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

Date of Hearing:20/04/2017
Date of Decision:05/05/2017

Service Tax Appeal No.59692/2013(DB)

[Arising out of Order-in-Original No.50/Commissioner/Meerut-I/2013 dated June 7, 2013 passed by the Commissioner of Central Excise, Meerut)

M/s.Bee Am Industries Pvt. Ltd. Appellants

Vs.

CCE & ST, Meerut-I Respondent

Appearance:

Rep. by Shri Bimal Jain, CA for the appellant.
Rep. by Shri Amresh Jain, DR for the respondent.

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

Final Order No.53166/2017

Per B. Ravichandran:

The appeal is against order dated 7.6.2013 of Commissioner of Central Excise, Meerut-I. The appellants are engaged in providing Clearing and Forwarding Agency service in terms of contract with M/s. Hindustan Unilever Ltd. "HUL". They were registered with the Department and were discharging service tax under the category of "Clearing and Forwarding Agency Service". The dispute in the present appeal relates to valuation of the said taxable service. In terms of the agreement, M/s. HUL provided various facilities to the appellants. M/s. HUL also paid consideration under various headings to the appellants. The case against the appellants is that the appellants have not discharged service tax on various components/considerations/reimbursements received from M/s. HUL. These amounts are under the category of reimbursement on depreciation of plant and machinery, reimbursement of bank interest on actual basis on loans taken by the appellant, return on investment made by the appellant and notional value of rent free accommodation given in the premises of M/s. HUL. Proceedings initiated against the appellant to demand and recover the service tax short paid, concluded in the impugned order. The Commissioner confirmed service tax liability of Rs.99,70,247/- covering the period October, 2006 to September, 2011. He also imposed penalties under Section 76 and 78 of the Finance Act, 1994.

2. Ld. Counsel for the appellant submitted that they are not contesting the service tax demand on merit except with reference to tax liability on the notional rent attributed to the premises of HUL used by them in providing the taxable service.

3. Ld. Counsel submitted that the substantial part of the demand is hit by time bar as the show cause notice was issued on 24.04.2012 covering the period October, 2006 to September, 2011. He further submitted that they have clearly indicated in their ST-3 returns regarding considerations on which service tax was not paid. It is also submitted that valuation of service in respect of C & F agent has been a subject matter of large number of litigations. There is a bonafide belief on the part of the appellant regarding service tax liability to be restricted only to the amount received towards the agency commission. In fact, regarding re-imburseamble expenditure, the Hon'ble Delhi High Court in the case of **Intercontinental Consultants And Technocrafts Pvt. Ltd. – 2013 (29) STR 9 (Delhi)]** held that Rule 5(1) of the Valuation Rules is ultra virus of Section 66 and 67 of Finance Act, 1994. The Larger Bench of the Tribunal in **Bhagwati Traders – 2011 (24) STR 290 (Tribunal-LB)** held that the terms of the contract should stipulate regarding the nature of reimbursable expenditure . The Tribunal further

held that the costs for input services and inputs used for rendering services cannot be treated as reimbursable costs. The cost of service cannot be artificially split as reimbursable expenses.

4. Ld. Counsel submitted that the Tribunal later in various decisions held that if the C & F agent has received amount as reimbursable expenses in terms of clear contractual arrangement and acted as pure agent in terms of Rule 5(2) of Valuation Rules, then no service tax liability can be put on such reimbursable expenditure. In view of these various judicial pronouncements, ld. Counsel submitted that there can be no question of invoking extended period for demand and to impose penalty under Section 78.

5. Ld. AR reiterating the findings of the Original Authority. He further submitted that in the present case, the appellants are availing the facility of rent free premises, from where they render services to the clients. The present case does not deal with reimbursement of expenditure on actual basis, in respect of all the considerations sought to be taxed. The appellants did not fulfill the conditions of Rule 5(2) for exclusion of receipts as pure agents.

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

7. As noted already, the appellants are not contesting the demand of service tax on merit except to an extent relatable to tax on considerations attributable towards the notional rent of the premises used by the appellant, without paying any rent. The demand is mainly contested on the time bar. Regarding inclusion of considerations towards notional rent, we note that the appellants were availing the facility of free usage of the premises of the clients. The term “usage” is mentioned in the agreement. It is not the case of any reimbursement of expenditure incurred

by the appellant and reimbursement on actual basis by the clients. Here, the working premises for the appellant has been provided rent free. It is clear that the appellant have used such accommodation to provide taxable service and it will have direct bearing on the quantum of amount charged by the appellant for the services rendered to the client. Apparently, such rent free premises is a non-monetary consideration received by the appellant for rendering the services. Section 67 of the Finance Act, 1994 clearly stipulates that when the considerations for provision of service is partly consisting of money, the other considerations should be arrived at in money terms, for tax purposes. As such, we find no merit in the submissions made by the appellant against the inclusion of the notional rent for tax liability as a part of consideration.

8. Regarding the issue of limitation, we have perused the copies of ST-3 returns filed by the appellants. They have mentioned the value on which the service tax is exempt/not payable in these returns. We also note that para-11 of the show cause notice also mentions about the endorsement made by the appellant regarding ROI and depreciation. However, because return did not specify the details of reimbursement on which exemption was sought , the allegation of suppression of facts was made against the appellant. We find that the appellant did make intimation, in statutory returns regarding receipt of non-taxable considerations by them. Apparently, any scrutiny and assessment of such returns could have revealed more details regarding various categories of amounts on which the appellants are not paying service tax. These facts reveal that there is no case for invoking suppression or willful mis-statement against the appellant. Further, there is no specific provision in the ST-3 returns to declare various details of reimbursable expenditure.

9. Further, we also note that valuation of "Clearing & Forwarding Agency Services" has been a matter of litigation and varying interpretation by the higher judicial forum. These decisions were already referred to by the submissions made by the ld. Counsel for the appellant. In this regard, we are in agreement with the appellant that in such a situation, it will not be legally sustainable to invoke the allegation of suppression, fraud, willful mis-statement with intention to evade payment of tax against the appellant. As such, we find the service tax liability of the appellant is to be restricted to the normal period. On the same reasoning, the penalties imposed on the appellants are also not sustainable.

10. In view of the above analysis, we find that the service tax liability of the appellant is to be upheld on merit. However, the demand cannot be sustained for extended period in view of the reasons narrated above. Accordingly, the demand should be restricted to the normal period and penalties are also accordingly set aside. The appeal is allowed only to that limited extent.

[Order pronounced on 05.05.2017.]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.