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. IV

DATE OF HEARING : 24/10/2018.
DATE OF DECISION: 24/10/2018.

Service Tax Appeal No. 753 of 2012

[Arising out of the Order-in-Appeal No. 536/AKJ/ST/JPR-II/2011 dated 10/01/2012 passed by The Commissioner (Appeals – II), Customs & Central Excise, Jaipur.]

M/s Shree Ram Gum Chemicals Ltd. Appellant

Versus

CCE, Jaipur – II Respondent

Appearance

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

Shri R.K. Majhi, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 53569/2018 Dated : 24/10/2018

Per. C.L. Mahar :-

The facts in brief are that the appellants are engaged in manufacture and export of guar gum powder and has availed services of foreign commission agents for booking of orders for export and in process have paid commission to such foreign agents who are not having any office in India. The department has entertained a view that services of booking of orders on behalf of the appellant is a taxable service under the category of business auxiliary service under the Finance Act, 1994 and as per the provisions of the Finance Act under Section 66 (A) readwith the relevant rules, the services which have been rendered by the foreign agents who are not having office in India, the recipient of the service (appellant) is liable to pay the service tax on the commission paid by them to the foreign agents under reverse charge mechanism basis.

2. In view of above, a show cause notice No. V (ST)/SCN/150/ JDR/09/8778 dated 09/06/2010 came to be issued for recovery of the service tax of Rs. 17,136/- on commission paid to foreign agents during the period from 01/09/2008 to 07/07/2009 under Section 73 (1) of the Finance Act, 1994 invoking the extended time proviso for demand of service tax under this section. The penal provision under Section 76, 77 and 78 has also been invoked. The matter got adjudicated by the order-in-original dated 28 September 2010, whereunder the charges of the show cause notice have been confirmed by the learned Deputy Commissioner. The appellant have approached the Commissioner (Appeals) and the learned Commissioner (Appeals) vide its order-in-appeal No. 536/AKJ/ST/JPR-II/2011 dated 10/01/2012 has upheld the findings of the order-in-original. The appellants are before us against impugned order-in-appeal. At the outset, it has been contended that the show cause notice is barred by the limitation as firstly, the required elements for invoking the

extended time proviso namely fraud, collusion, willful mis-statement, suppression of facts or any contravention of the provisions of service tax law with an intention to evade duty are not present in this case. Since, there was a bonafide ignorance on the part of the assessees in view of the Circular issued by the CBEC dated 08/10/2001, wherein it has been clarified that the services provided beyond territorial waters of India are not liable to service tax and since the services in the present matter were availed and utilized beyond the territorial waters of India, the assessee had a bonafide belief that activity is not covered by Section 66A and, therefore, they have not paid the service tax under the reverse charge mechanism basis. It has further been added that the department was fully aware about the facts of the matter as they have already issued a show cause notice dated 15/04/2009 under show case notice No. V (ST)/SCN/43/ JDR/09/3774, where on the same demand of service tax for the period pertaining to 1st January 2005 to 31 August 2008 has been demanded. It has, therefore, been contested that since the department was already aware about the facts that the appellant have been paying certain commissions to foreign based agents for procuring export orders, the issuing of the show cause notice by invoking the extended time proviso for the second show cause notice is legally not sustainable as held by Hon'ble Supreme Court in the case of **ECE Industries Ltd. vs. CCE – 2004 (164) E.L.T. 236 (S.C.)**

3. We have also heard the learned Departmental Representative who has reiterated the findings of the impugned order.

4. Having heard both sides. Before going to the merits of the case, we have to examine the facts whether the claim made by the appellant that the impugned show cause notice is barred by period of limitation. We noticed that earlier also on the similar issue, the department had issued a show cause notice to the appellant invoking a extended proviso under Section 73 of the Finance Act, 1994. This fact proves that the department was fully aware about the facts of the matter and therefore the impugned second show cause notice which came to be issued should have been issued for normal period of demand under Section 73 and not by invoking the extended time proviso. We therefore find that issue of the show cause notice by invoking extended time proviso is legally not sustainable, therefore, we remand back the matter to the Original Adjudicating Authority to restrict the demand to the normal period of demand under Section 73 (1) of the Finance Act, 1994. We also find that there is no valid ground for imposition of the penalty on the appellant as the department has already been seized with the matter and we do not find any suppression, mis-statement etc. with an intent to evade service tax or any violation of the provisions of the Finance Act by the appellant, inviting invocation of extended time proviso under Section 73 and corollary invocation of the penal provisions of Section 78, 77 and 76 of the Finance Act.

5. In view of above, we allow the appeal by way of remand. We also instruct the Original Adjudicating Authority to confirm the demand only for a normal period of limitation under Section 73 (1) of the Finance Act, 1994.

6. The appeal is allowed in above manner.

(Operative part of the order pronounced in the open court.)

(Rachna Gupta)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

PK