CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO.51850 OF 2018

[Arising out of Order-in-Original No. 04/GST-West/KAM/2017-18 dated 29.11.2017 passed by the Commissioner, Central Tax, Delhi West Commissionerate, Delhi]

M/s. VCI Hospitality Limited **Appellant**
BF-77, Janakpuri
New Delhi-110066

Vs.

Commissioner of Central Tax, **Respondent**
Delhi West Commissionerate

Appearance:
Present for the Appellant : None
Present for the Respondent: Shri Anand Narayan, Authorised Representative

CORAM :
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 03.03.2025
Date of Decision:09.05.2025

FINAL ORDER No.50636/2025

HEMAMBIKA R. PRIYA

The present appeal is filed by M/s. VCI Hospitality Limited[1] against the impugned Order-in-Original No. 04/GST-West/KAM/2017-18 dated 29.11.2017 passed by the Commissioner, Central Tax, Delhi West Commissionerate, Delhi wherein the demand of service tax of Rs. 3,44,30,4271- was confirmed along with interest and penalty.

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1. **the Appellant**

2. Brief facts are that M/s VCI Hospitality Ltd. were registered with Service Tax Department bearing Service Tax registration no. AAACV8758PST001 issued on 31.03.2006. The company entered into an agreement with M/s World Resort Ltd. (WRL), Bangalore to carry out promotional activities for the marketing and sales of Golden Palm Hotel & Spa which include inserting advertisements in daily newspapers, magazines, television channels, placing hoardings, contracting and reaching people over the telephone, informing the public of the facility and amenities of the hotel etc.

3. As the appellant was alleged to be providing taxable services, the Department issued a show cause notice dated 27.12.2016 to the appellant to show cause as to why:

a. Service Tax amounting to Rs 3,44,30,427/- for the period from FY 2011-12 to FY 2014-15 should not be demanded from them under sub-section (1) to section 73 of the said Act by invoking extended period as provided therein.

b. Interest as applicable during the relevant period on the amount of Service Tax not paid, should not be charged and recovered from them under Section 75 of the Finance Act, 1994.

c. Penalty should not be imposed under Section 78 of the Finance Act, 1994.

d. Penalty should not be imposed under Section 70 of the Finance Act, 1994 read with Rule 7C of Service Tax Rules.

e. Penalty should not be imposed under Section 78A of the Finance Act, 1994.

4. The appellant did not file any reply to the notice nor did they appear for personal hearing before the Commissioner. Hence, the impugned order was passed against which the present appeal has been filed. No one appeared for hearing before the Tribunal despite the matter being listed ten times. Hence we proceed to decide the matter based on the submissions made in the grounds of appeal.

5. The appellant has submitted that the burden of proof for any demand and confirmation of service tax lies on the department. Therefore, the department has to establish the nature of services provided by the appellant, service recipient and the consideration realised for such provision of service.

6. The appellant has further submitted that they do not provide any kind of taxable service to the Golden Pam Hotel & Spa, as they are not procuring any goods or services, which are inputs for the client, nor do they act as an agent for the Hotel Company. It has been contended that the appellant is paid a sum as per the terms of the contract with the Hotel for promotion of the Hotel. The appellant is not at liberty to fix the professional fees to be charged from the people enjoying the services of the Hotel, and have to work with the fees fixed by the Board of the Golden Palm Hotel & Spa. Further, there is no record to support the contention of the department that the appellant is providing business auxiliary services to the Hotel. The consideration arrived at between the appellant and Hotel is determined solely based upon the business negotiation between these two parties. There are two distinct business transactions in the instant case. One is where the appellant is providing promotion services to the Hotel and in the

other case the Hotel is providing the services to the customers who avail the services of the Hotel. Merely because, the appellant stands to gain by his arrangement with the Hotel Company, it does not make taxable what is otherwise non-taxable under service tax law. The Commissioner has failed to establish the reason behind estimating the turn over for the year 2014-15 to the tune of 25% more than what they have estimated in the 2013-14. The appellant relied on the judgment of Supreme Court in the matter of **CST** vs **H.M. Esufali[2],** wherein it was held that to determine the best judgment assessment to be rationale and proper the Court first need to check if the accounts submitted by the appellant were rightly rejected by the Assessing officer or not. In the present case, no viable reason for rejection of our accounts has been given by the appellant.

7. The appellant has stated that since no demand is sustainable, therefore there is no question of imposing interest and penalty. The appellant have not suppressed or mis-declared any information, to evade payment of duty. Further, there was no discrepancy in the documents maintained by the appellant and their records can be verified by the appellant from their own records.

8. Learned Authorized Representative for the Department has reiterated the discussions and findings in the Order-in-Original and in Order-in-Appeal. He relied upon the Tribunal decision in the case of **Shri Uday Veer Singh** vs. **Commissioner of Central**

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2. 1973(90) ITR 271 (SC)

Excise, Ghaziabad[3] in support of the Department's option to resort to Best Judgment method.

9. We have heard the learned authorized representative for the Department and perused the appeal paper book. We will now consider the first plea of the appellant. The appellant has submitted that they were not providing any taxable service to their client. In this context, we note that the appellant entered into a contract to provide promotional activities for marketing and sales for the clients. We note that Business Auxiliary activities related to promotion, marketing and customer care were made taxable under 'Business Auxiliary services' by the Finance Act, 2003, with effect from 01.07.2003. The Finance Act, 2004 and Finance Act, 2005, subsequently, enhanced the scope of activities forming part of business auxiliary services which included almost every service of procurement of inputs for the client, production or processing of goods (not amounting to manufacture) for and on behalf of the client and provision et service on behalf of the client became taxable under this head. The Finance Act, 2006 further expanded the scope of Business Auxiliary Services by bringing in 'any person' (in place of commercial concern) providing such service under the tax net with effect from 01.05.2006.

10. As per the provisions of 'Business Auxiliary Services', we note that any person is engaged in providing services in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client, promotion or marketing of service provided by the client and any customer care services provided on

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3. Final Order No.70532/2024 dated: 21.08.2024

behalf of client, would be taxable under the taxable category of Business Auxiliary Service as defined under the Finance Act, 1994. In the instant case, the services of appellant were to carry out promotional activities for the marketing and sales of Golden Palm Hotel & Spa, which included inserting advertisements in daily newspapers, magazines, television channels, placing hoardings, contracting and reaching people over the telephone, inform the public of the facility and amenities of the hotel etc. Consequently, we note that the services rendered by the appellant are fully covered under the taxable category of 'Business Auxiliary Services as defined under Section 65(105) (22b) of Finance Act, 1994. With effect from 1.07.2012, Section 66B provided that service tax would be levied at the rate of twelve per cent on the 'value of all the services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another. We note that the services provided by the appellant are neither covered under Section 66D of the Act nor fall under any exemption notification. Therefore, we hold that the appellant was providing 'taxable service' under Section 66B of the Act (with effect from 01.07.2012) and thus service tax is leviable thereon in terms of Section 66B of the Act (with effect from 01.07.2012).

11. We now address the submissions on the Best Judgment method resorted to by the Department for the year 2014-15. The admitted facts are that the appellant did not submit the copy of the Balance Sheet for the year 2014-15. Consequently, the Department had to resort to Best Judgment method under section 72 of the Finance Act, 1994.

12. In this context, we note that the Delhi High Court in the case of **National Building Construction Company ltd.** vs. **Union of India**[4] observed as follows:

> "**24.** Reference was made to Section 72 of the Fin Act, which reads as under:-
>
> "**72. Best judgment assessment.-**
>
> If any person, liable to pay service tax,-
>
> ………."
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> Section 72 of the Fin Act, as the heading empowers best judgment assessment in cases where a person liable to pay Service Tax (a) fails to submit return or (b) files a return but fails to access the tax in accordance with provisions of chapter or Rules. As per the respondents failure to pay Service Tax according to the provisions of the Chapter V and Rules is the pre-requisite and pre-condition for invoking clause (b) to Section 72 of the Fin Act. Provisions of Section 72(b) would apply only when the assessee had failed to access the tax in accordance with provisions of Chapter V of the Fin Act.
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> **25.Section 72 of the Fin Act, as the heading states, empowers and authorises the Central Excise Officer to make and pass an order known as 'best judgment assessment'. In terms, the Central Excise Officer can make an assessment of the value of the taxable service to the 'best of the judgment' and determine the sum payable by an assessee or refundable to the assessee on the basis of such assessment. The expression 'best judgment assessment' is to be found in Section 144 of the Income Tax Act and is a well- known and understood. Section 144 of the Income-tax Act is applied when an assessee fails to make a return or fails to comply with the notice issued to substantiate the return or directions issued for production of documents, etc. The expression 'best judgment assessment' in tax enactments refers to fair estimate and reasonable determination of the taxable amount made by the Assessing Officer, when it is not possible to compute the taxable amount on the basis of records and material made available. It is a type of assessment authorized by law in the absence of full and complete details and material. 'Best judgment assessment' need not be exact and precise, albeit an objective and fair assessment of the taxable amount based upon the material and evidence available and gathered.** This provision cannot be equated with and read as a provision prescribing and authorizing a separate and alternative procedure for adjudication under Section 73 of the Finance Act. Section 72 does not authorise Central Excise Officer to take up

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4. 2019(20) G.S.T.L. 515(Del.)

> returns for Service Tax for scrutiny assessment and pass an adjudicatory order, except possibly in cases where refund is claimed. This is not only clear from the expression 'best of his judgment' used in the heading and main part of Section 72, but also when we harmoniously read this Section with Section 73 which prescribes a detailed procedure with limitation periods with regard to the period for which show cause notice can be issued quantifying the demand raised as also the time period within which the show cause notice is to be adjudicated. Said prescriptions and stipulations made in Section 73 are missing in Section 72 of the Fin Act, for the Section 72 only allows the Central Excise Officer to make 'best judgment assessment'. Section 72 of the Fin Act does not prescribe a procedure for taking up the Service Tax returns for assessments, except when refund of tax is due as per the return and has to be adjudicated**."**

13. In similar circumstances upholding the best judgment assessment made under Section 72, the Tribunal in **Fort Health Club** vs. **Commissioner of Central Excise, Cochin**[5] held as follows:

> **"5.** First and foremost, we find that the objection raised by the appellant regarding the invocation of Section 72 of the Finance Act, 1994 seems to be mis-placed. On perusal of the show cause notice, we find that the show cause notice specifically says that the service tax liability has been worked out based upon the best judgment method as there were no evidence coming forth from the appellant regarding the amount collected by the appellant towards services rendered. We also find that on the date of issuance of show cause notice, the provisions of Section 72 were in force.
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> **6.** We find that in the absence of any information coming forth from the appellants as regards exact amount collected by them for the services rendered, the lower authorities have resorted to the next possible way for arriving at the amount of service tax payable by the appellant. We find that it was for the appellant to come forward and justify that the accounts and the bill book kept by them are correct and they have to be considered as an evidence, for collection of the amount. We find that the adjudicating authority in his OIO has clearly brought out the lacunae and the mis-match of the amounts collected by the appellant and the bill books shown by them as regards the service charges collected. We find that these particular findings of the adjudicating authority has not been contested by the appellant before the first appellate authority.

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5. **2010 (17) S.T.R. 154 (Tri. - Bang.)**

> **7.** Hence, we hold that the calculation of the service tax payable under the provisions of Section 72 seems to be correct as it is understood that there is a escapement of the service tax."

14. Thus we do not find any merits in the submissions made by the appellant challenging the findings arrived in the impugned order on the basis of best judgment assessment made as per section 72 of the Finance Act, 1994. The Supreme Court decision relied upon by the appellant categorically states that the accounts submitted by the appellant should be relied upon. In the instant case, it is an admitted fact that the appellant did not submit any accounts for the Financial Year 2014-15. As the appellant did not submit the copy of Balance sheet for the Financial Year 2014-15, there was no option left with the department, but to invoke the Best Judgment Assessment as prescribed under Section 72 of the Finance Act, 1994.

15. In view of the above discussions, we find no infirmity in the impugned order. The appeal is, accordingly, dismissed.

(Order pronounced in the open court on **09.05.2025**)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Archana