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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.78525 of 2018

(Arising out of Order-in-Original No. 02/COMMR/CGST & CX/KOL/NORTH/2018-19 dated 25.04.2018 passed by Commissioner of CGST & CX, Kolkata North, Kolkata.)

M/s. Shriram Insight Share Brokers Ltd.,
(CK-15, Sector-II, Salt Lake City, Kolkata-700091.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata North Commissionerate
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

...Respondent

APPERANCE :
Mr. Rajeev Agarwal & Mr. Amit Jain, CA Advocate for the Appellant
Mr. Joydip Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER(JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...75721/2023

DATE OF HEARING : 31st May, 2023

DATE OF PRONOUNCEMENT:……16th June, 2023

PER K. ANPAZHAKAN :

Brief facts of the case are that the Appellant is a provider of stock broking Service, Banking and Financial Service etc. On the basis of audit conducted by the Service Tax Commissionerate, a show-cause notice dated 13/11/2017 was issued to the Appellant demanding Service Tax as below:

(i) Rs.5,09,45,857/- on account of Late Payment Charges collected.

(ii) Rs. 2,29,621/- and Rs 9264/- on account of non-reversal of Cenvat credit under Rule 6 of Cenvat Credit Rules..

(iii) Rs 20,14,912/- on account of Trading of Scrips on own account.

(iv) 17,72,562/- on account of reimbursement expenses.

2. The Notice was adjudicated by the Commissioner videOrder-in-Original dated 25.04.2018, confirming the above said demands along with interest and penalties. Aggrieved against the impugned order the Appellant is before us.

We now discuss each of the demands separately on merits:

3. Service tax demand of Rs.5,09,45,857/- on Late Payment charges collected by the Appellant :-

3.1 The demand has been raised on the Late Payment Charges collected as 'Declared Service' under Section 66E(e) of the Finance Act, 1994. In their submissions, the Appellant stated that they received Late Payment Charges whenever their client does not make payment towards charges of shares within the stipulated time. The Late Payment Charges collected by them are in the nature of penalty for not making timely payment. However, the adjudicating authority considered these charges as 'Declared Service' under Section 66E(e) which reads as "agreeing to the obligation to refrain from an act, or to tolerate an act for situation, or to do an act".

3.2 They stated that they have to make payment from their own fund to the stock exchange causing loss of interest. The Ld. Adjudicating Authority failed to appreciate that the Late Payment charges is imposed as a penal measure so as to deter the client from making delayed payment.

3.3 In support of their contention the Appellant relied on the decision of the Tribunal, New Delhi in the case of South Eastern Coalfields Limited Vs. C.C.E, Raipur wherein it has been held that where any amount is collected to penalize the other party for violation of the terms of the contractual agreement, the said amount cannot be considered towards provision of any taxable service under Section 66E(e) and it cannot be said that by collecting the said penal charges, the Appellant has tolerated the non-performance of the contract by the other party.

3.4 They also stated that collection of Late Payment Charges were in the knowledge of the Department inasmuch as the demand for the prior period has already been dropped by the Ld. Commissioner vide OIO

dated 29.07.2016 and therefore, the extended period of limitation is not available.

3.5 The Ld DR reiterated the findings of the adjudicating authority in the impugned order.

3.6 We observe that the decision of the Tribunal in the case of South Eastern Coalfields Ltd cited by the Appellant is squarely applicable in this case. The gist of the order is reproduced below:

> Liquidated damages/compensation/penalty for non-performance of contract - Taxability of - Compensation/Penalty received from buyers by coal mining/supplier company on short lifted/unlifted quantity of coal, security deposit/earnest money deposit forfeited for non-compliance of contract by contractors for providing various services and liquidated damages from raw material supplier, not to be considered as consideration for tolerating an act and hence, not leviable to Service Tax under Section 66E(e) of Finance Act, 1994 as declared services particularly when contract nowhere provided obligation on assessee to refrain from an act or tolerate an act or a situation and flow of consideration therefor - Liquidated damages/penalty cannot be considered towards any service per se, since neither assessee carrying on any activity to receive compensation nor there can be any intention of other party to breach or violate contract and suffer a loss - Penalty provision stipulated in contract for breach thereof cannot be considered as a consideration for a contract - Revenue's contention that such compensation synonymous with tolerating an act or situation for breach of contract in view of Supreme Court decision in Fateh Chand v. Balkishan Das [AIR 1963 SC 1405], not acceptable

3.7 In the decision cited above, the Tribunal has clearly held that any penal charges recovered for non-performance of contractual obligation cannot be said to be towards rendition of declared service under Section 66E(e) of the Finance Act, 1994. We observe that the said decisionhas been accepted by Board in as much as the Civil Appeal No 2372 of 2021 filed before the Hon'ble Supreme Court has been decided to be withdrawn, as communicated in Circular No 214/1/2023-Sercice tax dated 28.02.2023.

3.8 In view of the above discussion, we hold that the demand confirmed in the impugned order on Late Payment Charges amounting to Rs 5,09,45,857/- is not sustainable.

4. Credit reversal under Rule 6 of Credit Rules – imposition of Penalty of Rs.34,443/- and Rs 1390/-

4.1 The Appellant stated that they have accepted the demand made on account of non-reversal of credit under Rule 6 of the Cenvat Credit Rules,2004, and deposited an amount of Rs.2,29,621/- along with interest of Rs.59,058/- immediately on being pointed out by the Audit.They stated that there was no fraud or willful suppression and hence notice should not have been issued for this demand as per Section 73(3) of the Finance Act, 1994. Accordingly they requested to set aside the penalties of Rs.34,443/- and Rs 1390/-

4.1 We observe that the Appellant has not contested the issue. They have deposited the tax amount along with interest before issue of the Notice. We also observe that there was no case of fraud or willful suppression established in the findings by the adjudicating authority. Since the entire amount of taxalong with interest has been deposited well before the issuance of the Show Cause Notice, the Notice need not have been issued as per Section 73(3) of the Finance Act, 1994. Therefore, the penalties of Rs.34,443/- and 1390/-imposed in the impugned order is liable to be set aside. Accordingly, we set aside the same.

5. Demand of Service Tax of Rs.20,14,912/- along with interest and penalty under Rule 6 of Credit Rules

5.1 The demand has been confirmed in the impugned order by calculating an amount of 6% or 7% of the value of exempted service, by considering 1% of the cost price of shares purchased by the appellant on its own account. The allegation in the Notice is that the Appellant has engaged himself in trading of scrips on their own account, which is an exempted service. Since the Appellant has taken credit on common input services such as Telecommunication, Renting of immovable property etc, the Appellant was asked to pay an amount

equal to 6% or 7% of the value of exempted service under Rule 6(3)(i) of the Cenvat Credit Rules.

5.2 The Appellant stated that even if trading of scrip on own account is considered as exempted service, they are liable to reverse only the proportional credit attributable to common input services. Accordingly, they have calculated the proportional credit liable to be reversed and deposited an amount of Rs.4,54,869/- along with interest of Rs.3,30,897/-. In the impugned order the adjudicating authority has not given any finding for rejection of this payment by the Appellant. The adjudicating authority only said that the Appellant's own calculation not acceptable.

5.3 We find that the reversal of proportional credit under Rule 6 has been settled by the Hon'ble Telangana High Court in the case of Tiara Advertising Vs UOI 2019 (30) GSTL 474 (Telangana) wherein it has been held that the Department cannot raise the demand of the amount exceeding the proportionate reversal pertaining to the common input services. Rule 6(3) of the Credit Rules merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider.

5.4 In view of the above decision of the Hon'ble High Court, we observe that when common input services are used in dutiable and exempted services, the Appellant are entitled to reverse the proportional credit attributable to exempted services. Accordingly, the Appellant has rightly reversed the proportional credit along with interest. Hence, the Notice need not have been issued under Section 73(3) of the Finance Act, 1994.Accordingly, we hold that penalty equivalent to the amount paid is not imposable in this case, as there is no findings of any suppression of fact available in the impugned order.

6.Service tax demand of Rs.17,72,562/- on account of reimbursement of expenses from group companies on cost sharing basis.

6.1The Appellant stated that the expenses claimed as reimbursement from the sister companies on cost sharing basis has not been disputed by the Ld. Commissioner in the impugned Order..They stated that major amount of reimbursement pertains to electricity charges and the reimbursement charges has nothing to do with provision of any taxable service. They contended that sharing of expenditure between group companies cannot be treated as service rendered to one another. In support of this claim, they cited the decision of the Hon'ble Supreme Court in the case of Gujarat State Fertilizers Vs Commissioner of C.Ex. and decision of the Tribunal in the case of Historic Resort Hotels Pvt. Ltd Vs CCE, Jaipur-II, wherein it has been held that reimbursements claimed from various group companies on cost sharing basis cannot be said to be towards provision of any taxable service. This view has been taken by Tribunal Kolkata in the case of Haldiram Marketing Pvt Lts Vs Commissioner in Final Order No 50122/2023 dated 13.02.2023. We also observe that the Ld. Commissioner has not given any finding with regard to the submissions of various decisions of the Tribunal in the impugned order.

6.2In view of the above discussion we hold that the demand on this issue is not sustainable.

7. Regarding penalty imposed on the above said demands confirmed in the impugned order, the Appellant stated that the demand in the impugned order pertains to the period from April 2012 to June 2017. The Notice was issued on 13.11.2017, by invoking extended period. There is no fraud or collusion or suppression of fact involved in this case. Hence, the penalty is not imposable in this case. They place reliance on the decision of the Tribunal, New Delhi, in the case of Vandana Global Vs. Commissioner (Appeals), CGST, Raipur, in Final Order No 51135/2022. We observe that there is no suppression of fact findings by the adjudicating authority in the impugned order. In view of the above decisions cited, we hold that the penalties imposed in the impugned orders are not sustainable.

8. In view of the above discussion, we hold that the impugned order is not sustainable on the demands made in (i), (iii) and (iv) in para 1above. In respect of the demandmade at (ii) in Para 1, where duty and interest has been already paid by the Appellant and admitted, is confirmed. The imposition of penalties in the impugned order are not sustainable. Accordingly, we modify the order in the above terms and dispose of the appeal.

(Pronounced in the open court on 16th June, 2023…….)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pinaki