

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench
Court - I

Appeal No.	Appellant	Respondent	Impugned Order No. & Date
ST/31175/2016	Hetero Labs. Limited	CCT, Hyderabad GST	O-I-O No. HYD-SVTAX-000-COM-78 to 80 -16-17, dated 30.08.2016 passed by CST, ST Commissionerate, Hyderabad.
ST/31176/2016	.do.	.do.	.do.
ST/31177/2016	.do.	.do.	.do.

Appearance

Shri Y. Srinivasa Reddy, Advocate for the Appellant.

Shri Arun Kumar, Dy. Commissioner/AR for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 04.06.2018

Date of Decision: 04.06.2018

FINAL ORDER No: A/30677 -30679/2018

[Order per: P. VENKATA SUBBA RAO]

1. These appeals are filed by the appellant against the Order-in-Original passed by the Commissioner of Service Tax, Hyderabad.

2. The appellants are manufacturers of pharmaceutical drugs with manufacturing units located across India and also outside India. They have

branches and associate companies in countries such as Mexico, Russia, Dubai and Vietnam. These Branches and the Associate companies are located in their own premises and maintain their infrastructure with manpower and are registered as permanent establishments in the jurisdiction of respective countries. They incur expenditure towards salaries, rent etc. and this expenditure incurred by their branches and companies are reimbursed by the appellant every month. Among the expenses claimed as reimbursement are also certain amounts towards commissions and professional charges. During audit, it was found that the appellant had paid service charges for the services received from their overseas service providers and for which they have paid in foreign currency. Show cause notices were issued alleging that the appellant had incurred expenditure in convertible foreign currency on various services received from abroad viz; Business Auxiliary Service, Intellectual Property Rights Service other than copyright, Transport Agency Service, Technical testing and analysis service, technical inspection and certification of service, Chartered Accountant service, Scientific Consultancy Service, Telecommunication Service and Legal Consultancy Service. These services are chargeable to service tax under Reverse Charge Mechanism and the appellant had not discharged the service tax on these services for which he had paid. As they have not disclosed these amounts in their Service Tax Returns, extended period of demand was invoked and interest under section 75 and penalties under sections 76 & 77 were also proposed to be imposed on the appellant. After following due process of law, Ld. Commissioner confirmed the demand and imposed penalties and interest

upon them. The current appeals are against these orders of Ld. Commissioner. Earlier, vide Miscellaneous Order No. M/30081-30084/2018, dated 25.04.2018, the appellant's request for an early hearing was allowed as the amount of service tax liability confirmed is substantial. Accordingly, the matter was listed for hearing today.

3. Heard both sides and perused the records.
4. The appellants have submitted a list of 91 expenses incurred by them on various items on which the service tax is proposed to be charged.
 - (a) Sl.No. 1 to 6: These pertain to the expenditure under the head "Commission" which is classifiable as Business Auxiliary Service. Service Tax was demanded in respect of these items on the ground that there was a difference between what was declared in their ST-3 Returns and what is accounted for in their Ledger and since these payments were made to the Commission Agents, service tax was demanded on the same. The appellant's argument is that the differential amount is only the amount for which a provision is made and this is not the actual amount paid as commission. Therefore, according to them, no service tax is payable on the differential amount.
 - (b) Sl.No. 7 to 12: These amounts are booked under Patent & Product Registration charges in their Ledger. The department seeks to classify

these as IPR services and charge service tax on the difference between the amounts of their ST-3 returns and Ledger accounts. It is alleged that the appellants made these payments for receipt of IPR through their branch offices. The appellant argues that these are not IPR charges and no IPR service is received in India. In fact, these are the amounts which they have paid to the Governments of those countries to register their intellectual proprietary rights in those countries. Since registration is a statutory function done by the Governments, these services are covered by the negative list of services under Section 66 D of chapter-V of the Finance Act, 1994. It is his further submission that during the relevant period, all services rendered by the government or local authority excluding some specified in that section were exempted. It is only w.e.f. 14.05.2015, the statutory definition for 'Government' has been introduced through Section 65 B(26A) restricting the scope of government to the departments of Central Government, State Governments and Union Territories. Therefore, these services rendered by the respective governments and for which they have aid, appropriate fees can not be charged to service tax.

- (c) Sl.No. 13 to 16: These expenses are booked under the head of expenditure "Business Promotion" and the department proposes to charge the amount under advertisement agency services alleging that the amounts are spent for advertisement service received through the

branches of the appellant. It is the assertion of the appellant that no advertising agency service was involved in this case and they have only reimbursed the expenditure incurred by their associate companies for the business promotion.

- (d) Sl.No. 17 to 21: These expenses are booked under the head “Professional Charges” in their accounts and the department sought to categorise these as “Legal and Professional Consultancy Services” and the appellant paid service tax on these charges.
- (e) Sl.No. 22 to 34: These expenses are incurred on salaries, office expenditure and telegrams and no classification was made by the department. It is alleged by the department that no prudent businessman spends so much amount on these charges and no claim for relief is made out by the appellant. The appellants argument is that salaries and other office expenditure are not liable to tax and at any rate without specifying the authority of law, no demand of service tax can be made on these amounts.
- (f) Sl.No. 35 to 45: These expenses pertain to Clinical Test Charges, Consultancy Charges, Consumption of innovatory samples and testing charges. The department sought to classify the clinical test charges as technical testing and analysis service and Scientific Consultancy

Service and had not made any specific classification of the remaining services. Appellant argues that these services were received and consumed outside India and hence no service tax needs to be paid on them.

- (g) Sl.No. 46 to 91: These are pertain to variety of charges such as Factory Audit Expense, Translation Charges, Audit Expenses, Bank Interest, Factory Maintenance, Repair and Maintenance of computers, Membership and subscription charges, Seminar expenses, stationery charges, vehicle maintenance, travel expenses, Hotel stay expenses etc. which were not classified under any particular head by the department. The appellant argues that these are in nature of office expenditure and no service is involved in such expenditure.

5. Appellant argues that the show cause notice was issued simply based on the amounts in the balance sheet or Ledger account comparing them with the amounts in the ST-3 returns without even verifying or enquiring regarding the nature of alleged service, details of the service providers, the taxability of such services and the applicability of the provisions of Section 66A for those services. In many cases, classification of the alleged service was also not made. It is a settled position that the demand cannot be made without specifying these details. As held in the case of DHL Express India Pvt. Ltd. [2017-TIOL-2462-Cestat.Mum], mere entries in the books without finding that a specific taxable service has been provided is not correct. In

respect of the demand under the category of Business Auxiliary Service, it is alleged by the appellant that the amounts taken by the department for some orders were wrong in the first notice. In respect of one entry head under the head "audit expenses", demand was made on an amount of Rs. 31,97,77,299/- whereas the actual amount was only Rs. 3,19,77,299/- thus inflating the amount by Rs. 28.00 crores. They further argued that the department found a difference between the ledger amounts and the ST-3 returns because the ledger amounts reflected the provision made whereas the liability to pay service tax in the case of reverse charge mechanism is on making the payment. The amounts mentioned in the Ledger would include the amounts paid, amounts for which provision was made, amounts relating to past period and amounts which are written off. Therefore, the demand of service tax simply based on the Ledger amount is incorrect.

6. The service tax is not required to be paid on 'intermediary services' provided by an intermediary located outside India as provide under Rule 9 of Place of Provision Rules, 2012. Though the amendment in the definition of 'intermediary' is made on 01.10.2014, since the amendment is made by way of substitution, it will have retrospective effect. Therefore, the service tax need not be an intermediary service w.e.f. 01.10.2014 or even for the previous period.

7. As far as patent/product Registration charges are concerned, these amounts were paid to the respective governments of those countries and

hence fall under the negative list, under section 66D and hence no service tax is payable on them. The last demand is on various expenses incurred at various branches outside India by the associate companies which were reimbursed by the appellant. It is their argument that these branch offices and associate companies expenses incurred towards salaries, purchase of properties etc. and all these are reimbursed by them. The department's proposal to charge these as business promotion expenses and charge them under reverse charge mechanism is not correct. The appellant relied on the following case laws:

- (a) Milind Kulkarni and others vs. CCE, Pune [2016-TIOL-709-CESTAT-Mumbai]
- (b) Genym biotech vs. CCE,Nasik [2016(42)STR 918 (Tri.-Mum.)]
- (c) KPIT Cummins Info System Ltd. CCE Pune [2013-TIOL-1568-CESTAT-Mumbai]
- (d) CCE Bangalore vs. Pragati Concrete Products Pvt. Ltd [2015(322)ELT 818 (SC)]
- (e) Sunil Forging & Steel Industries vs. CCE, Belapur [20176(332)ELT 341 (Tri.-Mum.)]
- (f) CCE Bangalore vs. MTR Foods Ltd [2012(282) ELT 196 (Kar.)]
- (g) Trans Engineers India Pvt. Ltd. vs. CCE, Pune [2015(40)STR 490 (Tri.-Mum.)]

8. Ld. DR reiterated the arguments made in the Orders-in-Original and vehemently opposed the appeal. It is his submission that the appellant was bound to have filed the returns reflecting the actual amount of services and the service tax liability thereon and paid the service tax accordingly.

However, the appellant had not done so, they had not discharged the service tax liability on the services received from abroad under the reverse charge mechanism. They have also not disclosed to the department that the amounts which were paid by them in foreign currency to their overseas service providers. This has come to light only when the department conducted an audit and found that appellant has not discharged the full tax liability. It is his further argument that if any services were rendered by the service providers to the branch offices or to the associate companies of the appellant abroad, it does not stand to reason that the appellant has paid for such services. Since the appellant has paid for these services, it would not be unreasonable to conclude that they have received the services directly or through their branch offices. Therefore, the consumption of service was invariably in India and therefore the appellant was liable to pay service tax on such services.

9. We have considered the arguments on both sides and perused the records. The demand is sought to be made on the ground that there is a difference between the ledger amounts and the amounts reflected in the Service Tax returns filed by the appellant. The amounts in the Ledger reflects the amounts transferred by the appellant to their branch offices or associate companies in foreign currency. The Department viewed these as payments made for services rendered by the overseas service provider and consumed by the appellant in India. The appellant argues that the expenses included several expenses which are the office expenses including salaries

incurred by their branch offices which are being supported by the appellant. It is also their argument that there were several services for which no classification was made by the department, hence it is impossible to understand and show why the service tax under reverse charge mechanism is not payable on such expenses.

10. As has been held by the Hon'ble Supreme Court in the case of Ranbaxy Laboratories Limited vs. Union of India [2012(27)S.T.R. 193 (SC)], "it is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to read in; nothing to be implied and there is no room for any indent ment". The order fastening a liability on the assessee has to pass this test. On going through the Order-in-Original, we find that Ld. Commissioner has not examined as to how each of the items of expenditure discussed above amount to services received by the appellant in India and how they are chargeable to service tax under reverse charge mechanism. We also find that there are various items of expenditure such as salaries, office expenses etc. which need to be classified by the department in the first place to show how these amount to services rendered by the service provider abroad and received in India and how they are liable to charge to service tax under reverse charge mechanism. It has been held in the case of DHL Express India Pvt. Ltd. (supra) that consideration received from a recipient of service for the services rendered by the provider alone is taxable and the demand for alleged short paid tax must be based on a finding that a specific

taxable service has been provided as agreed to be provided and on the consideration that was paid or payable by the recipient of the service to the provider of the service. Similarly, in the present case, where the appellant is supposed to have received the services and is liable to pay service tax under reverse charge mechanism, it is essential that the department say what services were received by the appellant and how they were unclassifiable and how they were liable to be charged under reverse charge mechanism and compute their tax liability accordingly. This is an original work to be done with respect to each of the specific items of expenditure on which service tax is proposed to be charged. We therefore find it appropriate to remit the matter back to the original adjudicating authority with a specific direction to compute the demand after specifying how each of the items of the expenditure are chargeable to service tax.

11. Appeals are disposed by way of remand to the original adjudicating authority, to do so after following principles of natural justice.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)