CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH
CHENNAI

Appeal No.ST/12/2011

[Arising out of Order-in-Appeal No.93/2010-ST dt. 06.10.2010 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore]

Precot Meridian Ltd. Appellant

Versus

Commissioner of Central Excise & ST
Coimbatore Respondent

Appearance :

Shri J. Shankarraman, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 25.06.2018

FINAL ORDER No. 41880 / 2018

Per Bench

The facts of the case are that appellants are engaged in manufacture of textile products. They had obtained commercial loans referred to as "External Commercial Borrowings (ECB). From the investigations conducted by the department, it emerged that appellants had effected payments of US$ 135000 towards processing charges / upfront fee to certain banks for facilitating ECB of

US$ 9 million. Department took the view that the appellants were liable to pay service tax on the said upfront fee paid by them on reverse charge basis under the category of 'Banking and Other Financial Services' (BOFS). Accordingly, a show cause notice dt. 12.05.2008 was issued to appellants, inter alia proposing demand of tax liability of Rs.7,32,344/- with interest and imposition of penalties under various provisions of law. In adjudication, the original authority vide an order dt. 04.11.2009 confirmed these proposals and also imposed penalties under Section 76, 77 & 78 of the Finance Act, 1994. In appeal, the Commissioner (Appeals) vide impugned order dt. 06.10.2010 set aside the penalty imposed under Section 76 ibid, however upheld the remaining order of the original authority. Hence this appeal.

2. Today when the matter came up for hearing, on behalf of the appellant, Ld. Advocate Shri J. Shankarraman made the following submissions which can be broadly summarised as under :

i) Upfront fee collected is not for any taxable service provided by ICICI, Bahrain Branch to assessee. The verification of credit worthiness of the borrower by conducting enquiries, investigations etc. for the purpose of credit appraisal is not provided by the bank to the customer.

ii) Even assuming without admitting that it is a service, the activity of processing has been performed by ICICI bank Ltd., Coimbatore and not ICICI Bank Bahrain. The mandatory obligation is cast on the receiver of service from foreign service provider when such service provider does not have office in India. However, the ICICI Bank Bahrain very much had an Indian office at Coimbatore which only handled application and documents in connection with the loan.

iii) Demand at best can be fastened on ICICI Bank, Coimbatore and not on the appellant.

iv) In any case, the entire proceedings are hit by limitation. The SCN has alleged suppression without any basis or evidence.

v) Further the issue of liability to pay service tax under reverse charge mechanism prior to introduction of Section 66A of the Act was under much doubt and confusion and there were several judgments holding in favour of assessee as well as Revenue. The said confusion was set to rest only after the judgment of Hon'ble High Court of Bombay in the case of *Indian National Ship Owners Association Vs UOI* – 2009 (13) STR 235 (Bom.) and its affirmation by the Hon'ble Apex Court on 14.12.2009 [2010 (17) STR J57 (SC)].

vi) During the relevant period of dispute, Service Tax Circular No.36/4/01 dt. 08.10.2001 was in vogue, which had inter alia clarified that services providers beyond the territorial waters of India are not liable to pay service tax as provisions of service tax having been extended to all such areas so far. The circular was very much valid till it was withdrawn on 10.05.2007.

vii) The department has no justification for proposing penalties under Section 77 & 78 of the Act or revocation of larger period.

3. On the other hand, Ld. A.R Shri B. Balamurugan, supports the impugned order. He further submits that upfront fees or processing fees paid by appellant will definitely fall under the category of BOFS. The appellant has been provided services from a country outside India and the service so provided would therefore become taxable on reverse charge basis. Further, in view of amendment of Rule 2 (1) (d) (iv) of Service Tax Rules, 1994 by Notification No.10/2006-ST dt. 19.04.2006, the argument of the appellant that they cannot be taxed since foreign service provider had office in India will not have merit.

4. Heard both sides and have gone through the facts. We first intend to take up the matter from the limitation point of view.

5. From the facts on hand, we find that the dispute has emanated from the upfront / processing fees of US$ 135000 equivalent to Rs.59,83,200/- paid by appellant on 26.12.2006. It is also seen that since the proceedings are resultant of the DGCEI investigations and in particular, the letter dt.11.6.2007 to the appellant which was replied to by the latter on 20.06.2007 itself. We also note that the disputed tax liability was paid up during the course of investigation, on 14.09.2007. However, the SCN was issued only on 12.05.2008. During this very period, the issue of taxability on such payment made to foreign service provider was mired in litigation. As correctly pointed out by the Ld. Advocate, this confusion was finally sorted out only after the judgment of the Hon'ble High Court of Bombay in *India National Ship Owners Association* (supra) on 11.12.2008 and its subsequent affirmation by the Hon'ble Apex Court on 14.12.2009. We further find that in response to the query from DGCEI, the appellant, as early as in June 2007 and August 2007 and thereafter, have consistently argued that upfront fee collected is not for any taxable service provided by the foreign service provider; that the service is not "Banking and Other Financial Service" under Section 65 (12) of the Act and that upfront fee is also not "interest on loans". Appellants also reiterated the same contentions even in their reply to the SCN. It is also pertinent to note that the entire proposed tax liability was paid by the appellant even before issue of SCN.

6. Viewed in this context, the appellant cannot be charged with having suppressed information or having indulged in misstatement or fraud with intent to evade payment of tax liability. On the other hand, even during the investigation

stage and before issue of SCN appellants have paid up the tax liability on 28.11.2007.

7. Viewed in this light, extended period of limitation cannot be invoked. The ingredients required for invoking extended period of limitation are not present in this case. The proceedings are therefore hit by limitation. Hence without going into the merits of the matter, we hold that appellant succeeds on the plea of limitation.

Appeal is allowed on the grounds of limitation.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

gs