CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 85304 of 2020

(Arising out of Order-in-Appeal No. NA/GST/A-I/MUM/226/19-20 dated 30.10.2019 passed by the Commissioner of GST & CX (Appeals-I), Mumbai)

M/s. BDR Pharmaceuticals International Pvt. Ltd. **Appellant**
407-408, Sharda Chambers,
New Marine Lines,
Mumbai 400 020.

Vs.

Commissioner of GST & CE, Mumbai South **Respondent**
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel (E), Mumbai 400 012.

Appearance:

Shri Kiran Sawle, Advocate, for the Appellant
Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 17.01.2023
Date of Decision: 17.01.2023

FINAL ORDER NO. A/85037/2023

This appeal is directed against Order-in-Appeal No. NA/GST/A-I/MUM/226/19-20 dated 30.10.2019 passed by the Commissioner of GST & CX (Appeals-I), Mumbai, holding as follows:-

"ORDER

7. In view of the above discussion and findings, the Order in Original No RN/R-419/2015-16 dated 29.10.2015 issued on 30.10.2015 passed by the Deputy Commissioner, Refunds, Service Tax-II, Mumbai (erstwhile) is modified and it is ordered that the refund claim for the period after 18.04.2006 be sanctioned to the appellant, M/s. BDR Pharmaceuticals International Pvt. Ltd.

The appeal is allowed on above terms with consequential relief."

2.1 Appellant had filed an application for refund of service tax for Rs.12,24,492/- and interest of Rs.10,49,142/- as per Notification No. 41/2007-ST dated 06.10.2007 as amended by Notification No. 17/08-ST dated 01.04.2008. After scrutiny of the refund claim, show cause notice dated 21.08.2015 was issued to the appellant seeking rejection of the refund, stating the following:-

"i. The conditions stipulated at Sr. nos (i) to (vi) against sr.no. 15 of the notification appear not to have been complied with,

ii. Refund claim is filed beyond the time limit since the goods are actually found to be exported during the period from 2003-04 to 2007-08, its corresponding commission to non-resident Commission agents appear to have been paid during the period April 2007 to 06.07.2009, further, the service tax and interest thereon appear to have been paid on or after 03.03.2014 and also furthermore, the refund claim is filed on 15.07.2014,

iii. No intimation in the form EXP-1 was filed before availing exemption, no six monthly return were filed in form EXP-2 and no relevant documents were submitted during relevant period."

2.2 The show cause notice was adjudicated by the original authority rejecting the refund claim filed. Against this order, appellant filed appeal. Commissioner (Appeals) while deciding the appeal held that the refund claim to the appellant is admissible for the period after 18.04.2006 and could be rejected for the period prior to that. Hence this appeal.

3.1 I have heard Shri Kiran Sawle, Advocate for the appellant and Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- The provisions with regard to payment of service tax on services received by foreign commission agent on reverse charge mechanism was introduced by way of Section 66A of the Finance Act, 1994 w.e.f. 18.04.2006. Prior to that no service tax was payable on such services. Commissioner (Appeals) has held so. Accordingly he holds that whatever payments were made by them for the period prior to 18.04.2006 were voluntary payments and could not be independent to any other payments.
- It is settled law that the Revenue could not demand the amount of service tax and interest which was not leviable on the appellant. He relies upon the following decisions:-
    - Bhandari Hosiery Exports Ltd. [2010 (20) STR J99 (SC)]
    - Nestle India Ltd. [2010 (19) STR J16 (SC)]
    - Unimark Remedies Ltd. [2014 (34) STR 31 (Guj.)]
    - Shri Ra Knitters [2014 (35) STR 61 (P&H)]
    - Prabhat K. Tyagi [2008 (10) STR 240 (Tri.-Bang.)]
    - Bhandari Hosiery Exports Ltd. [2008 (11) STR 151 (Tri.-Del.)]
    - Hari Pipes [2017 (358) ELT 112 (Mad.)]
    - Ambience Hospitality P. Ltd. [2019 (21) GSTL 400 (Tri.-Del.)]
    - Smruti Organics Ltd. [2015 (330) ELT 583 (Tri.-Mumbai)].
- Accordingly he submits that the refund should be allowed even for the period prior 18.04.2006.

4.1 Learned AR has objected to the appeal by stating that this appeal has been filed making Commissioner (Appeals) as respondent and hence this appeal is not maintainable. Learned counsel points that if this was a filing defect, it should have been pointed out by the Registry at the time of filing and it could have been cured then itself. Once the Registry has after scrutinizing the appeal accepted the same, it cannot be pressed. However, he can if required file an amendment memo in a day. Since the defect as pointed out by the AR is a curable defect, it cannot be a ground for holding the appeal to be non-maintainable and the same argument is rejected. Counsel for the appellant has undertaken to file the amendment memo in a day. On the basis of the submissions made, I allow the amendment to the cause title to this effect. I take up the appeal for consideration.

4.2 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.3 Service tax for the period 01.04.2008 to 31.03.2009 was not paid by the appellant and short paid by the appellant for the period 01.04.2009 to 06.07.2009 on foreign commission agent services under reverse charge mechanism. When this fact was brought to their knowledge in March 2014, the said amount was paid along with interest. It was also claimed that this amount was refundable to them as per Notification No. 41/2007-ST dated 06.10.2007 as amended by Notification 17/08-ST dated 01.04.2008 read with Section B of the Central Excise Act, 1944 as made applicable to service tax under Section 83 of the Finance Act, 1994. Therefore the appellant filed this refund claim.

4.4 Original authority has rejected the refund claim holding that the refund claim is barred by limitation. The observations made in the order of the adjudicating authority are reproduced below:-

"The main issue to be decided is "relevant date" applicable for deciding the refund claim. In this connection, from above threadbare discussion, facts and findings, it can be clearly concluded that: -

- The export of goods (Chemicals) took place during the period 2003-2009,

- The export commission to foreign agents located outside India were paid during the period April 2007 to July 2009. The earliest date of advice is dt.12.04.07 for S B nos.6250203, 6321429, 6361891, 6378329.... 6588666, 5137778 to 5137784, 5135065, 5128282.The ST payment under RCM should have been made immediately for claiming refund. But, the ST payment is observed to have been made on 03.03.2014 only.

- The service tax liability was discharged (being the ST payment on reverse charge mechanism under section 66A) on 03.03.2014 and interest thereon was paid on 06.03.2014. Therefore, though the notification 41/2012 grants exemption by way of refund, the timeline specified therein should have been adhered to. Here, the violation is clearly evident. The ST payment was due after remittance of the respective commission made to agents located outside India but, actual payment was made on 03.03.2014. Thus, due to violation of timeframe, the claimant rendered themselves ineligible for the claim and consequent grant of refund.

As, concluded in discussion on notification nos. 41/2007 and 41/2012 in para 8 above, the relevant date is much early but refund claim is actually filed on 15.07.2014. Though the claimant claims the date of payment of service tax (i.e. 03.03.2014) to be the "relevant date", I do not subscribe to this view. The reasons for this is amply elucidated in above para no.8 and mainly attributed to the fact that both notifications 41/2007 (amended vide 17/2008) and 41/2012 clearly spell out the "relevant date" to be calculated from Let Export Order date only. The refund claim filed under notn. No. 17/2008 read with Section 11B, is filed beyond the specified time limit of one year. In addition, certain procedural discrepancies as detailed in (i) to (iii) under this para, above persists and the claimant, by not filing the refund claim on a quarterly basis, within sixty days from the end of the relevant quarter during which the said goods have been exported clearly violated the clause 2(e) of Notification No. 41/2007 dated 06.10.2007 as amended by Notification No. 17/2008 dated 01.04.2008. Violation of timeframe has rendered the claimant ineligible for grant of rebate. This being the case, the refund claim is held to be time barred and thus inadmissible.

10. In view of the observation made above, I hold that the claimant is not eligible for rebate of Rs. 22,73,634/- under Notification No. 41/2007-ST dt. 06.10.2007 as amended by notification 17/2008 ST dated 01.04.2008, read with Section 11B of the Central Excise Act, 1944, as made applicable to service tax matters vide Section 83 of Chapter V of Finance Act, 1994.”

4.5 Commissioner (Appeals) while deciding the appeal does not agree with the rejection of the refund claim on the ground of limitation and holds as follows:-

"6.4 To summarize, I find that the refund claim filed by the appellant is well within limit and hence admissible.

6.5 Now, I proceed to discuss as to whether there is any liability to pay Service Tax during the period before 18.04.2006. I find that even if there was no liability to pay service tax before 18.04.2006, the appellant by his own admission has paid the same alongwith interest and filed refund claim as per Notification No. 41/2007 dated 06.10.2007. There does not appear to be any logical reason as to why the appellant should effect a payment of an amount which is not levied and evidently not due. I find such an act highly suspect especially since a refund of the said amount has been claimed. In absence of any credible rationale for this dubious payment, the refund claim of the appellant for the said period viz. prior to 18.04.2006 cannot be entertained."

4.6 The present appeal is basically challenging the observations made by the Commissioner (Appeals) in para 6.5

4.7 Once the Commissioner (Appeals) holds that there was no liability to pay service tax prior to 18.04.2006, then the refund claim should have been decided as per the provisions of Section 11B of the Central Excise Act, 1944. Undisputedly as noted by both the authorities, refund claim has been filed as per Notification No. 41/2007-ST dated 06.10.2007 as amended by Notification 17/08-ST dated 01.04.2008 read with Section B of the Central Excise Act, 1944 as made applicable to service tax under Section 83 of the Finance Act, 1994. There being so, the finding recorded by the Commissioner (Appeals) in para 6.5 itself is contrary and needs to be set aside. If the tax has been paid under mistake of law, the same could have been claimed as refund by way of refund claim made under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. This view has been held in series of judgments referred to by learned counsel.

5.1 Accordingly appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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