IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:23.03.2017
Date of Decision:28.04.2017

Service Tax Appeal No.101/2010 (DB)

[Arising out of Order-in-Appeal No.99/ST/DLH/2009 dated 8.12.2009 passed by the Commissioner of Central Excise (Appeals), New Delhi]

M/s.Samara India Pvt. Ltd. Appellants

Vs.

CST, New Delhi Respondent

Appearance:
Rep. by Shri J.K. Mittal, Advocate & Shri Rajeev Singh, Advocate for the appellant
Rep. by Shri Amresh Jain, DR for the respondent.

Coram: Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No.53132/2014

Per B. Ravichandran:-

The appeal is against order dated 8.12.2009 of Commissioner of Central Excise (Appeals), Delhi-I.

2. The appellants is a car dealer. During the course of their business, they also help and guide their customers to get loan from banks for buying car. They also help the bank to enforce and recover amount from defaulters. In consideration of the said activities, the appellants get remuneration from banks/financial institutions. The dispute in the present case is with reference to the liability of the appellant to pay service tax on such amount received, during the period July,

2000 to November, 2004. The appellants paid service tax of Rs.27,40,545/- along with interest of Rs.1,85,435/- during the course of investigation itself. The service tax liability is under the category of "Business Auxiliary Service" in terms of Section 65(19) of Finance Act, 1994. A show cause notice dated 31.07.2007 was issued to the appellant for demanding service tax of Rs.24,50,797/- and proposing imposition of penalties for alleged willful suppression of material facts.

3. The Original Authority decided the case and passed the order dated 20.08.2008. The Original Authority confirmed the service tax demand of Rs.24,59,565/- and also recorded that the appellant deposited the service tax along with interest during the course of investigation itself. However, no relief was given for the amount excess paid by the appellant. The Original Authority also imposed penalty of equivalent amount under Section 78 and Rs.1,000/- under Section 77 of the Finance Act, 1994. On appeal, the impugned order upheld the original order, except for reduction of demand to Rs.24,50,797/- with corresponding reduction in penalty imposed under Section 78.

4. The appellant, represented by Shri J.K. Mittal, ld. Advocate, contested the proceedings before the lower authorities, mainly on the following grounds:-

(a) The Commissioner (Appeals) has not appreciated the provisions of Section 73(3) and various judgements in this regard. The show cause notice, issued almost after three years of making payment with interest, is not legally justifiable. No penalty is leviable in such situation as the proceedings itself is neither warranted nor legally tenable.

(b) A show cause notice invoking extended period of limitation is not legally sustainable. The Commissioner (Appeals) did not consider the plea of the appellant that once the demand has been paid with interest, before issue of show cause notice, there is no question of proceedings, invoking extended period. The question involved in the present dispute is one of interpretation and as such, there is no room for invoking willful misstatement or suppression of facts, to justify the show cause notice. The activities undertaken by the appellants cannot be covered under the category of "Business Auxiliary Service". The impugned order did not examine the merits of the appellant's claim in detail. The provisions relating to commission agent was inserted under Section 65(19) only w.e.f. 10.09.2004. The fact that the appellants have paid service tax, does not bar them from contesting the tax liability on legal grounds. The activities performed by the appellant are not confined to one particular action but consisted of different activities. These cannot be segregated to call the activities as "promoting the business of the clients" to tax it as a whole. Reliance was placed on the decision of the Madras High Court in **Airlines Agents Association – 2006 (3) STR 3 (Madras).** As such, the appellant need not have paid service tax. The amount paid with interest should be refunded, with interest to them.

(c) The Commissioner (Appeals) did not examine the submissions made by the appellants regarding excess tax computation by Rs.1,89,806/-. Since the appellant did not collect service tax from the recipient of service, the whole amount should be considered as inclusive of service tax and accordingly, cum-tax benefit in terms of Section 67 should be extended to them.

(d) Circular dated 6.11.2006 of the Board cannot be applied retrospectively as laid down by Hon'ble Supreme Court in **Suchitra Components Ltd. – 2007 (208) ELT 321 (SC)** . The Board's circular, being oppressive in nature, cannot be given retrospective effect.

(e) As there is no ground for invoking demand for extended period, there is no justification in imposing penalty under Section 78 of the Act. The service tax along with interest has been paid long before the issue of show cause notice and as such, the penal proceedings against the appellant are not sustainable.

(f) Section 80, which provides for waiver of penalty, when reasonable cause is shown for non-payment of service tax in time, is rightly applicable to the present case.

(g) The amount has been paid by the appellant under influence from the Department. As the appellants are not liable to pay service tax, the amount should be refunded, with interest to them.

5. Shri Sanjay Jain, ld. AR supported the findings of the lower authorities. He submitted that the appellants were providing taxable service under the category of "Business Auxiliary Service". The appellants are acting as direct selling agent/direct marketing agent, Standard Chartered Bank, HDFC Banks, Citi Bank, ICICI Bank and some non-banking finance companies (NFFC) like GE Countrywide etc. For this purpose, the appellants have entered into contract with

such banks. In terms of the contract, the appellants were obliged to market the car loan products of such banks and provide such other services to the banks as laid down in the said contract. When car loans are successfully marketed by the appellants, a commission is paid by the banks/NBFC. The term of agreement clearly indicates that the appellants are promoting or marketing the services provided by the clients, and are also rendering incidental or auxiliary support services like evaluation of prospective customer, recovery of amount etc. Ld. AR also referred to the Board's Circular dated 20.06.2003 to emphasize that the services provided in relation to getting a customer, verification of prospective customer, etc. will be covered under BAS. Regarding issue of show cause notice much after the payment of service tax along with interest by the appellant, the ld. AR submitted that the case cannot be closed under the provisions of Section 73(3), as the appellant discharged the service tax only upon inquiry initiated by the Department. They have not disclosed the relevant detailed to the Department. The appellants were neither registered with the Department nor paid service tax during the relevant time.

6. We have heard both the sides and perused the appeal records.

7. First, we take up the question of tax liability of the appellant under the category of "Business Auxiliary Service". Section 65(19) reads as below:-

> "**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

[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or 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 commission agent, but does not include any information technology 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, -

(a) "Commission Agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person -

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "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 systems."

8. The Board vide Circular dated 20.06.2003 clarified the scope of activities covered under "Business Auxiliary Services". Among other things, service provided in relation to getting a customer, verification of prospective customer, etc. are clarified to be covered by the tax entry.

9. We have examined the nature of activities carried out by the appellant as summarized in the original order dated 20.08.2008. The obligation and responsibility of the appellant, as summarized in the said order, are as below:-

"2.2. The agent shall explain the finance scheme to the customer/ facilities provided by financing Bank for promoting the products to the customer / will prominently display and exhibit brochures, posters and advertising material and will undertake joint publicity and/ or advertising with expenses being shared on mutually agreed terms/ if customer fulfils the eligibility criteria notified to the dealer by the bank, it shall obtain from customer duly filled loan application and other documents to enable bank to process the loan application of the customer and will also ensure that the vehicle is delivered to the customer only after formalities like registration and bank's charge mentioned therein.

2.3 The above set of obligation responsibilities contained in the agreements between car dealers/ auto finance agents and the banks/ NBFCs indicate that the car dealers are providing following service for and on behalf of the bank/ NBFCs with whom they have an agreement with.

2.3.1 Car dealers/ agents are engaged in display of promotional material for advertising of loan by the banks.

2.3.2 The car dealers/ agents are engaged in doing first level of scrutiny of the prospective customers i.e. identifying such buyers who could then be pursued for marketing of loan.

2.3.3 They also act as an intermediary between the banks and the customer for canvassing the case of the customer with the banks, scrutinising the documentation as well as collecting and depositing the cheques of the instalments for the initial period before the sale of the car as enshrined in the agreement".

10. Reading together the statutory scope of the tax entry as above and the activities carried out by the appellant as narrated in the agreement, it is clear that the activities of the appellant are covered by the tax entry "Business Auxiliary Service".

11. In support of the above conclusion, we may refer to the decision of the Tribunal in **Jay Bharat Automobiles - 2016 (41) STR 311 (T-M).** The Tribunal held that the appellants bring in customers for the banks and the banks provide financial services to the customers. Undoubtedly, this activity falls under Clause (ii) i.e. promotion or marketing of service provided by the clients. The Tribunal

referred to the earlier decisions in **Roshan Motors Ltd. – 2009 (13) STR 667 (T-Delhi)** and **Bridge Stone Financial Services – 2007 (8) STR 505 (T-B).** The reliance placed by the appellant on the Hon'ble Supreme Court's decision in **Suchitra Components Ltd. – 2007 (208) ELT 321 (SC)** is not appropriate. The tax liability of the appellant is not created by the circular dated 6.11.2006. The tax liability is in terms of statutory provisions under Section 65(19) of Finance Act, 1944. There were circulars of the Board clarifying the scope of service tax entry earlier to 2006 also, as mentioned earlier in this order. In view of the above analysis, we find that the appellants are liable for service tax under the category of "Business Auxiliary Service" during the material time.

12. Now, we consider the correctness of issue of show cause notice and the proceedings thereafter by the lower authorities. The appellants strongly pleaded that when they have paid the service tax with interest, immediately on being pointed out by the officers, the case should have been closed in terms of Section 73 (3) of Finance Act, 1994. There is no case to proceed against the appellants by invoking suppression of facts, etc. The issue involved is one of the interpretation of legal provisions. The provisions of Section 73(3) clearly state that where any service tax has not been levied or paid, the person chargeable with service tax may pay the amount of such service tax chargeable, on the basis of his own assessments thereof or on the basis of tax ascertained by a central excise officer, before service of notice on him and inform the officer of such payment in writing. On receipt of such information , the officer shall not serve any notice under Section (1) of Section 73 in respect of the amount so paid. On careful consideration of the facts of the case, we are of the considered opinion that the provisions of the said sub-

clause (3) of Section 73 is rightly applicable to the facts of the present case. Apparently, the Revenue proceeded to issue notice after more than two years of payment of service tax dues with interest, only to impose penalty on the appellant and to appropriate already paid tax. It would appear that the Revenue entertained a view that the closure of the case is not possible in view of the bar under sub-section (4) of Section 73. Here, we notice that the allegations required for invoking demand for extended period under Section 73(1) are identical to the provisions of sub-section (4) of Section 73.

13. Admittedly, there were clarifications issued by the Board clarifying the scope of service tax levy under the category of “BAS”. In cases of similar nature, involving tax liability under “BAS” for marketing of loans by the banks/NBFCS, the Tribunal had held that there is no substance to invoke allegation of suppression or mis-statement for imposing penalties on the appellants. We are of the opinion that, simply because the non-payment extended beyond the normal period, by itself does not bar the closure of proceedings in terms of Section 73(3). The bar of sub-section 73(4) has to be legally justified with clear support. In the present case, we are satisfied that upon payment of full service tax liability by the appellant with interest, the matter should have been closed in terms of Section 73(3). As such, we find that proceedings initiated against the appellant to appropriate already paid tax with interest and to impose penalty is not warranted.

14. The appellants claimed that the amount has been paid under influence of the department and the same has to be refunded to them. We find no merit for such a claim. It is clear that the appellants have contested the show cause notice and subsequent proceedings by relying on the provisions of sub-section 73(3). We have

examined the tax liability of the appellant and came to the conclusion to the effect that they are liable to service tax under the category of “BAS”. The appellants have discharged the service tax under the said category along with interest for delayed payment and also filed ST-3 returns. The service tax payable on taxable activities has been duly paid under proper heading and credited to the Government. No protest has been recorded by the appellant at the time of payment of service tax. As such, we find that the tax paid by the appellant in respect of taxable consideration received during the material time are correctly credited to the Government. Section 68 of the Act provides that “every person providing taxable service to any person shall pay service tax at the rates specified in Section 66 in such manner and within such period as may be prescribed”. The appellants have paid service tax on the taxable service rendered by them along with interest, for delayed payment. We have referred to various case laws relied upon by the appellants. In **Gujarat Narmada Fertilizers Co. Ltd. – 2012 (285) ELT 336 (Gujarat).** The Hon’ble Gujarat High Court was dealing with liability of assessee to pay interest in respect of voluntary payment of duty under Section 11(2) of Central Excise Act, 1944. We further note that the case laws relied upon by the appellant to support their claim for refund of the tax amount have no application to the facts of the present case. In the present case, as already noted, the service tax due on taxable services were discharged by the appellant, though belatedly, with interest, upon initiation of enquiry by the department. In normal course, service tax is self assessed by the assessee. Here, the tax liability not paid in time was pointed out and as such paid later. Such payment is towards tax dues and cannot be considered as a deposit of amount for undetermined liability to be decided in future. The appellants paid service tax as per the obligation cast on them in terms of Section 68 of Finance Act, 1994. We have already held that upon payment of such tax due, the provisions of Section 73(3) will come into play in the present case. The case laws relied on by the appellant are not relevant to the facts of the present case. In **Aadishwar Motors (P) Ltd. Vs. CST,Ahmedabad - 2014 (33) STR 329 (Tribunal-Ahmd.),** the Tribunal and in **Mahalaxmi Exports - 2010 (258) ELT 217,** the Hon'ble Gujarat High Court were dealing with eligibility of appellant for a consequential refund upon favourable order from higher judicial authorities. The Hon'ble Madras High Court in **Pricol Ltd. – 2015 (39) STR 190 (Mad)** held regarding applicability of unjust enrichment for refund of pre-deposit amount paid under protest. In **Cosmic Textiles - 2006 (4) STR 508 (Tribunal-Mumbai),** the Tribunal was dealing with excess amount of pre-deposit made by the assessee in a case of clandestine removal of excisable goods.

15. However, the appellants shall be entitled for return of excess amount of tax, if any, paid by them. They have claimed that there is error in totaling the amount received as consideration from the banks. We find that this requires verification and the Original Authority can examine the correct factual position with records for settling the request made by the appellant regarding excess payment.

16. The appellants also pleaded for cum-tax benefit in terms of Section 67 of the Act. Section 67(2) of the Finance Act, 1994 stipulates as below:-

> "67(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be

such amount as, with the addition of tax payable, is equal to the gross amount charged.”

17. When the gross amount received by the appellant has been taken into account for calculating service tax, concession under Section 67(2) can be considered where there is no service tax element separately shown in the documents. We direct that the jurisdictional authority to verify whether there is any indication regarding service tax in the invoices etc. issued by the appellant. In case only gross consideration is shown in the invoices, bills raised, then the tax liability of the appellant requires to be revoked by applying the provisions of Section 67(2) of the Act.

18. In view of the above discussion and analysis, we find that the appellants are liable to service tax during the material time. The correct amount of tax liable to be paid shall be cross verified by the jurisdictional authorities to examine the claim of excess payment and claim for cum tax benefit by the appellant. In case of excess payment on these grounds the same shall be refunded to the appellant subject to refund provisions. As held above, the case was fit for closure under Section 73(3) of the Finance Act, 1994 and as such, penalties imposed on the appellant are set aside. The appeal is partly allowed in the above terms.

[Order pronounced on 28.04.2017]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.