

CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/687/2011-CU[DB]

[Arising out of Order-in-Original No.01-ST/PKJ/CCE/ADJ/2011dated
31.01.2011 passed by the Commissioner of Central Excise, New
Delhi]

Amway India Enterprises Pvt. Ltd. ...Appellants

Vs.

C.C.E. New Delhi ... Respondent

Present for the Appellant : Shri.Sujit Ghosh with Ms. Mannat,
Advocates

Present for the Respondent : Shri. Ranjan Khanna, D.R.

**Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. V. PADMANAVAN, MEMBER (TECHNICAL)**

Date of Hearing: 06/10/2016

Date of Pronouncement: 06/02/2017

FINAL ORDER NO. 50651/2017

PER: S.K. MOHANTY

Brief facts of the case, leading to this appeal, are as
under:-

1.1 The appellant is a wholly owned subsidiary of Amway
Corporation, USA and is engaged in the business of direct
selling of products in different segments such as, personal

care, home care, nutrition-wellness, cosmetics etc. The appellant is registered with the jurisdictional service tax authorities for providing various taxable services. The Service Tax Department conducted audit of books of accounts in the premises of the appellant from 16.12.2008 to 20.12.2008 for the period 2004-05 to 2007-08. During the course of audit, it was detected that the appellant had not paid service tax on the expenditure incurred in convertible foreign exchange on account of taxable services namely, 'Intellectual Property Service' and 'Business Auxiliary Services' received from the associate company M/s Amserve. The appellant agreed with the audit objection and deposited Rs. 46,08,759/- and Rs.1,60,68,000/- respectively. Further, the audit team also observed that the appellant had not paid service tax of Rs.8,01,78,254/- under the taxable category of 'Franchise Service' in respect of income earned by it during the period October' 2003 to March' 2007 under the heads of accounts namely, 'Joining and Business Fee', 'Business Renewal Fee' and 'Back to Future Fee'. On the basis of such audit objection, the Department issued Show Cause Notice dated 12.03.2009, proposing demand of service tax along with interest and imposition of penalties on the appellant. The said SCN was adjudicated vide the impugned order dated 31.01.2011, wherein service tax demand of Rs. 8,01,68,254/- was confirmed along with interest under the taxable category of 'Franchise Service' by invoking the extended period of

limitation under the proviso to Section 73(1) of the Finance Act, 1994. Besides, penalties were imposed on the appellant under Section 77 and 78 *ibid*. Further, the amount of Rs.1,60,68,000/- and Rs.46,08,759/- already deposited by the appellant were appropriated against service tax demand under 'Business Auxiliary Service'. For delayed payment of the said amount, the impugned order has confirmed the interest liability of Rs.6,57,475/- and Rs.1,84,116/- respectively under Section 75 *ibid* and also imposed penalty under Section 76 *ibid*. Filling aggrieved with the impugned order dated 31.01.2011, the appellant has filed this appeal before the Tribunal.

2.1 The Id. Advocate appearing for the appellant submitted that with regard to 'Franchise Service', the show cause proceedings are barred by limitation of time inasmuch as the Department had complete knowledge of the business activities of the appellant way back in 2005, when pursuant to the summons issued by the DGCEI, the appellant had furnished the detailed information on 07.11.2005. Thus, he submitted that since the business activities of the appellant were known to the Department, suppression of facts cannot be alleged and the show cause notice should have been issued within one year from the date of such knowledge. The Id. Advocate further submitted that in absence of fraud, collusion, wilful mis-statement with intent to evade payment of service tax, the demand is clearly barred by limitation of time. To justify such

argument, the Id. Advocate has relied on the judgments of Hon'ble Supreme Court in the case of CCE, Bangalore -Vs.- Pragathi Concrete Products Ltd.- 2015 (322) ELT 819 (S.C.), Blue Star Ltd. -Vs.- Union of India- 2015 (322) ELT 820 (S.C.), Commissioner -Vs.- Shah Alloys Ltd.- 2011 (270) ELT A38 (S.C.), CCE, Meerut -Vs.- Monsanto Manufacturers Pvt. Ltd.- 2010 (260) ELT 335 (S.C.), Kushal Fertilisers -Vs.- CCE, Meerut- 2009 (238) ELT 21 (S.C.), CCE, Mumbai -Vs.- Damnet Chemicals Pvt. Ltd.- 2007 (216) ELT 3 (S.C.), CCE, Vadodara - Vs.- Pioneer Scientific Glass Works- 2006 (197) ELT 308 (S.C.), Aban Loyd Chiles Offshore Ltd. -Vs.- C.C., Maharashtra- 2006 (200) ELT 370 (S.C.) and CCE -Vs.- Chemphar Drugs & Liniments- 1989 (40) ELT 276 (S.C.).

2.2 The Id. Advocate further contended that the amendment of Section 67 *ibid* w.e.f. 10.05.2008, which seeks to levy service tax prior to realization of taxable service on account of debit and credit entries, would have only prospective effect and cannot be applied retrospectively. Thus, he argued that the amounts deposited on that account, which were appropriated as service tax in the impugned order is not legally sustainable and that the interest liability confirmed on such account is accordingly, not proper and justified.

3.1 On the other hand, the Id. A.R. appearing for the Revenue reiterated the findings recorded in the impugned

order and further submitted that since on the basis of audit of the appellant's unit in 2008, the Department became aware of the activities, which the appellant had suppressed, the proceedings initiated thereafter are not barred by limitation of time. He relied on the judgment of Hon'ble Supreme Court in the case of CCE, Visakhapatnam -Vs.- Mehta & Co.- 2011 (264) ELT 481 (S.C.) and CCE, Mumbai -Vs.- Kalvert Foods India Pvt. Ltd.- 2011 (270) ELT 643 (S.C.) and also the judgment of Hon'ble Allahabad High Court in the case of CCE, Gaziabad -Vs.- Rathi Steel Power Ltd.-2015 (321) ELT 200 (All.) and of Hon'ble Gujarat High Court, in the case of CCE, Surat -Vs.- Neminath Fabrics Pvt. Ltd.- 2010 (256) ELT 369 (Guj.).

3.2 The Id. A.R. further submitted that since the appellant had deposited the amount of service tax attributable to the taxable services namely, Intellectual Property Services and Business Auxiliary Services voluntarily, without challenging the audit report, maintainability of such liability cannot be questioned at the appellate stage and therefore, interest liabilities confirmed against the appellant for delayed payment of the admitted Service Tax liability is in conformity with the statutory provisions.

4. Heard the Id. counsel for both sides and examined the case records.

5. We find that the DGCEI had issued the summon dated 28.10.2005, calling upon the appellant to submit the documents/ records, which were submitted by the appellant vide its letter dated 07.11.2005. The documents submitted by the appellant pursuant to the summon, included *inter alia*, the copies of invoices issued by it for subscription fee received from the distributor, copies of receipts issued to the distributors on renewal of periodicals for the month of September, 2005, copies of balance sheet and profits and loss account for the financial years 2001-05 showing receipt of income towards the subscription fee from the distributors, Code of Ethics and Rules of Conduct for Amway Distributor's booklets, sample copies of the application form for becoming the Amway Distributor etc. The facts regarding issuance of summon pursuant to the Panchnama dated 28.10.2005 and the receipt of the documents from the appellant has been acknowledged in the impugned order. Further, relying on the Code of Ethics and Rules provided by the appellant, Id. Adjudicating authority has arrived at the conclusion that the services provided by the appellant confirmed to the definition of 'Franchise Service' for the purpose of levy of Service Tax.

6. The demand for extended period can be issued and confirmed only in case where the non-payment of tax is by reason of fraud/collusion/wilful mis-statement/suppression of

fact/contravention of any statutory provision with intent to evade tax. In the present case, we note that the enquiry into the activities of the appellant were carried out in summon proceedings in 2005 itself. The materials/documents submitted by the appellants were with the Department. However, with the same set of facts/background and based on records maintained by the appellant, demand invoking suppression of fact was issued in 2009. While we are aware that the relevant date for issue of demand is with reference to periodical returns to be filed, the Department has to allege and establish with supporting evidence, the existence of factors indicating wilful mis-statement/suppression of facts. It should be a positive act of the appellant. The particulars, which formed basis of demand were all maintained and recorded in books of the appellant.

7. The show cause notice in this case has been issued by the Department alleging 'wilfull and intentional suppression' of facts by the appellant. It is trite in law that the suppression (intentional and deliberate) can never be said to exist when material and relevant fact forming the basis of the demand were already within the knowledge of the department. Accordingly, the pre-conditions for applicability of the proviso to Section 73 (1) *ibid* cannot be said to be made and in such eventuality, the extended period of limitation cannot be

invoked and the demand to be confined to the normal period of one year.

8. In context with issuance of show cause notice, where there is no involvement of suppression on the part of the assessee, the Hon'ble Supreme Court in the case of Pragathi Concrete Products Ltd. (supra) have held that extended period of limitation not to be invoked where the show cause notice was issued in 2000 for the period from 1995-1999 as no case of suppression could be made out when the Department had conducted several audits of the Appellant during the period prior to issue of show cause notice. Further, in the case of Blue Star Ltd.(supra), it has been held by the Hon'ble Supreme Court that no case of suppression could be made out where all the relevant facts were within the knowledge of the Department and consequently, the extended period of limitation could not be invoked. In the case of Shah Alloys Ltd. (supra), the SLP filed by Revenue was dismissed, holding that the extended period of limitation cannot be invoked, when it is established that the Department had knowledge of the facts. In the case of Monsanto Manufactures Pvt. Ltd. (supra), the Hon'ble Supreme Court held that the Appellant's transaction was on the basis of an agreement which was within the knowledge of the Department from 1995 and accordingly, the extended period of limitation under Section 11A of the Central Excise Act, 1944 could not be invoked vide show cause notice

issued in 2000. In case of Kushal Fertilisers (supra), the Department carried out periodic inspections of the factories and was also intimated in 1991 by the Assessee of the details of its business. In this background, the Department issued a show cause notice to the assessee in 1994 invoking extended period of limitation. The Hon'ble Apex Court held that since the requisite information had always been provided to the Department when requested, no case of suppression could be made out against the assessee. Where the Department had inspected and collected necessary information and details from the assessee, the Hon'ble Supreme Court in the case of Damnet Chemicals Pvt. Ltd. (supra) held that the relevant facts were within the knowledge of Departmental Authorities and accordingly the extended period of limitation could not be invoked. Where the Assessee had filed declarations of the products manufactured and where the sales literature and catalogue were examined during search operations, the Hon'ble Supreme Court in the case of Pioneer Scientific Glass Works (supra) held that the Department could not have alleged suppression at a later date when all the relevant facts were within the knowledge of the Department. Further, in the case of Loyd Chiles Offshore Ltd. (supra), the Hon'ble Supreme Court held that since the Department was all throughout aware of the Appellant's operations, the extended period of limitation under proviso to Section 28 of the Customs Act cannot be invoked. In the case of Chemphar Drugs & Liniments (supra),

it has been held by the Hon'ble Supreme Court that when the Department had full knowledge and the assessee's non-disclosure was based on its interpretation of the law, the extended period of limitation could not have been invoked.

9. The judgment of Hon'ble Supreme Court and High Courts relied upon by the Revenue are distinguishable from the facts of the present case, inasmuch as the assesseees in those cases were indulged in suppression, mis-statement, fraud, collusion etc., with intent to evade payment of duty and only on the basis of proceedings initiated by the Department, the desired information/particulars were furnished. In such circumstances, it has been held by the judicial forums that once it is established that pre-conditions of the proviso to Section 73(1) *ibid*/Section 11A *ibid* (i.e. fraud, suppression, collusion, wilful misstatement and contravention of any provisions with an intent to evade payment of tax), stand satisfied, then it becomes necessary to determine the date from which the extended period should be computed; and in such eventuality, the extended period of limitation should be computed from the date when the evasion of tax (fraud, suppression, collusion, wilful misstatement or contravention of provisions) came to the knowledge of the Department.

10. On a collective reading of the decisions cited by both the counsels, it is clear that the consistent position of law with

regard to applicability of the proviso to Section 73(1)/Section 11A *ibid* has been that suppression cannot be established where **material facts were within the knowledge of the Revenue**. Accordingly, where there is no suppression, the pre-condition for applicability of proviso to Section 73(1) cannot be said to be met and hence, extended period of limitation contemplated therein cannot be invoked. On the contrary, where the ingredients for invoking proviso to Section 73(1) are established or admitted and thus the pre-conditions for applicability of such proviso stands satisfied, and only in such cases, the period of 5 years is required to be computed from the date when the **evasion came to the knowledge of the Department**.

11. In the case in hand, since the *modus operandi* adopted by the appellant for selling its products were known to the Department and based on the information/documents furnished by the appellant in 2005, the show cause proceedings were initiated by the Department on 12.03.2009, seeking confirmation of service tax demand under 'Franchise Service' for the period October' 2003 to March' 2007, we are of the considered view that the proceedings are barred by limitation of time. Thus, the appeal should succeed on the ground of limitation.

12.1 The other issues involved in this case for consideration are as to whether service tax amounting to Rs.1,60,68,000/- under 'Business Auxiliary Service' and Rs.46,08,759/- on 'Intellectual Property Right Service' under reverse charge mechanism are required to be demanded along with interest.

12.2 Section 67 *ibid* lays down the provisions dealing with valuation of taxable service. In this regard, 'gross amount charged' had been defined to include payments by cheque, credit cards, and other forms of payments by debit notes or credit notes. The definition of gross amount charged was amended w.e.f. 10.05.2008 in order to provide that in case of transaction between 'associated enterprises', any amount debited or credited in the books of accounts of the person liable to pay service tax would also be included as 'gross amount charged'. Consequently, an amendment was also made to Rule 6 of the Service Tax Rules, 1994 whereby the explanation was inserted w.e.f. 10.05.2008, declaring that in case of transactions between associated enterprises, payment received for taxable service would include any amount debited or credited in the books of accounts liable to pay service tax.

12.3 It is an admitted fact on record that the amount of Rs.7,38,61,083/- and Rs.23,24,00,000/-, reflected in the books of accounts of appellant as outstanding as on 10.05.2008, were towards services received from abroad from

the associated companies. Since on the date of amendment of Section 67 *ibid* and Rule 6 *ibid*, such amounts were reflected under outstanding receipts, the appellant is liable to pay service tax on such amount under reverse charge mechanism as per Section 66A *ibid*. Therefore, we are of the view that service tax amounting to Rs.46,08,759/- and Rs.1,60,68,000/- paid by the appellant and appropriated in the impugned order are in conformity with the service tax statute. Since, the appellant had delayed in making such payment, interest amount thereon are required to be paid, since the same is compensatory in character.

13. In view of the foregoing discussions and analysis, the appeal is partly allowed and the impugned order is set aside to the extent of confirmation of service tax demand of Rs.8,01,68,254/- along with interest and imposition of penalties under 'Franchise Service'.

[Pronounced in the Open Court on 06.02.2017]

(V. PADMANAVAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Sakshi