CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SZB, CHENNAI

REGIONAL BENCH - Division Bench B1

**Service Tax Appeal No. 177 of 2012**
**ST/MISC(CT)/41603/2017**

(Arising out of Order-in-Appeal No. 125/2011 dated 20.12.2011 passed by the Commissioner of Central Excise , Chennai III Commissionerate, Chennai).

M/s. HCL Infosystems Ltd. Appellant

Vs.

Commissioner of Service Tax, Respondent
Service Tax Commissionerate,
MHU Complex, 692, Anna Salai,
Chennai-35

APPEARANCE:

Shri M. Karthikeyan, Advocate, for the appellant

Shri K. Veerabhadra Reddy, ADC. Authorized Representative for the Respondent

**CORAM :**

**HON'BLE MR MADHU MOHAN DAMODHAR, Technical Member**

**HON'BLE MR P.DINESHA, Judicial Member**

**FINAL ORDER No. 40673/2019**

Date of Hearing: **15.03.2019**
Date of Pronouncement: 23.04.2019

**Per: P. DINESHA,**

The revenue issued two SCNs, the first one dated 05.04.2010 in SCN No.81/2010 - alleging that the appellant had collected commission and had accounted Rs.33,08,870/- as agency commission for the period April 2008 to February 2009 from its group Companies for marketing of products, which is taxable under Business Auxiliary Service. The next allegation was that there was substantial difference between the taxable value declared in the ST-3 return and the service income shown in the profit & loss Account. The next allegation is that the appellant did not produce any documents based on which they had taken cenvat credit for the period October 2004 to March 2008 which was contrary to Rule 9 of Cenvat Credit Rules, 2004; thus alleging suppression of facts proposed to demand service tax on the above along with applicable interest and penalty. The second SCN No.21/2010 dated 16.07.2010 issued for the period 01.03 2009 to 31.03.2010 alleging the non-declaration of agency commission and thus demanding tax.

2.1 The appellant explained that they were engaged in manufacturing computers, its peripherals, their maintenance and also development of software; that there were divisions for Services & Manufacturing & Supply; that though it had various divisions, they maintained common balance sheet that included transactions of all divisions. Further, vide letters dated 15.06.2010, 24.08.2010 & 30.08.2011, it was submitted, regarding each head of allegation, as under: -

I – AGENCY COMMISSION.

- They were *interalia* engaged in trading activity, a customer placing order with the appellant would in turn passed on to its vendors namely Tyco Electronics;
- Goods would be supplied by Tyco but the discount was claimed by the appellant by raising debit notes on the supplier; but there was no arrangement to work as any agency commission with Tyco Electronics;
- By inadvertent mistake the same was shown as agency commission in its books/financials;
- That what they received was only discount and nothing else;
- That they sell products to customer which is offered to sales tax;

- That there is no agreement between them and the vendor for collecting agency commission; etc.

**II – DIFFERENCE IN ST-3 RETURN AND P & L ACCOUNT.**

- Annual financials were prepared consolidating the accounts in respect of all the three units of HCL Peripherals;
- The income reflected total income of all the three units with labour charges at all the divisions categorized under service income in its books and hence the service income cannot be attributed to the appellant alone;
- It is thus not tenable to classify income of the company to be that of one particular unit;
- That the demand raised on the basis of figures in books of account are not sustainable, in view of the decision in *CCE Vs. TRF Limited,* 2009(13) STR 557 (Tri-Kol);
- That the financials contain figures on actual basis whereas service tax is paid on receipt basis, the entire amount shown as income of its unit was not actually received, etc.

**III – IRREGULAR AVAILEMENT OF CREDIT.**

- That they were unable to locate the documents pertaining to the period 2004 onwards which fact was submitted at the time of audit;
- they were unable to provide the documents to the audit team due to paucity of time which could be produced as and when called for;
- that three factors governing the eligibility are fulfilled which had been supported by documentary evidences enclosed to the reply (we do not have the benefit of those documents);
- for the above reasons, their availment of credit was in order;
- on the credit availment on maintenance and repair services, ST was paid by the contractors;

- that they had undertaken installation and maintenance and repair of monitors, etc. manufactured by their sister units, also through their subcontractors who collected service tax for which credit was taken as the subcontractor had provided the services on their behalf;
- that for the above reasons, there was no infirmity in their availment of credit as the said input was used in the output service provided by the appellant; etc.

2.2 The appellant also questioned the invocation of extended period of limitation in its replies. Order-in-original came to passed after considering the explanations of the appellant, vide order dated 20.12.2011 by the Commissioner who vide common order in respect of both the SCNs confirmed the demands proposed therein. Aggrieved, the assessee has filed these appeals before this forum.

3. We have heard Shri M. Karthikeyan, Ld Advocate for the appellant and Shri K. Veerabhadra Reddy, ADC, Ld. DR for the Revenue, we have gone through the impugned order as also the documents referred to during the course of arguments and also carefully gone through the orders relied on during the hearing. We take up the issue of difference in ST-3 return and P&L A/c first. Our observation, at the outset, is that the appellant while taking us through the explanations filed before the Adj authority, did not bother to file the enclosures which, according to it, are the supporting documents. We fail to understand this. This assumes importance when this court observed about the supporting documents while passing order on stay petition. The appellant was happy with the order but never bothered to support its case with the help of any documents. In the absence of the vital documents, we find it difficult to even appreciate the strong contentions of the appellant which lacks directions/purpose. We therefore proceed

to dispose of the appeals based on the available material and case laws.

4. 1 Ld. Advocate also submitted that the audit team as also the revenue had not properly appreciated the transactions carried on by the appellant inasmuch as, the revenue had failed to take note of the fact that the appellant was engaged in the software development up to 2006-07, thereafter, only job charges were received for conversion activity the service tax for which was discharged by the principal manufacturers. He further submitted that the income indicated in the P & L a/c reflected only the income received for software development services and job charges. He thus asserted that the demand on the allegation of difference in ST-3 returns & P & L a/c was not sustainable. We are not in a position to appreciate any of these arguments of the Ld. Advocate as we do not have the benefit of either of them. The appellant while accepting the difference, has taken the stand that the alleged difference was because of the reason that it was maintaining a consolidated/common balance sheet for all its three units, they had undertaken software development, appellant's unit had recorded the payment of labour charges, that it was showing only income even though the same was not received during the year as it was following accrual system, etc. but it is even surprising to note that the appellant has tested the Commissioner also, by not bothering to produce any documents. The findings by the commissioner at paragraph 14.2 & 14.5 are very evident and the same has remained unchallenged. The basic documents like the balance sheet of each unit for reconciliation were not furnished despite reminders, nor even invoice copies, contracts, break up of income earned unit wise. The approach of the appellant is clearly very callous.

4.2 For the above reasons, we are compelled to accept the findings of Ld. Commissioner who has given a thread-bear analysis based on the best of his judgment due to the non-co-operation of the appellant. For these very factual position and reasons, we are of the considered opinion that even the case laws relied on by the appellant would not help. When no documents are furnished to shake the basic facts and findings of the Ld. Commissioner, we do not find any good reason to interfere with the findings on this issue in the impugned order, therefore this ground is dismissed.

5.1 We now take up the second issue of Agency commission. Ld. Commissioner observes that on behalf of M/s. HCL Technologies Limited is an independent entity, the appellant placed orders on the supplier namely M/s. Tyco Electronics. For this, the appellant got a discount of 6% which was claimed as just a discount not liable to service tax. He also observes that the appellant acted as an intermediary since the goods were directly supplied/shipped to the customer/end user and thus, the appellant only rendered assistance in the sale of goods. The sale was in the nature of in-transit sale with no trade margin while causing sale to the ultimate customer. Further, the appellant's books reflect the same as "Agency commission" only and the same is offered to income tax as such. We find it difficult to accept as to how the character of 'Agency commission' changes when it comes to service tax, on its own, without there being any documentary evidence, much less basic documents, furnished. If not agency commission, then the discount which is normally given to the buyer/end user, but the same is enjoyed by an intermediary/appellant. Books reflect it as agency commission but the appellant claims it, contrary to that, as discount. The same has been offered and has accordingly suffered income tax. In the absence of explicit supporting documents, even we find it difficult to dethrone the findings of Ld. Commissioner.

5.2 Case laws relied on by the appellant are not applicable to the facts on hand since, firstly, there were some arrangements/agreements in those cases which, as contended by the appellant, are not here in this case. The appellant has never claimed that it was a wholesale dealer of the supplier, unlike in some cases. We have to therefore dismiss this ground of appeal and accordingly, this ground is also dismissed.

6.1 We shall take up the next issue of wrong availment of Cenvat Credits of Rs.9,20,740/- comprising of three instances. It is an admitted fact even by the appellant, that the supporting documents to the extent of Rs.4,65,057/- could not be produced before the audit team, this admission is very much part of one of the replies. But the commissioner observes that the supporting documents were indeed furnished at the time hearing. The credits were availed on Security charges, Air Ticket/Travel/Tour operator services, Audit fees, Management consultant fees, Maintenance or Repair charges, Banking & Insurance charges and Outdoor catering charges.

6.2 During the hearing, Ld. Advocate re-iterated the submissions made before the adjudicating authority and also submitted that the appellant had furnished documentary evidence in response to the SCN which have not been considered by the commissioner.

7. We find that the appellant had contended with regard to Maintenance and Repair, that it was undertaking installation and repair of Monitors, etc., manufactured by its sister unit, the above activities were done by them and also through sub-contractors. Rule 2(l) of the amended Cenvat Credit Rules, 2004

defines input service to include any service used by the input service provider or the manufacturer, in relation to activities relating to business. The commissioner has allowed credit to the extent of Rs.6,00,104/- and we find analysis at great length by the commissioner after which the disallowance was made to the extent of Rs.3,20,636/-. Ld. Advocate contends before us that the services of Air travel agency was used in order to book tickets for its employees and that the amount was not recovered from them. Apparently, no such plea is forthcoming from the impugned order, rather the commissioner observes that the disallowance was resorted to for non-production of supporting documents. The plea is also not found nor the documents in support and hence, the adjudicating authority had no benefit of the plea while adjudication. Hence, we are remitting this issue to the file of adjudicating authority to pass de-novo order after affording reasonable opportunities to the appellant. Security charges is also disallowed, not as canvassed by the appellant for the reason of not used in rendering output services, but as could be seen from the table at paragraph 16 of the impugned order, for non-production of documents. The same, however, is a part of inclusive definition of input service and hence becomes eligible. Hence, this disallowance is set aside.

8. The next credit relates to Banking charges and Insurance charges, claimed to be incurred for the appellant's manufacturing units. We are not convinced by the reasons given in the impugned order for disallowing credit on this service since, it is the case of the appellant that the banking charges related to the commission on import payment processing and for the foreign exchange received for its export, which is not disputed. Nor has the revenue disagreed with the claim of the appellant on insurance taken on stocks and fixed assets in their factory premises. Hence, we are of the opinion that the denial of this credit is also not justified and hence, the same is set aside.

9. On the limitation/invoking larger period, we do not find any ground to interfere with the findings of the lower authority, the appellant could not produce basic documents in time, during audit, etc., that prompted SCNs which is in order. The revenue collated details after audit and issued the notices after analyzing the same and it is not the case that the appellant volunteered to offer explanation in between, when the fact of its non-production of documents was very much on board. Hence, we do not find any infirmity in invoking larger period of limitation in issuing show cause notices. Application for change of cause-title filed by the Revenue is allowed.

10. Appeal is disposed of on the above terms.

(Order pronounced in the Open Court on 23.04.2019)

(MADHU MOHAN DAMODHAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

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