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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Date 16/10/2009

Appeal No. ST/376 /2009 – SM[BR]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
SHRI SUDESH SHARMA,
NK-74, BAZAR NAUHRIAN, JALANDHAR.

SHRI SUDESH SHARMA, Appellant
Vs
Respondent
C.C.E. LUDHIANA

I am directed to transmit herewith a certified copy of **Final order No.** 1265 / 2009 –SM[BR] dated 24.9.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. LUDHIANA
   CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA 141001 (PUNJAB)
2. Adv. / Consult
   MR.SUDHIR MALHOTRA.
   13-R, HUKAM CHAND COLONY, NEAR D.A.V COLLEGE, JALANDHAR
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35. West Punjabi Bagh. New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

ST/376/09-SM

(Arising out of Order-in-Appeal No.17/ST/Appl./Jal./2009 dt.17.2.09 passed by the Commissioner(Appeals), Chandigarh)

Shri Sudesh Sharma — Appellant

Versus

CCE, Ludhiana — Respondent

Appearance
Sh. Sudhir Malhotra, Adv. For Appellant

Sh. S.K.Bhaskar, DR for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Final
Date of Hearing: 24.9.09
Order No. 1265/2009 SM (Br)

Per Rakesh Kumar:

The appellant provided taxable service of Business Auxiliary Service(as commission agent) under Section 65(19)(105)(zzb) read with 65(19) of the Finance Act,1994. During the period from 1.7.03 to 8.7.04, the service of commission agent provided by a person was exempt from service tax under Notification No.13/2003-ST dt.20.6.03 and this notification was amended only w.e.f. 9.7.04 so as to make the appellant liable for payment of service tax. The appellant was issued SCN dt.19.6.07 for recovery of service tax on non-paid tax amounting to Rs.2,13,786/- alongwith interest for the period from 14.9.04 to 31.3.07 and also for imposition of penalty under Section 75A, 76, 77 & 78 of the Finance Act,1994. Though the appellant pleaded that the value of taxable service, for the period from 14.9.04 to 31.3.2007, as determined by the Deptt. also includes the amount which was outstanding as on 9.7.04 for the service provided during period prior to 9.7.04 and also ~~at~~ the amount of receivables for the period of demand which had not been received, the Asstt. Commissioner did not accept the appellant's plea and by order-in-original dt.21.10.08 confirmed the entire demand alongwith interest and besides, this imposed penalties under Section 75A, 76, 77 & 78. On appeal to Commissioner(Appeals), the Commissioner(Appeals) vide impugned order-in-appeal dt.17.2.09 upheld the Asstt. Commissioner's order. It is against this order, the present appeal has been filed.

2. Heard both the sides.

2.1 Shri Sudhir Malhotra, Advocate, Ld. Counsel for the appellant made the following submissions:

(1) The assessable value for charging service tax adopted by the Deptt. for the period of demand also includes – (a) the amount ~~paid~~ billed during the period but not received on which no service tax should have been charged and (b) the amount outstanding as on 9.7.04 for the service provided prior to 9.7.04,

when the appellant's service was fully exempt from service tax under Notification No.13/03-ST and on which no service tax should be charged. These two amounts should be excluded from the assessable value on which the service tax has been calculated.

(2) It is settled law that the taxing event for service tax is providing the taxable service and liability arises only when the taxable service is provided and liability is not linked with the date of raising invoice or the date on which this amount is received. In this regard, he relies upon the Hon'ble Gujarat High Court's in the case of Commissioner of Central Excise vs Schott Glass India Pvt. Ltd. reported in 2009(14)STR.146(Guj.) wherein the Hon'ble High Court has held that when taxable service was rendered between Nov.'01 and March'02. service tax liability cannot be fastened on the respondent for the service which became taxable w.e.f. 16.8.02, merely because the invoices were raised and payment was received after 16.8.02 and that when the taxable event is providing taxable service, liability to pay the tax would arise only when the same became taxable. He also pleaded that during the period of dispute, the appellant was eligible for small service providers' exemption under Notification No.6/05-ST, which has not been considered ~~which~~ while quantifying service tax demand.

In view of this, he requested for remand of the matter to the original adjudicating authority for requantification of the service tax demand.

2.2 Shri S.K.Bhaskar, Ld. DR defended the impugned order reiterating the Commissioner(Appeals)'s finding. He also pleaded that the appellant's plea regarding their eligibility of small service provided exemption under notification No.6/05-ST cannot be considered at this stage.

3. I have carefully considered the submissions from both the sides and perused the records. The first plea of the appellant is that service tax demand has been confirmed even on the amount outstanding as on 9.7.04, which was in respect of the services provided during the period prior to 9.7.04, when this service was fully exempt from service tax under Notification No.13/03-ST. In view of Hon'ble Gujarat High Court's judgment in the case of Schott Glass India Pvt. Ltd.(supra), the service tax liability arises on the date on which the taxable service is provided and not on the date on which the bill is raised or payment is received. Though liability for service tax arises on the date on which the service is provided, by virtue of Rule 6(1) of the Service Tax Rules,1994, the service tax is payable only by the 5th day of the month immediately following the calendar month in which the payment for the service provided is received towards the value of the taxable service. Since unlike Rule 5 of Central Excise Rules,2002 and similar provisions in erstwhile Central Excise Rules,1944, providing that rate of duty applicable to excisable goods shall be the rate in force on the date of removal of the excisable goods, there is no such similar provision in Chapter V &

VA of the Finance Act,1994, or in the Service Tax Rules,1994, regarding the relevant date for determining the rate of tax, in case of service tax, the rate applicable shall be the rate in force on the date on which the taxable event of providing the taxable service occurs, not the date on which the bill is raised or payment is received. For example, if the rate of service tax during the period when a taxable service is provided is 12%, but the rate, when the payment for the taxable service provided is received, is 10%, the service tax will be payable at 12%, the rate prevailing during the period when the taxable event had taken place. Since in this case during period prior to 9.7.04, the service of commission agent provided by a person was fully exempt from service tax, in respect of the taxable service provided during period prior to 9.7.04, even if the payment was received on or after 9.7.04, no service tax can be charged, as the exemption under notification No.13/03-ST would be available. In view of this, the amount on which the service tax is charged can not include the payments which were outstanding as on 9.7.04 for the service of commission agent provided during period prior to 9.7.04.

3.1 As regards the second plea that service tax can be charged only on the amount received and not on the billed amount, I agree with this contention as per Rule 6 of the Service Tax Rules,1994, service tax is payable by 5th day of the month following the month during which, the payments for the taxable service provided is received.

3.2 For requantifying the service tax, the matter, however, has to be remanded to the original adjudicating authority. As regards the contention of the appellant that they were eligible for small service provider under exemption Notification No.6/05-ST and same was not considered by the Asstt. Commissioner, this is a legal point which can be made at this stage and since this had not been earlier considered by the adjudicating authority, the same can be considered in course of denovo proceedings.

6. In view of the above findings, the impugned order is set aside and the matter is remanded to the original adjudicating authority for re-determining the quantum of service tax recoverable from the appellant keeping in view the directions as mentioned above. As mentioned above at the time of denovo proceedings, the appellant can raise any legal point which may considered by the original adjudicating authority.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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