CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 42789 of 2014

(Arising out of Order-in-Appeal No. 173/2014 dated 18.09.2014 passed by Commissioner of Customs, Central Excise and Service Tax (Appeals), Coimbatore)

M/s. Kishore Apparels Pvt. Ltd. **...Appellant**
Kishore Industrial Estate,
No. 101-E, BSS Road,
Tirupur – 641 601.

Versus

Commissioner of GST and Central Excise **...Respondent**
Coimbatore Commissionerate,
No. 6/7, A.T.D. Street,
Race Course,
Coimbatore - 641 018.

APPEARANCE:

For the Appellant : Ms. P. Saravanaselvi, Advocate
For the Respondent : Mr. N. Satyanarayanan, Authorised Representative

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

FINAL ORDER Nos. 41385 / 2024

DATE OF HEARING : 09.10.2024
DATE OF DECISION : 29.10.2024

Order :- Per Mr. VASA SESHAGIRI RAO

Brief facts of the appeal No. ST/42789/2014 filed by M/s. Kishore Apparels Pvt. Ltd., Tirupur (the appellant herein) are that they are engaged in the manufacture and export of knitted garments. On verification, it was noticed that the appellants have availed the services of overseas Commission Agents to promote their sales abroad and paid commission to these foreign commission agents. In terms of the Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax

Rules, 1994, if any taxable service is received by a person located in India from a person outside India, the recipient of such service is deemed to be the service provider and is liable to pay the service tax applicable under Reverse Charge Mechanism. The appellants have paid commission of Rs.1,33,95,351/- to the foreign commission agents during the period from 09.07.2004 to 28.02.2009 but have failed to discharge their service tax liability of Rs.15,55,773/-.

1.2 As such, the appellant was issued with a Show Cause Notice No. 33/2009-ADC dated 30.09.2009 for the period from 09.07.2004 to 28.02.2009 by invoking the extending period of limitation proposing to levy service tax and cess for Rs.15,55,773/- under the category of BAS for the commission paid to overseas commission agents along with interest and penalty under Section 76, 77 and 78 of the Finance Act, 1994. The above service tax was demanded from the appellant under reverse charge mechanism as the overseas commission agents were located abroad who procured export orders for the appellants.

1.3 After the due process of the adjudication, the Adjudicating Authority *vide* Order-in-Original No. 36/2014 (ST-ADC) dated 25.03.2014 confirmed the levy of service tax for the period from 18.04.2006 to 28.02.2009 to an extent of Rs.10,96,489/- along with interest and penalty under Section 77(2) and 78 of the Finance Act, 1994 on the grounds that: -

i. The services provided by the overseas commission agent is covered by the definition of Business Auxiliary Service (BAS) defined under Section 65(19) of the Finance Act, 1994, which reads,

> *"65. Definition.-*
>
> *In this Chapter, unless the context otherwise requires,*
>
> *(19) "business auxiliary service" means any service in relation to,-*
>
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
>
> *(ii) promotion or marketing of service provided by the client; or*
>
> *(iii) any customer care service provided on behalf of the client; or*
>
> *(iv) procurement of goods or services, which are inputs for the client; or*
>
> *(v) production of goods on behalf of the client; or*
>
> *(vi) provision of service on behalf of the client; or*
>
> *(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commissions agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944.*
>
> *Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer system;*

ii. In terms Section 66A of the Finance Act, 1994 introduced w.e.f. 18.06.2006, if any taxable service is provided by a person from outside India and received by a person who has his place of business in India, it shall be treated as if the recipient himself had provided such taxable service in India.

iii. In terms of Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, when services are provided by a person located abroad but received by a recipient located in India and used in relation to the recipient's business or commerce, then such services are received in India

Demand of service tax was dropped for the period prior to 18.04.2006 as Section 66A came into force from the said date, in pursuance to the decision of the High Court of Bombay in the case *Indian National Shipowners Association [(2009) 13 STR 235].* Penalty under Section 76 was dropped as penalty under Section 78 of the Finance Act, 1994 was confirmed.

1.4 Aggrieved by the order of the Adjudicating Authority to the extent that the demand was confirmed, the Appellant filed an Appeal against the order on the following grounds: -

i. The Show Cause Notice is not signed; hence it is not valid. Therefore, the proceeding is *void ab-initio.*
ii. The Show Cause Notice has not invoked the provisions of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.
iii. The activity was carried out outside India and Section 64 which is the parent section is applicable only in India except Jammu and Kashmir.
iv. In terms of Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, services are taxable only if the services are received in India by the service recipient whereas in the present case, the activity namely, canvassing orders is performed outside India.

1.5 However, the Appellate Authority *vide* Order-in-Appeal No. 173/2014 dated 18.09.2014 upheld the Order-in-Original on the following grounds: -

i. That the fact of receiving export orders from a foreign agency is nothing but a kind of work/service, carried out on behalf of the Appellant by a person/agent abroad, the service was received by the appellant in India and payments were also made by the Appellant for the service given by the foreign agency.
ii. According to Section 66A read with Section 65(105)(zzb) of Finance Act, 1994, the recipient of service is to be treated as povider of service for the purpose of taxation and the amount paid to the foreign agency is the taxable amount and the receipt of service is covered under the category of 'Business Auxiliary Service' under Section 65(19) of the Act.

2. The Ld. Advocate Ms. P. Saravanaselvi representing the Appellant has contended as follows: -

i. That the entire proceedings are based on an unsigned Show Cause Notice which is *void ab initio* relying on the decisions in the cases of: -
   a. *Prakash Krishnavtar Bhardwaj Vs. ITO [(2023) 150 Taxmann.com 60 (Bombay)]*
   b. *SPS Steel and Rolling Mills Vs. CCE [(2007) 219 ELT 881]*
   c. *Shakambari Overseas Trades Pvt Ltd Vs. CCE [(2008) Taxmann.com 922 (Kolkata CESTAT)]*
ii. Show Cause Notice has not invoked the provisions of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.
iii. The activity of canvassing orders for export was carried out outside India.

iv. Notification No. 14/2004-ST dated 10.09.2004 exempts taxable service in the nature of business auxiliary service in relation to agriculture, printing, textile processing or education relying on the following decisions: -

a. *Texyard International Vs. CCE [(2015) 40 STR 322]*
b. *Arvind A. Traders Vs. CCE [(2016) 44 STR 264 (Tri.-Chennai)]*
c. *Polar Home Textiles (P) Ltd Vs. CST [(2024) 161 Taxmaпn.com 136 (Chennai - CESTAT)]*

v. As per Foreign Trade Policy for the period 2006 to 2009, para 2.483, in relation to all goods and services exported from India, the services received/rendered abroad shall be exempted from Service Tax.

vi. The issue is revenue neutral as the Appellant is eligible to avail credit on the Service Tax paid under reverse charge.

vii. The Show Cause Notice is time barred as none of the ingredients that are required for invoking the extended period of 5 years are present. All details have been taken from the Appellants books of accounts and there suppression is not attributable to the conduct of the Appelant.

3. The Ld. Authorised Representative Shri N. Satyanarayanan for the Department has reiterated the findings of the Lower Adjudicating Authorities. He has submitted that the services provided by a foreign commission agent or a non-resident from outside India and received by a person in India are taxable under BAS and the liability to pay tax was envisaged on the recipient of such service under Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 read with Section 66A of the Finance Act, 1994. He has referred to the Board’s Letter *vide* F.No. 276/8/2009-CX 8A dated 26.09.2011, wherein a clarification was issued to the effect that service tax liability falls upon the recipient of service in India where any taxable service

was provided by the non-resident or a person located outside India w.e.f. 18.04.2006. The fact of receiving export orders from a foreign agency is nothing but a kind of service carried out on behalf of the appellants by a person or an agent abroad and as such these services were received by the appellants in India and payments were also made by the appellants for services given by the foreign overseas commission agents.

4. We have heard both sides and considered the written submissions made by the Ld. Advocate for the appellant and also findings in the impugned Order-in-Appeal No. 173/2014 dated 18.09.2014.

5. The issues that arise for determination in this appeal are: -

i. Whether the appellant is liable to pay service tax on the commission paid to overseas agents for procuring the orders under BAS on Reverse Charge Mechanism as contented by the Department? and,

ii. Whether suppression can be alleged against the appellant for invoking extended period?

6. We find that the Appellant has argued both on merits and also on limitation. The main objection that was raised was that the Show Cause Notice No. 33/2009-ADC dated 30.09.2009 issued by the Additional Commissioner of Central Excise, Customs and Service Tax, Coimbatore was not signed and so, the proceedings initiated are *void ab initio*. A perusal of the Show Cause Notice dated 30.09.2009 enclosed with the Appeal was found to be not signed by the Additional Commissioner of Central Excise,

Customs and Service Tax, Coimbatore but was certified as True Copy. This certification whether done by the officer of the Department or by the Appellant or the Counsel is not clear. To discuss and give a finding, the Appellant must have enclosed the original copy of the Show Cause Notice issued which was received by them. As the Appellant is succeeding on merits as detailed below, there is no need to discuss about this issue and also on invocability of extended period.

7. The issue of chargeability of service tax on the commission paid to overseas agents is no more *res-integra* and the Tribunal, Chennai has held in the case of *Texyard International Vs. Commissioner of Central Excise, Trichy [2015 (40) STR 322 (Tri.-Mad.)]* that demand of service tax is not sustainable. All the facts obtaining in the present appeal are similar to those which were discussed in detail in the above decision which read as below: -

> *"4. Heard both sides. Ld. advocate submits that all the three appellants are manufacturer-exporters and all their products are exported outside India. In order to procure orders, they have engaged overseas commission agents. Only after securing the confirmed orders from overseas buyers, they procure yarn, dyes/chemicals and other raw materials for the manufacture of textile made ups. The entire activity is predominantly known as textile processing. Since their entire activity is dependent upon export orders, without securing the confirmed overseas orders, they cannot undertake manufacture of Textile made ups as quantity, design and specification of export goods is to be met as per overseas buyers requirement. He further submits that overseas commission agent service have direct nexus with the manufacturing and textile processing of finished goods and the commission paid to the overseas buyers is an input service as they are engaged in the textile processing. During the material period, the Notification No. 14/2004-S.T., dated 10-9-2004 exempts taxable service provided to a client in relation to Business Auxiliary Service, Agriculture, Printing, Textile Processing Industry. The lower appellate authority had denied the exemption. As they are the textile manufacturer and exporters, the exemption under the above notification is not applicable to them. He further submits that as per Foreign Trade Policy Notifications for the Policy Period 2004-09, para 2.483 provides that all goods and services exported from India, the services received/rendered abroad shall be exempted from service tax. He submits that FTP policy at para 2.483 read with exemption Notification No. 14/2004, the government has consciously exempted service tax on Business Auxiliary Service during the relevant period on the impugned service availed. He further submits that the appellants are also eligible to get the refund under Notification No.*

41/2007-S.T. as amended by Notification No. 17/2008-S.T. on the service tax paid on such service as they are eligible to avail the credit on the service tax paid under reverse charge. He also submits that the demand is also hit by limitation as there is no suppression of facts as it is only question of interpretation and they are regular exporters as well as the foreign exchange remittances are duly accounted in Profit & Loss Account. Therefore, extended period cannot be invoked. As regards Revenue's appeal against waiver of penalty under Sections 76, 77 & 78, ld. advocate submits that both the lower authorities have rightly waived penalty. He relied on the following decisions :-

(1) Commissioner v. Advantage Media Consultant - 2009 (10) S.T.R. 449 (Tri.-Kolkata) [affirmed by Hon. Supreme Court in 2009 (14) S.T.R. J49 (S.C.)]

(2) Needle Industries (I) Pvt. Ltd. v. CCE, Salem - 2010 (17) S.T.R. 525 (Tri.-Chennai).

5. On the other hand, ld. AR reiterated the findings of the adjudicating authority wherein the demand was rightly confirmed. She submits that assessees are not covered under Exemption Notification No. 14/2004-S.T. On the Revenue's appeal, she reiterated the grounds of appeal and submits that they are not eligible for waiver of penalty under Section 80 of Finance Act, 1994 and the lower appellate authority has erred in waiving penalties.

6.1 We have carefully considered the submissions of both sides and also examined the records. The assessees filed appeals contesting the service tax demanded under reverse charge on the commission paid to the overseas agents for export of finished goods. The Revenue filed appeal against setting aside of penalties by Commissioner (Appeals). The main issue in the present appeals is whether appellant-assessees are eligible to the benefit of exemption of service tax under Business Auxiliary Service under Notification No. 14/2004-S.T., dated 10-9-2004 and whether assessees are liable for penalty as contended by Revenue. Prima facie, we find that there is no dispute on the fact that the appellants are manufacturer-exporters and they manufacture textile made ups and export to overseas. They have engaged overseas agents and paid commission for procurement of export orders and the commission agency service is covered under the Business Auxiliary Service. The appellants claimed the exemption under Notification No. 14/2004-S.T., dated 10-9-2004 as applicable during the relevant period before appellate authority and he rejected their plea on the ground that the said exemption is applicable to the input services related to textile processing. The period involved in all these appeals relates to post 18-4-2006. It is relevant to reproduce the Notification No. 14/2004-S.T., dated 10-9-2004 as under :-

"Service tax exemption to specified services in relation to Business auxiliary service

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service provided to a client by any person in relation to the business auxiliary service, insofar as it relates to, -

(a) procurement of goods or services, which are inputs for the client;

(b) production or processing of goods for, on behalf, of the client;

(c) provision of service on behalf of the client; or

(d) a service incidental or auxiliary to any activity specified in (a) to (c) above.

and provided in relation to agriculture, printing, textile processing or education, from the whole of service tax leviable thereon under section 66 of the said Finance Act.

6.2 The lower authorities denied the exemption merely on the ground that the said services are not used for textile processing. On careful reading of the above notification, it is evident that service tax was exempted during the relevant period for the services provided under Business Auxiliary Service if it relates to agriculture, printing, textile processing or education. The appellants are Textile manufacturer and exporters. The word "textile processing" referred in the notification is to be understood in a broader sense. The dictionary meaning of "textile processing" means sequence of operations or changes undergone and the definition of "textile" includes fabrics, fibre, yarn suitable for weaving into fabric. The exemption of service tax under BAS was allowed in relation to four industries namely agriculture, printing, textile processing and education. Therefore, the appellant being textile industry, it is covered under the category "textile processing" in the notification.

6.3 Commission paid to the overseas agents is in respect of service provided by that agent to the appellant to export its goods and thereby sales is promoted. That is an activity incidental or auxiliary to processing of textile goods and covered by Business Auxiliary Service and Clause (d) of the notification extracted above covers the case of the appellant bringing the export promotion activity abroad as incidental and auxiliary to the activity of production as is meant by Section 65(19) of Finance Act, 1994. Appellants are accordingly entitled to the benefit of exemption Notification No. 14/2004 and not liable to the payment of service tax under reverse charge.

7. It is also relevant to state that appellants being the exporter of textile made ups as per the Foreign Trade Policy are not expected to export the taxes. Appellants pleaded that there was no suppression of facts with deliberate intention to evade payment of service tax. As payment of service tax by the recipients was under dispute for a long period till that was settled by the decision of Apex Court in the case of UOI v. Indian National Shipowners Association - 2011 (21) S.T.R. 3 (S.C.) there was no deliberate intention to make suppression of facts. Appellants were under bona fide belief that as per the EXIM Policy at para 2.482 of the Policy Period 2009-10 issued by Notification No. 1/(RE/2008)/2004-2009 dated 11-4-2008 all goods and services exported from India, services received/rendered abroad wherever possible shall be exempted from service tax. Therefore, the demand is also hit by limitation and the extended period cannot be invoked.

8. It is further pertinent to mention that appellants are manufacturer-exporters. Service tax if any payable under reverse charge is permissible to be availed as Cenvat credit and that may be refundable under Notification No. 41/2007 unless otherwise deniable by law. The provision made in Central

Excise Rules and Cenvat Credit Rules ensures that tax is not added to the cost of export so that Indian exporter can compete with overseas market. The Hon'ble Supreme Court in CCE v. Coca Cola India (Pvt.) Ltd. - 2007 (213) E.L.T. 490 dismissed Revenue's appeal holding that when an assessee is eligible to Modvat credit, the situation becomes revenue-neutral. In the present case, service tax demanded entitles the appellants to the credit thereof and claim refund thereof under 41/2007 since it is stated by appellants that they have no other liability for which the exercise may become revenue-neutral."

8. Appreciating the facts, evidence and ratio of the above decision, we cannot sustain the impugned Order-in-Appeal No. 173/2014 dated 18.09.2014 of the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore and, so ordered to be aside.

9. Thus, the Appeal is allowed with consequential relief, if any, as per the law.

(Order pronounced in open court on 29.10.2024)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

MK