IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.377 of 2012

(Arising out of Order-in-Original No. 12/2012 dated 21.3.2012 passed by the Commissioner of Central Excise, Chennai II Commissionerate)

Commissioner of GST & Central Excise **Appellant**
26/1, Mahatma Gandhi Road
Nungambakkam
Chennai – 600 034.

Vs.

M/s. Meridian Apparels Ltd. **Respondent**
No. 121/3, TTK Road
Teynampet
Chennai – 600 018.

AND

Service Tax Appeal No.385 of 2012

(Arising out of Order-in-Original No. 12/2012 dated 21.3.2012 passed by the Commissioner of Central Excise, Chennai II Commissionerate)

M/s. Meridian Apparels Ltd. **Appellant**
No. 121/3, TTK Road
Teynampet
Chennai – 600 018.

Vs.

Commissioner of GST & Central Excise **Respondent**
26/1, Mahatma Gandhi Road
Nungambakkam
Chennai – 600 034.

APPEARANCE:

Shri V.S. Manoj, Advocate for the Assessee
Ms. K. Komathi, AC (AR) for the Revenue

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order Nos. **40043-40044 / 2020**

Date of Hearing: 28.01.2019
Date of Decision: 28.01.2019

Per Ms. Sulekha Beevi C.S.

The assessees are manufacturers and exporters of garments, fabrics and they are registered with the Service Tax Department for Goods Transport Agency Services and renting of immovable property service. On intelligence gathered that the assessee is not paying appropriate service tax on GTA service, renting of immovable property service, BAS and Banking and Other Financial Services. The relevant records were called for and subjected to verification. Thereafter, Show Cause Notice was issued proposing to demand short paid service tax under the above categories along with interest and for imposing penalty. After adjudication, the adjudicating authority dropped the demand in respect of GTA service. The department has filed appeal ST/377/2012 against such dropping of demand. The adjudicating authority confirmed the demand in respect of renting of immovable property service, BAS and Banking and Other Financial Services. Hence the assessee has filed Appeal No. ST/385/2012 aggrieved by such confirmation of demand, interest and penalty.

2. On behalf of the assessee, ld. counsel Shri V.S. Manoj, appeared and argued the matter. He submitted that the demand raised under renting of immovable property is Rs.2,54,118/- The Show Cause Notice has been issued alleging that the value declared in the ST-3 returns and the value accounted in the books of accounts does not tally and therefore there is a short-payment of service tax. It is submitted by him that it is the rental received for renting of generator. The appellant vide their reply objected to the demand raised under the category stating that the services were provided prior to 2007 when the said services were not taxable. The rents

were received later and the demand has been partly made on such amounts which are services provided prior to 2007. The books of account were maintained by the appellant on accrual basis whereas the liability to pay service tax till 2011 was on receipt basis. The difference is on account of this and that there is no short-payment of service tax as alleged in the Show Cause Notice. The adjudicating authority in para 13.0 has confirmed the demand on the ground that the appellant has paid service tax on the amenity charges only when it was pointed out by the department. This finding is without basis and there is no discussion on the issue with regard to the payment of service tax and the accountal of the amount on accrual basis. The appellant has included the rent received for generator in the taxable value even though the same is not liable to service tax. This can be found out from reconciliation of the accounts.

2.1 With regard to Business Auxiliary Service, it is submitted by the ld. counsel that the appellant exported garments to the foreign buyer and received sale value for the goods. While paying the sale value, the foreign buyer deducted certain amounts from such sale value on the ground that they have paid commission to foreign agents. Though it is alleged in the Show Cause Notice that the appellant is paying commission to foreign agents and is liable to pay service tax on reverse charge mechanism, there is no evidence adduced by the department to show that the appellant has engaged commission agent for sales promotion / marketing of the goods in foreign countries. It is stressed by the ld. counsel that the appellant has not engaged any foreign agents and what is deduced is only part of the sale value and therefore it cannot be subjected to levy of service tax.

These facts have been correctly recorded in para 14.0 by the adjudicating authority. However, he concluded that the appellant is liable to pay service tax. The ld. counsel relied upon the case of Duflon Industries Pvt. Ltd. Vs. Commissioner of Customs, Raigad – 2017 (47) STR 335 (|Tri. Mum.) to argue that unless the department proves that the foreign based person is appointed as commission agent for the sale of goods and initiated the purchase or sale on behalf of the appellant, no service tax is payable. The amount deducted by the foreign buyer can only be treated as a trade discount.

2.2 With regard to the demand made under banking and other financial services, the ld. counsel submitted that the appellant while receiving the sale consideration for goods exported, the local banker of the appellant availed the services of foreign banker and the charges for such services were recovered from the appellant. As per RBI guidelines, the appellant has to submit Export Realization Certificate and for this purpose the amount deducted from the invoice is accounted as bank charges as incurred in foreign currency. Though the adjudicating authority recorded this fact in para 15, confirmed the demand merely reiterating the definition of Banking and Other Financial Services. There is no service provided by the foreign bank directly to the appellant. The amount is deducted for the services which are rendered by the foreign bank to the Indian bank and therefore the appellant is not liable to pay any service tax. He relied upon the decision of the Tribunal vide Final Order Nos. 41819 to 41832/2017 dated 29.8.2017 in the case of M/s. Cylwin Knit Fashions and Others Vs. Commissioner of Central Excise, Coimbatore.

2.3 With regard to the order passed by the adjudicating authority dropping the demand in respect of freight charges, the counsel submitted that in para 12.2, the adjudicating authority has observed that after perusal of the sample invoice it is clear that the invoices relating to air freight and ocean freight only. The expenses relating to ocean and air freight cannot be charged to service tax under GTA service and therefore has set aside the demand. The appellant had sufficient documents to show that there was no short-payment of service ax under this category which was accepted by the adjudicating authority.

3. The ld. AR Ms. K. Komathi supported the findings in the impugned order passed by the adjudicating authority in respect of services other than GTA service. In respect of GTA services, it is submitted by her that there was huge variation in the taxable value between the amount declared in the ST-3 returns and the financial statement. The adjudicating authority has erred in holding that the freight charges for transport of goods by air and sea does not fall under the category of GTA service.

3.1 With regard to renting of immovable property, she submitted that the demand is for the period June 2007 to March 2009. The appellant has excluded the generator charges collected from the tenants for the purpose of paying service tax and therefore there is short-payment of Rs.2,54,118/-. Though the assessee has put forward a contention that the rent is received for the services provided prior to June 2007, they have not produced any documents to support this argument. The second contention of the assessee that the accounts were maintained on accrual basis and service tax was payable on receipt basis also cannot be accepted since when the short-payment with regard to amenity charges was pointed out by the officers, the appellant has paid up the service tax. Further, the service tax is liable to be paid when the consideration is received. The demand made under this category is therefore legal and proper.

3.2 The demand under BAS has been confirmed on the amount paid to foreign agents for garments manufactured and exported by the assessee. The assessee has accounted the amounts in the books of accounts as commission and therefore it has to be understood that they have paid commission amount to foreign agents. Thus they are liable to pay service tax on the commission amount under reverse charge mechanism under the category of BAS.

3.3 With regard to demand under Banking and Other Financial Services, ld. AR submitted that the amount has been deducted by the foreign bank from the sale consideration received by the appellant. Therefore the appellant is liable to pay service tax on such amount under the said category.

4. Heard both sides.

5. The first issue is with regard to the demand under renting of immovable property service. The ld. counsel for appellant has submitted that part of the demand is in respect of services availed prior to June 2007 and therefore even though the rent for the generator was received after 2007, they are not liable to pay service tax. The appellant has not produced any document to show that the services were provided prior to 2007. It is submitted by the ld. counsel that during reconciliation of the accounts, it was brought to light that the rent was received for the services rendered prior to

2007. It is for the appellant to bring out sufficient documents to show if they are not liable to pay service tax. There is no evidence placed before us to show that the appellant has rendered service prior to 2007 for which the rent was received only after 2007. Therefore, we do not find any substance in the argument put forward by the appellant on this category of service. The confirmation of demand along with interest under renting of immovable property service is therefore upheld. However, the ld. counsel for the appellant has strenuously argued to set aside the penalty. We take note of the fact that the demand is during the period when the levy of service tax on renting of immovable property service was under litigation. Therefore, during the period, since the matter was under litigation, we hold that the penalty imposed are unwarranted and requires to be set aside which we hereby do.

5.1 The demand has been under BAS alleging that the appellant has received commission from the foreign buyer of goods. In the case of Duflon Industries Pvt. Ltd. (supra), the Tribunal has observed that unless it is established by the department that the assessee has engaged commission agent for the sale of goods and such commission agent has negotiated the purchase or sale on behalf of assessee, the amount paid by the assessee cannot be subjected to service tax under BAS. The amount deducted by the foreign buyer can at the best be treated as a trade discount only. For ease of reference, para 6 of the said order is reproduced as under:-

> "6. The entire issue revolves around the fact whether clearances effected by appellant on goods which exported by them to DEL is of actual sale or sale based on commission basis. If it is direct sale to DEL then appellant

> has case and if it is held that it is not direct sale, but the sale based on commission basis then appellant has no case. For this we have to examine the agreement dated 16-5-2001 entered between appellant and DEL. The agreement is enclosed to the appeal memorandum and on perusal of the same we find that the agreement sets out clauses about the sale of goods by appellant to DEL. The said agreement speaks of purchasing of various items from appellant by the said DEL and it also records that appellant shall allow flat deduction/commission of 8% on the invoice value to DEL. We perused the invoice raised by appellant to DEL and find that the invoice is for the sale of the goods and 8% commission is indicated as has been given on the total invoice value. It is also seen invoice value has been reduced by 8% shown as commission, is against the sale of the goods to DEL. We agree with the contentions raised by learned Counsel that the purchaser of the goods cannot be considered as a "commission agent" as the deduction/commission is for the goods sold. There is nothing on record to show that the said DEL was appointed as "commission agent" for the sale of the goods of the appellant to third parties. It may be that DEL might purchase the goods from the appellant and sells the same in Europe. The reliance placed by learned DR and adjudicating authority on the clause of agreement that "DEL shall increase the market share of appellant's products" to conclude that DEL was a commission agent, seems to be erratic reading of the clauses of agreement and this itself does not amount DEL has been appointed as "commission agent". The amount indicated on the invoice and recorded in the accounts as commission, in our view, will not attract tax under reverse charge mechanism. We also find strong force in the contentions raised by learned Counsel that in order to tax this account as a commission, there has to be necessarily three parties, seller, purchaser and a person who negotiates such transaction. From the records it is very clear that DEL had not negotiated purchase or sale on behalf of appellant or their customers; to our mind the deduction/commission is nothing but trade discount. In view of the factual position as ascertained from the records, we hold that the impugned orders demanding service tax under reverse charge mechanism from appellant are unsustainable and liable to be set aside."

Following the said decision, we are of the considered opinion that the demand under BAS cannot sustain and requires to be set aside, which we hereby do.

5.2 The Show Cause Notice alleges that the appellant has short-paid service tax under Banking and Other Financial Services. It is the contention of the department that the foreign bank has deducted some charges from the sale value received by the appellant from the foreign purchaser. It can be seen that the said amount is banking charges which are to be paid by the local banker to the foreign bank for the services rendered by the foreign bank to the local bank. In fact, there is no service rendered by the foreign bank directly to the appellant. The said issue was considered by the Tribunal in the case of Cylwin Knit Fashions & Ors. cited supra. The relevant paragraph is extracted below:-

> *"6. The case of the department is that when the foreign bank deducts the charges towards transfer of foreign exchange to the Indian bank, since the same is deducted from the sale proceeds, it is a service rendered by the foreign bank to the appellants and that there is a service provider and service recipient relationship between the foreign bank and the appellant. It is to be noted that the foreign bank deducts such charges and transfers the foreign exchange to the Indian bank from where the appellant receives the money. The foreign bank in which the overseas buyer deposits the sale proceeds is chosen by the foreign buyer and not by the appellant, who is situated in India. By no stretch of imagination can such foreign bank be considered as a service provider for the appellant who in most cases would not even be aware of the identity of such foreign bank. The act of deduction of an amount as charges for transfer of the foreign exchange to the Indian bank from the sale proceeds of the appellant is only a facility for collecting such charges from the Indian bank. This cannot be considered as payment of charges for services by the appellant to the foreign bank. It is actual charges deducted being bank to bank transaction. The department by the Trade Notice dated 14.2.2014 has clarified the very same situation."*

Following the said decision, we are of the considered opinion that the demand under Banking and Other Financial Services cannot sustain and requires to be set aside, which we hereby do.

5.3 The department has filed appeal against the order passed by adjudicating authority dropping the demand on GTA service. In para

12.2, the adjudicating authority has observed that he has perused the sample copies of ocean and air freight bills. It is the case of the department that while discharging service tax under GTA service they have not included the transport charges by air and sea. Needless to say that such freight charges cannot be charged under GTA service. Further, it has to be noted that the freight charges has been incurred by the appellant for export of goods. We do not find any ground to interfere with the discussion made by the adjudicating authority in para 12.2 of the impugned order. The appeal filed by the department is therefore devoid of any merit and deserves to be dismissed. Ordered accordingly.

5.4 The appeal filed by the assessee is partly allowed as under:-

a. The demand made under renting of immovable property service is upheld along with interest. However, the penalty imposed under this category is set aside.

b. The demand made under BAS is set aside.

c. The demand made under Banking and Other Financial Service is set aside.

d. The appeal filed by assessee is partly allowed with consequential relief, if any.

(Dictated and pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**ANIL G. SHAKKARWAR**)
Member (Technical)

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