Adj)/2012, dated 28.06.2012 in the case

of M/s. Vatika Ltd. in its support. (iii) The amount recovered as administrative charges/transfer charges should be treated as cum tax amount for

computing the amount of service tax if the same are held liable to service tax.

3. Ld. Department Representative contended that the appellant was a real estate agent and provided service in relation to real estate and therefore the

administrative/transfer charges were clearly includible in the assessable value for the purpose of levying service tax under 'Real Estate Agent' service.

He also stated that the appellant was registered as a real estate agent and therefore was aware of the provisions of law and hence it was a wilful act

on its part not to pay service tax on the impugned amount.

4. We have considered the contentions of both sides. As per section 65(88) of Finance Act , 1994 ""Real Estate Agent"" means â??a person who is

engaged in rendering any service in relation to say purchase and leasing or renting of real estate and includes a real estate consultant â?. It

is an admitted fact that the appellant was a real estate agent and registered under 'Real Estate Agent' service. It was providing service in relation to

sale purchase, leasing or renting of real estate and paying service tax for rendering real estate agent service. The related taxable service is defined in

section 65(105)(v) ibid as under:-

Taxable service means any service provided or to be provided to any person by real estate agent in relation to real estate.

It is evident that the administrative/transfer charges were recovered for rendering service in relation to real estate. Thus, we are of the clear view that

the service rendered clearly fell within the purview of 'Real Estate Agent' service and these charges constituted part of the assessable value of 'Real

Estate Agent' service.

5. The appellant has strongly contended that it was under bona fide belief that these charges being administrative in nature did not constitute part of

the 'Real Estate Agent' service. It is seen that the primary adjudicating authority in the impugned order has clearly noted that the appellant undoubtedly

accounted for all the transactions in the statutory records. But the primary adjudicating authority held that the appellant was guilty of wilful

misstatement/suppression of facts with intention to evade service tax as it never approached the Department to ascertain the details of their liability to

pay service tax and the evasion would have gone undetected but for the investigation by the Department. In this regard it is pertinent to mention that in

case of a bona fide belief about the non-taxability of certain transactions, the appellant would not approach Revenue for any clarification because

clarification is sought only when there is some confusion/doubt. In case of CCE Vs. Chemphar Drugs & Liniments [2002-TIOL-266-SC-CX]

Supreme Court held that something positive other than mere inaction or failure on the assessee's part or conscious withholding of information when

assessee knew otherwise is required for invoking extended period. In the case of Continental Foundation Joint Venture Vs. CCE [2007 (216) EL T

177 (SC)] Supreme Court went to the extent of saying that any incorrect statement by itself cannot be equated with wilful mis-statement. Indeed the

fact that even the adjudicating authority [Commissioner (Adjudication), Service Tax, New Delhi] in its order No.49/AKM/CST (Adj)/2012, dated

28.06.2012 in the case of M/s. Vatika Ltd. has held that no service tax is payable under 'Real Estate Agent' service on such administrative/transfer

charges is a clear evidence that it was in no way unreasonable on the part of the appellant to entertain such a bona fide belief.

6. As regards the contention that cum tax benefit should be extended to the appellant, we find that in the given circumstances, the cum tax benefit can

be extended in terms of Explanation 2 to section 67 ibid as it existed prior to 18.04.2006 and in terms of sub-section 2 of Section 67 ibid as it exists

w.e.f. 18.04.2006.

7. In the light of the foregoing analysis we allow the appeal by way of remand to the primary adjudicating authority for de nova adjudication with our

following directions/findings:-

(i) Extended period in this case is not invocable and therefore penalty under Section 78 ibid is also not sustainable

(ii) The appellant is eligible for the cum tax benefit.

(iii) The demand is to be accordingly re-computed. Needless to say that the penalty under Section 76 ibid will also have to be recomputed.

(iv) The appellant should be given an opportunity of being heard before the de nova adjudication.

