IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.69 of 2009

(Arising out of Order-in-Original No.42/Commr./ST/Kol/2008-09 dated 07.01.2009 passed by Commr. of Service Tax, Kolkata)

M/s Biswanath Hosiery Mills Ltd.
39, Kali Krishna Tagore Street, 1st Floor, Kolkata-700007

Appellant

VERSUS

CST, Kolkata
180, Santi Pally, Rajdanga Main Road, Kolkata-7000107

Respondent

APPERANCE :
Shri Ravi Raghavan & Shri Harsh Shukla, both Advocate for the Appellant
Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEWS, MEMBER (TECHNICAL)

FINAL ORDER NO. 75370/2020

DATE OF HEARING : 26.09.2019
DATE OF PRONOUNCEMENT/DECISION : 20 March 2020

PER P.K.CHOUDHARY :

The instant appeal has been filed by the assessee, M/s. Biswanath Hosiery Mills Ltd, against demand of service tax of Rs.41,75,361/- along with interest and equivalent penalty confirmed vide Order dated 07.01.2009 passed by the Ld. Commissioner, Service Tax, Kolkata, pertaining to the period 10.09.2004 to 15.02.2005.

2. Briefly stated, the facts of the case are that the appellant assessee has entered into User Agreements dated 1st April, 2004 with its clients whereby the clients were granted the right to sell the goods using the trade mark 'LUX' owned by the appellant in return of the consideration mentioned in the said agreement. Show Cause Notice dated 11.10.2007 (SCN) was issued proposing demand of service tax under the category of "Management Consultancy Services" for the period 01.04.2002 to 09.09.2004 and under the category of

"Intellectual Property Services" for the subsequent period 10.09.2004 to 15.02.2005 in respect of the consideration amount received by the appellant in terms of subject User Agreement. The Ld. Commissioner while adjudicating the SCN dropped the demand proposed in the category of "Management Consultancy Services" with the observation that the same service cannot be classified in more than one category of taxable service. He, however, confirmed the demand of service tax under the category of "Intellectual Property Services".

3. Sri Ravi Raghavan, Ld.Advocate appeared for the appellant and Sri. S.Mukhopadhyay, Ld. D.R. appeared for the Revenue.

4. The Learned Advocate appearing for the assessee disputed the demand under the category of Intellectual Property Services on the ground that since the subject agreement was entered with the clients on 01.04.2004, the taxable event, even if assumed to be taxable, arose on that date which is much before the date when levy under the category of Intellectual Property Service was introduced (i.e. 10.09.2004). He submitted that it is a settled legal position that tax cannot be demanded when the taxing entry was not in existence on the date of rendition of service. He also submitted that the mere fact, that payments were being received subsequent to the date of entering the agreement, will not alter the situation. In support of his contentions, he relied on the following decisions :

- *Modi Mundipharma Pvt Ltd. vs. CCE, Meerut 2009 (15) STR 713*
- *20th Century Finance Corp Ltd vs. State of Maharashtra [2000] 119 STC 182 (SC)*
- *CST vs. Denso Haryana Pvt Ltd 2015-TIOL-2649-CESTA-DEL*
- *IIM, Kolkata vs. CST, Kolkata Final Order no. 76902/2018 dated 12.11.2018*
- *AB Hotels Ltd vs. CST, Delhi 2018-TIOL-1294-CESTAT-DEL*
- *Reliance Industries Ltd vs. CCE 2016-TIOL-CESTAT-MUM*

He also disputed the demand on the ground of limitation contending that there was no fraud or suppression. On the same counts, he contested the imposition of penalty.

5. The Ld. D.R. for the Revenue submitted that the appellant changed the agreement on 15.02.2005 with retrospective date of 10.09.2004 to deceive the Revenue by reducing the value of taxable services. He supported the findings of the Ld. Commissioner and submitted that service tax is rightly payable under the category of Intellectual Property Services and that merely because the initial agreement was dated 01.04.2004, the assessee could not claim that tax is not payable for the subsequent period. He accordingly prayed that the appeal be rejected.

6. Heard both sides and perused the appeal records.

7. On perusal of the case decisions relied by the Ld. Advocate for the appellant assessee, we find that the issue stands settled in favour of the appellant assessee by series of decisions rendered by the various co-ordinate Benches of this Tribunal wherein it has been held that the intellectual property service which is made the subject matter of service tax levy is transferred prior to the date of introduction of taxable entry under the head "Intellectual Property Services" w.e.f. 10.09.2004, no service tax is leviable. In the case of Denso Haryana Pvt Ltd (Supra), the Tribunal observed that:

> *"7. We find that facts and the legal analyses as made in the above two decisions are applicable to the present case. Here the agreement for grant of licence or transfer /permission to use the technology was effected before 10.09.2004. The fact that M/s DHPL continued to manufacture and sell using such transferred technology even after the introduction of service tax on IPR cannot be considered as continuous supply of service. the rendering of service is effectively determined by the date of transfer / permission to use technology by M/s. Denso, Japan, which was prior to the introduction of tax liability on such service."*

It is further relevant to note the observation made by the Mumbai Bench in the case of Reliance Industries Ltd.(Supra) which is directly on the issue involved in the present case:-

> *"11. In so far as the agreement with Investa Technologies S. A. R. L. is concerned the same was entered into on 14.8.2004, prior to IPR service being brought into the net of service tax w.e.f. 10.9.2004. The service itself having been rendered prior to the introduction of the levy, the mere fact that payment for the same were made on a staggered basis over a period of time cannot be ground for levying service tax merely with reference to the date on which payments were being made. we find that during the relevant period the issue as to whether a transaction is leviable to service tax and if so at what rate was required to be reckoned with reference to the date when the service was rendered and not with reference to the date on which payment is made. The law is settled by the decision of the CESTAT reported in 2008 (10) STR 243 = 2008 - TIOL - 283- CESTAT-AHM which was affirmed by the Hon'ble Gujarat High Court in Appellant's own case reported in 2010 (19) STR 807 as also by the Hon'ble Delhi High Court in the case of CCE vs. Consulting Engineering Services India (P) Ltd 2013 (30) STR 586. As the service in the case of Investa Technologies S.A.R.L was rendered prior to 10.9.2004, the date when taxing entry was brought to the statute the mere subsequent payment in respect of services that are already being rendered cannot be brought to tax with respect to the rate applicable on the date on which the payment was effected."*

In view of the issue being settled by the Tribunal following the various High Courts' decisions, we are of the view that service tax cannot be demanded from the appellant in the present case when the subject service was rendered prior to the introduction of taxable entry under the head "Intellectual Property Service" i.e. 10.9.2004. With regard to other issue as contended by the Ld. DR that the agreement was modified on 15.02.2005 retrospectively from 10.09.2004 to reduce the value of taxable service, we are of the view that the said aspect is not relevant when the tax itself is held to be not payable as the date of entering into the original agreement i.e. 01.04.2004 is not in dispute.

8. In view of the above, the impugned demand of service tax, interest and penalty are set aside and the appeal is allowed with consequential relief as per law.

(Order pronounced in open Court on 20 March 2020.)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(C.J.Mathews)
Member (Technical)

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