IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.46 of 2010

(Arising out of Order-in-OriginalNo.33/Commr/ST/Kol/2009-10 dated26.11.2009 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata
(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

...Appellant

VERSUS

M/s. National Insurance Company Limited

.....Respondent
(Everest House, 4th Floor, 46C, Jawaharlal Nehru Road, Kolkata-71.)

WITH

Service Tax Appeal No.48 of 2010

(Arising out of Order-in-Original No.33/Commr/ST/Kol/2009-10 dated 26.11.2009 passed by Commissioner of Service Tax, Kolkata.)

M/s. National Insurance Company Limited

(3, Middleton Street, Kolkata-700071.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent
((180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri K.Chowdhury, Authorized Representative for the Appellant/Revenue
Ms.Priyanka Rathi, Advocate for the Respondent/Assessee

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75874-75875/2023

DATE OF HEARING : 16 May 2023
DATE OF DECISION : 28 June 2023

Per : K. ANPAZHAKAN :

M/s. National Insurance Co. Ltd. (The Appellant) are engaged in providing General Insurance Business and they are registered with Service Tax authority under the category of General Insurance Service. A show cause notice dated 30.03.2009 was issued to them demanding service tax of Rs.29,51,39,734/- along with interest and penalty, on the ground that they have not paid service tax on the reinsurance premium paid as well as received during the period 01.05.2006 to 31.03.2008. The Notice also proposed to appropriate an amount of Rs.29,51,39,727/- already paid by the Appellant. The Notice was adjudicated and the demand of service tax was confirmed vide Order-in-Original dated 01.12.2009, wherein the demand of service tax was confirmed along with interest and penalty equal to service tax was imposed under Section 78 of the Finance Act, 1994. The adjudicating authority also appropriated an amount of Rs.29,51,39,727/- already paid against the demand confirmed. However, no penalty was imposed under Section 76 of the Finance Act, 1994.The Appellant filed the present appeal against the impugned order. The Department is on Appeal against non-imposition of penalty under Section 76 of the Finance Act.1994.

2. In their submission, the Appellant stated that the the issue involved in the impugned order is related to the leviability of service tax on the amount paid abroad for reinsurance as well as on the amount received by them from other insurance companies in the domestic sector during the period May'06 to March-08.

3. The department contended that the Appellant paid re-insurance premium to foreign based companies, but did not pay service tax in terms of Rule 2(i)(d)(iv) of the service tax rules, 1994. They were also liable to pay service tax on the re-insurance premium collected from other domestic insurance companies.

4. The Appellant stated that the department has allowed Provisional Assessment in their case. The re-insurance premium was centrally controlled. So, it should have been taken care of at the time of

finalization of the provisional assessment. However, after discussion with the department they have paid the entire amount of service tax of Rs. 29,51,39,727/- before issue of the Notice. As there was no suppression involved, penalty under section 78 of the Finance Act, 1994 not imposable on them. Also, since they were under provisional assessment, the demand, if any, could have been taken care of at the time of finalization. Hence, they contended that the penalty is liable to be set aside.

5. The Ld A.R. for the department reiterated the findings in the impugned order. He also contended that penalty imposable under section 76 of the Finance Act.1994.

6. Heard both sides and perused the appeal records.

7. We observe that the issue involved in the present appeal is related to the leviability of service tax on the amount paid to foreign insurance companies for reinsurance as well as on the amount received by them from other insurance companies in the domestic sector during the period May'06 to March-08. The department contended that the Appellant paid re-insurance premium to foreign based companies, but did not pay service tax in terms of Rule 2(i)(d)(iv) of the service tax rules, 1994. They were also liable to pay service tax on the re-insurance premium collected from mother insurance companies.

8. We observe that w.e.f.01.05.2005, insurer includes re-insurer also. Thus, w.e.f 01.05.2006, any service provided in relation to re-insurance by a re-insurer carrying on general insurance business, was liable to pay service tax. Thus, we find that there is no dispute that the amount received by the Appellant from domestic insurance companies for re-insurance service is liable to service tax. In respect of re-insurance premium paid by the Appellant to foreign companies, we observe that as per Section 66A read with Taxation of Services (Provided from outside India and received in India) Rules, 2006, the Appellant was liable to pay service tax on the re-insurance premium paid by them to foreign companies. Thus, we observe that there is no dispute regarding the service tax liability on re-insurance premium paid

by the Appellant to foreign insurance companies as well as the re-insurance premium received by them from domestic insurance companies. We find that the Appellant has already paid the service tax amounting to Rs. 29.51.39.727/-. Hence, we hold that the confirmation of the service tax demand and appropriation of the amount already paid towards the confirmed demand is in order. The Appellant is liable to pay interest towards is this liability, if not already paid.

9. We observe that the impugned order has imposed penalty of Rs.29,51,39,734/- under section 78 of the Finance Act, 1994. The Appellant contended that there was no intention to evade service tax in this case. The Appellant has not included the re-insurance premium paid by them to foreign companies as well as received by them from domestic insurance companies in the ST-3 returns. The adjudicating authority considers this omission as suppression of fact for the purpose of imposition of penalty under section 78 of the Finance Act, 1994.

10. The Appellant has relied upon the following decisions to support their argument that penalty not imposable when tax was not paid on the bona fide belief that there was no liability:

(i)C.C.I. Logistics Ltd. v. Commr. of CGST & C.Ex., Kolkata North
[2021 (54) G.S.T.L. 27 (Tri.-Kolkata)]

(ii)) C.C.E. & S.T., LTU, Bangalore v. Adecco Flexione Workforce Solutions
[2012 (26) S.T.R. 3 (Kar.)]

(iii)Chiron Behring Veccines Pvt.Ltd. v. CCE 7 ST, Surat-II

[(2023) 6 Centax 79 (Tri.-Ahmd.)]

(iv) Commissioner of C.Ex., Chennai-I v. Chennai Petroleum Corpn. Ltd.
[2007 (211) E.LT. 193 (S.C.)]

11. We observe that the decisions cited by the Appellant supports their view that penalty under section 78 of the Finance Act, 1994 not imposable when they acted on the bon fide belief that no service tax was payable on re-insurance premium paid. We observe that re-insurance premium was liable to service tax only w.e.f.01.05.2005 when the definition was amended to include re-insurer also as insurer. Thus, there were some confusion regarding payability of service tax on

the re-insurance premium paid to foreign insurance companies. The issue became clear only after the issue of Taxation of Services (Provided from outside India and received in India) Rules, 2006. After this, the Appellant has agreed their liability and paid service tax on the re-insurance premium paid by them to foreign companies. Thus, we observe that there was no intention to evade payment of service tax on the part of the Appellant. In such cases, no penalty imposable under Section 78 of the Finance Act, 1994. The following decisions supports this view:

(a) C.C.I. Logistics Ltd. v. Commr. of CGST & C.Ex., Kolkata North
[2021 (54) G.S.T.L. 27 (Tri.-Kolkata)]

> *"**7.**I find that penalty has been imposed by the authorities below with the finding that the appellant had not deposited service tax on the basis of own ascertainment and that it was only after the CERA audit was undertaken, the short payment of tax was detected. I find that the very SCN was issued in the year 2014 for which the compliance was already made by the appellant in 2011 by way of payment of tax and interest soon after the short payment was detected. The only allegation in the SCN is that the appellant-assessee has not deposited service tax on their own ascertainment. I find that when the tax amount stands already deposited with interest, the very SCN was not required to be issued under Section 73(3). Merely because the tax amount has been deposited on the basis of ascertainment by the Department, the assessee cannot be deprived of the benefit of aforesaid provisions, more so in view of the fact that no evidence has been adduced in the SCN that there was a deliberate short payment. Any other interpretation will render the said provision redundant inasmuch as the very intention of the said provision is to reduce litigation when compliance is made by the assessee.*
>
> ***8.**Since the tax amount alongwith interest has already been deposited by the assessee, I do not find any reason to uphold the penalty amount in absence of evidence of fraud or suppression with an*

intent to evade payment of tax. Hence, the penalty imposed is set aside."

(b) C.C.E. & S.T., LTU, Bangalore v. Adecco Flexione Workforce Solutions
[2012 (26) S.T.R. 3 (Kar.)]

"5. *Mark a copy of this order to the Commissioner of Large Tax Payers Unit who is in charge of collection of service tax to issue proper circular to all the concerned authorities, not to contravene this provision, namely sub-section (3) of Section 73 of the Act."*

(c) Chiron Behring Veccines Pvt.Ltd. v. CCE 7 ST, Surat-II

[(2023) 6 Centax 79 (Tri.-Ahmd.)]

"We have carefully considered the submission made by both sides and perused the records. Before going into the merit of the case that is the jurisdiction issue and taxability, we find that the appellant have made a submission about limitation and sought benefit of section 73 (3) and section 80 of the finance Act, 1994. As regard the limitation we find that the issue about taxability on rever charge basis in respect of service received from foreign based service provider was not free from doubt as the issue was finally decided by the Hon'ble Supreme Court in a landmark judgement in the case of Indian National Shipowners Associations. Moreover the appellant have paid the entire service tax even for the period prior to its levy ie.. before 18-4-2006 and the appellant have filed ST-3 returns wherein details of payments have been declared. In this fact we are of the view that demand for the extended period is not sustainable. We further find that the appellant alternatively claimed the benefit of section 73(3) of finance Act, 1994 on the ground that the entire service tax along with interest paid prior to show cause notice. Considering this position we are of the view that the demand for extended period is not sustainable hence the same is set aside. Demand for the normal period if any, is sustained along with interest. However, in the facts and circumstances of the case the penalties are not sustainable hence the same is set aside. Since we have considered appellant's submission on the point of Section 73(3) we are not going into other issue such as jurisdiction and taxability."

(d) Commissioner of C.Ex., Chennai-I v. Chennai Petroleum Corpn. Ltd. [2007 (211) E.LT. 193 (S.C.)]

> ***"6.*** *However, the assessee produces electricity from RFO. That electricity is sold to Tamil Nadu Electricity Board. The major portion of the electricity produced is captively consumed. The entire generated electricity is not sold. A part of the generated electricity is sold. It was vehemently argued before us on behalf of the assessee that the refinery was a "deemed warehouse" and whatever is produced in the refinery from the RFO was entitled to exemption. It was vehemently urged that RFO is a residuary which remains at the bottom of the columns. That RFO was never removed from the refinery. Hence, the assessee was entitled to claim deduction for even the RFO used in generation of electricity. We do not find merit in this argument. The assessee is a refinery. It is a "deemed warehouse". It is so recognised by the Central Government. This is not in dispute. The very purpose behind giving the status of "deemed warehouse" to the refinery is to provide exemption to the RFO which is used for producing petroleum products. That status is not meant for producing products which are not petroleum products. In other words, the Deemed Warehouse Status demands nexus to the final product cleared from it. Generation of electricity, if captively consumed, is exempted from duty. This is because electricity which is generated in the refinery is used to operate the various processes within the refinery. In the refinery, there exists large number of processes. Each process generates an item and, therefore, every refinery is given the status of "deemed warehouse". However, a portion of the generated electricity, in the present case, is sold to Tamil Nadu Electricity Board. To that extent alone, the Department was right in demanding duty on RFO."*

12. Following the above decisions, we hold that there was no mala fide intention on the part of the Appellant to evade payment of service tax. Accordingly, we hold that the penalty imposed under section 78 of the Finance Act, 1994, is liable to be set aside. We also observe that there is no ingredient available in this case to impose penalty under section 76 of the Finance Act,1994. Accordingly, the Department appeal is liable to be rejected.

13. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant. The department appeal is rejected.

(Order pronounced in the open court on 28 June 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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