

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.50539 of 2015

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/188-189/2014-15 dated 30/10/2014 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Noida)

M/s LG Electronics India Pvt. Ltd.

.....Appellant

(Plot No.51, Udyog Vihar, Surajpur-Kasna Road
Greater Noida-201306, Uttar Pradesh)

VERSUS

Commissioner of Central Excise,

....Respondent

(Noida)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant

Shri A.K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70166/2024

DATE OF HEARING : 03.04.2024

DATE OF DECISION : 03.04.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Appeal No.NOI/EXCUS/000/APPL/188-189/2014-15 dated 30/10/2014 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Noida. By the impugned order following has been held:-

ORDER

"1. I uphold the confirmation of demand of Service Tax amounting to Rs. 30,71,176/- under section 73(2) of the Finance Act, 1994.

2. I uphold the recovery of confirmed demand along with interest under section 75 of the Finance Act, 1994.

3. I allow the Department's appeal and impose penalty under Section 77(1)(C) of the Finance Act, 1994.

4. I set aside the penalty of Rs. 5000/- imposed upon the Appellant under Section 77(2)

5. I uphold the penalty imposed amounting Finance Act, 1994. to Rs. 30,71,176/- under Section 78 of the Finance Act, 1994."

2.1 The appellant is registered with the Department as a manufacturer of various consumer electronic goods and also as a service provider in respect of various taxable services namely Advertising Agency, Consulting Engineer, Maintenance & Repair Service, Business Auxiliary Service etc.

2.2 The appellant is exporting their produce to various countries and to promote their sales they have appointed a commission agent LG Electronics Inc, Korea. They entered into an agreement dated 01.01.2009, specifying the terms and conditions for engagement of the service provider. Appellants were required to pay service tax on the commission received under reverse charge mechanism but for Exemption Notification No.18/2009-ST by following the prescribed procedure.

2.3 Audit officers of AGUP, Lucknow conducted a an audit of the records of the appellant for the period April 2010 to March 2011. In the audit note communicated vide CERA No.52211-12 it was alleged that the appellant has not paid service tax amounting to Rs.30,71,176/- on account of commission of Rs.2,98,17,242/- paid by them during the year 2009-10 to Foreign Service Provider.

2.4 After certain correspondence a show cause notice dated 31.01.2013 was issued to the appellant asking them to show as to why:-

- i. Service Tax amounting to Rs. 30,71,176/- (Rs. Thirty lacs seventy one thousand one hundred seventy six only) not paid by party during the period 2009-10, should not be demanded and recovered from them under proviso to Section 73 of Finance Act, 1994.

- ii. Interest on delayed payment of Service Tax should not be demanded under Section 75 of the Finance Act, 1994.
- iii. Penalty should not be imposed upon them under Section 77 & 78 of Finance Act, 1994 for contravention of Section 66 A, 68 & 70 of the Act read with Rule 6 and 7 of Service Tax Rules 1994.

2.4 The show cause notice was adjudicated as per Order-In-Original No.71/Addl.Commissioner/Noida/2013-14 dated 31.03.2024 holding as follows:-

ORDER

- i. I confirm demand of Service Tax amounting to Rs. 30,71,176/- (Rs, Thirty lacs seventy one thousand one hundred seventy six only) under section 73(2) of the Finance Act 1994.*
- ii. I order for recovery of confirmed demand alongwith interest under section 75 of the Finance Act, 1994.*
- iii. I impose penalty of Rs. 5,000/= upon the party under Section 77(2) of Finance Act'1994*
- iv. I also impose-penalty of Rs. 30,71,176/- (Rs, Thirty lacs seventy one thousand one hundred seventy six only) under section 78 of Finance Act, 1994, as discussed hereinabove.*

2.5 Aggrieved appellant filed an appeal before the Commissioner (Appeals). Department also filed an appeal. Both the appeals have been disposed of as per the impugned order.

2.6 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Atul Gupta, advocate for the appellant and Shri A.K. Choudhary, Authorized Representative for the Revenue.

3.2 Arguing for the appellant learned counsel submits as follows:-

- the appellant is entitled to the benefit of exemption under notification no. 18/2009-ST. The benefit of the said notification is denied stating that:
 - has not provided the copy of the agreement between the Appellant and LG Korea at the time of audit.
 - commission amount has not been mentioned in the shipping bill as required under the said notification.
- The impugned order goes beyond the SCN by stating that the amount of exemption claimed by the Appellant was more than what is allowed under the notification. Reliance is placed on the decision in case of Toyo Engineering India Limited, 2006 (7) SCC 592 and in case of **Calibre Chemicals Pvt. Ltd. [2021 (52) GSTL 618]**.
- Appellant in Para 40 of the Reply to the Audit Report dated 12.06.2012 stated the Appellant has shown the copy of the agreement to the audit party and has also attached the copy of the agreement as Annexure D & E in the Reply to the Audit Report. Merely because the copy of the agreement could be produced instantly may not be the reason for disallowing the benefit of the Notification.
- all the facts establishing that the commission was paid for procurement of orders for goods exported are available then merely a failure to mention the commission amount in the shipping bills could not be the reason to disallow the benefit of the notification. Reliance is placed on the decision in case of **Radian Textiles Ltd. [2017 (47) SRT 195.]**
- Demand is beyond the limitation period, therefore, the same is not sustainable.
 - *complete facts were furnished by the Appellant in terms of the Notification No, 18/2009 in Annex 2 in time, therefore, due to mere failure to comply with a procedural formality, the extended period of limitation cannot be invoked.*
 - *An allegation that the fact about non-compliance has come to knowledge only during the course of audit, therefore, extended period is invokable is not sustainable, as has been held by Hon'ble Allahabad*

*High Court in the case of **Accurate Chemical Industries 2014 (310) ELT 441 (All)***

- *the Show Cause Notice has alleged that the fact of suppression and violation of provisions of Notification came to notice of the department only at the time of audit therefore the extended period of limitation invokable. The mere violation of the condition of Notification in absence of an allegation of suppression with intent to evade payment of tax is not sufficient to invoke extended period of limitation as held in the matter of*
- **PVR Ltd. [2021 (55) GSTL 435]**
 - **SEBI 2023 (385) ELT 865 (Bom);**
 - **Bharat Hotels Ltd. [2018 (12) GSTL 368].**
 - *CONTINENTAL FOUNDATION JT. VENTURE [2007 (216) E.L.T. 177 (S.C.)]*

3.3 Learned Departmental Representative reiterates the findings given in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 Undoubtedly the entire case of the Revenue has been based on the audit-objection raised by CERA. Extract of objection is reproduced below:-

"Part II-B

Para No 1- Non payment of Service Tax on Services
Rendered by Foreign Agencies. (Rs 30,71,176.00)

Rule 2 of Service Tax Rules, 1994, effective from 16 August, 2002 provides that in relation to any taxable service provided by a person who is not a resident and is from outside India not having any office in India, the person receiving the taxable service in India is liable for payment of service tax.

M/a L G Electronics (I) Pvt. Ltd., Plot No 51, Udyog Vihar Surajpur Kasana Road, Greater Noida in NOIDA Commissionerate paid a commission of Rs 2,98,17,242 during the year 2009-10 to foreign service providers for procurement of export orders and sale of goods to the concerned parties out of India. Since such services were

taxable under Clearing and Forwarding agent services, Service Tax of Rs 30,71,176.00 was leviable. Service tax was not paid by the assessee.

On being pointed out in audit, the assessee management stated that they had paid export commission amounting to rs 2,98,17,242.00 which was related to financial year 2009-10. They had not paid service tax on this amount as per Notification No 18/2009 dated 7.7.2009 and no export commission has been paid by them for the period 2010-11. The reply is not tenable as Notification no 18/2009 dated 7.7.2009 is not applicable in this case as bill of export on which the amount of commission paid was shown, copy of agreement and half yearly return to this concern etc. as was required under the above notification was not shown to audit. Therefore above service tax of Rs 30,71,176.00 was payable on the said commission which was not paid and therefore is recoverable from the assessee along with interest.

The matter is brought to the notice of the Department for remedial action under intimation to audit."

4.3 After receipt of this audit objection department proceeded to issue show cause notice for the period from 2009-10 in 2013 invoking the extended period of limitation. In Para 7 of the show cause notice following has been observed:-

"7. Whereas it appears that since the above fact of suppression and violation of provisions of Notification No. 18/2009 dated 07.07.2009 came to the notice of the department only at the time of audit. Therefore, service tax amounting to Rs. 30, 71,176/- not paid by the party, is liable to be recovered from them along with interest, by invoking the extended period under proviso to Section 73 of the Finance Act. 1994 read with Section 75 of the act. The party has also rendered themselves liable for penal action as contemplated under Section 77 & 78 for contravention of Section 66 A, 68 & 70 of the Act read with Rule 6 and 7 of Service Tax Rules 1994."

4.4 On the issue of limitation Adjudication Authority has observed as follows:-

"24. The party has contended that extended period of limitation of five years is not invokable, as prescribed EX-2 returns, for the relevant period was filed by them in due course of them. Whereas the notice to show cause alleged that the party suppressed facts from the department and violated the provisions of Notification No. 18/2009-ST and that these facts came to the knowledge of the department

only during the course of the audit, hence extended period invokable.

24.1 As discussed in aforesaid paras, the party, though required under notification No. 18/2009-ST, failed to produce copy of the agreement dt. 01.01.09 to the audit, submitted the same only after issuance of letter from the jurisdictional range on 12th June, 2012 and now with this reply. Further, by not fulfilling the conditions of the Notification, as discussed in preceding paras, they have contravened provisions of Notification No. 18/2009-ST, hence of Finance Act'1994. Accordingly, I find that, the extended period has been rightly invoked as prescribed under proviso to section 73(1) of Finance Act'1994. Further as they had not paid service tax, under reverse charge mechanism, they are liable to pay interest as prescribed under section 75 of Finance Act'1994."

4.5 Notification No 18/2009-ST lays down the following procedure, for claiming the benefit under the said notification.

The relevant text from the notification is reproduced below:

"Provided that-

- a) The exemption shall be available to an exporter who,-*
 - (i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP1, before availing the said exemption;*
 - (ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;*
 - (iii) is a holder of Import-Export Code Number;*
 - (iv) is registered under section 69 of the said Act;*
 - (v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with sub-clause (iv) or sub-clause (v) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules,1994, for the specified service;*
- b) the invoice, bill or challan, or any other document issued by the service provider to the exporter, on which the exporter intend to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item (v) of clause (a);*
- c) the exporter availing the exemption shall file the return in Form EXP2 every six months of the financial year, within fifteen days of the completion of the said six months;*
- d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in*

clause (b) and the certified copies of the documents specified in column (4) of the said Table;

- e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.*
- f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;*
- g) where the amount of service tax in respect of the service specified against serial No. 2 of the Table exceeds one per cent. of the free on board value of the export then, the amount in excess of the said one per cent. shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994;*

4.6 For implementation of the above notification the said notification itself provides for filing of the Form –EXP1 and EXP2, at prescribed frequency with the jurisdictional Deputy/ Assistant Commissioner. The format of the said Form EXP1 & EXP2 is reproduced below:

*"Form- EXP1
[see Paragraph (a)(i)]
S.No-----
(to be filled in by the office of jurisdictional
Assistant / Deputy Commissioner)*

To,

*The Deputy Commissioner /Assistant Commissioner of Central
Excise*

Sir,

I/We intend to avail the exemption from service tax under Notification No.18/2009-ST, dated.....in respect of services for transport of said goods by road or services provided by a commission agent located outside India, which have been used for export of goods and the relevant particulars are as follows.

- 1. Name of the exporter.*

India and have used the same for export of goods during the period from to and the relevant particulars are as follows.

- 1. Name of the exporter.
- 2. Address of the registered / head office of exporter
- 3. Tel. No. and e-mail ID of the exporter
- 4. Service Tax Registration No.
- 5. Division Commissionerate
- 6. Membership No. Of the Export Council
- 7. Import Export Code No.....
- 8. Name of the Export Council
- 9. Details of Bank Account (Name of Bank, branch address and account number)

Table-A

S No	Details of goods exported (on which exemption of service tax availed) during the six months ending on.....							
	Details of Shipping Bill/ Bill of export (Please enclose self attested copy of Shipping Bill or Bill of Export) and Details of goods exported (in case of exports of more than one commodity, please fill in the proforma, commodity-wise)							
	No	Date	Date of Let Export Order	Export Invoice No	Date	Description of goods exported	Quantity (please mention the unit)	FOB Value (in rs in Lakhs)

Table-B

Details of specified services used for export of goods, covered under the Shipping Bill or Bill of Export mentioned in Table 'A' in respect of which the exemption has been availed during the six months ending on.....						Details of Documents attached showing the use of such services for export, the details of which are mentioned in Table 'A' (self attested)	Total amount of service tax claimed as exemption (rupees in lakhs)
Name of service provider	Address of service provider	Invoice No	Date	Description of specified service	Classification under the Finance Act, 1994		

9. Declaration:-

I / We hereby declare that-

- (i) I have complied with all the conditions mentioned in notification No 18/09-ST, dated 7th July, 2009;*
 - (ii) the information given in this application form is true, correct and complete in every respect and that I am authorised to sign on behalf of the exporter;*
 - (iii) no CENVAT credit of service tax paid on the specified services used for export of said goods taken under the CENVAT Credit Rules, 2004;*
 - (iv) I / we, am/ are enclosing all the required documents.*
- Further, I understand that failure to file the return within stipulated time or non-enclosure of the required document, duly certified, would debar me/us for the refund claimed aforesaid.*

Date:

Place:

Signature and full address of Exporter
(Affix stamp)

Enclosures: as above”

4.7 For availing the benefit of Notification No.18/2009-ST appellant was required to file details of export made against which they were claiming the benefit of exemption under the said notification. They have filed the details as detailed in the table below:-

Period	Date of filing EXP-2 Return
July 2009-Sept.2009	13 th Oct 2009
Oct.2009-Mar.2010	14 th Apr.2010
Apr.2010-Sept.2010	15 th Oct.2010

4.8 From the above it is evident that the appellant had filed the requisite details in the manner prescribed by the Notification with the jurisdictional authorities. Just for the reason that the same was not produced before the auditors at the time of audit cannot be ground for stating that these Forms were not filed. This fact could have been verified with jurisdictional officers. When all the details including the details of the shipping bill

export invoices etc., were filed by the appellants in the manner as prescribed, revenue should have before issuance of the show cause notice demanding the duty, should have verified and replied to the audit.

4.9 Admittedly the fact about commission paid by the appellant to the foreign service provider was not indicated by the appellant in the Shipping Bill as required under the said notification. However all the details as required under the notifications were made available by way of Form-EXP2 filed by the appellant.

4.10 The show cause notice has been issued invoking the extended period of limitation alleging that the appellant had not produced the copy of agreement with the foreign service provider and the relevant documents to audit at the time of audit. Though these documents were in existence and were made available to revenue authorities even before the issuance of show cause notice. As all the information which was necessary to determine eligibility under Notification No.18/2009-ST was available with the Revenue and the prescribed Return/Form was filed by the appellant they could not have suppressed any fact from the Department for which extended period of limitation could have been invoked. Where merely a procedural violation in respect of complying with a condition of Notification cannot be said to be an act of suppression for invoking extended period of limitation. No justification for invoking extended period of limitation is forthcoming from the show cause notice, order in original or the impugned order.

4.11 When all the facts were in the knowledge of the Department, extended period could not have been invoked as has been held by the **Anand Nishkawa Co Ltd. [2005 (188) E.L.T. 149 (S.C.)]**

"27. Relying on the aforesaid observations of this Court in the case of *Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay* [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the

parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In *Densons Pultretaknik v. Collector of Central Excise* [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts". This view was also reiterated by this Court in *Collector of Central Excise, Baroda v. LMP Precision Engg. Co. Ltd.* [2004 (9) SCC 703]."

4.12 Hon'ble Supreme Court in the case of **Continental Foundation Jt Venture [2007 (216) ELT 177 (SC)]** held as follows:

"10. *The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."*

4.13 Further in case of **Accurate Chemical Industries [2014 (310) ELT 441 (ALL)]** Hon'ble Allahabad High Court has held as follows:

"5. *Admittedly, a show cause notice was issued on 16 August 2007 beyond the prescribed period of one year but*

the Revenue sought to invoke the extended period of limitation under the proviso to Section 11A(1) of the Act. The Tribunal observed that during the period in question, the assessee had not sold any part of its products to independent buyers and the entire stock was transferred to M/s. Accurate Transformers Limited. Consequently, these clearances were liable to be treated as being made to a related person for its captive use and under Rule 9 read with Rule 8 of the Central Excise Valuation Rules, 2000, the duty was payable on 110%/115% of the cost of production, whereas it was paid on a lower value. On the invocation of the extended period of limitation, the Tribunal held that the assessee had duly filed ER-1 returns on a monthly basis. Under the circulars of the Central Board of Excise and Customs, the Range Officer was required to carry out a detailed scrutiny of the ER-1 returns and if this had been done, the short payment would have been detected. There was no evidence of any collusion between the assessee and the jurisdictional Central Excise Officers. The short payment was detected when an audit team visited the premises and examined the records but this, as the Tribunal held, could have been detected even by the jurisdictional Range Officer much earlier. In the circumstances, it was held that there was no suppression of fact or wilful misstatement on the part of the assessee and no ground was, therefore, available for invoking the extended period of limitation. In addition, the Tribunal observed that in the present case, the situation was revenue neutral since, in the facts of the case, the entire duty paid by the assessee in respect of the clearances of MS tanks and radiators to its transformer unit was available to the transformer unit as Cenvat credit. In other words, the Cenvat credit was available not to a third party buyer of the assessee's manufactured goods but to the assessee itself in its transformer unit. Since the situation was revenue neutral, this was an additional ground which weighed with the Tribunal to hold that the extended period could not be invoked.

6. *Having considered the judgment of the Tribunal, we see no reason to interfere with the finding of fact that if a scrutiny had been made by the Range Officer of the ER-1 returns, that would have revealed that the assessee had cleared its MS tanks and radiators to the owning company for the manufacture of transformers. This indicated that there was no fraud, collusion, misstatement or suppression of facts. Besides, since the situation was revenue neutral, no intent to evade the payment of duty could be ascribed to the assessee. Once, there was no intent to evade the payment of duty, the Tribunal was justified in coming to the conclusion that the extended period of limitation under the proviso to Section 11A(1) of the Act, would not be attracted....."*

4.14 As we do not find demand to be sustainable on the ground of limitation, we are not discussing the issue on merits.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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