

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11619 of 2016-DB

[Arising out of Order-in-Original/Appeal No CCESA-VAD-APP-IIMM-31-2016-17 dated 24.05.2016 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Shri Janak S Patel

.... Appellant

3,Tirumala Society, Nr. Gautam Bhavan, Piplod
SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-i

.... Respondent

New Building, Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat -395001

WITH

(i) SERVICE TAX Appeal No. 11620 of 2016 (Mukesh S Patel)

(ii) SERVICE TAX Appeal No. 11621 of 2016 (Amisha J Patel)

(iii) SERVICE TAX Appeal No. 11622 of 2016 (Sharmila M Patel)

[Arising out of Order-in-Original/Appeal No CCESA-VAD-APP-II-MM-44-2016-17, No CCESA-VAD-APP-II-MM-41-2016-17 dated both 26.05.2016 and CCESA-VAD-APP-II-MM-45-2016-17 dated 27.05.2016 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

APPEARANCE :

Shri Punit Prajapati, Chartered Accountant for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR), for the Respondent

**CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 08.05.2024

DATE OF DECISION: 03.09.2024

FINAL ORDER NO. 11922-11925/2024

C.L. MAHAR :

The brief facts of the matter are that the appellants are engaged in providing certain commercial properties on rent and for that purpose the appellants have taken due registration with the Service Tax department. It is matter of record that appellants are joint owners of properties which are given on lease to large corporate bodies and have been discharging their service tax liability under the category of Renting of Immovable Property till March 2009 and in certain cases thereafter also. The department has conducted searches on 18.12.2012 at the premises of the appellant

suspecting that the appellants have not been paying service tax correctly on the properties rented out by them for commercial purpose. The show cause notices have been confirmed by the learned Adjudicating Authority whereunder the amount of service tax has been confirmed under Section 73 of the Finance Act, 1994 and penalties under Section 78 and 77 have also been confirmed. The appellants have approached the office of the Commissioner (Appeals) however they did not succeed there also. In view of the above facts, the appellants are before us against the above mentioned impugned orders-in-appeal.

2. Shri Punit Prajapati, learned Chartered Accountant appearing for the appellants have stated that the appellants have been paying service tax on some of the properties as some of the service recipients were not ready to pay the service tax due to the fact that taxability on immovable property service was under litigation in various High Courts and the Supreme Court during the period October 2008 to September 2012. The learned Chartered Accountant has drawn attention to the Hon'ble Delhi High Court's order dated 18.04.2009 in the case of *Home Solutions Retails (India) Limited vs. UoI - 2009 (14) STR 433 (Del.)* and held that the service tax is not payable on renting of immovable properties. With this background, the learned Chartered Accountant has mentioned that after April 2009, after the decision of Hon'ble Delhi High Court in the case of *Home Solutions Retails India Limited* the appellants have been filing ST-3 returns with remarks that they are not paying service tax on the rent received from certain service recipients as they are not paying service tax relying on the decision of Hon'ble Delhi High Court in the case of *Home Solutions Retails (India) Limited vs. UoI - 2009 (14) STR 433 (Del.)*.

2.1 The learned Chartered Accountant has also mentioned that during the course of searches on 18.12.2012, the appellants on their own have paid the difference of service tax for the period October 2008 to September 2012 within three months from the date of searches. It has been contended that show cause notices have been issued on 04.04.2014 invoking extended period of limitation even though the appellants were filing regular returns with a note on ST-3 return that they are relying on the judgment of Hon'ble Delhi High Court in the case *Home Solutions Retails India Limited vs. UoI* and therefore it was wrong on the part of the Adjudicating Authority as well as

the appellate authority to confirm the demand by invoking extended time proviso and imposing penalty under Section 78 of the Finance Act, 1994. The learned Chartered Accountant submits that imposition of the penalties under Section 78 and 77 are not justified in the facts of the matter for the reason that firstly, the matter was under litigation at the higher forum and at the same time the appellant was filing regularly ST-3 returns indicating the entire taxable value with a note that certain service recipients are not paying service tax because of the fact that taxability on renting of immovable property has been found *ultra-vires* by Hon'ble Delhi High Court in the case of Home Solutions Retails India Limited. It has also been pointed out that entire amount has been paid much before the issuance of the show cause notices and as per provisions of Section 73(3) of Finance Act, 1994 the matter should have been condoned and there was no need to issue show cause notice in this matter.

2.2 The learned Chartered Accountant has not agitated or contended levy of service tax and the only point on which he argued was the penalties under Section 78 and 77 which were not imposable in the facts of the matter.

3. We have also heard Shri Himanshu P Shrimali, learned Superintendent (AR) who has reiterated the findings as given in the impugned orders-in-appeal.

4. Having heard the rival submissions, we are of the view that there was bonafide belief on the part of the appellant for non-payment of tax as litigation was going on in the Hon'ble Delhi High Court in the case of Home Solutions Retails India Limited as well as in the Hon'ble Supreme Court regarding taxability of 'rent on immovable property', however, the appellant have regularly been filing ST-3 returns and wherever service tax has been paid by the recipients of service, it is a matter of record that on such amount, service tax was deposited in time by the appellant with the department. It is also a matter of fact that entire amount of service tax short paid, which has been made payable by the Hon'ble Delhi High Court vide order dated 23.09.2011 reported under 2011 (24) STR 129 (Delhi), the appellant have deposited the entire short paid service tax. In view of these facts, we are of the view that extended time proviso for demanding service tax because of the reason that fraud, suppression of facts, mis-

representation or contravention of any provisions with intent to evade payment of service tax are not present in this case and the service tax has already been paid before issue of show cause notices. We are therefore of the view that the provisions of Section 78 of Finance Act, 1994 for imposition of penalties on the appellants are not sustainable. We therefore hold that impugned orders-in-appeal upholding imposition of penalties under Section 77 and 78 of the Finance Act, 1994 is not sustainable and therefore we set-aside the same. Accordingly, the appeals are allowed.

(Pronounced in the open court on 03.09.2024)

(Somesh Arora)
Member (Judicial)

(C L Mahar)
Member (Technical)

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