IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL <u>CHENNAI</u>

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 42491 of 2013

(Arising out of Order-in-Appeal No. 109/2013 dated 30.08.2013 passed by the Commissioner of Central Excise (Appeals), Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

M/s. Chillies Export House Limited **: Appellant**
1B, Patel Road,
Virudhunagar – 626 001

VERSUS

The Commissioner of Central Excise and Service Tax **: Respondent**
Central Revenue Building, Lal Bahadur Shastri Marg, Bibikulam,
Madurai – 625 002

<u>APPEARANCE</u>:

Smt. S. Vishnupriya, Learned Advocate for the Appellant

Smt. K. Komathi, Learned Additional Commissioner for the Respondent

<u>CORAM</u>:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40238 / 2023

DATE OF HEARING: 16.03.2023

DATE OF DECISION: <u>31.03.2023</u>

Order : [Per Hon'ble Mr. P. Dinesha]

Brief undisputed facts, which are relevant for the purposes of this appeal, as could be gathered upon hearing both sides as well as from the Show Cause Notice, Orders-in-Original (two rounds) and Orders-in-Appeal (two rounds) are as under.

2. The appellant is a manufacturer of "Oleo Resin" and had exported their products to various countries through their commission agents residing in foreign countries. These foreign agents would provide services of sales agency in the respective foreign country like promoting

sales, securing sales orders, negotiating price and mode of payment with purchaser, quantity and quality of the goods to be exported, etc., on behalf of the appellant, for which they are paid commission by the appellant.

3. The Revenue issued Show Cause Notice dated 11.11.2008 wherein it was proposed, *inter alia*, to classify and demand Service Tax under the category of 'business auxiliary service', for which the Revenue took support of Section 66A of the Finance Act, 1994 inserted with effect from 18.04.2006, to levy Service Tax on the appellant under reverse charge mechanism, read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 with effect from 16.06.2005, from 16.06.2005 to 29.02.2008, along with Education Cess, Secondary and Higher Education Cess, applicable interest and penalties under the Finance Act, 1994.

4.1 In the adjudication proceedings, the Adjudicating Authority vide Order-in-Original No. 07/2009-ST dated 24.04.2009 considered the explanation of the appellant, but however, proceeded to confirm the demands as proposed in the Show Cause Notice, and it appears that the appellant, after paying the Service Tax as demanded along with a part of the penalty, however, preferred first appeal before the Commissioner of Central Excise (Appeals), Madurai, wherein, vide Order-in-Appeal No. 267/2010 dated 20.07.2010, the appeal was allowed in part. The First Appellate Authority had set aside the demand insofar as the same related to the demand raised by invoking the extended period of limitation; but however, for the normal period i.e., 01.10.2007 to 29.02.2008, he had, while sustaining the demand, directed the lower authority to quantify the Service Tax along with other applicable cesses.

4.2 From the documents placed on record, it appears that the Revenue had preferred an appeal against that part of the order which was set aside by the First Appellate Authority holding that the demand could not be sustained for the period other than the normal period. It clearly appears from the same that the appellant seems to have accepted the other part of the order whereby the demand was sustained for the normal period. In his order, the First Appellate Authority had held, with respect to the period from 18.04.2006 to 30.09.2007, that the Show Cause Notice was issued under Rule 2(1)(d)(iv) *ibid.* for the period 16.06.2005 to 29.02.2008 and in view of the enactment of Section 66A *ibid.,* the beneficiary is the one who is liable to pay Service Tax, but this *per se* would not make the service recipient liable to tax by imputing *mens rea*. Thus, the demand raised under Section 73(1) *ibid.* came to be set aside.

4.3 In the first round of litigation, the Revenue had challenged the order of the First Appellate Authority on the limited ground of limitation. This Bench, vide Final Order No. 328 of 2011 dated 15.02.2011 had, *inter alia*, set aside the order of the Commissioner (Appeals) with a direction to re-adjudicate the issue relating to time-bar in the light of the evidence which were filed before the Bench.

5.1 In the consequential proceedings taken up by the Adjudicating Authority, the appellant appears to have responded to the notice for re-adjudication and it also appears that they had filed the following: -

(i) Letter issued by the Superintendent (Preventive), Virudhunagar Division, along with reply thereto vide letter dated 24.05.2006;

(ii) Summons issued by the Senior Intelligence Officer, Madurai requiring the appellant to furnish details of commission paid to the foreign agents for the period from 08.04.2004 to 24.06.2006, along with details furnished vide letter dated 27.05.2006;

which have been recorded in the re-adjudication order - Order-in-Original No. 35/2012-ST dated 28.12.2012 (paragraph 18).

5.2 In his *de novo* order, the Adjudicating Authority has, however, brushed aside the above contentions, without going into the contents of the letter for some silly reason as to the date on the covering letter. By this, it appears that the Adjudicating Authority has compromised on the legal requirements as to the verification of the contents of the letter, which was the direction issued by this Bench so as to verify the documents, and, never the date on the covering letter. The Adjudicating Authority has thus confirmed the original demands contained in the Order-in-Original dated 24.04.2009.

5.3 Seriously aggrieved, the appellant pursued the matter by way of first appeal before the Commissioner of Central Excise (Appeals), Madurai, who vide impugned Order-in-Appeal No. 109/2013 dated 30.08.2013 has chosen to consider the claims of the appellant only with regard to limitation, without going into the other contentions of the appellant on merits. In the impugned order, the Commissioner (Appeals) has upheld the demand raised in the Order-in-Original, but however, has also observed that the date of payment to the foreign agent viz. M/s. Nachman Gilon Corp. was mentioned as 24.06.2006 whereas the date of the covering letter was 27.05.2006. It is against this order that the present appeal has been filed by the appellant before this forum.

6. Heard Smt. S. Vishnupriya, Learned Advocate for the appellant and Smt. K. Komathi, Learned Additional Commissioner for the Revenue. We have heard the rival contentions and we have also perused the documents placed on record.

7. We do not find it necessary to get into the merits of the case since this Bench vide Final Order dated 15.02.2011, while remitting the matter back to the file of the Adjudicating Authority, had agreed with the contentions of the assessee-respondent therein as to the existence of certain documents which, when considered, there would not have been any scope to allege suppression

for invoking the extended period of limitation. We note that the above appeal before this Bench was preferred by the Revenue alone and the order on merits passed by the First Appellate Authority against the appellant has reached finality as there was no appeal filed by the appellant. Hence, to this extent, we agree with the findings in the impugned order that the arguments of the appellant on merit and the question of liability to Service Tax, did not arise. Hence, we also do not propose to consider the arguments of the appellant on merits.

8. The additional documents which were filed before this Bench in the first round of litigation have been placed on record by the appellant and we have carefully considered the same, in particular, the letter dated 27.05.2006 filed before the Senior Intelligence Officer, Madurai. The same is reproduced below for the sake of convenience: -

CHILLIES EXPORT HOUSE LIMITED

1-B, Patel Road, VIRUDHUNAGAR - 626 001.
INDIA.

फोन : 91-4562-343315
Fax : 91-4562-345089
91-4562-346703

Post Box No.: 31
Cable : CHILEX HOUSE
Web Site : svvt.com
E-Mail : rsrk@svvt.com

Date : ....
May 27, 2006

HAND DELIVERY

TO
THE SENIOR INTELLIGENCE OFFICER,
OFFICE OF THE DEPUTY DIRECTOR,
DIRECTORATE GENERAL OF CENTRAL EXCISE,
REGIONAL UNIT,
7-1-32,MAHATMA GANDHI NAGAR MAIN ROAD,
MADURAI - 625 014

PH : 2643511/512

DEAR SIR,

Sub: Submission of particulour for Commission paid to the Commission Agents located outside India

Ref: Your Summons dated 18-04-06 and our letter dt.28-04-06.

With reference to the above, We are enclosing herewith the following partuculars for your kind reference:-

1) Details of Sales Commission paid to the Parties Located Outside India and In India with address.
2) Certified copy of Manufacturing,Trading and Profit & Loss Account for the financial year 2004-2005.
3) Xerox copies of Allotment of Service Tax Code Number and Certificate of registration for Goods Transport Agency.
4) Xerox Copies of Service Tax Return (GTA) for the period from 01-10-2004 to 31-03-2005, 01-04-2005 to 30-09-2005 and 01-10-2005 to 31-03-2005.

Kindly acknowledge the same.

Thanking You,

Yours Faithfully,
For CHILLIES EXPORT HOUSE LIMITED

DIRECTOR.

9.1 At internal page number 3 (Sl. No. 6) – Annexures to the above letter - do we find the details of the commission paid to M/s. Nachman Gilon Corp., International Food Agency, Israel. It is this payment that the Revenue is contending, as being suppressed, which resulted in this prolonged litigation. When the complete payment schedule right from page number 1 is considered, it is seen that this is the only payment which appears to have been made in the year 2006 which, perhaps, was on account of a clerical mistake since the payments to other foreign agents at Sl. Nos. 1, 2, 3, 4, 5, 7 and 8 have been made between 2004 to 2005. When this was placed on record in the re-adjudication proceedings, the Adjudicating Authority could have called for the P&L Account / balance sheet of that particular year to ascertain the exact year of payment instead of drawing inference against the appellant.

9.2.1 It is also surprising for us to note that the above documents were placed, along with the covering letter, before the Senior Intelligence Officer, who appears to have accepted the same. It is most relevant now to revisit the Show Cause Notice dated 11.11.2008, issued much after the furnishing of details/documents by the appellant in response to the summons issued by the Senior Intelligence Officer. At paragraph 12, the fact of furnishing of the details of commission paid to the foreign agents stands acknowledged, in addition to which, the Service Tax liability has been determined in the same paragraph. Further, at paragraph 13 of the Show Cause Notice, the Assistant Commissioner has gone on to allege suppression of fact of receipt of business auxiliary services from foreign agents which are taxable, from the knowledge of the Department, with an intention to evade payment of Service Tax and thus, has justified the invoking of extended period of limitation as in the proviso to Section 73(1) of the Finance Act, 1994.

9.2.2 It is strange that nowhere in the Show Cause Notice has it been flagged as to the mismatch of the dates, which has become the sole reason in both the orders of the lower authorities to allege suppression and to justify invoking the extended period of limitation. What is baffling is the fact that the date of payment of commission to M/s. Nachman Gilon Corp., Israel has also not been flagged even in the first Order-in-Original dated 24.04.2009 nor has it been urged by the Department in its appeal in the first round, before this forum.

9.3 Be that as it may, but the fact remains that, irrespective of the date, the fact of payment was within the knowledge of the Department and hence, the Department could never have simply thrown it away or take the plea of ignorance since it is forming a part of the record of the Revenue.

10. In view of the above, we are satisfied that there remains nothing for the Revenue to allege suppression of any fact, much less of any commission payment to a foreign agent by the appellant, to invoke the extended period of limitation.

11. Hence, we set aside the impugned order and the ground-of-appeal, to this extent, stands allowed, with consequential benefits, if any, as per law.

12. The appeal is therefore allowed in part, as indicated above.

(Order pronounced in the open court on **31.03.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd