IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/831/2012-ST(DB)
[Arising out of Order-in-Original No. 05/Commr/STADJ/BPL-II/2012 dated 12.03.2012, by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Bhopal].

M/s. HEG Ltd. **....Applicants**

Vs.

C.C.E. Bhopal **....Respondent**

Appearance:

Shri B.L. Narsimhan, Advocate for the Applicants
Shri Ranjan Khanna, DR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Ashok K Arya, Member (Technical)

Date of Hearing: 17.10.2016

FINAL ORDER NO. 56385/2016-ST(DB)

Per Ashok K Arya:

Ms. HEG Ltd. is in appeal against Order in Original No. 05/Commr/STADJ/BPL-II/2012 dated 12.03.2012 passed by Commissioner, Central Excise whereunder the demand of service tax of Rs.1,33,27,894/- has been upheld and an equivalent amount of penalty has also been confirmed against the appellant.

2. The appellant has been represented by Shri B.L. Narsimhan, the Ld. Advocate and the Revenue has been represented by Shri Ranjan Khanna, the Ld. DR.

3. The Ld. Advocate, Shri B.L. Narsimhan is only challenging the penalty of Rs. 1,33,27,894/- imposed under section 78 of the Finance Act 1994. The Ld. Advocate based on the appeal memo *inter alia* submits that:

(i) There has not been any suppression on their part as all the documents evidencing export of goods were given to the department as proof of export, when exports were made in bond without payment of duty or under rebate claim if goods were exported on payment of duty.

(ii) The appellant was under bonafide belief that they were entitled to benefit of exemption notification number 32/2004-ST dated 03.12.2004; it was a genuine mistake to mention notification no.32/2004 instead of notification no. 40/2007; and claimed /obtained exemption under wrong understanding.

4. Ld. DR for the Department reiterates the findings of the lower Revenue Authority.

5. We have carefully considered the facts of the case, the submissions of both the sides and the case laws cited. The appellant relies on the following case laws:

i) CCE Vs. Coca Cola India Pvt. Ltd. 2007 (213) ELT 490.

ii) CCE Vs. Dinesh Chandra R. Agarwal 2013 (31) STR 5 (Guj.)

iii) ETA Engineering Ltd. Vs. CCE 2004 (36) STR 598 (Tri-Del)

iv) British Airways Vs. CCE 2014 (36) STR 598 (Tri-Del)

v) Jain Irrigation Systems Ltd. Vs. CCE 2015 (40) STR 752 (Tri-Mum)

5.1. The appellant appointed agents in foreign countries to whom they paid commission for the services rendered by them. The services rendered by the foreign based agents are covered by the definition of “Business Auxiliary Services” under section 65 (19) of Finance Act, 1994 and is taxable under section 65 (105) (zzb) of the said Act. During the relevant period i.e. from April 2008 – October 2008, the appellant has been under the bonafide belief that under notification 41/2007-ST dated 06.10.2007 maintained by notification no. 17/2008-ST dated 01.04.2008 services provided by commission agent engaged by the Indian exporter to cause sale of the goods exported by them were exempted. The appellant submits that they mistakenly mentioned the notification no. 32/2004-ST instead of 41/2007-ST to the Department. The appellant also submits that as soon as the department pointed out the mistake they undertook to pay the entire service tax dues. The appellant makes a mention that entire dues were deposited vide challan no. 00104 dated 08.12.2008 (Rs.1,10,56,928/- for April 2008 to September 2008) and Rs.38,32,686/- (Challan No. 00554 dated 03.12.2008 for October 2008) before the issue of show cause notice and the balance amount of Rs.26,69,801/- deposited vide challan no. 00713 dated 06.01.2009.

5.2. The department has not provided any evidence to prove any willful suppression and misstatement with an ‘intention to evade’ payment of service tax on the part of the appellant. The facts on record indicate that there has been a bonafide mistake on the part of the appellant to treat the taxable services as exempted services. When the department has not been able to prove any willful suppression or misstatement with an intention to evade payment of service tax on the part of the appellant there cannot be imposition of any penalty on the appellant under section 78 of the Finance Act 1994.

6. Considering above discussions and the ratio of the decision in the case of ***Dinesh Chandra (Supra), ETA Engineers Ltd. (supra) and British Airways Ltd. (Supra)*** the penalty imposed under section 78 of the Finance Act on the appellant by the impugned order is hereby set aside. In the result, the appeal is partly allowed in above terms.

[Operative part of the order pronounced in the open Court]

(Ashok K. Arya)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

Bhanu