

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 11779 of 2016- DB

(Arising out of OIO-BHR-EXCUS-COM-36-2016-17 dated 21/07/2016 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch)

Gujarat Guardian Ltd

Village: Kondh, Taluka:valia
Bharuch, Gujarat

.....Appellant

VERSUS

C.C.E-Bharuch

Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara, Gujarat- 390023

.....Respondent

APPEARANCE:

Shri S J Vyas, Advocate for the Appellant

Shri G Nair, Assistant Commissioner (AR), for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MS. SULEKHA BEEVI C.S.
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. 10424/2024

DATE OF HEARING: 18.01.2024

DATE OF DECISION: 19.02.2024

Per: C L Mahar

The brief facts of the matter are that the appellant are engaged and manufacture of Float Glass falling under Chapter 70 of the First Schedule to the Central Excise Tariff Act, 1985 and they are also registered for service tax related matters. During the course of the audit for the financial year 2013-14 and on the scrutiny of the balance sheet and other financial records of the appellant, the officers of the department observed that the appellant had paid an amount of Rs. 5,78,59,139/- during the year 2013-14 as commission on profit to one of the directors namely Shri Alok Kumar Modi.

1.1 The department entertained a view that as per the provisions of Section 65B (44) of the Finance Act, 1994, 'every activity carried out by a person for another person, for some consideration is considered as service'

and same is accordingly liable for service tax as per the provisions of the Finance Act, 1994. The exception from this provision has been provided under Section 65B (44)(b) of the Finance Act, 1994 wherein it has been provided that "*a provision of service by an employee to the employer in the course of or in relation to his employment.*" The department was of the view that the service provided by the director on commission basis to the appellant is taxable to service tax and appellant was required to pay service tax on reverse charge basis as per the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(EE) of the Service Tax Rules, 1994.

1.2 On the above premises, the department issued a show cause notice dated 18.09.2015 demanding service tax of Rs. 71,51,390/- under the provisions of Section 73(1) of the chapter 5 of the Finance Act, 1994. The provisions of demanding interest as per the Section 75 and penalty as provided under Section 78(1) of the Finance Act, 1994, has also been invoked. Matter was adjudicated vide impugned order-in-original dated 21.07.2016 where under all the charges as invoked in the above mentioned show cause notice were confirmed by the Learned Adjudicating Authority. The appellant are before us against the above mentioned impugned order-in-original.

2. The Learned Advocate appearing for the appellant submits that the adjudicating authority has not considered the submissions made by them at the time of adjudication and therefore the impugned order-in-original is a non-speaking order and therefore liable to be set aside.

2.1 The Learned Advocate has drawn our attention to Para 7.10 of the Impugned order-in-original, where in respect of commission on profit it has been mentioned that there was no employer/employee relationship with respect to commission on profit and therefore the amount paid to Shri Alok

Kumar Modi is liable for the service tax. Emphasizing this conclusion the Learned Adjudicating Authority has mentioned that the resolution appointing joint managing director is on temporary basis for four years and therefore he was not a permanent employee, thus it was concluded by the Learned Adjudicating Authority that employee/employer relationship has not been established in this case. Learned Commissioner has also found that the Joint managing Director has received commission on profit which is extra consideration to the salary and that the joint managing director was not a permanent employee of the company and as such the commission on profit cannot be called remuneration to an employee.

2.2 The Learned Advocate has vehemently argued that there is no concept of temporary or permanent employee relevant to the service tax. The fact of the employer/employee relationship does not undergo a change on the basis of temporary or permanent nature of the employment. It has further been emphasised that a temporary employee would also be an employee and the relationship with the employer would be that of an employee/ employer. It is therefore submitted that the distinction made by the Learned adjudicating authority is legally not sustainable.

2.4 The Learned Counsel has also drawn our attention to Section 317 of the Companies Act, 1956 wherein it has been provided that appointment of a director would always made for a specific period and it has further been provided under the Act that no company shall appoint any individual as its managing director for a term exceeding five years at a time.

2.5 The Learned Advocate has also drawn our attention to form No. 16 issued by the appellant to its joint managing director where under it has been provided that the salary as per the provision Section 17(1) shown as 6,15,27,231/- is inclusive of commission of Rs. 5,48,47,231/- and the form 16 was in accordance with the provisions of the Income Tax Act.

2.6 The Learned Advocate has also drawn our attention to Section 17(1)(iv) where under the salary has been defined as it includes "any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages". It has thus been emphasized that even the percentage of the profit provided to the joint managing director was a part of the salary and therefore the same in no way destroys the relationship between the appellant and the joint managing director as an employer and employee.

The Learned Advocate has also relied on following decisions:-

- Bengal Beverages 2020 11 TMI 622 TRI KOL
- Maithan Alloyes 2019 4 TMI 1595
- Supreme Traves 2021 5 TMI 832 TRI AHD
- Supreme Traves Guj High Court order 2023 3 TMI 569

3. The department Authorized representative has reiterates findings as give in the Order-In-Original.

4. After considering the submissions made by both the sides, we find that matter is no longer res-Integra as this Tribunal in the case of M/s Bangal Beverages Pvt. Ltd. Vs. CGST & Excise, Howrah reported under 2020 (11) TMI 622-CESTAT Kolkata has held as follows:-

"8. *In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'whole-time director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the company secretary states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company*

assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

9. Further, the judgment of this Tribunal in the case of MAITHAN ALLOYS LTD Versus COMMISSIONER OF C. EX. & S.T., BOLPUR (supra) is squarely applicable to the facts of the case. Further, the Ld. Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable.”

Since, the facts and circumstance of the present case are akin to, the above mentioned decision of this Tribunal and therefore same is squarely applicable in the present case also.

5. Accordingly, we hold that impugned order-in-original is without any merit and we set aside the same. Thus the appeal is allowed.

(Pronounced in the open court on 19.02.2024)

**(MS. SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)**

**(C L MAHAR)
MEMBER (TECHNICAL)**