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

Service Tax Appeal No. 52584 of 2014- Cus

[Arising out of Order-in-Original No. 14/2014 dated 29.1.14 passed by the Commissioner of Service Tax (Adjn), New Delhi]

S. Saberwal & Co. **Appellants**

Vs.

Commissioner of Service Tax **Respondent**
Delhi

Appearance:

Shri Vijay Kumar, Advocate for the Appellants
Shri Ranjan Khanna , DR for the Respondent

<u>CORAM</u>:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : 27.06.2017
Date of Decision: 04.08.2017

FINAL ORDER NO. 55696 /2017

Per: V. Padmanabhan:

The appeal is against the order in original No. 14/2014 dated 29.1.14. The appellant is a recovery agent for ICICI Bank and is liable to pay service tax under the category of recovery service falling under section 65 (105) (zzzl) of the Finance Act, 1994 with effect from

1.5.2006. The period involved in the present dispute is from 2006 - 2007 to 2009-2010. During the above period, the appellant has discharged the service tax liability on 20% of commission received by them from ICICI Bank. Their claim is that rest 80% is towards actual expenses incurred by them on behalf of ICICI Bank. Their claim is that 80% of the commission received will be deductible in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. However, the department was of the view that the appellant does not satisfy the conditions prescribed under Rule 5(2) of the Service Tax Rules to justify such exclusion as pure agent. Accordingly, a show cause notice was issued and service tax was ordered to be paid vide the impugned order on the full value of commission received from ICICI Bank. The adjudicating authority, accordingly confirmed the Service Tax demand amounting to Rs. 1,53,52,862/- along with interest and penalty of equivalent amount under section 78 of the Finance Act.

2. Aggrieved by the said order, the present appeal has been filed.

3. With the above background, we heard Shri Vijay Kumar, Advocate and Shri Ranjan Khanna, learned DR for the Revenue.

4. Learned Counsel for the appellant submitted that they will be entitled to abatement of 80% of the consideration, Since these were towards expenditure or costs incurred while providing such services. He further, argued that the demand is barred by limitation inasmuch as

the appellant has duly reflected in all ST 3 returns filed by them, the fact of Service tax is being paid only on 20-% of the service consideration. He also pointed out the communication between the appellant and jurisdictional Revenue authorities to indicate that the said fact was brought to the notice of jurisdictional officer for confirmation. He argued that in such a scenario, the show cause notice issued on 15.4.2011 is hopelessly time barred and the benefit should be given to them.

5. Learned DR appearing for the Revenue submits that there is nothing to show that the said annexure indicating payment of service tax only on 20% of the commission earned was annexed to the ST 3 returns. He also submits that inasmuch as the said annexures were not part of the actual ST 3 return filed by the assessee, the same should not be given any credence. As regards the correspondence, learned DR submits that same started with effect from 17.12.2007 i.e. the date of first letter was written by them on 17.12.2007 and as such, the appellant should be made to deposit the service tax for the period prior to the said letter inasmuch as the period started from 2006 onwards.

6. The first issue for consideration before us is whether the appellant will be entitled to exclude 80% of the commission received from ICICI Bank while payment of service tax.

7. We have perused the relevant clauses of agreement between the appellant and the ICICI Bank. We find that the agreement nowhere mentions that the appellant was engaging personnel on behalf of ICICI Bank and that payment for these personnel were to be made by ICICI Bank. Rule 5(2) of the Service Tax (Determination of Value) Rules, specifies the conditions which are required to be satisfied for excluding certain expenditures or costs incurred by the service provider as a Pure agent of recipient of service. After going through the agreement, we note that the condition prescribed are not satisfied by the appellant. This is particularly so in view of the fact that the agreement does not suggest that the payments made by the appellant were on behalf of the recipient of service. Further, the same has not been separately indicated in the invoices issued by the appellant. From the record, we see that the appellant has also indicated that 80% is only an estimate and may not be exact. In view of the above, we are of the view that there is no justification for excluding 80% of commission from payment of service tax.

8. Next we turn to the claim of the appellant that demand is time barred. Our attention was drawn to the ST 3 returns filed by the appellant. We find that returns filed, specifically made an endorsement in the form of Note mentioning clearly that the appellant was working as Pure agent of the bank and that service tax was being paid by excluding 80% of the total receipt towards expenses. Further,

we find that the appellant has taken up the matter for clarification with the jurisdictional Commissioner vide their letter dated 19.3.2008, mentioning clearly that they are deducting 80% of the charges towards expenses. The Commissioner in the impugned order has not arrived at any finding that such remarks in the ST 3 returns were not there in returns actually filed with the Revenue. Further, from the fact that the appellant wrote several letters explaining their stand and asking for clarification reflects upon the bonafide of the appellant, that they entertained a belief that 80% of the commission can be excluded.

9. In view of the above, we are of the view that Department is not justified in invoking the extended period of limitation under section 73 for demand of Service Tax in the present case. The Show cause notice which has been issued on 15.4.2011 for demand of service tax for the period 2006-07 to 2008-09 is time barred and hence the demand is required to be set aside in full.

10. In view of the above, the appeal is allowed.

(Pronounced in the open Court on 04.08.2017)

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

ss