IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 21/03/2017.
DATE OF DECISION : 26/05/2017.

Service Tax Appeals No. 1052 – 1060 with 1474 and 1750 of 2011

[Arising out of the Order-in-Appeal No. 181-185/CB/ST/JPR-II/2011 dated 11/04/2011 with No. 287-288/CB/ST/JPR-II/2011 dated 29/06/2011 and No. 429/CB/ST/JPR-II/2011 dated 15/09/2011 all passed by The Commissioner (Appeals – II), Customs & Central Excise, Jaipur.]

M/s Shree Ranie Gums & Chemicals Pvt. Ltd.	]	
M/s Jainsons (India) Industries	]	
M/s Basant	]	Appellants
M/s Satyam Enterprises (Unit I)	]	
M/s Satyam Enterprises (Unit II)	]	
M/s Shree Ram Gum Chemicals Ltd.	]	

Versus

CCE, Jaipur – II — Respondent

Appearance

Shri O.P. Agarwal, C.A. – for the appellant.

Ms. Neha Garg, Authorized Representative (DR) – for the Respondent.

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

Final Order No. 53507-53517/2017 Dated : 26/05/2017

Per. B. Ravichandran :-

These 11 appeals are on identical issue of service tax liability of the appellants, on reverse charge basis, in respect of commission paid to the overseas agents as a consideration for providing marketing services, covered under category of

„Business Auxiliary Service‟. The period involved in these appeals are from 18/04/2006 to 06/07/2009. The Revenue initiated recovery proceedings by issue of show cause notices to all the appellants and the case was adjudicated by the Original Authority. The Original Authority confirmed service tax liability on the appellants for the period from 18/04/2006 in terms of Section 66A of Finance Act, 1994. However, no penalties were imposed except in two cases where penalty under Section 76 alongwith Section 77 (one case) was also imposed.

2. Contesting the impugned orders the learned Counsel for the appellant submitted on the following grounds :-

(a) The appellants are entitled for Cenvat credit on the service tax now demanded and the said credit is refundable under Rule 5 of Cenvat Credit Rules, 2004 or under Rule 18 of Central Excise Rules, 2002. Further, the commission paid to the foreign agent is eligible for exemption for part of the period, under Notification 41/2007-ST, as amended by Notification No. 17/2008-ST ;

(b) the whole of service tax now demanded is available as a credit to the appellants and, as such, it is a revenue neutral situation and the demands was not sustainable on this ground alone. On the issue of revenue neutrality even the Original Authority dropped the demand in a similar set of facts vide order dated 29/07/2016 issued with reference to M/s Shree Nath Gum & Chemicals, Jodhpur and vide order dated 25/11/2016 in respect of M/s Mec Shot Blasting Equipment Pvt. Ltd. As such, when benefit is given to similar by placed assessees, the demand in the present cases are also should be held as untenable.

(c) major portion of the demands are also hit by time bar. There was a bonafide belief on the part of the appellants, regarding non-taxability of services rendered in foreign country, during the material time. Even the Board vide a Circular dated 08/10/2001 clarified that services provided beyond territorial waters of India are not liable to service tax. Even the Original Authority as well as First Appellate Authority held in these proceedings, that penalties are not imposable as the issue involved is one of interpretation of law and in any case, the matter is revenue neutral ;

(d) all the notices which are subject matter of these appeals were issued prior to 10/05/2013 invoking proviso to Section 73 (1) of the Finance Act, 1994. As there is no case for suppression of facts with intent to evade payment of service tax, to demand for normal period also cannot be upheld. Section 73 was amended by Finance Act, 2013. W.e.f. 10/05/2013 sub-Section (2A) was inserted under Section 73. Prior to that date, there is no provision to restrict the demand to normal period, in case the demand for extended period was held to be not sustainable.

3. The learned AR submitted that Section 66A of the Act is very clear and unambiguous. Admittedly, the appellants availed services of foreign selling agents and paid consideration for such services. The liability to service tax under BAS cannot be disputed. The appellants are taking a plea regarding revenue neutrality and un-sustainability of demand due to time bar only to avoid the legitimately payable service tax. The revenue neutrality can be a defence to plead for bonafide belief and non-existence of malafide intent on the part of the assessees.

Revenue neutrality by itself cannot be pleaded for non-payment of service tax. If such proposition is accepted any assessee who is entitled to avail Cenvat credit of tax paid can choose to not to pay tax at all. Such proposition will be against the very basis of taxation. Regarding sustainability of demand even for normal period, if the demand for extended period was held unsustainable, the learned AR submitted that the authorities who issued show cause notice are competent to issue notice both for normal period as well as for extended period. In case, if the demand was issued for extended period it does not mean that the normal period demand cannot be part of the same. In other words, prior to 10/05/2013 it is not the case that for each proceedings involving longer period two show cause notices are to be issued one for normal period and another for extended period. Such proposition will be legally unsustainable.

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

5. Admittedly, the appellants did avail services of foreign selling agents and such services are clearly covered by the tax entry Business Auxiliary Services in terms of Section 65 (19) of the Finance Act, 1994. Even the appellants do not challenge the legal position in this regard. However, the demands are contested on various other technical grounds.

6. The first one is to the effect that the demands are not sustainable as there is a revenue neutral situation. In case the

service tax is paid on such services the appellants are eligible for credit of tax paid and thereafter eligible for refund of such tax under Rule 5 of Cenvat Credit Rules, 2004. The appellants relied on certain case laws in this regard. Tribunal in the case of **Taxyard International vs. CCE, Trichy** reported in **2015 (40) S.T.R. 322 (Tri. – Chennai)** held that the appellants were exporters of taxable articles. The Foreign Trade Policy does not allow the export of taxes. Following the general principle that the tax paid by the appellants are available as a credit in that case, the Tribunal set aside the demand. We note that in the said case it was recorded that the demand was hit by limitation.

7. Before applying the principles of revenue neutrality, it is to be noted that the eligibility of credit to the appellant should be clearly established with supporting evidence. Further, the appellants claim for refund of the said credit is subject to various conditions stipulated under Rule 5 of Cenvat Credit Rules, 2004 or Rule 18 of Central Excise Rules, 2004. We cannot record a categorical finding regarding the eligibility of the appellants for such benefits as these matters are not before us for decision. As rightly contended by the Revenue that revenue neutrality as a concept will help the appellants to defend their case of bonafide belief against service tax liability and accordingly to defend against penal action or demand for extended period. The penal action and demand for extended period arises when the ingredients of suppression, willful mis-statement etc. are established. Further, we also note that there can be no general

rule to the effect that the assessee need not pay tax if the same is available as a credit to them. In other words, a purported revenue neutral situation cannot, by any means, mitigate a tax liability of an assessee, which is otherwise payable in view of clear legal position of charging section and the tax entry, found correctly applicable to the assessee. The whole scheme of Cenvat credit as envisaged by the Cenvat Credit Rules, 2004 will become redundant if the proposition of revenue neutrality is invoked for non-payment of service tax or duty on inputs/input services. We find that such interpretation of law will be against the very basis of value added taxation and leaves the discharge of tax liability to the discretion of the assessee. We find no legal sanction for such interpretation.

8. Having examined and upheld the liability of the appellants to pay service tax on reverse charge basis, in respect of services availed from foreign commission agents, we note that the appellants have a strong case regarding limitation. Wherever the demands issued invoking the provisions applicable to extended period, we find that the same is not legally sustainable for such longer period. The Original Authority himself recorded that the issue is one of interpretation of provision of law and refrained from imposing penalty. It is relevant to note that the penalty was not waived under the provisions of Section 80, but the penalty was held to be not imposable. A perusal of the impugned orders indicate that no sustainable reasons were recorded to support the demand for extended period. We find, only a passing remark to

the effect that the appellant did not inform the facts to the Department and these facts came to the notice of the Department only at the time of enquiry and, hence, the appellants suppressed the facts from the Department. We find such summary assertions cannot support the demand for extended period. Admittedly, the tax liability under reverse charge basis itself is a new concept and was subjected to various litigations and clarifications. In such situation, we find no scope for invoking extended period for demand of service tax. There is no case for fraud, collusion, willful mis-statement or suppression of facts with intent to evade service tax in these cases. Accordingly, we hold the service tax liability should be restricted to the normal period available under Section 73 (1) of the Finance Act, 1994.

9. The appellants contested that once the demand is held to be not sustainable for extended period, the same cannot be held to be tenable even for normal period. The amendment carried out in Section 73 w.e.f. 10/05/2003 was quoted in support of such assertion. It is the case of the appellant that the demand for normal period can stand only for the period after 10/05/2013 when sub-Section (2A) was inserted under Section 73. The appellants relied on the decision of Hon'ble Calcutta High Court in **Infinity Infotech Parks Ltd. vs. Union of India** reported in **2014 (36) S.T.R. 37**. The Hon'ble High Court relied on the decision of Hon'ble Supreme Court in **Alcobex Metals – 2003 (4) SCC 630**. However, on examination of these decisions, we

find that no law has been laid down by the Hon'ble Supreme Court regarding the non-sustainability of demand for normal period in case the demand for longer period was held untenable. The Hon'ble Calcutta High Court in **Naresh Kumar & Co. Pvt. Limited vs. Union of India** reported in **2014 (35) S.T.R. 506 (Calcutta)** held as below :-

> „13. ….. In case of *Collector of Central Excise, Jaipur* v. *Alcobex Metals* reported in 2003 (153) E.L.T. 241 (S.C.), one of the plea agitated before the Supreme Court was whether the show cause notices can still be treated as invalid for the period which is within the normal period of limitation. The Apex Court did not lay down the law on the above subject but proceeded to declare the show cause notice as invalid on the ground that the same was issued by an authority not competent under the relevant statute. The aforesaid judgment, in my view, is not pointer to an issue whether the show cause notice can still be validated for a period which is within the normal period enshrined under the statute. …..‟

10. The provision of Section 73 (1) are as below :-

> „Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of –

(a) fraud ; or
(b) collusion ; or
(c) willful mis-statement ; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words „[„eighteen months‟], the words „five years‟ had been substituted‟.

11. It is clear that in show cause notice for demand of service tax short paid or not paid can be issued only under the provisions of sub-Section (1) of Section 73. The proviso to the said sub-Section does not form the basis for demand of service tax. The said proviso only has got the effect of fixing the time period of 5 years instead of 18 months for issue of show cause notice, if such short payment is by any one of the reasons mentioned therein. As such, it is clear that any show cause notice issued by Central Excise officer for demanding service tax can be only in terms of Section 73 (1). If the ingredients of proviso to the said sub-Section is found to be not available in respect of any show cause notice, then apparently the Adjudicating Authority can restrict the demand for the normal period, as per the main sub-Section. This is clear even from the newly inserted sub-Section (2A) of the said

Section. It states that where any appellate Authority or Tribunal or Court concludes that the notice under proviso to sub-Section (1) is not sustainable, then the Central Excise officer shall determine the service tax payable for the period of 18 months, as if the notice has been issued with a limitation applicable under sub-Section (1). It is clear that the said sub-Section refers to only findings by the Appellate Authority. It means that when the Original Authority himself decides, that based on evidences, the ingredients of proviso clause is not available in a particular case then he himself will restrict to the demand to the normal period. Such restriction of demand to the normal period can be done in case of direction by appellate Authority also. Considering the fact that there cannot be two different show cause notices against the same assessee simultaneously, one under the main sub-Section (1) of Section 73 and another one invoking proviso to sub-Section (1) of Section 73, it is apparent that a demand issued for longer period includes the demand of normal period, falling under the very same main sub-Section. It is relevant to note that the officer who issued the show cause notice is competent to issue, invoking either one of the time limit. In case, the limitation of longer period was invoked, it is well within his right to determine the demand for normal period also.

12. Considering the above legal position, we find that there is no merit in the submission of the appellant that when the demand for longer period was held to be not sustainable, then the whole demand will fall. As discussed above that such

proposition is not supported by the provisions of Section 73. We may also note that here we are dealing with period of limitation, not the power to demand and recover short paid tax. The Hon'ble Supreme Court in **Thirumalai Chemicals Ltd. vs. Union of India** reported in **2011 (268) E.L.T. 296 (S.C.)** held that law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. The Hon'ble Supreme Court held as below :-

> „15. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in *Garikapati Veeraya* v. *N. Subbiah Choudhry & Ors.* - AIR 1957 SC 540, *New India Insurance Company Limited* v. *Smt. Shanti Mishra* - (1975) 2 SCC 840, *Hitendra Vishnu Thakur & Ors.* v. *State of Maharashtra & Ors.* - (1994) 4 SCC 602; *Maharaja Chintamani Saran Nath Shahdeo* v. *State of Bihar & Ors.* - (1999) 8 SCC 16; *Shyam Sundar & Ors.* v. *Ram Kumar & Anr.* - (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.
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> 16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be

construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective‟.

13. The right of the Revenue to recover service tax not paid or short paid is a substantive right in terms of Section 73 (1). As already noted that the said provision is invoked by Central Excise officer to demand service tax, not paid or short paid. The period of limitation being procedural has to be examined in this context. In the present cases demands were issued within the prescribed periods, by the competent officer.

14. In view of above discussion and analysis, we hold that the appellants are liable to service tax on reverse charge basis in respect of commission paid to foreign agents. Such liability will be only w.e.f. 18/04/2006 and restricted to the normal period of demand. There can be no justification for imposition of penalty on any of the appellants. Accordingly, the penalty imposed in two cases is set aside. The appeals are disposed of in the above terms.

(Order pronounced in open court on 26/05/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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