(2024) 10 CESTAT CK 1177

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

Case No : Service Tax Appeal No. 55704, 55936 of 2013

M/s Chaque Jour Outsourcing Solutions (Pvt.) Limited @APPELLANT
@Hash Commissioner, Central Excise, Panchkula @RESPONDENT

Date of Decision : 01-10-2024

Acts Referred:
Finance Act, 1994 — Section 65, 65(105)(k), 66, 67, 69, 70, 73(1), 75, 77, 78
Central Excise Act, 1944 — Section 11(A), 11A(4)
Service Tax (Determination of Value) Rules, 2006 — Rule 5, 5(1), 6(1)

Citation : (2024) 10 CESTAT CK 1177

Hon'ble Judges : Dilip Gupta, President (J);Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : A.K. Batra, Sakshi Khanna, Anand Narayan

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. These two appeals seek the quashing of the order dated 10.10.2012 passed by the Commissioner, Central Excise, Panchkula, the Commissioner. Though the said order extends the benefit for cum-tax, but it confirms the demand of Rs. 12,80,19,061/- in respect of the first show cause notice dated 22.10.2010 and the demand of Rs. 1,24,50,127/- in respect of the second show cause notice dated 19.10.2011. The order also directs for payment of interest under section 75 of the Finance Act, 1994, the Finance Act and imposes penalties under sections 77 and 78 of the Finance Act.

2. M/s. Chaque Jour Outsourcing Solutions Pvt. Ltd., the appellant claims to be engaged in various activities like manpower recruitment, housekeeping, data entry, customer service, data sorting, data processing and other allied activities and to achieve this purpose, it entered into agreements with the clients to perform such activities for a consideration.

3. According to the appellant, for better efficiency of the work it has to send its personnel to the clients place for performance of work. These personnel perform their work under the supervision and direction of the appellant and not as per the

supervision and direction of the service recipient. For providing such services to the clients, the appellant charges the clients and discharges payment of service tax. Apart from services charges, the appellant is reimbursed for the expenses incurred by the appellant towards the salary paid to the personnel deployed.

4. An audit was conducted by the department and it was observed that the appellant had entered into agreements with clients to supply manpower as per the requirement of the clients and under the terms and conditions of the agreements, the staff was not employed by the recipients of services, but serve under their directions. The audit team also noted that the appellant was not discharging service tax on the full consideration, but it paid service tax only on the service charges and not on the reimbursements claimed. The audit believed that reimbursements would also be taxable under rule 5 of the Service Tax (Determination of Value) Rules, 2006, the 2006 Rules read with section 67 of the Finance Act.

5. A show cause notice dated 22.10.2010 for the period 16.06.2005 to 31.03.2010 and a show cause notice dated 19.10.2011 for the period 2010-11 were, therefore, issued to the appellant proposing demands of Rs. 14,31,42,787/- and Rs. 1,37,32,490/-, respectively, with interest and penalty.

6. The appellant filed detailed replies to the show cause notice and denied the allegations made therein.

7. An order dated 10.10.2012 was passed by the Commissioner adjudicating both the show cause notices. These two appeals have been filed to assail the order dated 10.10.2012 passed by the Commissioner.

8. Shri A.K. Batra, learned chartered accountant appearing for the appellant assisted by Ms. Sakshi Khanna submitted that:

(i) The Commissioner committed an error in classifying the services under the taxable category of "manpower recruitment services" and so the entire demand is liable to be dropped on account of misclassification of services;

(ii) In the present case, the staff is under the control, supervision and direction of the appellant and it is the appellant that is responsible for completion of the jobs assigned as would be apparent from the agreements;

(iii) Both the show cause notices are liable to be quashed as they were issued under rule 5(1) of the 2006 Rules, which rule has been declared to be ultra vires sections 66 and 67 of the Finance Act by the Delhi High Court in Intercontinental Consultant and Technocrats Pvt. Ltd. vs. Union of India, 2013 (29) S.T.R. 9 (Del.) against which the appeal filed by the department before the Supreme Court was dismissed and the judgment of the Supreme Court is reported in 2018 (3) TMI 357- Supreme Court, Union of India vs. Intercontinental Consultant and Technocrats Pvt. Ltd.

(iv) The reimbursements are not taxable under the Finance Act for the period prior to 19.04.2006. Thus, service tax amounting to Rs. 81,76,886/- is not taxable;

(v) The extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act is not applicable to the facts of the present case as there is no suppression of facts with intent to evade payment of service;

(vi) No interest can be charged under section 75 of the Finance Act; and

(vii) Penalty under section 78 of the Finance Act cannot be imposed as there is no fraud, collusion, willful misstatement, or suppression of facts by the appellant with an intention to evade payment of service tax.

9. Shri Anand Narayan, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference.

10. The submissions advanced by the learned chartered accountant for the appellant and the learned authorized representative appearing for the department have been considered.

11. The appellant has paid service tax under "manpower recruitment or supply agency services" on the value charged for providing such services i.e. the commission received by it. The department is seeking to impose service tax on reimbursement amount based on rule 5(1) of the 2006 Rules. The issue that would arise for consideration is whether the reimbursement amount can be subjected to levy of service tax for a period prior to May, 2015.

12. It needs to be noted that section 67 of the Finance Act deals with valuation of taxable services for charging service tax. Sub-section (1) and Explanation (a) are reproduced below:

"67(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) *****

(3) *****

(4) *****

Explanation. — For the purposes of this section,-

(a) "consideration" includes — (i) any amount that is payable for the taxable services provided or to be provided;

(b) *****

(c) *****"

13. Rule 5(1) of the 2006 Rules is as follows:

"5. Inclusion in or exclusion from value of certain expenditure or costs.-

(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service."

14. Section 67 of the Finance Act was considered and explained by the Supreme Court in Intercontinental. The appellant therein was providing consulting engineering services. It received payment not only for the services provided by it but was also reimbursed for the expenses incurred by it on air travel, hotel stay, etc. It paid service tax on the amount received by it for services rendered to its clients but did not pay any service tax in respect of expenses incurred by it which were reimbursed by the clients. A show cause notice was issued to it to explain why service tax should not be charged on the gross value including reimbursable and out of pocket expenses. The provisions of rule 5(1) of the 2006 Rules were resorted to for this purpose. A Writ Petition was filed challenging the vires of rule 5 as being unconstitutional as well as ultra vires the provisions of sections 66 and 67 of the Finance Act. The Delhi High Court accepted the said contention and declared rule 5 to be ultra vires the provisions of sections 66 and 67 of the Finance Act. The Delhi High Court noted that both the amended and un-amended section 67 authorised the determination of value of taxable services for the purpose of charging service tax under section 66 of the Finance Act as the gross amount charged by the service provider for such services provided or to be provided by him in a case where consideration for such service is money. The Delhi High Court placed emphasis on the words "for such service" and took the view that the charge of service tax under section 66 of the Finance Act has to be on the value of taxable service i.e. the value of service rendered by the assessee and the quantification of the value of service can, therefore, never exceed the gross amount charged by the service provider for the service provided by him. On that analogy, the Delhi High Court opined that the scope of rule 5 goes beyond the scope of section 67 of the Finance Act which was impermissible as rules could be framed only for carrying out the provisions of Chapter 5 of the Finance Act. In taking this view, the Delhi High Court observed that the expenditure or cost incurred by the service provider for providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him. The Supreme Court noticed the

various reimbursable claims which were included in the gross value and in respect of certain Appeals, the value of diesel supplied free of cost by the service recipient was also considered. The Supreme Court noted that rule 5 does bring within its sweep the expenses which are incurred while rendering the service and are reimbursed and, therefore, what was required to be decided was whether section 67 of the Finance Act permits subordinate legislation to be enacted as done by rule 5. It needs to be noted that prior to 19.04.2006, in the absence of a rule, the valuation was required to be done as per the provisions of section 67 of the Finance Act. The Supreme Court noticed that the charging section 66 of the Finance Act provides that there shall be levied service tax @ 12% of the value of taxable services referred to in the sub-clauses of section 65 of the Finance Act and collected in such manner as may be prescribed. Thus, the service tax is on the "value of taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the Supreme Court observed that the expression "such" occurring in section 67 of the Finance Act assumes importance. It is in this context that the Supreme Court in paragraph 26 observed that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service". This, according to the Supreme Court, is the plain meaning attached to section 67 of the Finance Act either prior to its amendment on 01.05.2006 or after this amendment and if this be so, then rule 5 went much beyond the mandate of section 67 of the Finance Act. The Supreme Court, therefore, held that the reimbursement amount cannot be treated as "gross amount charged" as that is not a "consideration" for rendering the service.

15. The impugned order relies upon rule 5(1) of the 2006 Rules which rule, as noted above, has been struck down by the Supreme Court in Intercontinental as being ultra vires the provisions of section 67 of the Finance Act.

16. It needs to be noted that it is only w.e.f. 14.05.2015 that reimbursable expenditure or cost would form part of valuation of taxable service. However, in the present case, the transaction were made before 14.05.2015. Thus, inclusion of the reimbursable cost in the value of taxable service cannot be justified.

17. Learned chartered accountant for the appellant also contended that the extended period of limitation could not have been invoked in the facts and circumstances of the case. In this connection learned chartered accountant for the appellant placed a chart to show that an amount of Rs. 8,21,87,032/- was purposed for the extended period of limitation and an amount of Rs. 5,82,82,158/- was proposed for the normal period of the limitation. The said chart is reproduced is below:

S. No.

Period

ST-3 filing date

Due date to serve the show cause notice

Remarks

Demand

1.

01.10.2005 to 31.03.2006

25.04.2006

24.04.2007

Time barred

8,21,87,032

2.

01.04.2006 to 30.09.2006

25.10.2006

24.10.2007

3.

01.10.2006 to 31.03.2007

25.04.2007

24.04.2008

4.

01.04.2007 to 30.09.2007

24.10.2007

23.10.2008

5.

01.10.2007 to 31.03.2008

23.04.2008

22.04.2009

6.

01.04.2008 to 30.09.2008

25.10.2008

24.10.2009

7.

01.10.2008 to 31.03.2009

25.04.2009

24.04.2010

8.

01.04.2009 to 30.09.2009

25.10.2009

24.10.2010

9.

01.10.2009 to 31.03.2010

25.04.2010

24.04.2011

Within time

5,82,82,158

10.

01.04.2010 to 30.09.2010

25.10.2010

24.10.2011

11.

01.10.2010 to 31.03.2011

25.04.2011

24.04.2012

18. The Commissioner held in the order dated 10.10.2012 that the extended period of limitation was correctly invoked. The relevant observations are as follows:

“8.1 Whether the extended period was invokable in the present case?

I find that the notice had contested the department’s proposal of invocation of extended period on various grounds i.e. they have been showing the amount as Non Taxable as pure agent and regularly filing ST-3 returns and no such objections were every raised by the department.

8.2 I find that the department had proposed invocation of extended period on the ground that the Noticee had failed to discharge their service tax liability properly; that the notice had knowledge of Service Tax law and procedure which was evident from the fact that they have taken Service Tax Registration Manpower recruitment or Supply Agency services failing under section 65(105)(k) of the finance Act, 1994 as amended also filed their ST-3 returns; that they had recovered certain amount as reimbursement of Salary and Statutory cost and that they have knowingly and deliberately avoided payment of proper service tax with an ulterior motive to defraud the Govt. Revenue; that the notice had not disclosed the proper value of taxable service provided Manpower recruitment or Supply Agency services falling under section 65(105)(k) of the finance Act, 1994 as amended 'Register to Issue services' in their ST-3 returns filed with the department; that the non-payment of Service Tax had been noticed during the audit of the party by the Delhi Service Tax Commissionerate. Since the notice was registered under ---. It was incumbent upon him to cast onus of payment of Service Tax on the value as determined under Section 67 of the Finance Act, 1994.

8.3 The notice, on the other hand had argued that there was not even an iota if evidence to prove the suppression of facts was with intent to evade payment of Service Tax. They have submitted that no interest should be levied, no penalty should be imposed, as the demand raised had not been clearly covered under the Act. They have further stated that no penalty should be imposed as there had been no suppression of facts.

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8.6 ***** The Assessee had an obligation to comply with statutory provisions and to furnish the information as required thereunder. Section 68(1) of the Act, as stood during the relevant period, provides that every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. Section 66 provides the rate of tax as well as levy of the tax on the services specified therein. Sub-clause (a) and (zm) of Clause (105) of Section 65 had been specified under Section 66 for the purpose of levy of tax. Section 69 mandates that every person liable to pay the service tax shall apply to the proper officer for registration. Undoubtedly, the Assessee had taken registration, but had abused the facility of self-assessment provided under Section 70, which directs that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish the periodical returns as prescribed. Thus, the afore mentioned statutory provisions of service tax cast an obligation upon the Assessee to get registration; to pay service tax; and to file periodical returns. The Assessee did not disclose the correct value of taxable service in their ST-3 filed with the department and failed to take registration for specified services namely 'Register to issue' and 'Banking And Financial' services. All these facts narrated above go to show that the Assessee suppressed the taxable value by non-compliance of the obligations cast upon them by the statutory provisions. The noticee had deliberately with intent to evade the payment of Service Tax has deliberately contravened the provisions of Finance Act, 1994 i.e. clause and Rules made there under in as much as he as not file."

(emphasis supplied)

19. Learned chartered accountant for the appellant submitted that the appellant had not suppressed any fact relating to taxable service of "manpower recruitment or supply agency services" to the department as the appellant had been regularly filing service tax returns for the relevant period. Learned chartered accountant also pointed out that the issue involved relates to interpretation of the provisions and the Supreme Court has clearly held that the rule 5(1) of the 2006 Rules is ultra vires section 67 of the Finance Act and that the amount that is reimbursed cannot be subjected to levy of service tax.

20. A bald allegation of suppression of facts, without any positive evidence to show any act of suppression, could not have been made a ground to invoke the extended period of limitation. It is seen from the aforesaid order of the Commissioner that what prevailed upon him to hold that the extended period of limitation was correctly invoked is the fact that the appellant had "abused the facility of self-assessment" and as the appellant had not disclosed the correct value of taxable service in the ST-3 Returns, the assessee suppressed the taxable value. The Commissioner (Appeals), thereafter, held that the appellant had suppressed facts with intent to evade payment of service tax.

21. It must be remembered that mere suppression of fact is not enough. There has to be a deliberate attempt to evade payment of excise duty. The show cause notice must specifically deal with this aspect and the adjudicating authority is also obliged to examine this aspect in the light of the facts stated by the assessee in reply to the show cause notice.

22. The provisions of section 11A(4) of the Central Excise Act, 1944, which are pari materia with the provisions of section 73(1) of the Finance Act, came up for interpretation before the Supreme Court in Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay, 1995 (78) E.L.T. 401 (S.C.). The Supreme Court observed that section 11A(4) empowers the Department to reopen the proceedings if 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. It is in this context that the Supreme Court observed that the act must be deliberate to escape payment of duty. The relevant observations are:

"2. ****** The Department invoked extended period of limitation of five years as according to it the duty was shortlevied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.

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4. A perusal of the proviso indicates that it has been used in company of such strong works as fraud, collusion or willful 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."

(emphasis supplied)

23. This decision of the Supreme Court in Pushpam Pharmaceuticals was followed by the Supreme Court in Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut, (2005) 7 SCC 749 and the relevant paragraph is as follows:-

"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE 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 and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove 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 the proviso to Section 11-A 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 7 (2005) 7 SCC 749 11 E/52953/2018 not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."

(emphasis supplied)

24. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur, 2013 (288) E.L.T. 161 (S.C.) and the relevant portion of the judgment is reproduced below:

"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of nonpayment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

(emphasis supplied)

25. In Raydean Industries vs. Commissioner CGST, Jaipur, Excise Appeal No. 52480 of 2019 decided on 19.12.2022 the Tribunal in connection with the extended period of limitation, observed that even in the case of self assessment, the department can always call upon an assessee and seek information and it is the duty of the proper officer to scrutinize the correctness of the duty assessed by the assessee. The Division Bench also noted that departmental instructions issued to officers also emphasise that it is the duty of the officers to scrutinize the returns. The relevant portion of the decision is reproduced below:

"24. It would be seen that the ER-III/ER-I returns filed by the applicant clearly show that the applicant had categorically declared that it had cleared the final products by availing the exemption under the notification dated 17.03.2012. The applicant had furnished the returns on the basis of self assessment. Even in a case of self assessment, the Department can always call upon an assessee and seek information. It is under sub-rule (1) of rule 6 of the Central Excise Rules, 20028 that the assessee is expected to self assess the duty and sub-rule (3) of rule 12 of the 2002 Rules provides that the proper officer may, on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee. Sub-rule (4) of rule 12 also provides that every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer. Hence, it was the duty of the proper officer to have scrutinized the correctness of the duty assessed by the assessee and if necessary call for such records and documents from the assessee, but that was not done. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department that the appellant should have filed a proper assessment return under rule 6 of the Rules.

25. Departmental instructions to officers also emphasise upon the duty of officers to scrutinize the returns. The instructions issued by the Central Board of Excise & Customs on December 24, 2008 deal with "duties, functions and responsibilities of Range Officers and Sector Officers". It has a table enumerating the duties, functions and responsibilities and the relevant portion of the table is reproduced below:

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26. The Central Excise Manual published by CBEC on May 17, 2005, which is

available on the website of CBEC, devotes Part VI to SCRUTINY OF ASSESSMENT.

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27. It is thus evident that not only do the 2002 Rules mandate officers to scrutinise the Returns to verify the correctness of self assessment and empower the officers to call for documents and records for the purpose, Instructions issued by the department also specifically require officers at various levels to do so."

(emphasis supplied)

26. In Commissioner of C. Ex. & Customs vs. Reliance Industries Ltd. 2023 (385) E.L.T. 481 (S.C.), the Supreme Court held that if an assessee bonafide believes that it was correctly discharging duty, then merely because the belief is ultimately found to be wrong by a judgment would not render such a belief of the assessee to be malafide. If a dispute relates to interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation. The Supreme Court further held that in any scheme of self-assessment, it the responsibility of the assessee to determine the liability correctly and this determination is required to be made on the basis of his own judgment and in a bonafide manner. The relevant portion of the judgment is reproduced below:

"23. We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division Bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona fide manner.

24. The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law. xxxxxxxxxxx. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances."

(emphasis supplied)

27. In the present case, as noticed above, the Commissioner observed that the appellant had received certain amount as reimbursement but deliberately avoided payment of service tax on the said amount with an ulterior motive to defraud the government. The Commissioner also observed that the appellant had abused the facility of self-assessment. It is for this reason that the Commissioner found that the appellant had suppressed facts with intention to evade payment of service tax.

28. These issues have already been dealt with in the aforesaid decisions. The Commissioner, therefore, could not have confirmed the demand of service tax for the extended period of limitation as the requirements of the proviso to section 73(1) of the Finance Act are not satisfied. This part of the order of the Commissioner, therefore, also deserves to be set aside.

29. The impugned orders dated 10.10.2012, therefore, deserves to be set aside and are set aside. The two appeals are, accordingly, allowed.

(Order Pronounced on 01.10.2024)