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

Appeal Nos. ST/340/2011 and ST/41643/2013

(Arising out of Order-in-Original No.8/2011-ST dated 28.3.2011 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore and Order-in-Appeal No.155/2013 dated 23.4.2013 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Coimbatore)

M/s. Benchmark Services — Appellants

Vs.

Commissioner of GST & Central Excise
Coimbatore — Respondent

Appearance

Shri M.N. Bharathi, Advocate for the Appellant
Shri K. Veerabhadra Reddy, ADC (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 :20.11.2018
Date of Pronouncement :18.12.2018

Final Order Nos. **43117-43118 / 2018**

Per Bench

Brief facts are that appellants are holding service tax registration under the category of Business Auxiliary Service (BAS). They entered into an agreement with ICICI Bank for rendering activities of collection of instalment / loan from the customers of the bank. The department was of the view that the said activity would fall within the category of BAS as defined under Section 65(105)(zzb) of Finance Act, 1994. Show cause notice dated 21.4.2010 was issued for the period 2004 – 05 to December 2009 – 10 (December 09) proposing to demand service tax on the amounts received from ICICI bank under BAS. A further demand was also made being service ax on reimbursable expenses. The said show cause notice was adjudicated by the Commissioner who confirmed the demand along with interest under the category of BAS after granting cum-tax benefit. The demand on reimbursable expenses was also confirmed. The Commissioner also imposed penalties. A further show cause notice dated 20.4.2012 was issued for the period October 2010 to March 2011 demanding service tax on the amount received from ICICI bank under the category of BAS. After due process of law, the original authority confirmed the demand under this show cause notice along with interest and imposed penalties. In appeal, Commissioner (Appeals) upheld the same. Hence the appellant is before this Tribunal against the confirmation of demand under BAS as well as on reimbursable expenses.

2.1 On behalf of the appellant, ld. counsel Shri M.N. Bharathi submitted that the appellant had entered into an agreement with ICICI bank engaging the appellants to collect the instalments from customers / depositers. The said activity comes under Recovery Agent Service which came within the taxable net only with effect from 1.5.2006. The demand prior to this date cannot sustain for the reason that the said activity would not fall under BAS. The demand after 1.5.2006 is not sustainable under BAS since the services would fall under Recovery Agent Service.

2.2 It is further submitted by him that the appellant had not received any service tax from ICICI bank as the bank was of the view that the said activity carried out by appellant is not liable to service tax. The appellant had informed the Assistant Commissioner of Central Excise vide letter dated 10.11.2005 intimating this fact. In the said letter, the appellant had intimated that the ICICI bank was refusing to pay service tax contending that the activity of the appellant of recovering the installments is not subject to levy of service tax. Even though the department had received this letter on 11.11.2005, they failed to give any clarification to the appellant. He thus argued that the appellant did not pay service tax on the bonafide belief that the activity is not subject to service tax and had no intention to evade payment of service tax. The show cause notices issued invoking extended period cannot sustain for the reason that the appellant has furnished all details when requested by the department and has not suppressed any facts. The ld. counsel adverted to the letters submitted by the appellant to the department. Whenever the documents were called for, the appellant has furnished the entire documents. The non-payment of service tax under the BAS was only due to the bonafide belief that the said services are not subject to levy of service tax. This is reflected from the effort taken by the appellant to reach to the department seeking clarification as to whether the activity is subject to service tax or not. Though they raised the invoices showing the service tax separately ICICI refused to pay the tax. Taking note of the fact that ICICI has not paid service tax to appellant, the Commissioner while adjudicating the show cause notice for the earlier period dated 21.4.2010 has given the appellant the cum-tax benefit. These being the facts, the show cause notices are time-barred and the demands cannot sustain.

2.3 With regard to the demand on reimbursable expenses, he submitted that these were actual expenses incurred by the appellant for obtaining demand drafts, courier charges, telephone charges, travelling expenses etc. Being reimbursable expenses, they are not subject to levy of service tax during the relevant period as decided by the Hon'ble Supreme Court in the case of Union of India Vs. Intercontinental Consultants and Technocrats P. Ltd. – 2018 (3) TMI 357 (SC).

2.4 Without prejudice to the above submissions, he submitted that the issue was an interpretational one and there were several notifications issued with respect to amendments in the definition of BAS during the relevant period. The issue being an interpretational one, the Tribunal in the case of Commissioner of Central Excise Vs. Sundaram Finance Ltd. – 2018 (10) GSTL

580 (Tri. Chennai) had set aside the demand for the extended period. He therefore strongly argued that the demand for the extended period and the penalties may be set aside.

3. The ld. AR Shri K. Veerabhadra Reddy supported the findings in the impugned order. He submitted that the appellant was engaged for recovery of the defaulted dues from the customers. The said activity falls under BAS. The contention of the appellant that the said activity is not taxable is without any basis. Merely because ICICI bank refused to pay service ax, the appellant cannot escape from the liability to pay service ax. The appellant has suppressed the facts with intention to evade payment of service tax and therefore the demand raised invoking extended period is legal and proper.

4. Heard both sides.

5.1 The first contention put forward by the ld. counsel for the appellant is that the activity of collecting amounts from the customers / defaulters would not come under BAS prior to 1.5.2006. Undisputedly appellants are acting in the capacity of collecting agents for ICICI Bank and they collect the dues payable by customers to such Banks on behalf of the Banks. The definition of BAS under Section 65(19) of the Act is reproduced as under:-

"Business Auxiliary Service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) *promotion or marketing of service provided by the client; or*

(iii) *any customer care service provided on behalf of the client; or*

(iv) *procurement of goods or services, which are inputs for the client; or*

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) *production or processing of goods for, or on behalf of, the client;]*

(vi) *provision of service on behalf of the client; or*

(vii) *a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods.*

5.2 It is his argument that such recovery agent services have been bought under the recovery agent service with effect from 1.5.2006. The relevant definition of Recovery Agent Service is as under:-

"Taxable service means any service provided or to be provided to a banking company or a financial institution including a non-banking financial company or any other body corporate or a firm, by any person, in relation to recovery of any sums due to such banking company or financial institution, including a non-banking financial company, or any other body corporate or a firm, in any manner;"

Though the services fall under Recovery Agent Service, the demand has been raised under BAS which in our view is incorrect. In S.K. Associates Vs. Commissioner of Central Excise, Salem vide Final Order No. 42043 to 42046/2017 dated

11.9.2017, the Tribunal had analysed the scope of activities that would come under BAS. In the said case, the assessee therein was engaged by ICICI bank to canvass prospective customers to perform the work from the stage of obtaining the application from prospective customers, processing such application, verify, undertake file sourcing till disbursement of loan. Such activities would fall under BAS even after 1.5.2006. As per the agreement dated 28.1.2005, the appellant has been appointed as mere collection agent. The agreement itself is named as 'Collection Agreement'. The scope of the work is to act as collection agents of ICICI. Such activity would definitely fall under 'Recovery Agent Service'. The demand under BAS for the period after 1.5.2006 therefore cannot sustain, the demand of service tax under BAS after 1.5.2006 is therefore set aside.

5.3 The ld. counsel for appellant has argued on the ground of limitation. He has adverted our attention to the letter dated 10.11.2005 issued by the appellant to the Assistant Commissioner of Central Excise. It is seen that the said letter has been served upon the department on 11.11.2005. In the said letter, the appellant has requested the department to clarify whether the activity is subject to levy of service ax. They have intimated the department that ICICI bank has refused to pay service tax stating that it is not a taxable activity. The department has not responded to this letter of the appellant. However, the show cause notice for the period from 2004 – 05 to 2009 – 10 has been issued only on 21.4.2010. Further, it is seen from the receipts that the ICICI bank has not paid service tax. The Commissioner has quantified the liability of service tax after giving cum-tax benefit. The appellant had not been paying service tax only for the reason that they were under the bonafide belief that the said services are not subject to levy of service tax. Even after seeking clarification from the department, since they did not receive any reply, they have opted not to pay the service tax believing that these services are not taxable. Though the department alleges that the appellant is guilty of suppression of facts, there is no evidence brought forth as to what is the positive act committed on the part of the appellant. The various documents show that the appellants have furnished the entire documents as requested by the department. In fact, the demand has been quantified basing upon the document produced by the appellant. There is no case for the department that appellant had been maintaining parallel records so as to evade payment of service tax.

5.4 From the above discussions, we are of the considered view that the department has failed to establish suppression of facts with intent to evade payment of service tax so as to invoke extended period. The appellant therefore succeeds on the ground of limitation. The demand made invoking the extended period is set aside as time-barred.

5.5 The second issue is with regard to the demand of service tax on reimbursable expenses. The appellant has stated that these were expenses incurred by the appellant for obtaining demand drafts, courier expenses, travelling expenses etc. These are actual expenses incurred by the appellant which would fall under reimbursable expense. Following the decision of the Apex Court relied by the appellant in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. (supra), we are of the view that the demand on reimbursable expense cannot sustain and requires to be set aside, which we hereby do.

6. From the above discussions, we hold that the impugned orders are modified to the extent of setting aside the demands on BAS prior to 1.5.2006 on the ground of being time-barred. After 1.5.2006, the demand is set aside since the activity does not fall under BAS. The demand on reimbursable expenses is entirely set aside. The appeals are allowed in above manner, with consequential relief, if any.

(Pronounced in court on 18.12.2018)

(**Madhu Mohan Damodhar**)
Member (Technical)

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

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