
(2024) 10 CESTAT CK 1189

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50320 Of 2018

**M/s Bharti Palace @APPELLANT @Hash Commissioner of Central Goods
Service Tax, Customs and Central Excise @RESPONDENT**

Date of Decision : 09-10-2024

Acts Referred:

Finance Act, 1994 — Section 65, 65(66), 65(67), 83
Central Excise Act, 1944 — Section 9D, 9D(1)(b), 14, 36A
Code of Criminal Procedure, 1973 — Section 103(2)

Citation : (2024) 10 CESTAT CK 1189

Hon'ble Judges : Binu Tamta, Member (J); Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Krishnamohan K. Menon a/w Parul Sachdeva, Jayakumari

Final Decision : Allowed

Judgement

Hemambika R. Priya

1. The present appeal has been filed by M/s Bharti Palace (hereinafter referred to as the appellant) against the Order-in-Appeal No. BHO-EXCUS-001-APP-194-17-18 dated 31.08.2017 wherein Commissioner (Appeals) has confirmed the demand of service tax amounting to Rs. 3,59,796/- along with interest and equal amount of penalty.

2. The brief facts of the case are that the appellant was engaged in providing of 'Mandap Keeper Services' as defined in section 65 of Chapter V of Finance Act, 1994. During the scrutiny of records during audit, the appellant provided photocopies of register showing details of booking, copies of receipts, ITR of Financial Year 2011-12, 2012-13 & 2013-14. Further, statement of the proprietor, Shri Chandra Shekhar Agrawal was recorded under Section 14 of the Central Excise Act, 1944 on 23.04.2016 wherein he submitted a booking register and a green coloured diary and, inter-alia stated that the register is being maintained for booking and a diary is being maintained by his employees to show the inclusive booking amount negotiated by the tent houses. All the entries in respect of marriage hall booking, date and name mentioned in diary match with

the entries shows in the register which was prepared for the period 2011-12 to 2014-15. Also, entries in the register and diary match with the dates of temporary electrical connection obtained from the electricity department. Consequent to the investigations, the Department alleged that for the period 2011-12 to 2015-16 (upto June), the total service tax liability of the appellant was Rs. 3,59,796/- along with interest & penalty. Accordingly, a show cause notice dated 13.10.2016 was issued. Subsequently the proceedings were finalized by the adjudicating authority vide Order-In- Original dated 30.12.2016 wherein he dropped the proceedings as the respondent is entitled to small scale exemption as provided under Notification No.06/2005-ST dated 01.03.2005. The said order was reviewed by the Principal Commissioner, Central Excise & Service Tax, Jabalpur (MP) vide Review Order dated 15.03.2017 and an appeal was filed before the Appellate Authority. The department filed an appeal before the Commissioner (Appeals), who allowed the appeal of the department and reversed the order of the adjudicating authority and restored the demand of Rs. 3,59,796/- under 'Mandap Keeper Service' along with interest and equivalent penalty.

3. Learned Counsel for the appellant submitted that it is a settled law that the statement of witness recorded under Section 14 of Central Excise Act, 1944 before the gazetted Central Excise Officer during the course of investigation cannot be relied upon, unless procedure prescribed under Section 9D of the said Act is scrupulously followed. Such statement would have no evidentiary value if the person making it is not subjected to examination-in-chief before the adjudicating authority and also not produced for cross-examination as stipulated under Section 9D(1)(b) of Central Excise Act, 1944. By virtue of Section 83 of the Finance Act, 1994, the provisions of Central Excise Act is applicable to Finance Act. The procedure prescribed in Section 9D sub-section (1) of Central Excise Act, 1944 has to be followed by the Department in the same way as in adjudication proceedings of a criminal matter relating to prosecution. In support of his submissions, learned counsel relied upon the following decisions: -

- Anjani Steel Ltd Vs Commissioner of Central Excise & Service Tax [2022-TIOL-947-CESTAT-DEL]
- G.T.C Industries Ltd Vs Collector of Central Excise [2023 (384) E.L.T 239 SC]
- Jindal Drugs Pvt. Ltd Vs Union of India [2016 (340) ELT 67 (P&H)]
- Goyal Tobacco Co. Pvt Ltd Vs CCE & ST, Jaipur [2017 (348) ELT 720 (Tri-Del)]
- Manek Chemicals Pvt Ltd Vs Union of India [2016 (334) ELT 302 (Guj)]
- G-Tech Industries Vs Union of India [2016 (339) E.L.T 209 (P&H)]
- J.K. Cigarettes Ltd. vs. CCE [2009 (242) ELT 189 (Del.)]

In view of above, learned counsel submitted that the impugned order needs to be set aside on this ground alone as the statements of tent owners have no

evidentiary value when they were not subjected to examination-in-chief before the adjudicating authority and also not produced for cross-examination as stipulated under Section 9D(1)(b) of Central Excise Act, 1944. Thus, the general principles of evidence must be followed since Commissioner (Appeals) has placed extensive reliance on the statements recorded during investigation without invoking speaking section (1) of Section 9D of Central Excise Act.

3.1 Learned Counsel further submitted that the Revenue has deliberately not placed reliance on the exculpatory statement of Shri Chandra Shekhar Agarwal, Proprietor of the Appellant. He contended that Shri Chandra Shekhar Agarwal in his statement dated 28.10.2015 at Question No.10 has mentioned the names of the person through whom amounts were received. The Revenue did not take any steps to examine the said persons. Learned counsel further stated that it is not open to drop the evidence in favour of the appellant and to pick the partial evidence which may be against the appellant.

3.2 Learned Counsel also submitted that the demand of service tax under wrong classification of service is not sustainable in law as the demand in the present case has been raised under the category of 'Mandap Keeper Service' defines under Section 65(66) and Section 65(67) of the Finance Act, 1994. He further submitted that the tent owners used to provide the mandap, furnitures, utensils & shamianas etc. The role of the appellant was limited to leasing his premises. Learned counsel further submitted that the department's case hinges around the 'Green Diary' which allegedly contains the details of the booking of the hall. He further submitted that presumption of documents in certain cases under Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned. In view of above, it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized, that the presumption under Section 36A is available. In the present case, admittedly, the green diary was not produced by the Appellant or seized from the Appellant's premises or control. In these circumstances, when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove otherwise.

3.3 Learned Counsel also stated that the panchnama is essentially a document that records the proceedings that occur in the presence of the Panchas that are seen & heard by them. He contended that the team of Preventive Officers visited the premises of the appellant on 23.04.2015 and searched the premises and took the statement of Mr. Chandra Shekhar Agarwal, Proprietor. He contended that the panchnama must be drawn in terms of Section 103(2) of CRPC, and the panchnama should disclose proper description of the premises and the things found in the premises. This information assumes importance when there is a serious dispute about the articles alleged to have been recovered and seized from such premises & such articles are sought to be linked with the activities of the concerned party. In this regard, learned counsel placed reliance on the

following decisions:-

- Kuber Tobacco Products Ltd Vs Commissioner of C.Ex., Delhi [2013 (290) E.L.T 545 (Tri-Del)]
- Commissioner of Central Excise, Delhi-I Vs Sharp Mould & Dies [2017 (357) E.L.T 796 (Tri-Del)]

In view of above, learned counsel prayed that as there is no malafide intention and suppression of facts, the imposition of penalty is liable to be set aside. He prayed that the impugned order be set-aside

4. Learned Authorized Representative for the Department submitted that the appellant is providing the service of 'Mandap Keeper' as defined in section 65 of chapter V of Finance Act, 1994. A statement was recorded by the Department, wherein they have accepted that the register is being maintained for booking and a diary is being maintained by his employees to show the inclusive booking amount negotiated by the tent houses. The quantification of service tax payable was based on the entries made in these diaries only. The Adjudicating authority dropped the demand proposed in the SCN by relying upon the IT returns filed by the appellant to conclude that inflows were below the taxable threshold. The appellant in the grounds of appeal have submitted that the demand has been confirmed on the basis of diary which was recovered from their premises which show booking amounts. Under the law, there is a presumption about the truth of any documents recovered from the premises of a person, section 36A of the Central Excise Act, 1944 which is made applicable to service tax matter.

4.1 Learned AR further submitted that the demand of service tax is based on the entries made in the documents/diaries which had been admitted by Shri Chandra Shekhar Agrawal is his statement, that the entries related to booking amounts. The denial now that the diary was not written by them is an afterthought. The learned Authorized Representative contended that the original adjudicating authority had ignored vital evidences such as green coloured diary, Statement of the tent house owners and correlation of entries with booking by the customers while dropping the demand. The appellant had not disclosed their service tax liability to the department which established suppression of facts. In the light of above submission, learned AR prayed that the instant appeal may be dismissed.

5. We have heard the Ld. Counsel for the appellant and the Ld AR for the department and have also perused the case records.

6. We note that the primary submission of the Ld Counsel in the instant case is that the statement of witness recorded under Section

14 of Central Excise Act, 1944 before the gazetted Central Excise Officer during the course of investigation cannot be relied upon, unless procedure prescribed under Section 9D of the said Act is scrupulously followed. Such statement would have no evidentiary value if the person making it is not subjected to examination-in-chief before the adjudicating authority and also not produced for cross-

examination as stipulated under Section 9D(1)(b) of Central Excise Act, 1944, which is made applicable to Service Tax vide Section 83 of the Finance Act, 1994. In this context, we note that that Section 9D of the Central Excise Act, 1944 deals with the evidentiary value of statements recorded before a Central Excise Officer in certain situations. Section 9D(1)(b) provides the conditions under which such a statement can be admitted as evidence. As regards cross-examination, we note that when a statement is used against the appellant in proceedings, the courts have consistently held that the right to cross-examine the individual who made the statement is fundamental. If a person is available for testimony and their previous statement is being used as evidence, the other party must be given the opportunity to cross-examine the person. Failing to provide this opportunity would violate principles of natural justice. The Delhi High Court in the case of J&K Cigarettes Ltd. v. Commissioner of Central Excise dated 28.08.2009 in WP 1854 of 1992 and others clarified that if the person who made the statement is available, the person should be presented for cross-examination when requested. The relevant paras are reproduced for ease of reference:

"28. The moot question that arises at this stage is as to whether the provision in question is arbitrary. Such a provision can still be held to be offending Article 14 of the Constitution and can be termed as arbitrary if it is established that the provision gives uncanalised and uncontrolled power to the quasi-judicial authorities.

But, we are of the opinion that it is not so. The safeguards are inherent in the provision itself. In the first instance, only those statements of such persons, which are made and signed before the Central Excise Officer of a gazetted rank, are treated as admissible. Thus, protection is taken to treat the statements relevant only if they are made before an officer enjoying a higher rank/status. Secondly, (and that has already been taken note of) such statements are made relevant only under certain specified circumstances, and these are the ones which are beyond anybody's control. Thirdly (and this is most important), the quasi-judicial authority can rely upon the statement of such a person only when the stated ground is proved. For example, in those cases where the person who made the statement is dead, there should be sufficient proof that he is dead. In case, where a person cannot be found, the authority would have to form an opinion, based on some material on record, that such a person cannot be found. It would not be mere ipse dixit of the officer. In case, cogent material is not there to arrive at such a finding, the persons against whom the statement of such a person is relied upon can always challenge the opinion of the authority by preferring appeal to the higher authority, which appeal is statutorily available. Same yardsticks would apply to other grounds. If the quasi judicial authority opines that a person is incapable of giving evidence, formation of such an opinion has also to be predicated on proper material on record, which could be in the form of mental or physical disability of such a person.

29. Thus, when we examine the provision as to whether this provision confers

unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi-judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi-judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for forming the opinion. Only then, it would be possible for the affected party to challenge such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi-judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted.

30. Therefore, it cannot be said that the provision gives uncanalised or uncontrolled power upon the quasi-judicial authority. Granting of opportunity and passing reasoned order are the conditions inbuilt in exercise of power by any quasi-judicial authority and, therefore, it is not necessary that these conditions should be specifically mentioned in the provision. The very fact that before power under Section 9- D(2) of the Act could be exercised, the authority has to satisfy itself about the existence of any of the conditions stipulated therein, which provides clear and sufficient guidance to such quasi-judicial authority to exercise its power under the section. We may also state that such arguments have been repelled by the Supreme Court on number of occasions. {See - Harishankar Bagla v. State of Madhya Pradesh, AIR 1954 SC 465; and Bhatnagars & Co. Ltd. v. Union of India, AIR 1957 SC 478}.

31. Interestingly, even in the present case, the attempt of learned senior counsel appearing for the petitioners was to show that the respondent No.1 ought to have given prior intimation and granted an opportunity to the assessee to make its submissions on invocability of Section 9-D itself and thereby enabling the assessee to take appropriate steps, as may be possible, in the circumstances of the case. He submitted that if a particular witness was not allowed to be cross-examined by stating that it was not possible to procure his presence without delay or expense, had the opportunity been given to the petitioners to meet the expenses, the petitioners would have borne the expenses and could have procured the presence of witnesses. Likewise, he argued that if the opinion was that it is the adverse party, i.e. the petitioner, who kept a particular person out of the way, the petitioner should have been confronted with that so as to enable him to contact the witness through his own resources and inform him about the time and place of the cross-examination, or else, to enable the petitioners to clarify the relevant facts and assist and cooperate with the adjudicator in contacting the witness. These examples, at the most, would indicate as to how

the powers are to be exercised by the adjudicating authority. That would not make the provision arbitrary. As stated in the beginning, validity of the provision is totally different from exercise of powers by an authority invoking those provisions. We may only refer, at this stage, to the judgment of the Supreme Court in the case of Mahesh Chandra v. Regional Manager, U.P. Financial Corporation, (1993) 2 SCC 279. In that case, the Supreme Court categorically observed that wherever wide power is conferred by statutes on public functionaries, the same is subject to inherent limitation that it must be exercised in just, fair and reasonable manner, bona fide and in good faith; otherwise, it would be arbitrary. In such cases, test of reasonableness is more strict. Following observations therefrom are worth quoting :-

"15. Every wide power, the exercise of which has far reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair . and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason."

32. Thus, we summarize our conclusions as under :-

- (i) We are of the opinion that the provisions of Section 9-D (2) of the Act are not unconstitutional or ultra vires;
- (ii) while invoking Section 9-D of the Act, the concerned authority is to form an opinion on the basis of material on record that a particular ground, as stipulated in the said Section, exists and is established;
- (iii) such an opinion has to be supported with reasons;
- (iv) before arriving at this opinion, the authority would give opportunity to the affected party to make submissions on the available material on the basis of which the authority intends to arrive at the said opinion; and
- (v) it is always open to the affected party to challenge the invocation of provisions of Section 9-D of the Act in a particular case by filing statutory appeal, which provides for judicial review....."

7. We also take note that the Courts have consistently recognised that if the department seeks to rely on the previously recorded statement of a person

during an inquiry, the opposing party must be allowed to cross-examine that person in court to challenge the veracity of the statement. This provision ensures that any statement made in the absence of the accused (during the investigation phase) does not automatically hold evidentiary value unless the maker of the statement is subjected to questioning by both sides, thus adhering to principles of natural justice. In the instant case, we note that at the original stage of adjudication, the adjudicating authority considered the submissions made by the appellant and set aside the proceedings. There does not appear to be any request seeking cross examination of the persons whose statements were relied upon, in the show cause notice. In the proceedings before the Commissioner (Appeals) as well, we note that during the personal hearing, the authorised representative has reiterated the submissions made in their written response. There is no evidence of the appellant seeking cross examination. However, this request has been made before this Tribunal. As already noted above, cross-examination under Section 9D(1)(b) is a right granted to the appellant, which cannot be denied.

8. In view of the above, we find it appropriate to remand the matter to the Commissioner (Appeals) to re-adjudicate the matter, giving an opportunity to the appellant to cross examine all the witnesses whose statements have been relied upon in the impugned order and the show cause notice.

9. Accordingly, the impugned order is set aside and the appeal is allowed by way of remand

(Order pronounced in the open Court on 09.10.2024)