

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

REGIONAL BENCH- COURT NO. 3

SERVICE TAX APPEAL NO. 10686 of 2014-DB

(Arising out of OIO-SUR-EXCUS-001-COM-050-13-14 Dated 31/12/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Krish Corporation

C-1115, Radhe Krishna Textile Market,
Begampura, Nawabwadi,
SURAT, GUJARAT

.....Appellant

VERSUS

Commissioner of C.E. & S.T.-Surat-i

NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT, GUJARAT-395001

.....Respondent

APPEARANCE:

Shri Vipul Khandhar, Chartered Accountant appeared for the Appellant
Shri Rajesh Nathan, Assistant Commissioner(AR) appeared for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

FINAL ORDER NO. 12835/2024

DATE OF HEARING: 19.11.2024
DATE OF DECISION: 26.11.2024

RAMESH NAIR

The present appeal has been filed by M/s. Krish Corporation against the Order-in-Original No. SUR-EXCUS-001-COM-050-13-14 dtd. 31.12.2013.

1.1 Briefly stated the facts of the case are that DGCEI received an intelligence through the sources that M/s Sagar Builders Pvt. Ltd. has constructed the Commercial Complex known as Radha-Krishan Textile Market and after completion of the construction of said complex, they have sold number of shops and given number of shops on rent. Officer searched the said premises and noticed that there are some shops left unsold, belonging to the Appellant and are given on rent. The DGCEI initiated the investigation against the appellant and revealed that Appellant has given 228 shops on rent to various tenants. This activity of renting shops fall under the taxable category of "Renting of Immovable Property" classified under the heading 65(105) (zzzz) of Finance Act 1994. It was contended that the Appellant collected the rent yearly basis in cash and suppressed the income generated from renting of shops. During the investigation, inquiries were made with some of the tenants, occupying shops in Radhe Krishan Textiles Markets and their

statements were recorded. Accordingly, a show cause notice dtd. 06.06.2013 was issued to the Appellant for recovery of Service tax of Rs. 70,86,927/- along with interest and penalty. In adjudication, Ld. Commissioner confirmed the demand of Service tax of Rs. 72,61,747/- and ordered for appropriation of Rs. 38,00,000/- deposited by appellant. He also imposed the penalty under Sections 76, 77 and 78 of the Finance Act, 1994. Therefore, Appellant is in appeal against the impugned order.

2. Shri Vipul Khandhar, Learned Chartered Accountant appearing on behalf of the Appellant submits that in the present matter department alleged that the Appellant has received the rent in excess of the rent booked in the books of accounts on the basis of four tenants' statements out of total tenants of 238. Accordingly, differential value and service tax has been demanded from the appellant. He also submits that the service tax demand confirmed by the Ld. Commissioner are untenable and unjustified. Appellant has submitted the copy of Ledger & data in respect of the each tenant & prospective buyers of the shop before the Ld. Commissioner, however without considering the same and without going to the factual data & details he confirmed the total service tax demand.

2.1 He also argued that in the present matter revenue has calculated the service tax demand on hypothetical basis on the basis of assumption only on the basis of shop owner statements regarding the payment to agent in cash, however no cash receipts has been found by the department from the tenant. Therefore, it is clear that the department has demanded the excess service tax and demand of service tax required to reduce from 72,61,747/- to Rs. 17,82,992/- against the Appellant.

2.2 He also submits that Appellant was not liable for penalty on amount of service tax which has been already paid prior to issue of show cause notice.

3. On other hand Shri Rajesh Nathan , Learned Assistant Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have considered the submissions made at length by both sides and perused the records. We find that the Appellant in the present matter mainly disputed the method of calculation of taxable value. The revenue calculated the rent value on the basis of statements of persons. Department rely on the

statements of tenants of shops in Radha –Krishna Textiles Markets and statements of Shri Jerambhai Patel. The persons admitted in their statements that Appellant have collected rent in cash from the tenants.

4.1 We find that, it is settled law that though the admission is an important piece of evidence but it cannot be said to be conclusive and it is open to the person who has made the admission to show that this is incorrect. We also note that there are numerous decisions of the Tribunal laying down that such admission of persons, cannot be considered to be conclusive evidence to establish the guilt of the assessee. Burden of proof is on the Revenue and same is required to be discharged effectively. Without corroborative evidences only on the basis of statement of few tenant it cannot be concluded that the appellant has collected the part of rent in cheques and balance is taken in cash. In the present matter tenant nowhere produced any records/piece of paper in support of their statement. The only oral statements of service recipient cannot be accepted as admissible piece of evidence. No cash receipts has been relied upon by the department, no financial flow back has been relied upon by the department for the collection of rent in cash, no rent agreement has been found by the department for the support of excess rent , no ledger entry in the books of accounts of the appellant found for so called excess collected rent. Moreover, none of the persons on whose statement reliance was placed by the department were cross-examined by the Ld. Commissioner in the present matter. Clearly, the Adjudicating Authority had failed to follow the requirement of Section 9D of the Central Excise Act 1944, which is applicable in Service Tax matters, regarding examination in chief of witness, therefore quantification of demand of service tax on the basis of statement of persons not sustainable.

4.2 However, before fastening the service tax demand, it was incumbent on the revenue to come up with tangible evidence to prove the suppression of taxable value and quantify the demand on the basis of documentary evidences. We also find that in the present matter appellant also produced the details of rent received from each tenant and shops during the disputed period before revenue and Ld. Commissioner. However, department has calculated the demand of service tax on all the shops for whole periods without verifying the details that whether the said shops have been given on rent during the whole disputed period or not; whether shops have been given on rent or sale basis; what is the actual rent recoverable or received by the appellant; how many month occupant's have been holding the shops as a tenant. We noticed

that in the present matter revenue has not considered the proper facts while calculating the liabilities against the department.

4.3 After considering the above facts and details of quantification of rent produced by the appellant before us, we, therefore, reduce the demand of Service tax from Rs. 72,61,747 to Rs. 17,82,992/- together with interest.

4.4 As regard the penalties we find that the appellant in the present matter not disputed the liability of services tax and has admittedly paid the service tax well before the issuance of show cause notice. In these circumstances, we do not find that there was any *mala fide* on the part of the appellant. Therefore, benefit of Section 80 should be extended for the appellant and penalties imposed by the Ld. Commissioner are set aside.

4.5 Without prejudice, as regard penalty imposed under Section 76 and 78, we are of the view that simultaneous penalty under Section 76 and 78 cannot be imposed as held by Hon'ble Gujarat High Court in the case of *Rawal Trading Company*-2016 (42) S.T.R. 210 (Guj.).

5. As per our above discussion and finding, impugned order is modified to above extent. Appeal is partly allowed in the above terms.

(Pronounced in the open court on 26.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)