

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017
COURT NO. 1

**Appeal No.ST/622/2009-CU[DB]
ST/706/2009-CU[DB]**

Date of Hearing: 08.09.2017
Date of Decision: 10.05.2019

[Arising out of Order-in-Appeal No.30/ST/JC (P&V)/CHD/ADJ/08 dated 29.07.2008 passed by the Commissioner (Appeals) Customs, Chandigarh]

For approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Devender singh , Member (Technical)

C.C.E Chandigarh, Punjab Cricket Association : **Appellant**

vs.

Punjab Cricket Association, C.C.E & S.T. Chandigarh : **Respondent**

Appearance:

Sh. Sudeep Singh, Advocate for the Appellant(s)
Sh. Atul Handa, A.R. for the Respondent(s)

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Devender singh , Member (Technical)

Interim order no. 56-57 / 2017

Final Order No. 60493-60494/2019

Per : Devender Singh

Brief facts of the case are that the appellants had provided taxable service in the category of "sale of space or time for advertisement" to M/s Gujarat Ambuja Ltd. The aforesaid service is specified under Section 65(105)(ZZZm) of the Finance Act, 1994 as a service leviable to tax with effect from 01.05.06. In this regard, two agreements dt. 07.10.1999 and 05.003.05 were entered into by the appellant with M/s Gujarat Ambuja Ltd.

2. Revenue received an intelligence that the appellant had not paid service tax on part of the agreement. Investigations were conducted and it was found that the agreement dt. 07.10.1999 was for period 01.10.99 to 30.04.2006 and total consideration was for Rs. 75,00,000. The appellants had received Rs. 55,00,000/- on 07.10.1999 and 24.01.2006. Hence, no service tax was leviable for the period upto 30.04.2006 under the aforesaid agreement. Agreement dt. 05.03.05 was for the period 01.03.05 to 28.02.15 and total consideration was Rs 1 crore 20 lakhs. Under this agreement, no service tax was leviable for the period 05.03.05 to 30.04.06. The appellant had received Rs. 60 lakhs on 04.02.05, i.e before the date on which service tax was levied on service tax.

3. The Revenue felt that since the appellants realised a part of the amount of service in advance before the date on which service tax was levied on the said service, the appellant were leviable to pay service tax on that value of service tax, which was attributable to the service rendered in the period after service tax was levied on the said service.

4. Accordingly, a show cause notice dt.05.03.2008 was issued to the appellant demanding service tax of Rs. 8,33,340/- along with interest and proposing penalties under Section 76, 77 and 78 of the Finance Act, 1994.

5. The matter was adjudicated and the demand was confirmed along with interest and imposition of equivalent penalty under Section 78 as well as penalties under Section 76 and 77 of the Finance Act, 1994.

6. The appellant went in appeal. The Commissioner (Appeals) upheld the demand along with interest. Penalties under Section 77 and 78 upheld. However, penalty under Section 76 was set aside.

7. Aggrieved from the same, the appellants have filed this appeal. Revenue has also filed an appeal against the order being aggrieved by dropping a penalty under Section 76 of the Act.

8. Ld. advocate for the appellants submits that they are not challenging the taxability and the demand. They are only contesting the interest and penalty. He took us through one of the agreements between Punjab Cricket Association, and Gujarat Ambuja Cement, showing the payment pattern mention in clause 2 of the agreement. He also stated that they had made month wise payments of service tax and a sum of Rs. 7,47,467/- has already been deposited, which includes amounts deposited on monthly basis. He contended that they had computed their liability to service tax on pro-rata basis as informed by them by the investigating officer in his letter dt. 17.05.2007. A copy of the letter was also placed on record. The investigating officer had worked out the amount for May, 2006 to April, 2007 as Rs. 2,22,714/- and further

calculated the amount for November, 2007 which was worked out to Rs. 72,679/- and these two amounts had been deposited on 19.10.2007 and 20.11.07. From December, 2007 onwards, they had been depositing their liability regularly and had deposited Rs. 3,56,933/- upto March, 2008. He contended that they had deposited the interest as per the letter dt. 17.05.07 of the Department. There was thus no justification for asking interest on lump sum payment of service tax. He also invited attention to the Board Circular dt. 05.11.03 in which it was mentioned that the value of service tax received in advance for a service becoming taxable subsequently, service tax has to be paid attributable to relevant month/quarter on pro-rata basis. He also contended that the penalty under Section 78 was not justified as there had been regular exchange of correspondence with the Department and in those circumstances suppression cannot be alleged and as there was bona fide reason for them for not depositing the service tax lump sum, they were entitled to benefit of Section 80 of the Finance Act.

9. Ld. AR also relied upon the Board Circular dt. 05.11.03 and submitted that the amount of service tax was to be worked out on pro rata basis but has to be paid on lump sum basis as analysed in the order of the Ld. Commissioner (Appeals). He also stated that as per the amended definition of taxable service under Rule 65(105) of the Finance Act, 1994, the service tax is payable on receipt of advance payment irrespective of when the services are provided. He relied on the following case laws:-

(1) P.T Education & Training Service Vs. CCE Jaipur, 2009 (14) STR34 (Tri. Delhi)

(2) CCE Allahabad vs. Krishna Coaching institute, 2009 (14) STR (Tri. Delhi).

10. Heard the parties and perused the records.

11. We find that undisputed facts are that the appellant had signed two agreements before Service Tax levy on "sale space or time for advertisement" came into effect on 01.05.06. The appellants had received the advance payments in respect of both the agreements for the rendition of part of the service after 01.05.06. The appellants are not contesting the demand of duty but are only contesting the interest and penalty part.

12. We find that both the sides have relied on the Board circular on 05.11.03 in which it has been clarified as under:-

"In this regard it may be noted that Rule 6 prescribe the procedure of payment of tax. The liability to tax is created by Section 66 of the Finance Act, 1994 as amended from time to time. The liability to pay tax is fastened on the service provider by Section 68 of the said Act. These two sections read together imply that service provider is taxable, tax has to be paid on its value. Section 67 also clarifies value of service as the amount charged for the taxable service by the service provider. In other words, an amount becomes value of taxable service only when it has a nexus with the service provided. That is the reason why the expression used in Rule 6 is "value of taxable service" and not amount. The implication is that the tax has to be paid on the value of taxable services attributable to the service provided in a month/quarter as and when it is received. Thus, Rule 6(1) cannot be read in isolation. When read along with the provisions of the Act, it becomes clear that where the value of taxable service has been received in advance for a service which became taxable subsequently, service tax has to be paid on the value of service attributable to the relevant month/quarter which may be worked out on pro-rata basis."

13. We find that in terms of Rule 6 of Service Tax Rules 1994, the service tax was required to be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments were received towards the value of taxable services (emphasis supplied). Rule 6 provides for payment of service tax on taxable services on receipt of payment of the value of taxable services, which may be after the completion of taxable service, during the course of providing the taxable service or in advance before the provisioning of taxable service. In the case of appellant, subject services being provided by them became taxable from 01.05.2006 onwards and on that day they were already in receipt of payment in advance in respect of taxable services to be provided subsequently. As such the twin requirements for payment of service tax by 5th day of the following month namely, (i) that payment should be for value of taxable service to be provided and (ii) the actual receipt of the said payment, existed on 01.05.2006. In view of thereof, while the Board Circular dt. 05.11.2003 provided the basis to work out the value on pro-rate basis for the period prior to 01.05.2006 and after 01.05.2006, the payment of the Service Tax on the advance already received for value of taxable service to be rendered after 01.05.2006 was to be made for the month of May, 2006. Thus, the amount already received and worked out on pro-rata basis for the period 01.05.2006 and onwards has to be treated as value of taxable service received in the month of May, 2006. Hence, the Service Tax on the same was payable by 05.06.2006. In this regard, the following observations of the Ld. Commissioner (Appeals) are also quite relevant:-

"This situation was also addressed w.e.f. 16.06.2005 when the definition of taxable service under Section 65(105) of the Finance Act, 1994 as amended by Finance Act 2005 to read "taxable service" means any service provided or to be provided. The words "to be provided" were inserted to provide for taxable services for which advance payments had been received in lieu of services yet to be provided. According to the amended provision service tax shall be payable on receipt of advance payments irrespective of the fact when the services are provided in respect of which such advance has been received."

Hence, we hold that the Ld. Commissioner (Appeals) has rightly upheld the demand.

15 As the payment of service tax was required to be done on a lump sum basis, we find that the amount of interest demanded for the delayed payment of service tax is in accordance with Section 75 of the Act. Even if the investigating officer had earlier informed about the interest on monthly basis, the same cannot override the statutory requirement for paying the interest on the demanded amount as required by the statute. Hence, the demand of interest is upheld.

16. As to the penalty under Section 78, we find that the appellants were in regular correspondence with the department from the beginning after onset of the levy and had been following the advice given to them by the investigating officer to pay monthly instalments of service tax along with interest. Besides the service tax on impugned service, had been newly introduced at that time and the appellants had acted very much in line with the advice given by the investigating officer vide later dt. 17.05.07. In these circumstances, suppression cannot be alleged. We also find that in the unique circumstances of the case where appellants were acting in

line with instructions of the Department from the beginning and there was change in the stand of Department, benefit of Section 80 would be admissible to the appellants. Since, we have allowed the benefit of Section 80 of the Finance Act to the appellant, the Revenue's appeal No. ST/622/2009 against order of Commissioner's (Appeal) dropping the penalty under Section 76 is liable to be dismissed.

17. In view of the above, the demand of Rs. 8,33,340/- along with interest is upheld. Penalties imposed are set aside by allowing the benefit of Section 80 of the Finance Act 1994.

18. In result, (i) appeal No. ST/706/09 is disposed of in above terms;

(ii) Revenue's appeal No. ST/622/09 is rejected.

(pronounced in the court.....)

Devender Singh
Member (Technical)

Archana Wadhwa
Member (Judicial)

Per: Archana Wadhwa:

With respect to Id. Member (Technical), I have a different opinion about the confirmation of interest, as held by Id. Member (Technical). Accordingly, separate order is being recorded.

2. As the factual position has already been discussed in the order proposed by Member (Technical), the facts are not being repeated so as to avoid redundancy. Id. Member (Technical) has upheld the confirmation of interest by applying the provision of Rule 6 of the Valuation Rules for payment of Service tax on taxable services, on receipt of advance payment of the value of the said services. The appellant had not contested the demand and has paid the same. The only issue required to be decided in the present appeal is as to whether the appellant is liable to pay interest on the ground that they should have paid the service tax on lumpsum basis, on the introduction of service tax to Service net.

3. It is on record that the appellant was in touch with their jurisdictional Central Excise Officers and paid tax on monthly basis as per the advice of the jurisdictional Superintendent. In such a scenario, it cannot be held that there was any misstatement or suppression on the part of the assessee, with an intent to evade any dues. In fact, the Id. Member (Technical) has himself extended the benefit of Section 80 of the Finance Act and has set aside the penalties imposed upon the assessee, by observing that the appellants were acting under the instruction of the department itself.

4. In view of the above, the short question required to be decided, which is contested by the appellant, is regarding the demand of interest being barred by limitation. The show cause notice raising such demand of interest was issued on 05.03.2008 for the period 05.06.2006 holding that the service tax should have been paid on lumpsum basis on 05.06.2006.

The Hon'ble Delhi High Court in the case of ***Kwality Ice Cream Company vs. Union of India – 2012 (281) ELT 507 (Del.)*** has followed the Hon'ble Supreme court decision in the case of ***Commissioner vs. TVS Whirlpool Limited – 2000 (119) ELT A177 (SC)*** and has held that the period of limitation for demand of duty, as provided under Section 11A of the Central Excise Act, 1944, would equally apply to the demand of interest, except in exceptional circumstances of mis-statement, fraud etc. Reference can also be made to another decision of Hon'ble Delhi High court in the case of ***Hindustan insecticides reported as 2013 – TIOL -631-HC-DEL*** laying to the same effect. Inasmuch as in the present case, the Id. Member (Technical) has himself held that there was no mis-statement etc. on the part of the appellant and has set aside the penalty, it has to be held that the interest demand would also be barred by limitation. Accordingly, by following the above referred order of the Hon'ble Supreme Court as also Hon'ble High Court, I hold that the demand of interest is barred by limitation and is required to be set aside. Accordingly, I set aside the impugned order and allow the appeal with consequential relief to the

appellant. However, as regard setting aside of Penalty, I agree with the Id. Member (Technical).

(Archana Wadhwa)
Member (Judicial)

Difference of Opinion

Whether the impugned order is required to be upheld for the purpose of confirmation of demand of interest as held by Ld. Member (Technical) or the interest demand has to be set aside as barred by limitation, as held by Member (Judicial).

(Devender Singh)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

Per: Ashok Jindal

5. Heard the parties.

6. The following reference has been made for consideration before me:-

"Whether the impugned order is required to be upheld for the purpose of confirmation of demand of interest as held by Ld. Member (Technical) or the interest demand has to be set aside as barred by limitation, as held by Member (Judicial)."

7. The facts and arguments advanced by both sides are not repeated for the sake of brevity as the same have already been recorded in the original order.

8. I find that the sole issue for reference is whether the limitation is applicable for demand of interest or not? Admittedly, the Referral Bench itself extended the benefit of Section 80 of Finance Act, 1994 holding that the appellants were under bonafide belief that they were not liable to pay service tax as they have deposited service tax on monthly basis. In that circumstance, I hold that the demand of interest is barred by limitation. Therefore, I agree with the view expressed by the Hon'ble Member (Judicial).

9. The reference is answered accordingly.

10. The Registry is directed to place matter before the Referral Bench for further proceedings.

(pronounced in the open court on 06.02.2019)

(Ashok Jindal)
Member(Judicial)

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Service Tax appeal No. 622 and 706 of 2009 Customs (DB)

Majority Order

In view of the majority order, assessee's appeal is allowed by setting aside the interest & penalty. Revenue's appeal is rejected.

(Archana Wadhwa)
Member (Judicial)

(C.L. Mahar)
Member (Technical)