CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. – I

Service Tax Appeal No. 50045 of 2016

(Arising out of **Order-in-Original** No.35/ST/D-I/2015 dated 30.09.2015 passed by Principal Commissioner of Central Excise, New Delhi)

Kuoni Travel India Pvt Ltd., .. **APPELLANT**
(Now SOTC Travels Services Pvt Ltd.,)
Urmi Estate, 10th Floor,
Tower A, Canpatrao Kadam Marg,
Lower Parel (West), Mumbai,
Maharashta – 400 013.

VERSUS

Pr. Commissioner of Central Excise .. **RESPONDENT**
Office of Pr. Commissioner of Central Excise, Delhi-1,
17-B, IAEA House, I.P.Estate,
New Delhi – 110 002.

APPEARANCE:

Shri B L Narasimhan, Advocate for the Appellant.
Ms. Jaya Kumari, Authorized Representative for the Respondent.

CORAM:
HON'BLE Mr. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. 55114/2024

Date of Hearing: 12.02.2024
Date of Decision: 07.03.2024

[ORDER PER: P. ANJANI KUMAR]

M/s KUONI Travel India Private Ltd., (now taken over by SOTC Travel Services Pvt Ltd.,)[1] are engaged in providing services like "air travel agent" "rent-a-cab" "business auxiliary services" and "tour operators" and are registered with the service tax department. On the basis of audit conducted, by the officers of AG (audit), of the accounts of the appellants for the year 2006-07 and 2008-09, revenue entertained an opinion that the appellants received advances, on various counts, from their customers during these years and have not discharged the applicable service tax on the same; the appellants were asked to provide details of the advances received vide

[1] Appellant

letters dated 12.04.2010 and 20.05.2010; alleging that no reply has been received from the appellant a show cause notice dated 14.09.2010 was issued to the appellant demanding service tax of Rs. 64,06,240/- on the advances received by them for provision of various services. The show cause notice was adjudicated by the Commissioner, vide Order[2] dated 30.09.2015, confirming the demand along with interest while imposing equal penalty under Section 78 of the Finance Act, 1994;a penalty of Rs. 2,97,000/- under Section 76 and a penalty of Rs. 5,000/- under Section 77(2) ibid. Hence, this appeal.

2. Shri B.L. Narasimhan, Learned Counsel for the appellant submits that the said advances from customers were amounts required to be adjusted towards outstanding liabilities of customers on account of i) cancellation of service ii) multi branch invoices iii) extension of discounts etc; they have explained to Adjudicating Authority that the nature of services rendered by the appellant did not warrant collection of advances and on the contrary in many cases credit was extended for recovery of the consideration. Learned Counsel submits that to be exigible to service tax, any of the services listed under Section 66 should have been rendered and any amount received for the same, before, during or after provision of such service, shall be deemed to be the consideration; Revenue relied on Section 67(1)(i) without applying the rules in entirety. Learned Counsel submits that the provisions related to service tax would give an understanding that taxability is subject to performance of an identified "taxable service under any of the clauses of Section 65(105) of the Act" and the amounts received, as consideration for the provision of such service, prior to or during or after provision of service; the department has neither alleged nor indicated the exact taxable service which was agreed upon to be provided against the said advances received. He submits that the demand was confirmed on the basis of a presumption that the advances would have been attributable to any of the service provided by the appellant; he submits that no levy of service tax can be sustained without identifying a taxable service. Service tax can only be levied on a concrete service transaction and cannot be imposed merely on the basis of assumption. He relies on the following:

- Prakash Road Lines Vs CCE, C & ST, Allahabad [2022-TIOL-928-CESTAT-ALL]

---

[2] Impugned Order

- Hindustan Zinc Ltd., Vs CCE, Udaipur [Final Order No. 51819-51820/2021]
- Hindustan Zinc Ltd., Vs CCE, Udaipur [Final Order No. 51000/2022]
- Coramandel Fertilizers Ltd., Vs CCE, Chennai [2009 (13) STR 542 (Tri-Chennai) affirmed in Commissioner Vs Coramandel Fertilizers Ltd., [2012 (25) STR J126 (Mad)]
- Deltax Enterprises Vs CCE, Delhi-I [2018 (10) GSTL 392 (Tri-Del)]
- Shubham Electricals Vs Commissioner [2015 (40) STR 1034 (Tri-Del) affirmed by Hon'ble Delhi High Court in Principal Commissioner Vs Shubham Electricals [2016 (42) STR J312 (Del)]
- CMS (India) Operations and Maintenance Co. (P) Ltd., Vs CCE, Puducherry [2017-VIL-115-CESTAT-CHE-ST]
- ILFS Clusters Development Initiative Ltd., Vs CC, CE & ST, Noida [2018-TIOL-3797-CESTAT-ALL]
- Ajay Marketing Co Vs CCE, Panchkula [2015-TIOL-2320-CESTAT-Del]
- Balaji Contractor Vs CCE, Jaipr-II [2017-TIOL-1071-CESTAT-Del]
- Commissioner of Central Excise, Bhopal Vs M P Windfarm Ltd., [2017-TIOL-408-CESTAT-Del]

3. Learned Counsel further submits that demand of service tax cannot be raised merely on the basis of nomenclature used by the appellant in their financial statements; merely because some payments received were accounted under the head "advance from customers", service tax cannot be levied without first establishing the nature of the amounts and the purpose of the payment; in the absence of any concrete allegation towards the taxability of the amounts, the demands cannot be sustained; service tax cannot be fastened on the basis of difference between the accounts maintained by the appellant and ST-3 returns. He relies on the following:

- Prakash Road Lines Vs CCE, C & ST, Allahabad [2022-TIOL-928-CESTAT-ALL]
- Firm Foundation & Housing Pvt Ltd., Vs Principal Commissioner, ST [2018 (4) TMI 613 – Madras High Court]
- Commissioner of ST, Ahmedabad Vs Purni Ads Pvt Ltd., [2010 (19) STR 242 (Tri-Ahmd)
- Go Bindas Entertainment Pvt Ltd., Vs CST, Noida [2019 GSTL (397) (Tri-All)]

4. Learned Counsel further submits that the advances reflected in their books of account are on various grounds like cancellation of tickets, closure of the customer's account, reconciliation of various branch accounts, discounts and time lagging receipts from corporate credits against invoices to the customers. Learned Counsel submits that the impugned proceedings are legally invalid as they have been initiated wholly on the basis of audit objections and a selective approach in reading the financial statements ; no independent investigation or analysis was carried out by the Revenue before issuing the show cause notice; in the absence of independent investigation demand cannot be sustained as held in Sharma Fabricators and Erectors Pvt Ltd., Vs CCE, Allahabad [2017-TIOL-3191-CESTAT-ALLA] affirmed by Allahabad High Court in [2019-TIOL-492-HC-ALL-C.Ex]. Learned Counsel also submits that the demand is time barred as no *mala fide* was established on the part of the appellant and no suppression can be alleged. He further submits that in case the demand is held to be sustainable appellants are eligible to claim cum tax benefit. Lastly, he submits that interest and penalties cannot be imposed when the demand itself is not sustainable; moreover, penalty under Section 76 and 78 cannot be imposed separately as held in Care and Cure Pvt Ltd., Vs Commissioner of Central Excise, Chandigarh [2015 (38) STR 225 CESTAT-Chand].

5. Ms Jaya Kumar, Authorised Representative for the Department submits on the other hand that the appellant did not show any documentary evidence to substantiate their claim that the advances were not in respect of any service rendered; the Chartered Accountant certificate submitted by the appellants does not indicate whether these recoveries are to be adjusted and if so when and against which account Learned AR submits that not mentioning a specific category of service was not vitiate the proceedings.

6. Learned AR further submits that as per Section 67(3) of the Finance Act 1994 the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service. She relies on following case laws:

- Pradyumna Steels Ltd., [1989 (41) ELT 555(Tribunal)]
- Pradyumna Steels Ltd., [1996 (82) ELT 441 (S.C.)]
- Times Internet Ltd., [2015 (40) STR 207 (Tri-Del)]
- Shilpa Printing Press [2013 (297) ELT 417 (Tri-Mumbai)]
- Paharpur Cooling Towers Ltd., [2013 (31) STR 227 (Tri-Del)]

- Central Power Research Institute [2017 (6) GSTL 42 (Tri-Del)]

7. Heard both sides and perused the records of the case.

8. A perusal of the impugned order indicates that the appellants have submitted before the Adjudicating Authority that the advances shown in their books of accounts are not necessarily towards the provision of services and the same were on account of various reasons explained therein; in fact in respect of air travel service which constitutes 90% of their activity no advance is being taken and on the contrary credit time is allowed to the customers to pay after the services availed by them. The Adjudicating Authority relies on the statement of the appellants themselves that air travel service accounts for 90% of their activity. However, Commissioner construes that if 90% of the activity is towards air travel agent service and if advances were not taken for that particular service rest of the 10% is necessarily for the other services rendered or to be rendered by the appellant. We find that Learned Commissioner observed as follows:

"35.3 As it is seen that it is not necessary that the "advance for customers" ledger is not containing the advance from customers involving in that 10% business with the assessee in the services other than "Air Travel Agents Service", so going by the assesses's version that 90% of their business is related to "Air Travel Agent Service" and 10% attributed to other services provided by the assessee, the plain calculations of their income as per their balance sheets of 4 years may be done easily as follows:

1	*2*	*3*
Year	*Income in Balance Sheet (In Rs. Crores)*	*10% income attributable to other services as put forth by the assessee (in Rs. Crores)*
2006-07	*35.92*	*3.59*
2007-08	*49.56*	*4.96*
2008-09	*58.85*	*5.89*
2009-10	*52.31*	*5.23*

I cannot ignore the common trend of the business at large, and going by the common trend of the other 10% services provided by the assessee, advance payments are generally accepted in such provision of the services for keeping the customers committed and to recover the cost of the resources which might be put into use while providing of such services. Thus, the version of assessee that only credit balances of their air travel customers occur in their "advance from customers" ledger is not acceptable or justified. The assessee did not even consider to mention these aspects which also play an important role in their business. Thus, I find that the assessee has failed to establish their version, duly substantiated by the trail of transaction that the all entries in that ledger (due to different locations it is necessary) in a particular financial year is reflecting into the "debtors" ledger at the end of the financial year and how it is related to the "advance from customers" in that particular account. Merely providing the ledgers balances at the end of the financial year does not establish their arguments to my satisfaction and I therefore, reject the claim of the assessee that 'advances from

customers' appearing in the Balance Sheets were not actually advances received in cash from customers towards provision of any service. Further, the CA certificates produced by the assessee are only the reflection of the ledgers of "debtors" and "advance from customers" of the 4 financial years in question involving transactions of various customers during the years. There is no reflection of credit balances in detail in respect of any of the customers and how the netting/squaring off of credit and debit balances are done and how that gets transferred to the "advance from customers" head. The CA certificate did not inform or reveal the nature of the transactions that have actually taken place during the year in a particular account. The mere reflection of last balances at the end of the year does not serve any purpose in the present case. The real issue is whether any advances were taken from the customers or not in transactions with the customers during the year by the assessee, which can only be ascertained through the billing and its receipts in the account of particular case. No documents has been produced before me to establish that and hence, I am not convinced that the assessee has not accepted any advances from their customers, and hold that the amount appearing under the head "Advance from Customer" is in fact represents the advances accepted by the assessee from their customers and as no service tax is paid by the assessee on that, the same is recoverable from them. Thus, the amount of service tax of Rs. 64,06,240/- on the "advances from customers" is liable to be recovered from the assessee."

9. We find that the Adjudicating Authority fails to understand that in demanding the service tax, the twin conditions i.e. identification of the particular service rendered and the payment received for such service, either before, during or after providing of such service, were to be satisfied. We find that Learned Commissioner has considered the appellant submission that 90% of their income is towards air travel agency service and that in provision of such service no advances were being taken. Interestedly, Learned Commissioner uses the submission of the appellant to come to the conclusion that if 90% of the receipts is for the air travel agency service, the rest 10% is towards other services rendered or to be rendered by them and in terms of Section 67 of the Finance Act 1994 such amounts are includable in the gross value of service for the purpose of levying of service tax. We fail to understand as to how the Commissioner comes to the conclusion that this 10% of the income or advances shown in the books of accounts of the appellants leads to the inevitable conclusion that the amounts were for provision of certain services. We find that no specific service has been identified by the Adjudicating Authority, while accepting in principle that duty evasion cannot be proved with mathematical precision, the same cannot be established by applying a mathematical formula. We find that Courts and Tribunal have been consistently holding that service tax cannot be fastened without identifying the specific service provided and consideration received or to be received for the same.

10. We find that in case of Hindustan Ltd., Tribunal observed vide Final Order No. A/51819-51820/2021 dated 17.09.2021 as follows:

> *"12. It is well settled that the show cause notice as also the order of the adjudicating authority should specify the taxable service. In this connection reference can be made to the following decisions.*
>
> *13. In Shubham Chemicals, the Tribunal observed as follows:-*
>
>> *"11. Neither the show cause notice dated 21-10-2011 nor the impugned adjudication order dated 18-1-2013 record any assertion/conclusion whatsoever as to which particular or specific taxable service the appellant had provided. In the absence of an allegation of having provided a specific taxable service in the show cause notice and in view of the failure in the adjudication order as well, neither the show cause notice nor the consequent adjudication order could be sustained." (emphasis supplied)*
>
> *14. In Deltax Enterprises, the Tribunal observed as follows:-*
>
>> *"4. In the absence of specific allegation with reference to the nature of service or the service recipient it is not tenable to hold an income of the appellant even if it is admitted to be an actual income, as consideration for a taxable service."*
>
> *15. In NR Management Consultants, the Tribunal observed as follows:-*
>
>> *"It is clear that there is no categorical finding as to how the expenditure incurred in foreign exchange can be considered as a payment towards specific category of taxable service and thereafter can be subjected to tax at the hands of the appellant on reverse charge basis. We find considerable force in appellant-assessee's plea with reference to presumptive nature of the demand for service tax attributable to expenditure in foreign currency. In fact, the nature of services received by the appellant-assesses with supporting evidence has not been analyzed at all. In such situation, the finding recorded by the impugned order suffers from serious legal infirmity." (emphasis supplied)*
>
> *16. The confirmation of demand on the basis of such a vague show cause notice cannot, therefore, be sustained."*

11. Further, Tribunal has held in the case of Shubam Electrical (supra) which was upheld by Supreme Court in [2016 (42) STR J312 (Delhi)]

> *"13. We have noticed earlier that the show cause notice itself adverts to the fact that the appellant had provided copies of 20 work orders executed in relation to CWG Projects, particulars of which are set out in a tabular form in para 5 of the show cause notice. From the description of the works in this table, officers could have classified the several works into the appropriate taxable service which may appropriately govern rendition of these services. In any event officers are not handicapped and the Act provides ample powers including of search under Section 82 of the Act to obtain information necessary to pass a proper, disciplined and legally sustainable adjudication order. The disinclination to employ the ample investigatorial powers conferred by the Act is illustrative of gross Departmental failure and cannot afford justification for passing an incoherent and vague adjudication order. The failure to gather relevant facts for issuing a proper show cause notice cannot provide justification*

> *for a vague and incoherent show cause notice which has resulted in a serious transgression of the due process of law.*
>
> *6. We have considered the facts of the case. We notice that in the show cause, neither any period has been specified nor any amount of demand quantified. The show cause notice does not refer to any agreement between the appellant and the telephone company so as to identify the exact nature of "service" rendered. It also does not name the 'taxable' services allegedly rendered by the appellant. These deficiencies in a show cause notice are fatal and such a show cause notice is per se unsustainable as it disables the assessee to defend itself, thereby being violative of the principles of natural justice. Further from whatever can be made out from the show cause notice, the issue is fully covered in favour of the appellant vide CESTAT/High Court orders in the cases of R.B. Agencies Vs CCE, Calicut - 2008 (11) STR 124 (Tri-Bang.) =* ***2007-TIOL-1416-CESTAT-BANG*** *and Martend Foods and Dehydrates – 2013 (30) STR 634 (Tri-Del) and Commissioner Vs Daya Shankar Kailash Chand – 2014 (34) STR J 99 (Allahabad)."*

12. In the light of the above discussions, we find that the impugned order is not legally sustainable and is liable to be set aside and we do so. Accordingly the appeal is allowed with consequential relief, if any, as per law.

(Order Pronounced in open court on 07/03/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Jaya