

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

SERVICE TAX APPEAL NO.50223 of 2019

[Arising out of Order-in-Appeal No.479(SM) ST/JPR/2018 dated 02.11.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur].

M/s. Gravita India Ltd.

402, Gravita Tower, A-27B,
Shanti Path, Tilak Nagar,
Jaipur, Rajasthan - 302004

...Appellant

VERSUS

**Commissioner of Central
Goods and Service Tax &
Central Excise-Jaipur-I**

NCR Building, Statue Circle,
C-Scheme, Jaipur,
Rajasthan - 302005

...Respondent

APPEARANCE:

Shri R.K. Hasija, Advocate for the appellant

Mr. Sanjeev Kumar Ray, Authorised Representative for the Respondent

Coram: HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 22/08/2024

DATE OF DECISION: 22/08/2024

FINAL ORDER NO.58612 / 2024

DR. RACHNA GUPTA

The brief facts of the case are that the appellant is a holder of service tax registration for payment of service tax on Work contract Service, Manpower Supply and Recruitment Service, Security/Detective Agency Service and GTA etc. During the course of audit of the records of the appellant, it was observed that the appellants had not paid service tax amounting to Rs. 53,08,970/- during the period 2010-11 to 2014-15, on foreign bank charges and finance cost paid in foreign currency in contravention of provisions of

Section 66A, 68, 69 & 70 of the Finance Act, 1994, read with Rule 2(1)(d)(iv), 4, 5, 6 and 7 of Service Tax Rules, 1994 and Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 and Notification No. 30/2012-ST dated 20.06.2012.

2. Invoking extended period of limitation, show cause notice, vide C. No. V(H)ADJ/ST/104/2015/3171 dated 20.10.2015 was issued to the appellants by the Commissioner, Central Excise Commissionerate, Jaipur, demanding Service Tax amounting to Rs 53,08,970/- (including Cess) under Section 73 (1) alongwith interest under section 75 and penalty under Sections 77 (2) and 78 of the Finance Act, 1994.

3. The said proposal was confirmed vide Order-in-Original No.05(ST)JP/VKJ/ 2017-18-JC dated 07.06.2017. The appeal against the said order is dismissed vide Order-in-Appeal No. 479 (SM) ST/JPR/2018 dated 02.11.2018. Still being aggrieved the appellant is before this Tribunal.

4. We have heard Shri R.K. Hasija, Id. Counsel for the appellant and Mr. Sanjeev Kumar Ray, Authorised Representative for the respondent-Department.

5. Ld. Counsel for the appellant submitted that the Show Cause Notice was solely based on the objections raised by the AG Audit in respect of the audit conducted by them without the authority of law. No further investigations were carried out by the Department to substantiate the objections raised during the audit, except asking for

the figures. It is a settled legal position that SCN cannot be issued merely based on audit objections, without any independent investigation of such objections. Reliance is placed on the following decisions:

i) Swastik Tin Works v. CCE, 1986 (25) ELT 798 (Tri.)

ii) Indian Plastics Ltd. v. CCE, 1988 (35) ELT 434 (Tri.)

iii) Shree Uma Foundries Pvt. Ltd. v. CCE - 2008 (222) ELT 317

6. SCN is also objected being barred by time. It is submitted that the department has failed to show any positive act of suppression on the part of the appellants. Decision in the case of **CCE Hyderabad v/s Chemphar Drugs and Liniments, 1989 (40) ELT 276 (SC)** has been relied upon. Otherwise also demand is based on statutory documents. Extended period cannot be invoked. For the same reasons penalties also should not have been imposed.

7. On the merits of the case it is submitted that foreign banks have not provided any service to the appellants and the said bank charges retained by them cannot be termed as a consideration for providing any banking or financial service. Ld. Counsel impressed upon that service provider and service recipient relationship does exist between the foreign bank and its customer, but not between the foreign bank and the appellants. There is no contract existing between the appellants and the Foreign Bank to point out that the appellants are availing any services from the Foreign Banks. The Foreign Bank has provided service to the buyer who is having Letter of Credit facility with it. For the Foreign Bank the buyer is the client

and not the appellants' company. If at all any service provider and service recipient relationship exists with the appellants then it is between appellant and its banker in India and not with foreign bank located outside India and in which case the liability of service tax if any is on the Indian bank of the appellant company providing the 'banking and financial service' to the appellants. Only because payment is remitted by the foreign bank to the Indian Bank on behalf of the Buyer of the goods after deducting its charges; it cannot be presumed that the foreign bank had provided service to the appellant and the charges retained by it is a consideration of that service

8. Ld. Counsel also relied upon the Circular No.180/06/2014-ST dated 14.10.2014 which is alleged to have been ignored by Commissioner (Appeals).

9. Finally it is submitted that the issue is no more res-integra as has already been decided in the case of **Greenply Industries Ltd. vs. CCE reported in 2015 (30) STR 605 (Tri.-Del.)**. With these submissions Id. Counsel has prayed for Order-in-Appeal to be set aside and appeal to be allowed.

10. Ld. Departmental Representative has conceded that the issue stands already decided in favour of assessee, however has reiterated the findings in the order under challenge. It is submitted that the appellant received banking and financial services from foreign banks. These services include the remittance and realization of money in foreign currency, for which the foreign banks charge fees as deduction. The fees charged by foreign banks is the consideration for the services provided, making them taxable under the provision of

section 67 of the Finance Act'1994, according to which "Gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.)

11. The findings holding that since the foreign banks could not remit money directly to the Indian exporter due to RBI guidelines, the exporter (appellant) indirectly agreed to the deductions made by the foreign banks has no infirmity. The deductions from the appellant's account therefore qualify as 'gross amount charged' for services rendered.

12. The appellant failed to provide satisfactory evidence that they did not receive any services from foreign banks. The documents submitted did not adequately support their claim of non-receipt of services.

13. Ld. D.R. submitted that the appellant is liable to pay service tax under the reverse charge mechanism, as the foreign service provider is in a non-taxable territory.

14. Ld. D.R. has accordingly prayed for appeal to be dismissed.

15. Having heard both the parties and perusing the record, we observe following as the apparent fact:

Appellant is an exporter and the buyer is in the foreign land i.e. non-taxable territory. Appellant, for such transactions, appoint his banker in India for all purposes. After the materialization of the contract, the Indian Banker transacts with the Foreign Bank who represents the party to whom the export was made being situated in non-taxable territory. Upon such negotiations between the Indian Bank and Foreign Bank, upon the contract entered in relation to the export. Foreign Bank deducts certain amounts, in case there is deficiency in the documents or there are breach of any terms and conditions entered between the parties and this burden was passed on to the appellant as bank charges. This amount was reflected in the accounts of the appellant under the head 'Foreign Bank Charges,

16. We are of the opinion that these facts shows that Appellant who has booked the sale, instead of reducing the amounts released against such sale, booked the same under the head charges/ deductions levied by the Foreign Banks just to distinguish such deductions from the actual export proceeds. As such, the Foreign Bank of the customer located outside India has not provided any service to the appellant located in India. For the Foreign Bank, the buyer is the client and not the appellants' company. Thus, service provider and service recipient relationship exist between the foreign bank and the buyer and not between the foreign bank and appellant. Appellant has not received any service from the foreign banks as no relationship exists between the foreign bank and the appellant. Appellant has not received any service from the foreign banks as no

relationship exists between the foreign bank and the appellant. If at all any service provider and service recipient relationship exists with the appellant then it is between appellant and its banker in India and not with foreign bank located outside India and in which case the liability of service tax if any is on the Indian bank of the appellant company providing the 'banking and financial service' to the appellant. It is the business understanding of the appellant with its buyer as to who will bear the bank charges.

17 Thus we hold that in the instant case no service has been provided within the taxable territory. Foreign Bank of the buyer had provided service to its client i.e. Buyer who is having letter of credit facility with it Foreign bank after retaining its charges and commission remits the net amount to appellant's bank in India where the appellant has facility of letter of credit. Appellant had received service if any from its bank in India with whom all the documents were negotiated. It does not have any direct connection/ nexus with the Foreign Bank of the Buyer When the provider of service i.e. 'the Foreign Bank' and recipient of service i.e. 'the Buyer' both are located outside India, there is no question of taxing such service in India as the said service has been provided outside the taxable territory and outside the purview of Section 66B which is the charging section for levy of service tax.

18. Hon'ble Tribunal in the case of Greenply Industries Ltd. VS CCE [2015 (38) S.T.R. 605 (Tri.- Del)] has been held that there is no document showing foreign banker charging any amount directly from assessee and the assessee cannot to be treated service recipient and

Service Tax not to be charged under Section 66A of Finance Act, 1994 read with Rule 2(1)(2)(iv) of Service Tax we ord from: Rules, 1994.

We also draw our support from:

1. Kadri Mills (CBE) Ltd. Versus Commissioner of GST & Central Excise, Salem - 2023 (8) TMI 1149-CESTAT, CHENNAI
 2. SKM EGG Products Export (1) Ltd. Versus The Commissioner of Central Excise (Appeals), Annai Medu Salem. 2023 (3) TMI 1384 - CESTAT CHENNAI
 3. Theme Exports Pvt. Ltd. Versus C.S.T., Delhi 2018 (5) TMI 825 - CESTAT NEW DELHI
 4. Dileep Industries Pvt. Ltd. Versus CCE, Jaipur - 2017 (10) TMI 1231 - CESTAT NEW DELHI
19. Further, as per Circular No. 180/06/2014-S.T., dated 14-10-2014, no service tax is leviable as place of provision of service is outside India. It has been clarified that no service tax is payable per se on the amount of foreign currency remitted to India from overseas for the reason that the remittance comprises money and does not in itself constitute any service in terms of the definition of 'Service' as contained in Section 65B of the Finance Act, 1994. Conversion charges or fee levied for sending such money would also not be liable to service tax as the person sending money and the company conducting the remittance are both located outside India.
20. Otherwise also if appellant is legally required to pay the amount of service tax under reverse charge mechanism then the appellant would be entitled to avail CENVAT credit of the amount of service tax so paid and utilize it against payment of excise duty in respect of its

clearances of final products. We rely upon the judgment in the case of JET Airways (I) Ltd. Vs. CCE [2016 (44) STR-465 (Tri-Mumbai)]

21. Thus issue is no more *res-integra*. It stands decided in favour of the assessee. The Commissioner (Appeals) is held to have wrongly ignored the decisions as quoted above.

22. On technical ground of limitation we observe that SCN has been issued on 20.10.2015 for the period FY 2010-11 to 2014- 15. The normal period of limitation is eighteen months from the "relevant date". Hence, the demand for the period prior to 31.03.2014 in respect of Finance Cost paid to foreign banks in foreign currency is time barred. Demand in respect of bank charges is for the period 2010-11 to 2012-13, is completely hit by time limitation. Suppression means not providing information which the person is legally required to state, intentionally or deliberately with intent to evade payment of tax. Appellant had clearly reflected such payments in its notes to financial statements based on which SCN has been issued. Hon'ble Supreme Court has held in the case of **Continental Foundation Jt. Venture Vs. CCE, Chandigarh-1 [2007 (216) ELT-177-SC]** that since the expression "suppression" in proviso to Section 11A is accompanied by very strong words such as "fraud" or "collusion", it has to be construed strictly and mere omission to give information is not suppression of facts unless it was deliberate act to evade payment of tax. Supreme Court's in the case of **Collector Vs. Champhar Drugs [1989 (40) ELT-276-SC]** has held that mere inaction or failure on the part of manufacturer will not amount to suppression of facts. Conscious or deliberate withholding of

information when the manufacturer knew otherwise is required to be established before saddling the manufacturer with liability for a period beyond one year. For the bonafide belief neither extended period is applicable nor is penalty imposable.

23. Also no penalty is imposable where there is interpretation of law. SCN does not bring out any evidence to show any positive act of suppression on the part of the appellants. In the case of **Uniworth Textiles Ltd. v/s CCE Raipur, 2013 (288) ELT 161 (SC)**, Hon'ble Supreme Court held that mere non-payment of duty does not amount to collusion, or willful misstatement or suppression of fact and that it demands proof of a high order of credibility. All these decisions are sufficient for us to hold that the extended period has wrongly invoked. Resultantly, the SCN is held to be barred by time.

24. With these observations order under challenge is hereby set aside and consequent thereto the appeal is hereby allowed.

[Pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)