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

Application No.ST/Misc/41103/2017
Appeal No.ST/587/2011

[Arising out of Order-in-Appeal No.118/2011 (MST) dt. 27.07.2011 passed by Commissioner of Central Excise (Appeals), Chennai]

Counter Point Management Plus — Appellant

Versus

Commissioner of GST & CE
Chennai South Commissionerate
Chennai — Respondent

Appearance :

Shri S. Murugappan, Advocate
For the Appellant

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

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 13.12.2018

FINAL ORDER No. 43175 / 2018

Per Shri Madhu Mohan Damodhar

The facts of the case are that pursuant to audit conducted by the department, it emerged that appellants during the period January 2007 to December 2008 paid an amount of Rs.1,68,23,658/- for the use of logo and study material to their USA based franchiser, namely, M/s.Crest Com International Limited, USA. Department took the view that the activity of the appellants would fall under ambit of 'Franchise services' as per section 65 (105) (zze) of the Finance Act, 1994. Accordingly, a show cause notice dated 18.03.2009 was issued to the appellants inter alia, proposing demand of Rs.20,84,270/- under franchisee service for the period January 2007 to December 2008 along with interest thereon and also imposition of penalty under various provisos of law. In adjudication, original authority vide an order dt. 31.07.2009 confirmed the demand as proposed in SCN with interest and also imposed penalty under Section 77 & 78 of the Act. In appeal, Commissioner (Appeals) vide impugned order dt. 27.07.2011 upheld the order of original authority. Hence this appeal.

2. When the matter came up for hearing, on behalf of appellant, Ld. Advocate Shri S.Murugapan made oral and written submissions which can be broadly summarized as under :

(i) The appellants have a Technical Business Services and Marketing Agreement with M/s.Crest Com International Ltd., USA for distributing the USA company's management programmes. The appellant who is the master distributor as per the above agreement has a right to appoint other distributors for marketing and actually implementing the training programme. The agreement defines the person who conducts the management training programme as an Active Distributor.

(ii) As per the agreement the proceeds from the initial franchise fee paid by the new distributor is to be divided between the appellants (master distributor) and the USA company (producer) in the ratio of 40:60 i.e. 40% to master distributor and 60% to the producer. Apart from the above, the distributors are required to pay 35.5% of their gross revenue as royalty which is to be shared between the producer and master distributor as per the percentages mentioned in the agreement.

(iii) The original authority has treated the amounts shared with the USA producer as payment of royalty and has demanded service tax which was affirmed by the Commissioner (Appeals). Such a demand is not sustainable on the following grounds :

(a) The actual distributor or the above distributor conducts the management training programme and for whatever amount is collected, pays the service tax, as applicable. For all the payments received from the distributors, the appellants have collected service tax and remitted the same to the department. There is not a single case where service tax was not collected and not remitted in respect of training programmes conducted. The revenues earned from these transactions by the appellants was shared as per the percentages mentioned in the distributor agreement. Therefore, it can be seen that such sharing of the revenue are after payment of applicable service tax only.

(b) There is no separate service envisaged from the USA supplier to the master distributor i.e. the appellant here. After discharge of service tax, the income earned is shared in their role as “master distributor” and “producer” and accordingly, there cannot be any further levy of service tax.

(c) The appellants also rely upon the judgment of the Kerala High Court in the case of *Speed and Safe Courier Services Vs. Commissioner reported in 2010 (18) S.T.R.550,* where the Hon’ble High Court of Kerala negative the department’s contention for charging Service Tax for the second time when the revenues were shared between the courier service and the franchisees.

3. On the other hand, Ld. A.R Shri B. Balamurugan supports the impugned order. He drew attention to para 5.4 and 5.5 of the impugned order where Commissioner (Appeals) has analysed the agreement between the appellant (Franchisee) and M/s.Crest Com International Limited, USA. (Franchisor). The appellant had not produced any evidence that the service tax collected had been paid to the department and further onus is on the appellant to substantiate any contention that the royalty paid by them to foreign service provider had also suffered service tax and the same had been paid to the department.

4.1 Heard both sides. On going through the facts on record, we find that in the reply dt. 18.06.2009 to the SCN, the facts of which has been summarized in para-6 of the order of the original authority where the original authority had narrated the submissions of appellants that the payments are made by them to Crest Com International Ltd., U.S.A only after payment of service tax for which a detailed working had been enclosed as an annexure. However, we find that these averments of the appellant have not been critically analyzed by the original authority.

4.2. We find that as per the grounds of appeal, summarized in para-3 of the order, all the payments made to Crest Cam International Ltd., U.S.A were paid only after payment of service tax in India. However, even the lower appellate authority has dismissed the prayer on the grounds that onus is on the appellant to substantiate the contention that royalty paid by them to foreign service provider already suffered service tax and that the same had been paid to the department. The original authority has not accepted the contention of the appellant concerning payment of service tax "in absence of proof of documentary evidence". From the discussions, what comes to the fore is that while appellants have been consistently contending that the amount sent to Crest Com International Ltd., U.S.A has already suffered, both the lower authorities have chosen to disregard the same on the grounds that such claim is not backed up with necessary documentation. On the other hand, appellant has argued that they have supplied necessary evidence to substantiate their averment before both the lower authorities, however the same has not been adequately considered. In the interests of justice, we therefore are of the opinion that the matter requires to be remanded to original authority to cause necessary verification on this aspect, namely, whether the payouts made to Crest Com International Ltd., U.S.A. did indeed suffer service tax earlier. Needless to say, appellants should be given suitable opportunity to present their case including production of submission of additional evidence, if any.

4.3 Coming to penalty, taking into account the facts on record as also the genesis of the dispute, we find that penalty imposed under Section 78 is an overkill and requires to be set aside which we hereby do. The appeal is therefore partly allowed and partly remanded on above terms.

4.4 The MA filed by Revenue for change of cause title is allowed.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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