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

Division Bench

Court - I

Appeal No.	**Appellant**	**Respondent**	**Impugned Order No. & Date**
ST/557/2008	CCCE, Hyderabad-III	Usha Kiran Movies Limited	O-I-A No. 25/2008 (H-III)ST, dt. 31.07.2008 passed by CCCE&ST, Hyderabad
ST/558/2008	.do.	.do.	O-I-A No. 26/2008 (H-III)ST, dt. 31.07.2008 passed by CCCE&ST, Hyderabad
ST/680/2009	.do.	.do.	O-I-A No. 23/2008 (H-III)ST, dt. 30.04.2009 passed by CCCE&ST, Hyderabad
ST/246/2011	Usha Kiran Movies Limited	CCCE&ST, Hyderabad	O-I-A No. 12to22/2010 (H-III)(D)ST,dtd. 30.09.2010 passed by CCCE&ST, Hyderabad
ST/247/2011	Rhythm	CCCE&ST, Hyderabad	.do.
ST/248/2011	Harmony	.do.	.do.
ST/249/2011	Ushakiran Movies – M.City	.do.	.do.
ST/250/2011	Parade	.do.	.do.
ST/251/2011	Margadarsi Housing & Finance Limited	.do.	.do.
ST/252/2011	Ushodaya Enterprises Pvt. Ltd.	.do.	.do.
ST/253/2011	Maya	.do.	.do.
ST/254/2011	Priya Dairy	.do.	.do.
ST/255/2011	Usha Kiran Movies - Film Division	.do.	.do.
ST/256/2011	Ramoji Universal Travels	.do.	.do.

Appearance

Smt.B.V. Siva Naga Kumari, Commissioner , Sh. M. Chandra Bose, Addl. Commissioner and Sh. Arun Kumar, Dy. Commissioner/ARs for the Appellant (Revenue)

S/Shri M. Narayana Swamy Naidu and M.V.S. Sridhar, Advocates for the Respondents

Coram:

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

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

Date of Hearing: 08.05.2018
Date of Decision: 10.08.2018

FINAL ORDER No. A/30896-30909/2018

[Order per: M.V. RAVINDRAN]

1. All these appeals are raising same question of law and facts, are being disposed of by a common order.

2. Appeal No. ST/557/2008 is filed by Revenue against Order-in-Appeal No. 25/2008 (H-III)ST, dt. 31.07.2008. The Appeal No. ST/558/2008 is filed by Revenue against Order-in-Appeal No. 26/2008 (H-III) ST, dt. 31.07.2008. Appeal No. ST/680/2009 is filed by Revenue against Order-in-Appeal No. 23/2008 (H-III)ST, dt. 30.04.2009 and appeal Nos. ST/246-

256/2011 are filed by various assesses against Order-in-Appeal No. 12 to 22/2010 (H-III) (D)ST, dated 30.09.2010.

3. The relevant facts that arise for consideration in these appeals are produced in brief to understand the issue correctly.

(a) In appeal No. ST/557/2008, the relevant facts are the respondent M/s Usha Kiran Movies Limited were alleged to have rendered the security agency services to their various sister concerns, big companies located within the premises of Ramoji Film City but did not pay service tax on the amount so received by them for the period from 01.04.2001 to 31.08.2005. On conclusion of the investigation conducted by DGCEI, a show cause notice was issued for the demand of service tax liability for the amount received as reimbursement of salaries of security personnel from their sister concerns. According to the Revenue, this amount recovered as reimbursement from the sister concerns is liable to tax under security agency services.

(b) In appeal No. ST/558/2008, the facts are in continuation to the investigation undertaken by DGCEI, the Officers felt that appellant had rendered the services of man power supply and repair & maintenance service during the period 16.06.2005 to 31.12.2005. To arrive at such a conclusion, they considered that the respondent herein had deputed their personnel to attend the electrical, civil and mechanical work and charge usual charges from the sister companies located within Ramoji Film City and are also deputing the personnel to undertake the functions of various sister concerns within the Ramoji Film City. This activity, according to the authorities, would fall under the category of Maintenance & Repair Services and Manpower Supply Services are liable to tax.

(c) In appeal NO.ST/680/2009 as filed by Revenue, the issue is regarding refund of the amount which was deposited by the Respondent assessee in the investigations carried out in the appeal Nos. ST/557 & 558/2008. On receipt of an order in their favour (Appeal No. ST/557/2008) they filed refund claim before the adjudicating authority. Adjudicating authority, after following due process of law, rejected the refund claim filed by the Respondent assessee. Aggrieved by such an order, an appeal was preferred to the first appellate authority and the first appellate authority by the impugned order dated 30.04.2009 came to the conclusion that the refund claim needs to be allowed and set aside the Order-in-Original and allowed the appeal with consequential relief.

(d) In appeal Nos. ST/246-256/2011, the relevant facts are that the appellants herein had filed various refund claims with the authorities below on the ground that they are eligible for the refund of the amount which has been paid by them to M/s Usha Kiran Movies Limited, consequent to the adjudication that took place in appeal No. ST/558/2008 (Order-in-Appeal No. 26/2008(H-III)ST, dated 31.07.2008. Appellants filed the refund claim consequent to the Order-in-appeal which upheld the contention of Usha Kiran Movies Limited that tax liability does not arise under the category of "Maintenance and Repair service and Manpower Recruitment Supply Agency Services”. The said refund claims were scrutinised by the authorities and the adjudicating authority sanctioned the refund claims to all the appellants herein as per the chart produced by them. Aggrieved by such an order, Revenue preferred appeals before the first appellate authority and the first appellate authority by impugned Order-in-Appeal Nos. 12 to 22/2010 (H-III)(D)ST, dated 30.09.2010 set aside the Order-in-Original on the grounds that appellants have not discharged the burden of unjust enrichment.

4. Ld. Counsel S/Shri M. Narayana Swamy Naidu and M.V.S. Sridhar appeared for the respondents in the departmental appeals and in the appeals of various appellants i.e. Usha Kiran Movies Limited and others while Ld. Commissioner, Ld. Additional Commissioner and Ld. Dy. Commissioner (A.Rs) appeared for the Revenue and other appellants.

5. Ld. Commissioner appearing for Revenue in Revenue’s appeal Nos. ST/557 & 558/2008 submits that the respondent herein had rendered the security services to the units which are within the premises called as Ramoji Film City and has not paid the service tax. It is her submission that in appeal No. ST/557/2008, the services were of security while in appeal No. ST/558/2008, the services are Maintenance & Repair Service and Manpower Supply Services. It is her submission that the adjudicating authority had confirmed the demands raised but the first appellate authority had set aside the Orders-in-Original as respondent claimed before the first appellate authority that they are not service providers of alleged services and the said services are rendered incidentally. She would submit that in the grounds of appeal, Revenue has taken a plea that the activity rendered by the respondent in these two appeals satisfies the criteria of taxable services inasmuch they are service provider to their clients and rendering of services for a consideration by a commercial concern i.e. respondent. It is her submission that the respondent in these cases was maintaining the properties in the film city like roads, buildings, common areas, electrical sub stations, water treatment plant, sewage treatment plant, hospital, bank, post office etc. and also providing security services. It is her submission that the appellant collected amount from various group companies located in the film city proportionately to the land used by them. It is also her submission that appellants were collecting service charges/supervision charges from group companies for rendering these services.

6. As against the submissions made by Ld. Commissioner, the Counsel for respondent would submit that they are not rendering any services and it is their own property which they are safeguarding by appointing security persons and also maintaining the state-of-the-art, infrastructural facilities of roads, electricity, street lights, water supply, drainage etc. compatible for carrying out commercial activities. It is his submission that the respondent shares the infrastructure amenities built with other sister concerns of the respondent and has only charged the amount of salary paid to the security personnel and proportionate cost of maintenance and repair services as also the cost of the personnel taking care of the sister concerns' accounts and administration. It is his further submission that respondent being owner of the movable and immovable properties within Ramoji Film City, cannot be termed as a person engaged in business of rendering the services of security, management or maintenance repair services or manpower recruitment and supply agency. It is his contention that the respondent had never charged any extra amount over and above the actual expenditure in terms of salary and other outgo on the personnel and the company’s auditors have certified that the respondent had claimed only reimbursement of expenditure actually incurred. He draws our attention to Page No. 22 of the Order-in-Original in page No. 49 of the departmental appeal. He would rely upon the decision of Hon’ble High Court of Gujarat in the case of Commissioner of Service Tax vs. Arvind Mills Limited as reported at [2014(35)S.T.R 96 (Guj.)] as also the decision of the Tribunal in the case of Reliance ADA Group Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai in appeal No. ST/86341/2015 (unreported judgment downloaded from the website of CESTAT) and Sara Services & Engineers Pvt. Ltd. vs. CCE, Meerut [2009(13) S.T.R 177 (Tri.-Del.).

7. Ld. Additional Commissioner appearing for the department submits that they are contesting the order of the first appellate authority in this appeal wherein he has allowed the refund of an amount paid by the respondent without considering the provisions of Section 11B of Central Excise Act, 1944. It is his further submission that the Respondent herein had filed a refund claim based on the order of the first appellate authority in Order-in-Appeal No. 26/2008 (H-III)ST, dt. 31.07.2008. It is his further submission that the adjudicating authority has correctly rejected the refund claims on the ground of unjust enrichment as they had debited the payments in the expenditure account. It is his submission that the respondent has not passed the hurdle of unjust enrichment in this case and first appellate authority has erred in coming to a conclusion that the appellant has crossed the hurdles of unjust enrichment as an remittances made to the expenditure account is indirectly passed on to the customers. He relies upon the decision of the Tribunal in the case of Rajasthan Spinning & Weaving Mills Ltd [206(194) E.L.T 254 (Tri.-Del.)] and Inn-Venue Hospitality Management Pvt. Ltd. [2008(225) E.L.T 500 (Tri.-Mumbai)]. He would submit that the first appellate authority's Order-in-Appeal No. 23/2008 (H-III)ST, dt. 30.04.2009 be set aside.

8. Ld. Counsel appearing for the respondent submits that the respondent herein had paid the amount on the directions of the Officers of DGCEI on visit. He would submit that the question of discharging service tax liability as alleged in the show cause notices would not arise as per the decision of Hon'ble High Court in the case of Arvind Mills Limited (supra). It is his submission that when the tax liability does not arise, the question of any amount collected during investigation as tax is totally incorrect argument of the Revenue and the said amount needs to be considered as a deposit for hearing and disposing of the appeal on merits.

9. Ld. Counsel appearing for various appeals i.e. Appeal Nos. ST/557-558/2008, ST/680/2009 and ST/246-256/2011, submits that these are all consequential refund claims by various appellants against amounts paid by them to M/s Usha Kiran Movies Limited when they were directed to make the payments. It is his submission that all the appellants herein are actually sister concerns of Usha Kiran Movies Limited in Ramoji Film City and amounts have been collected from them by Usha Kiran Movies Limited for sharing the expenses on repairs & maintenance and expenses on human resources purchase, Chairman's Office etc. It is his submission that Usha Kiran Movies Limited instead of filing the refund claims in pursuance of Order-in-Appeal No. 25/2008 (H-III) ST, dt. 31.07.2008, directed all these appellant to claim refunds from the department as the said services were not taxable as per the first appellate authority’s order. He relies upon the decision of Hon’ble High Court of Gujarat in the case of Arvind Mills Ltd. (supra) in support of his claim. It is his further submission that in these cases, the adjudicating authority had sanctioned the refund claims but on appeal by the Revenue, the first appellate authority has set aside Order-in-Original. He would submit that appellants herein had submitted the Chartered Accountant’s certificate before the adjudicating authority as well as first appellate authority which stated that all these appellants have borne the service tax amount paid by Usha Kiran Movies Limited and it is also his submission that the Director (Cost) was appointed by the Department to go into the factual position. It is his submission that the said Director (Cost) appointed by Revenue authorities, confirmed that the amount claimed as refund was borne by the respective clients.

10. Ld. DR reiterates the findings of the first appellate authority in these appeals.

11. We have considered the submissions made at length by both sides and perused the records.

12. Since all the appeals are inter linked to the issue which is in appeal Nos. ST/557-558/2008, we record our findings on these two appeals first.

A) <u>Appeal Nos. ST/557/2008 and ST/558/2008:</u>

13.1 In these appeals, Revenue has sought the intervention of the Bench for setting aside the Orders-in-Appeal passed by the first appellate authority. It is the case of the Revenue that the respondent in these appeals i.e. Usha Kiran Movies Limited had collected/billed some amounts to their sister concerns towards the cost of security services, maintenance & repair services and supply of manpower.

13.2) It is seen from the records that the facts are correctly put forth by both sides inasmuch Respondent Usha Kiran Movies Limited is owned by Ramoji Film City and has employed security personnel to safeguard the property and has created various infrastructure facilities like roads, supply of electricity, street lights, water supply, drainage and other facilities required for smooth functioning of any unit in the film city. Various sister concerns of the group company of Usha Kiran Movies Limited are situated inside the Ramoji Film City is also undisputed; respondent Usha Kiran

Movies Limited collects proportionate amount of salary and wages paid to various security personnel and also for maintenance and repair of the infrastructure provided and an amount proportionate to the salary paid to various personnel who are looking after the sister concerns purchase, administration and Chairman’s office etc. This part of collection and reimbursement of the amount proportionate to the group companies is based on space occupied in Ramoji Film City is not disputed. It is the case of the Revenue that the respondent Usha Kiran Movies Limited has charged additionally service charges from the group sister concerns, hence, it would amount to rendering of services. On perusal of the records and findings of the first appellate authority, we notice that this charge of the Revenue has been discarded by the first appellate authority looking at various records produced by the respondent before him. Before us also, few records were shown which indicates that appellant has not charged any amount in addition to the proportionate actual salaries and wages and other expenses related to the personnel deployed by them. In the absence of any contrary evidence we have to hold that the respondent has a case in their favour, as correctly decided by the first appellate authority. This law settled by Hon’ble High

Court of Gujarat in the case of Arvind Mills Limited (supra) in respect of manpower supply recruitment agency and we reproduce the relevant paragraphs of the judgment.

> **"5.** *It is true that in the present form, the definition of Manpower Supply Recruitment Agency is wide and would cover within its sweep range of activities provided therein. However, in the present case, such definition would not cover the activity of the respondent as rightly held by the Tribunal. To recall, the respondent in order to reduce his cost of manufacturing, deputed some of its staff to its subsidiaries or group companies for stipulated work or limited period. All throughout the control and supervision remained with the respondent. As pointed out by the respondent, company is not in the business of providing recruitment or supply of manpower. Actual cost incurred by the company in terms of salary, remuneration and perquisites is only reimbursed by the group companies. There is no element of profit or finance benefit. The subsidiary companies cannot be said to be their clients. Deputation of the employees was only for and in the interest of the company. There was no relation of agency and client. It was pointed out that the employee deputed did not exclusively work under the direction of supervision or control of subsidiary company. All throughout he would be under the continuous control and direction of the company.*
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> **6.** *We have to examine the definition of Manpower Supply Recruitment Agency in background of such undisputable facts. The definition though provides that Manpower Recruitment Supply Agency means any commercial concern engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to a client, in the present case, the respondent cannot be said to be a commercial concern engaged in providing such specified services to a client. It is true that the definition is wide and would*

include any such activity where it is carried out either directly or indirectly supplying recruitment or manpower temporarily or otherwise. However, fundamentally recruitment of the agency being a commercial concern engaged in providing any such service to client would have to be satisfied. In the present case, facts are to the contrary."

14. This ratio of Hon'ble High Court of Gujarat was considered by the Tribunal in the case of Spirax Marshall Pvt. LTd. [2016(44)S.T.R 310 (Tri.-Mumbai)]. The Bench after considering the judgment of Hon'ble High Court in the case of Arvind Mills Limited, following their own decision in the case of Krohne Marshall Pvt. Ltd. (Order No. A/2503/2015, dt. 22.07.2015), held that collection of salary to the employees deputed to group companies cannot be considered as manpower recruitment service or supply agencies. Respectfully following the said judgment, the Mumbai Bench in the case of Spirax Marshall Pvt. Ltd. (supra) set aside the demands raised. Against this decision of the Tribunal, Revenue preferred a Civil Appeal before Hon'ble Apex Court and the said Civil Appeal was dismissed by Hon'ble Apex Court on 15.07.2016 which also dismissed the appeal filed by Revenue against the order of Tribunal in the case of Krohne Marshall PVt. Ltd. The said dismissal is reported at [2016(44)S.T.R.J153(S.C)]. Since similar/

identical issue has been settled by Hon'ble Apex Court, we find that the orders of the first appellate authority in these two appeals are correct and legal and does not suffer from any infirmity. Impugned orders are upheld and appeals are rejected.

B. <u>Appeal No: ST/680/2009:</u>

15. In this appeal, Revenue is challenging the Order-in-Appeal No. 23/2008 (H-III)ST, dt. 30.04.2009 passed by the first appellate authority, sanctioning the refund claims filed by Usha Kiran Movies Limited when they received Order-in-Appeal No. 26/2008 (H-III)ST, dt. 31.07.2008 in their favour. The respondent had filed the refund claims before the authorities and the adjudicating authority has rejected the refund claim on the ground that the respondent had not passed the hurdle of unjust enrichment inasmuch, respondent had shown the amount deposited by them as expenditure in the books of account. The first appellate authority has set aside the said Order-in-Original by relying upon the various declarations filed by the sister concerns that they had not reimbursed the service tax amount to the appellant.

16. We find that in the Order-in-Appeal No. 26/2008, dt. 31.07.2008, the first appellate authority had set aside the demands raised on the ground that the services rendered by the respondent Usha Kiran Movies Limited would not be covered under taxable services in respect of the amount collected or charged by the appellant from various sister concerns towards security agency services. The said Order-in-Appeal No. 25/2008, dt. 31.07.2008 has been upheld by this Bench in this Order as indicated herein above. In short, the amount deposited by the respondent herein during the investigation is not towards any tax liability but has to be considered as deposit with the authorities. On perusal of the records and considering the submissions made by both sides, we find that the first appellate authority has correctly recorded that the respondent herein had filed various declarations from the parties concerned that the said amount was not reimbursed by them to Usha Kiran Movies Limited. Such categorical finding of the fact has not been disputed by Revenue in their grounds of appeal. The entire grounds of appeal only submits that the respondent has not passed the hurdle of unjust enrichment as the amount deposited was mentioned in the expenditure portion and the said amount automatically is recovered indirectly from various customers. We are unable to agree with the contentions raised by Ld. DR in the grounds of appeal. It is noticed that there is no dispute as to the fact that the respondent herein has not been reimbursed of the amount deposited by the group companies. We find that the Tribual in the case of Cummins India Limited **[2008(221) E.L.T 525 (Tri.-Mumbai)]** has considered this argument that the amount being shown as expenditure in their Profit & Loss Account does not establish recovery from customers. Since in the case in hand, the respondent herein had furnished declarations from the parties/group companies/sister concerns to whom allegedly the incidence of duty is passed on, we find that the ratio of the judgment in the case of Cummins India Limited (supra) squarely covers the case in favour of the respondent herein. In our view, the impugned order is correct and legal and does not require any interference and the appeal filed by Revenue is to be rejected and we do so.

C. <u>Appeal nos. ST/246-256/2011:</u>

17. The issue in these appeals relates to the refund of the amount paid by Usha Kiran Movies Limited on the direction of DGCEI authorities holding that they had rendered the services under maintenance & repair services and manpower recruitment & supply agency services. The first appellate authority in the Order-in-Appeal No. 26/2008, dt. 31.7.2008 held that the amounts recovered by Usha Kiran Movies Limitd from these appellants herein is for the reimbursement of various expenses like salaries etc. is not taxable. The said Order-in-Appeal No. 26/2008 has been upheld by this Bench as stated herein above. In these cases, Usha Kiran movies Limited has not filed any refund claims and directed the sister concerns to file the refund claims. The said refund claims were allowed and sanctioned by the adjudicating authority. The first appellate authority in these cases has set aside the Order-in-Original by holding that the appellants had not been able to pass the hurdle of unjust enrichment.

18. On perusal of the records, we find that in these cases, specifically the question that arises is with regard to unjust enrichment. It is noticed from the records that the appellants herein had filed Chartered Accountant's certificate dated 26.03.2009 before the lower authorities. It transpires from the records that the department had appointed Director (Cost) for looking into the claim of these appellants and the said Director (Cost) vide his report No. V'Genl/1/72/2009/Dir-Cost, dated 28.08.2009 stated that the appellant herein had borne the amount charged by Usha Kiran Movies Limited. It is noticed from the Order-in-Appeal that the first appellate authority has summarily dismissed the claim of these appellants that the certificate issued by Chartered Accountant does not confirm whether the service tax borne by the appellant herein had further passed to any other person. In our view, the certificate issued by Chartered Accountant cannot be dismissed summarily by the first appellate authority unless it is countered effectively. It is seen from the Order-in-Original which states that as a measure of abundant caution, the ledger copies and invoices submitted by these appellants were forwarded to Director (Costs) as to whether entries made in the accounts tantamount to reimbursement to having received service tax paid to government treasury respectively and the report indicated that the service tax paid by Usha kiran Movies Limited has been reimbursed to only Usha Kiran Movies Limited, appellants herein had borne the amount is correct. The said certificate of Chartered Accountant carries weight. The appellants herein are entitled for the refund of the amounts which have been collected from them by Usha Kiran Movies Limited as correctly held by the adjudicating authority.

19. In view of the foregoing, we hold that all these appeals succeed and the impugned order is set aside. All the appeals (**Appeal nos. ST/246-256/2011)** are allowed with consequential relief.

20. All these appeals are disposed of as indicated herein above.

(Pronounced in the open Court on 10.08.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

vrg