

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

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 270 of 2012-DB

(Arising out of OIA-189/2012/COMMR-A-/RBT/RAJ Dated-19/04/2012 passed by
Commissioner of Service Tax-RAJKOT)

Rolex Rings Pvt Ltd

Gondal Road, Village : Kotharia,
Rajkot, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

.....Respondent

APPEARANCE:

Shri. Paresh Sheth, Advocate for the Appellant

Shri. R. P. Parekh, Superintendent (AR) for the Respondent

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

Final Order No. A/ 12264 /2022

DATE OF HEARING: 02.09.2022

DATE OF DECISION: 22.12.2022

RAMESH NAIR

M/s. Rolex Rings Pvt. Ltd. is in appeal against Order-in-Appeal No. 189/2012/COMMR(A)/RBT/RAJ dtd. 19.04.2012 of Commissioner (Appeals) of Central Excise & Service Tax, Rajkot which has confirmed demand of Service tax of Rs. 34,09,301/-, interest thereon, and penalties under Sections 76, 77 and 78 of Finance Act, 1994.

2. The brief facts of the case are that the appellant were registered with the Service Tax Department under various categories of taxable services. After audit of their accounts by the officers of the Department, the Revenue entertained a view that the appellant/assessee did not discharge service tax liability on commission amount paid to foreign Commission agent. The commission paid to the foreign agent is taxable and falls under the purview of "Business Auxiliary Services" as defined under Section 65(19) of the

Finance Act, 1994. The definition of the person liable for paying service tax is given in Rule 2(1)(d)(iv) of the Service tax Rules 1994. as "in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Act, the recipient of such service". The Appellant was issued show cause notice for demanding service tax amount alongwith interest and penalty which was confirmed vide OIO dtd. 30.11.2011. Being aggrieved, appellant filed appeal before the Commissioner (Appeals) who vide impugned order upheld the order. Being aggrieved, the appellant have approached this Tribunal with the present appeal.

3. Shri. Paresh Sheth, learned counsel appearing on behalf of Appellant submits that Ld. Commissioner (Appeals) has erred in confirming the demand of Service tax without considering the fact that the service is exempt from payment of service tax under Notification No. 41/2007 and/ or Notification No. 18/2009 and therefore no part of service tax was liable to be confirmed.

3.1 He also submits that Ld. Commissioner (Appeals) also erred in not considering the fact that the Service tax so demanded was otherwise available as credit and therefore there can not be any intention to evade the payment of tax and consequently the allegation of suppression of fact was not sustainable and hence, the show cause notice was ought to have been declared as barred by limitation. Moreover, audit party has raised this issue only on the basis of Balance Sheet.

3.2 He further submits that in the impugned matter Appellant has paid the service tax alongwith interest prior to issue of show cause notice, in terms of the provisions of Section 73(3) of the Act, therefore the show cause notice itself could not have been issued.

3.3 He also argued that the department has not clarified the relevant clause referred in the definition of 'Business Auxiliary Service' under which the service tax is proposed to be recovered, the show cause notice is liable to be declared as bad in law and consequently proceedings are liable to be dropped.

3.4 He placed reliance on the following decisions in support of above submission.

- (i) Balaji Enterprises – 2020-33-GSTL-97 (Tri. Del)
- (ii) Amrit Foods – 2005-190-ELT -433 (SC)

- (iii) Calibre Chemicals Pvt. Ltd. – 2021-52-GSTL-618 (Tri- Ahmedabad)
- (iv) LG Electronics Pvt. Ltd. – 2010-255-ELT -135(Tri. Mumbai)
- (v) Sai Consulting Engineering Pvt. Ltd. – 2018-15-GSTL-708 (Guj)
- (vi) Motor World – 2012-27-STR-225-Kar. (HC)

4. Shri. R.P.Parekh, learned Superintendent (Authorised Representative) appearing for Revenue reiterates the findings of the impugned orders.

5. We have carefully considered the submissions made by both sides. We find that in the present matter Ld. Counsel strongly defended the liability on the ground of limitation. As regards the question of extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994, the same would not be available to the Department on the ground of revenue neutrality. We are of the view that the demand, having been raised by invoking the longer period of limitation is hit by the provisions of Section of the Act. The impugned show cause notice proposed that – "*whereas, it appears that the said assessee are holder of service tax registration of Goods Transport Agency but they did not get registered under the service category of BAS, nor paid service tax and also not declared the facts in their ST-3 returns being filed by them during the period. Hence it appears to be a clear case of suppression of facts to avoid payment of appropriate duty and it appears that this is a fit case for invocation of extended period under proviso to Section 73 of the Act for demand of tax not paid/ short paid.*"

5.1 We are not in agreement with the said observations made by department. If non-registration and non-filing of returns is the criteria for rejecting the appellant's plea of *bona fide* belief and holding against them, the plea of limitation would not be available to any assessee, inasmuch as the Service Tax liabilities would arise only in those cases where the appellants are not registered and are not filing the returns. Coming to the *bona fide* belief of the assessee, there are number of factors which are required to be considered.

5.2 We also find that, as no intention to contravene the provisions of Finance Act, 1994 and of the rules made thereunder can be attributed to the appellant for the reason that even if they are required to pay Service Tax on the disputed service, in question, provided by foreign agent, the entire Service Tax paid under RCM would be immediately available to them as Cenvat Credit and collection of Service Tax from the appellant would be a

revenue neutral exercise. We find that Larger Bench of the Tribunal in case of *Jay Yushin Ltd.* reported in [2000 \(119\) E.L.T. 718](#), has held that in such circumstances where revenue neutral situation comes about in relation to the credit available to the assessee himself of the duty paid by him and not by the way of availability of credit to the buyer of the assessee's manufactured goods, longer limitation period under proviso to Section 11A(1) of Central Excise Act, 1944 would not be applicable. The ratio of this judgment is squarely applicable to the facts of this case, as the provisions of Section 11A(1) of Central Excise Act, 1944 are in *parimateria* with the provisions of Section 73(1) of the Finance Act, 1994. In such a scenario, there are plethora of judgments by various Courts that no *mala fide* can be attributed to an assessee so as to invoke the longer period of limitation. Accordingly, we agree with the Id. counsel that the demand is barred by limitation and is required to be set aside. Since in this case, intention to evade the tax is absent, the penalty under of Finance Act, 1994 also would not be attracted.

6. Accordingly, the impugned order is set aside and appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 22.12.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PRACHI