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

Appeal No.ST/174/2008

(Arising out of Order-in-Original No.06/2008 (Commissioner) dated 08.05.2008 passed by the Commissioner of Customs and Central Excise, Salem)

M/s.Sakthi Sugars Ltd	Appellant
Vs	
Commissioner of Central Excise, Salem	Respondent

Appeal No.ST/460/2009

(Arising out of Order-in-Appeal No.96/2009 dated 10.06.2009 passed by the Commissioner of Customs and Central Excise (Appeals), Salem)

M/s.Sakthi Sugars Ltd	Appellant
Vs	
Commissioner of Central Excise (Appeals), Salem	Respondent

Appearance

Shri Muthuvenkataraman	For the Appellant
Shri K.P.Muralidharan, 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 : **08.08.2017**

FINAL ORDER No. 41743, 41782/2017

Per Bench

The issue involved in both appeals being the same, they were heard together and are disposed by this common order.

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2. The appellants are engaged in the manufacture of Sugar, Molasses etc. and were availing credit on inputs / input services. On investigation it was found that they have availed taxable service of 'merchant banking service' falling under category of 'Banking & Other Financial Services' rendered by service providers outside India in connection with raising Foreign Currency Convertible Bonds, by paying various fees for the period April 2006 to July 2006 and failed to discharge service tax on such taxable services under the reverse charge mechanism even after introduction of Section 66A with effect from 18.4.2006. On perusal of records it was found that out of the total value of Rs.10,55,99,873/- the tax liability of Rs.65,48,020/- relates to their Modakurichi Unit and separate Show Cause Notices were issued to both units. Appeal ST/174/2008 relates to Modakurichi unit. The Modakurichi unit had paid service tax of Rs.52,40,503/- as on 31.5.2007 and other unit, (Erode) had paid Rs.25,54,160/-.

3. The Show Cause Notices dated 22.2.2008 (Modakurichi) and 11.3.2008 were adjudicated, and the original authority confirmed the demand of Rs.65,48,020/- (Modakurichi) and Rs.31,91,288/- (in other unit) alongwith interest and imposed penalties under Section 76,77 and equal penalty under Section 78 of the Finance Act, 1994. The appeal ST/174/2008 is filed against order passed by Commissioner confirming the demand, interest and penalties in ST/460/2008 is filed against confirmation of demand, interest and penalty which was reduced to Rs.20 Lakhs.

4. On behalf of the appellant, the Ld.Counsel Ms.Minchoo Mariam Punnoose submitted the interalia, the following main arguements.

i) The appellants were not aware that they are liable to pay service tax on the fees paid to foreign agents. Section 66A was introduced in the Finance Act with effect from 18.4.2006 and prior to that there was utter confusion as to assessee are liable to pay service tax under reverse charge mechanism under Rule 2 (1) (d) (iv) of Service Tax Rules, 1994. The controversy was set to rest by the judgement rendered by the Hon'ble High Court of Bombay in Indian National Ship Owners Association vs Union of India which was upheld by Hon'ble Apex Court as reported in 2010 (17) STR J51 (S.C.). Prior to that there were decisions in favour of appellant which held that service tax is not liable to be paid on commission/fees paid to service providers outside India under reverse charge mechanism. That appellants did not discharge service tax only on bonafide belief and the period involved is immediately after 18.4.2006 the crucial date.

ii. That in any case, the appellant had not suppressed facts and entire accounts were furnished to department when called for. The demand is raised on such accounts. This being so, the Show Cause Notice issued invoking extended period is unsustainable. She relied upon the decision of Tribunal in the case of Indofil Chemicals Company Vs Commissioner of Service Tax, Mumbai 2016 (46) STR 507 (Tri-Mum), Persistant System Ltd Vs RST, Pune 2016 (45) STR 177 (Tri – Mum) and Punjab Chemicals & Crop Protection Ltd Vs Commissioner of Central Excise, Chandigarh 2017 (47) STR 345 (Tri-Chan).

iii. On merits, the learned Counsel adverted to para 5.2 of the Order-in-Original where the details of the demand are laid out. She submitted that the demand is raised on Legal fees paid to the foreign service provider and that such services became taxable only with effect from 1.9.2009. That these services cannot fall under Banking and other Financial Services, and therefore demand on legal fees has to be set aside.

iv. That the authorities below have imposed penalties both under Section 76 and 78 which is unsustainable. Further as there was no suppression and as the appellant had discharged substantial amount even before issuance of Show Cause Notice, the penalties imposed may be set aside.

v. That even, if there was omission to pay service tax, the whole situation is a revenue neutral one as the appellant would be able to avail credit on the service tax paid. That for this reason itself, the demand ought to be set aside.

5. The Learned AR Shri A.Cletus appearing for the department reiterated the findings in the impugned order. He argued that even prior to introduction of Section 66A in the Finance Act, 1994, the Service tax Rules provided for payment of service tax on reverse charge mechanism, The appellants suppressed the fact of fees paid to foreign service providers and the same would not have come to light, but for the investigation conducted by the department. He submitted that the Show Cause Notice issued invoking extended period is legal and proper.

6. Heard both sides.

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7. On merits, the main ground put forward by the learned Counsel is that, the demand on the legal fees paid to foreign service provider would not fall under the category of Banking & Financial Services. In para 5.2 alongwith charges like, Commitment charges, Out of pocket expenses, Trusteeship fees, Processing fees, Listing fees, Printing fees etc, the demand also includes legal fees. Such services have become taxable only with effect from 1.9.2009 and therefore the demand on legal fees in our view is unsustainable. On such score, for the limited purpose of requantification of the demand eliminating legal fees, the matter requires to be remanded to the adjudicating authority. We hold that demand raised on all services / fees except legal fees is maintained.

8. The learned Counsel has strongly argued on the ground of limitation and also on the penalties imposed. It is correct that there was much controversy as to the liability to pay service tax under reverse charge mechanism during the relevant period. Prior to introduction of Section 66A in Finance Act, only the Rules provided for such levy and the doubt was whether there can be levy of service tax merely by providing in the Rules, without having a charging section in the Act. The issue was set to rest by the judgement rendered in the case of Indian National Shipowners Association (supra). The decision was rendered in the year 2009 and was maintained by Supreme Court. This along with the fact that appellants would be eligible to avail credit on the service tax paid on input services, which gives rise to a revenue neutral situation we are of the opinion that the penalties imposed are unwarranted. The penalties imposed under Section 76 and 78 in both appeals are set aside.

9. In the result, the impugned orders are modified by setting aside the demand of service tax on legal fee and directing the adjudicating authority to requantify the demand in such manner. So also the penalties imposed under Section 76 and 78 in both appeals are set aside. Both appeals are partly allowed in above terms.

(Operative portion of the order was pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

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

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