

ST/3087 & 3166/2012-ST(DB)

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

Date of Hearing: 23.01.2018

Date of Pronouncement: 01.02.2018

Appeal No. ST/3087 & 3166/2012-ST(DB)

[Arising out of Order-in-Original No. 123/GB/2012 dated 06.07.2012
passed by the Commissioner of Service Tax, Delhi]

CST, Delhi

...Appellant

Vs.

M/s McCann Erickson (India) Pvt Ltd

...Respondent

Appearance:

Rep by Shri N. Venkatraman, Senior Advocate for the appellant.

Rep by Shri Amresh Jain, AR for the respondent.

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

Final Order No. 50438-50439/2018

Per V. Padmanabhan:

The present appeals are filed against the Order-in-Original No. 123/2012 dated 08.07.2012. The appeals have been filed by both the assessee as well as Revenue against different portions of the impugned order. There are two issues involved, and we proceed to discuss them one by one.

2. The assessee is engaged in the business of providing advertising services and related activities. They also create advertisements for their clients and are also engaged in media planning and buying spaces for their clients for advertisement to be published in print and electronic media. The dispute is pertaining to the period 2005-2006 to 2007-2008 and 01.04.2008 to 16.05.2008. The appellant rendered service to M/s Result Services Pvt. Ltd., New Delhi, which was an associate/subsidiary of the appellant's company. It was noted during the course of audit that a total amount of Rs. 2,26,82,264/- was found recoverable/outstanding as on 16.05.2008 from M/s Result Services Pvt. Ltd. for the services provided to them. With effect from 10.05.2008, Section 67 of the Finance Act, 1994, dealing with valuation of taxable services for charging Service Tax was amended. Similarly, Rule 6 of the Service Tax Rules, 1994, was also amended by Notification No. 19/2008-ST dated 10.05.2008. For ready reference this is reproduced below:

“After third proviso in Sub-rule (1) of Rule 6 of the Service Tax Rules, 1994, following Explanation clause was inserted by Notification No. 19/2008-S.T., dated 10.05.2008:

Explanation. – *For the removal of doubts, it is hereby declared that where the transaction of taxable services is with*

any associated enterprise, any payment received towards the value of taxable service, in such case shall include any amount credited or debited, as the case may be, to any account, whether called 'Suspense account' or by any other name, in the books of account of a person liable to pay service tax."

3. In the light of the amendment carried out, the department was of the view that the appellant was liable to pay Service Tax on the amount which was outstanding from the subsidiary company as on 16.05.2008. Accordingly, after the issue of show cause notice, the adjudicating authority confirmed the demand for Service Tax on the outstanding amount. The Service Tax was confirmed amounting to Rs. 24,72,677/-. Out of this amount, the appellant paid the Service Tax amounting to Rs. 12,66,876 along with interest.

4. The second issue which is in dispute is pertaining to Service Tax payable by the appellant in respect of certain services received from foreign service providers. Such amounts become payable by the appellant on reverse charge basis on the basis of the statutory provisions of Section 66A of the Finance Act, 1994. In terms of Rule 5 of the Taxation of Services (Provided from outside India and received in India) Rules, 2006, the Service Tax payable on reverse charge payable is required to be paid

in cash. However, the appellant made payment of Service Tax amounting to Rs. 1,93,74,146/- by making use of Cenvat credit. The adjudicating authority ordered for payment of this amount in cash and observed that the appellant will be eligible for Cenvat credit of the same only after payment of this amount in cash.

5. In addition to confirmation of tax as above, the adjudicating authority also levied penalties under Section 77 and 78, but refrained from imposing any penalty under Section 76 as well as Rule 15 of the Cenvat Credit Rules, 1994. Aggrieved by the impugned order, appeals have been filed by both sides. The assessee has argued that the Service Tax amounts demanded are not payable. The Revenue, on the other hand, has challenged the order with the argument that the adjudicating authority ought to have levied penalty under Section 78 equal to the total amount of Service Tax demanded, and not the net amount of Service Tax payable.

6. With the above background, we have heard Shri N. Venkatraman, learned Senior Advocate on behalf of the appellant and Shri Amresh Jain, learned D.R. appearing for the Revenue.

7. The learned Senior Advocate submitted on behalf of the appellant on the first issue as follows:

The services provided by the appellant to its subsidiary, i.e., M/s Result Services were taxable services, but the appellant was not required to pay the Service Tax on the consideration transferred by book adjustment by the subsidiary till the date of amendment of the law on 10.05.2008. Such amount recovered from the subsidiary by way of adjustment of accounts were made liable to payable to Service Tax only from the date of amendment, i.e., 10.05.2008. He relied on the decision of the Honorable Supreme Court in the case of Union of India versus M/s Martin Lottery Agencies, reported as 2009(14) S.T.R. 593 S.C., in which the Apex Court has held that any amendment in the statute by which the charging provision has been widened, cannot have retrospective operation. He argued that the appellant is liable to pay Service Tax for such amounts only after 10.05.2008 and the appellant has already deposited the amount of Service Tax along with the interest on that portion of the amount outstanding from the subsidiary.

8. On the second issue wherein the appellant has made use of Cenvat credit for discharge of Service Tax liability arising on reverse charge basis for services received from foreign service providers, he argued that the adjudicating authority himself held that such amount, if paid in cash, will be allowable as Cenvat credit to the appellant. This leads to the Revenue

neutral situation. In this regard, he relied on the decision of the Honorable Supreme Court in the case of M/s Nirlon Ltd versus Commissioner of Central Excise, Mumbai, reported as 2015-TOIL-96-S.C.-C.

He also argued that the entire demand is hit by time bar in as much as full details of Cenvat credit availed and utilized, has been declared by the appellant in their periodic ST-3 returns.

9. On the other hand, the learned D.R. justified the impugned order. He argued that the service rendered to the subsidiary is a taxable service, even for the period prior to the date of amendment of the statute, i.e., 10.05.2008. Hence, taxability of the service is not in doubt. The consideration receivable from the subsidiary for such service was outstanding, even in the period prior to 10.05.2008, but has been showed as recoverable only on 16.05.2008. Accordingly, he argued that Service Tax is payable for the full outstanding amount.

10. On the second issue, he argued that the appellant is required to discharge Service Tax on reverse charge basis only in cash. The same cannot be discharged using Cenvat credit. The argument of the Revenue neutrality is not applicable for the present case. He also argued that the demand in the case is not hit by time bar. In this connection, he relied on

the detailed findings recorded by the adjudicating authority in Para 20 of the impugned order.

11. We have heard both sides at length and perused the records.

12. We first consider the issue of amendment of the statute with effect from 10.05.2008. By this amendment, the amount adjusted with an associate enterprise towards service rendered for such enterprise is to be considered as part of gross amount charged for such services. The appellant has rendered services to its subsidiary M/s Result Services Pvt. Ltd. The audit found a large amount outstanding from the subsidiary as on 16.05.2008. The stand of the appellant is that the appellant was not required to pay Service Tax on such amounts recovered by book adjustments from the subsidiary prior to the amendment. For the amount adjusted after 10.05.2008, the appellant has already discharged the Service Tax along with the interest. They relied on the decision of the Apex Court in the case of M/s Martin Lottery Agencies (supra). We have considered the judgment of the Apex Court. The Apex Court has observed as follows:

“24. A bare perusal of the said circular letter would clearly show that lottery tickets were considered to be goods. It is with that mindset, the circular was issued. However, it must have been

realized that resale of lottery tickets by the distributor or by others is not permissible. Whether sub-clause (ii) of clause (19) of Section 65 had been applied in case of any other distributor or agent of such lottery tickets is not known. If the assertion of Mr. Salve that nobody had demanded tax under the second clause is correct, we do not know why the principle of 'small repairs' by inserting an explanation was taken recourse to. The explanation, in our opinion, cannot be said to be a simple clarification as it introduces a new concept stating that organizing of the lottery is a form of entertainment. Introduction of such new concept itself would have a constitutional implication. In the year 2003, while amending the provisions of 1994 Act, the Constitution was also amended and Article 268A and Entry 92C in List I were inserted. The courts are in future required to determine whether a service tax within the purview of residuary entry containing Entry 97 List I. If it is held to be a taxing provision within the purview of Entry 97, the same will have a bearing on the States. The Explanation so read appears to be a charging provision. It states about taxing need. It can be termed to be a sui generis tax. If it is a different kind of tax, the same may be held to be running contrary to the ordinary concept of service tax. It may, thus, be held to be a standalone clause. A constitutional question may have to be raised

and answered as to whether the taxing power can be segregated. If, by reason of the said explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.”

13. It has been categorically held by the Apex Court that the explanation inserted in the statute through which the taxing net has been widened, cannot be held to be retrospective in operation. Through the amendments carried out in Section 67 of the Act as well as Rule 6(1) of the Service Tax Rules, effectively the liability to pay Service Tax has been imposed in respect of transactions with the subsidiary or associate enterprises. Such an amendment is definitely having the effect of widening the tax net. In the light of the Apex Court's decision, we are of the view that the demand raised cannot be sustained, except for the adjustments made on or after 10.05.2008. The Service Tax liable for the period on or after 10.05.2008 has been paid by the appellant along with the interest and is not being challenged. In the result, for the earlier period, the demand as well as the interest and penalties are set aside.

14. Next, we turn to the second issue. In respect of the tax received from the foreign service providers, the appellant is required to discharge Service Tax on reverse charge basis in cash. Once such Service Tax is paid in cash, the appellant will be entitled to take Cenvat credit of the same. In the

present case, instead of making the payment in cash, the liability was discharged by making use of the Cenvat credit. The appellant has argued that this amounts to a situation of Revenue neutrality and hence, the demand cannot be raised in the light of the Apex Court's decision in the case of Nirlon.

15. We have considered the decision in the Nirlon case, in which the Apex Court was considering the case of products cleared from one factory to another factory of the same company. It has been held that if higher duty is paid in the first factory, the same will be available as Cenvat credit in the second factory. Therefore, the assessee could not have any intention to evade duty.

The situation in the present case is entirely different. The statute specifically provides that Service Tax payable on reverse charge basis in terms of Section 66(A) of the Act is required to be discharged by making payments in cash. Once such Service Tax is paid in cash, Cenvat Credit Rules allow credit of the same. This cannot be interpreted to mean that it is a revenue neutral situation. The credit is allowable contingent upon the tax being paid in cash. In this case, the appellant failed to pay the amount in cash and consequently the tax amount has been demanded rightly by the adjudicating authority.

16. It has been argued on behalf of the appellant that the extended period of limitation cannot be invoked in the present case. The learned Advocate had relied upon the same Apex Court's decision in Nirlon case to claim that there can be no mala fide intention on the part of the appellant. The adjudicating authority has elaborately discussed the reasons as to why the extended period of limitation is applicable in the present case, in Para's 20.1 to 20.6. For the reasons outlined above, we are of the view that the Revenue is justified in invoking the extended period of limitation in the present case to raise the demand of Rs. 1,93,74,146/-. However, the appellant will have the option to avail the Cenvat credit of this amount after payment of the same in cash.

17. Now, we turn to the Revenue's appeal. The only ground agitated in the Revenue appeal is that the impugned order should have imposed penalty under Section 78, equal to the total amount of the Service Tax demanded, i.e., Rs. 24,72,677/-. But the adjudicating authority as imposed penalty only to the extent of Rs. 12,05,801/-.

We note that the demand for the period prior to 10.05.2008 has been set aside by us as above. The balance amount of Rs. 12,66,876/- already stands paid by the appellant. Consequently, we find that the appeal filed by the Revenue is without merit and is dismissed.

18. As a result, the impugned order is modified and appeal filed by the assessee is partially allowed.

[Pronounced in Open Court on 01.02.2018]

(Justice (Dr) Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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