

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40790 of 2014

(Arising out of Order-in-Appeal No. 35/2014 dated 23.01.2014 passed by the Commissioner of Central Excise and Service Tax (Appeals), Large Taxpayer Unit, 1775, J.N. Road, Anna Nagar [W] Extn., Chennai – 600 101)

M/s. Alstom T&D India Limited

: Appellant

19/1, G.S.T. Road,
Pallavaram, Chennai – 600 043

VERSUS

Commissioner of Central Excise and Service Tax : Respondent

Large Taxpayer Unit,
1775, J.N. Road, Anna Nagar [W] Extn., Chennai – 600 101

APPEARANCE:

Shri Joseph Prabakar, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Superintendent for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40737 / 2023

DATE OF HEARING: 16.08.2023

DATE OF DECISION: 31.08.2023

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

Brief facts of the case, as could be gathered from the Show Cause Notice, Order-in-Original and the impugned Order-in-Appeal, are that the assessee was rendering service under 'business auxiliary service', availing CENVAT Credit of the Service Tax paid on the input services received by them, which was being utilised towards payment of Service Tax on the business auxiliary service. It is a fact borne on record that they are also distributing the credit to their other units in their capacity as an Input Service Distributor (ISD).

2. It appears that there was an internal audit conducted by the Internal Audit Party of LTU, Chennai, during December 2010 and April 2011, during which they appear to have noticed that M/s. Areva group had deputed some of their employees to the appellant in India, for utilisation of their expertise and upon payment of a fee. This, according to the Revenue, fell within the purview of manpower supply agency service and therefore there was a Service Tax liability on the appellant under reverse charge mechanism within the meaning of Section 66A of the Finance Act, 1994 read with Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

3. A Show cause notice therefore came to be issued on 15.06.2012, wherein the Revenue *inter alia* proposed that the case of the assessee was squarely covered under the definition of 'manpower recruitment or supply agency' as defined under Section 68 *ibid.*, any service therefore provided is covered under Section 65(105)(k) *ibid.* It was thus indicated that under the self-assessment procedure, a taxpayer is responsible to arrive at the correct value of taxable services and pay the Service Tax as per the Finance Act, 1994 and the rules made thereunder, but however, the assessee having not done so in its S.T.-3 returns, the same appeared to be a deliberate suppression of facts with intent to evade payment of Service Tax. Accordingly, it was proposed to demand the Service Tax payable on the manpower recruitment or supply agency, further to appropriate the payment made under protest along with interest remitted by them, apart from levy of penalty under Sections 78 and 76 *ibid.*

4. It appears from the documents placed on record that the appellant filed a detailed reply incorporating various defence to justify non-payment of Service Tax and also by relying on decisions of various higher judicious fora, but however, the original authority vide Order-in-Original No. LTU/061/2013-ADC(LTU) dated 18.03.2013 proceeded to

confirm the demand as well as appropriation, as proposed in the Show Cause Notice.

5. Insofar as the limitation and the suppression of facts is concerned, the officer has recorded the plea of the assessee that there was enough scope for doubt as to the chargeability and that the issue involved intricate interpretation of legal provisions and hence the larger period could not be invoked, for which reason, no penalty could be imposed. The original authority has, however, held that the assessee nowhere demonstrated a reasonable cause for its failure to remit Service Tax and that if the issue involved intricate interpretation of the legal provisions, they should have sought clarifications regarding the same. Further the fact that they did not disclose their activities in their S.T.-3 returns also clarifies about the intention.

6. Aggrieved by the above order, the assessee filed first appeal before the first appellate authority, but however, even the first appellate authority having rejected their appeal vide impugned Order-in-Appeal No. 35/2014 dated 23.01.2014, the present appeal has been filed before this forum.

7.1 Today, when the case was taken up for hearing, Shri Joseph Prabhakar, Ld. Advocate, submitted that the appellant is not pressing the grounds of appeal on merits, but however, is restricting their claim insofar as the invoking of larger period of limitation and levy of penalty under Section 78 *ibid.* is concerned.

7.2 He would contend that upon being pointed out during audit itself, the assessee paid the entire Service Tax along with applicable interest and therefore, there was no need at all for the Revenue to issue Show Cause Notice. The very fact that even the Show Cause Notice proposes to appropriate the payment made towards Service Tax and the interest as well itself shows that the Show Cause Notice was issued only with a view to levy penalty under

Section 78. He would thus contend that having appropriated towards both Service Tax liability as well as interest, there is no loss to the Revenue and hence in the first place, the Revenue ought not to have issued Show Cause Notice at all.

8. On the other hand, Smt. Anandalakshmi Ganeshram, Ld. Departmental Representative, relied on the findings of the lower authorities.

9. Having heard the rival contentions, we have gone through orders of lower authorities. It is a matter of record, and admittedly so, that as on the date of Show Cause Notice, the appellant had discharged the Service Tax liability, as quantified and proposed in the Show Cause Notice, along with the appropriate interest as well and hence, according to us, issuance of Show Cause Notice was only to levy penalty under Section 78 *ibid.* on the ground of suppression of facts.

10.1 The Hon'ble High Court of Karnataka in the case of *Commissioner of Central Excise and Service Tax, LTU, Bangalore v. M/s. Adecco Flexione Workforce Solutions Ltd. [2012 (26) S.T.R. 3 (Kar.)]* had an occasion to consider a similar situation where the Revenue having appropriated the duty liability as well as interest, had issued Show Cause Notice, wherein the proposal was made again to appropriate the amount already paid towards the duty liability and interest and also thereby proposing penalty, had deleted the penalty so levied since there was no loss to the exchequer. The relevant paragraphs of the above judgement are reproduced below: -

"3. Unfortunately the assessing authority as well as the appellate authority seem to think. If an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest. It is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in

accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court hereafter, certainly it will be a case for taking proper action against those law breakers.

4. In that view of the matter, we do not see any merit in these appeals. The appeals are dismissed."

10.2 The co-ordinate Kolkata Bench of the CESTAT in the case of *M/s. Sen Brothers v. Commissioner of Central Excise, Bolpur* [2014 (33) S.T.R. 704 (Tri. – Kol.)] has, after following the decision in the case of *M/s. Adecco Flexione Workforce Solutions Ltd. (supra)* and various other judicial precedents, held as under: -

"7. It is thus evident from the aforesaid provisions that in the cases of non-payment of Service Tax on due dates, once payment along with interest is made before issuance of show cause notice, in such cases no show cause notice could be issued for imposition of penalty. In this regard I also find that Id. Commissioner (Appeals) in his order has made a categorical finding that the elements of fraud, suppression, misstatement, etc. were not present in this case. Revenue has not contested his findings by filing appeal. In view of these facts the appellants' case is fully covered by the provisions of sub-section (3) of Section 73 of the Finance Act, 1994.

8. It is not in dispute in this case that the appellant had discharged the entire Service Tax liability and interest thereof before the issuance of show cause notice. The issue is regarding the imposition of penalty on the appellant under Section 76 of the Finance Act, 1994. I find that once the appellant has already discharged

Service Tax liability and the interest thereon and no additional liability has been adjudged in the adjudication proceedings, provisions of Section 73(3) will be applicable in this case and there was no necessity of issuing any show cause notice to the appellant. In such cases no penalty is imposable by virtue of Explanation 2 to sub-section (3) of Section 73 of the Finance Act, 1994.

9. *Hon'ble Karnataka High Court in the case of CCE & ST, LTU, Bangalore v. Adecco Flexione Workforce Solutions Ltd. - 2011-TIOL-635-HC-KAR-ST = 2012 (26) S.T.R. 3 (Kar.) has upheld the ratio that in case the entire amount of Service Tax liability, interest thereon stands paid by the appellant before issuance of show cause notice, hence provisions of Section 73(3) of the Finance Act, 1994 should be made applicable and no show cause notice should have been issued. This judgment has been followed by this Tribunal in the case of M.R. Coatings Pvt. Ltd. v. CCE, Rajkot - 2013 (30) S.T.R. 76 (Tri.-Ahmd.).*

10. *The issue of penalty came up for the consideration before the High Court of Karnataka in the case of Commissioner of Service Tax, Bangalore v. Master Kleen - 2012 (25) S.T.R. 439 (Kar.). The ratio from the judgment of Hon'ble High Court in the case of Master Kleen is reproduced below :-*

"The Revenue has preferred this appeal against the order passed by the Tribunal [2010 (17) S.T.R. 365 (Tribunal)] setting aside the orders passed by the lower authorities, imposing penalty under Section 76 of the Finance Act, 1994 for non-payment of Service Tax on due dates.

2. The material on record discloses that the assessee on being pointed out by the authorities for not paying the Service Tax, has paid the Service Tax with interest even before the issue of show cause notice. Sub-section (3) of Section 73 of the Finance Act, 1994, categorically states that if tax and interest is paid and the same is informed to the authorities, then the authorities shall not serve any notice calling upon the authorities to pay penalty. It is unfortunate that inspite of statutory provisions, the authorities have issued a show cause notice claiming penalty. So, tax and interest was paid before issue of show cause notice. Therefore, the Tribunal was justified in setting aside those orders. As the said order is strictly in accordance with law we do not find any legal infirmity that calls for interference. Therefore this appeal is dismissed."

11. *In view of the law being settled as hereinabove stated, I find that the impugned order is liable to be set aside and I do so. Impugned order is set aside and the Appeal is allowed."*

The ratio laid down in the above cases has been consistently followed by various benches of the CESTAT.

11. We find that the same reasons apply even for invoking the larger period since other than mere alleging suppression, no documentary evidence is placed on record. The Show Cause Notice is therefore clearly issued only for levying penalty and to this extent, the above decision of the Hon'ble High Court of Karnataka in *M/s. Adecco Flexione Workforce Solutions Ltd. (supra)* squarely applies.

12. In view of the above, we uphold the demand for the normal period alone.

13. The appeal is disposed of on the above terms.

(Order pronounced in the open court on **31.08.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

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

Sdd