IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
Court : DB- B1

Appeal No. ST/600/2012

(Arising out of Order-in-Appeal No. 131/2012 dated 18.07.2012 passed by the Commissioner of Central Excise (Appeals), Coimbatore).

M/s. Richard Felix : Appellant

Vs.

CCE & ST, Coimbatore : Respondent

Appearance

Shri J. Shankarraman
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: 03.01.2019

FINAL ORDER No. **40111/2019**

Per Bench

The issue involved in the present appeal relates to the taxability of the services of distribution of the products of M/s. Conybio Healthcare (India) Pvt. Ltd. by the appellant under the Direct Selling Concept commonly known as

“Multi-level Marketing”. Entertaining a doubt that the activities undertaken by the assessee are covered by the scope of the definition of “Business Auxiliary Service” as a taxable service, a Show Cause Notice (SCN) dated 21.04.2011 was issued proposing to demand service tax under Business Auxiliary Service along with interest and various penalties. SCN dated 21.04.2011 categorically mentions that the appellant had not even obtained the service tax registration and that the appellant had even contravened the provisions of Section 70 of the Finance Act,1994 read with Rule 7 of Service Tax Rules, 1994, whereby the appellant had not filed the periodical ST-3 returns. The SCN also mentions that they had pursued simultaneously and separately with Conybio who, vide letters dated 12.10.2010 and 19.10.2010 revealed the details of the commission paid by them to the appellant. From the explanations offered by the appellant at various stages also, the appellant has nowhere denied the allegations levelled against him but for explaining the modus operandi and building a loyal following for the brand conybio. Nowhere is there any denial as to the marketing or sale of the products of conybio. The proposes made in the SCN were confirmed in the adjudication and the same was upheld by the Commissioner (Appeals) against which the present appeal is filed before this forum.

3. Today when the matter was taken up Shri J. Shankarraman, Ld. Advocate appeared on behalf of the appellant and relied on the decision of the Delhi Bench of the Tribunal in the case of *Charanjeet Singh Khanuja Vs. CST, Indore/Lucknow/Jaipur/Ludiana* reported as 2016 (41) STR 213 (Tri.-Del.) to say that if not on merits the appeal should succeed on limitation as held by the Delhi Bench.

4. Per contra, Shri B. Balamurugan, AC (AR) appeared on behalf of the Revenue supported the findings of the authorities below. He also contended that even after being pointed out as to the requirement of registration after the introduction of the negative list the appellant did not register himself nor did he even file ST-3 returns.

5.1 After hearing and after going through the decision relied on by the Ld. Advocate, we are of the view that the appeal does not survive on merits since the Delhi Bench has considered the identical issue and ruled in favour of Revenue. But however, on limitation we are allowing the assessee's appeal on the consideration that the issue in dispute was mired in litigation and was put to rest only by the Tribunal decision in *Charanjeet Singh Khanuja* (supra) on 09.06.2005 in a batch of 38 appeals. While confirming that the activity involved would fall within the scope of BAS, the Tribunal however set aside the longer period of limitation, on the following grounds:

> "**16.** Another plea raised in these appeals is regarding limitation. It is the contention of the assessees that there was absolutely no suppression or mis-statement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to evade payment of Service tax. The Department's contention, on the other hand, is that the assessees neither obtained service tax registration nor did they declare their activities to the jurisdictional Service tax authorities nor did they file ST-3 Return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assessees did not apply for Service Tax Registration or did not file ST-3 Returns or did not declare their activities to the jurisdictional central excise authorities, it cannot be inferred that this was a wilful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals) after analyzing the activities of the assessees had taken the view that the same is not covered by the definition of "Business Auxiliary Service" under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994. When on the issue involved in this group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assessees was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of *Continental Foundation Joint Venture* v. *CCE, Chandigarh* reported in 2007 (216) E.L.T. 177 (S.C.) when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11A(1)cannot be invoked and in our view, the ratio of this judgement of the Apex Court is applicable to the facts of these cases. Therefore, the longer limitation period of 5 years under proviso to Section 73(1) of the Finance Act, 1994 would not be invokable and duty can be demanded only for normal limitation period of one year from the relevant date."

5.2 We further find that on identical dispute, the Hon'ble High Court of Madras in *Principal Commr. of GST & C.EX, Chennai Vs. C. Kamalakannan* – 2018 (18) GSTL 589 (Mad.)

referred to the aforesaid view adopted in *Charanjeet Singh Khanuja* (supra) and held as under:

> "**14.** In the instant case, there was no allegation of fraud or suppression or wilful misstatement against the assessee. The Department, even in the said show cause notice, stated that the assessee was liable to pay service tax and get himself registered from the year 2007-08 whereas he got himself registered only in the year 2012. The Tribunal, in the decision in *Charanjeet Singh Khanuja*, considered an identical issue in a batch of cases and pointed out that when, on the issue involved in the batch of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assessee was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. Thus, it held that when there is scope for doubt in the mind of the assessee on a particular issue, the longer period under the proviso to Section 11A of the Central Excise Act, 1944 cannot be invoked.
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> ……………..
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> **16.** In the impugned order, the Tribunal had followed the decision in *Charanjeet Singh Khanuja*, which has attained finality. The Revenue does not dispute the fact that there were two views on the issue within the Department itself and this was considered by the New Delhi Bench of the Tribunal in a batch of appeals, which consisted of both appeals filed by the Department against the orders passed by the Commissioner (Appeals) as well as appeals filed by the assessee as against the orders of the Commissioner (Appeals). Thus, in our view, the Tribunal rightly held that the extended period of limitation could not have been invoked. There is no error in the order passed by the Tribunal.

5.3 On these conclusions, the Hon'ble High court answered the following substantial question of law in favour of the assessee and against the Revenue.

"In the facts and circumstances of the case, in the absence of documentary evidence to show that the assessee had acted in *bona fide* belief and in the light of evidence of his non-registration, non-payment and non-filing of returns, which were statutorily required to be complied, whether the Tribunal was justified in holding that there was no suppression of facts and that the issue of show cause notice was hit by limitation?"

Applying the ratio of these two decisions to the facts of the present appeal, we then find that the extended period cannot be invoked here also. Hence, the proceedings and consequential demand get hit by limitations. Impugned order cannot then survive and in the event the appeal succeeds on limitation.

4. In the result, appeal allowed on the grounds of limitation.

(Operative part of the Order pronounced in the open Court)

(P.DINESHA)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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