

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 87224 of 2019

(Arising out of Order-in-Appeal No. MKK/19/RGD/APPELLANT/2019-20 dated 23.04.2019 passed by the Commissioner of Central Tax (Appeals), Raigad)

M/s Thyssenkrupp Indl. SolutionsAppellant
(India) Pvt. Ltd.
Uhde House, LBS Marg,
Vikhroli (W), Mumbai

VERSUS

Commissioner of CGST, Navi MumbaiRespondent
10th Satra Plaza, Palm Beach Road,
Section19D, Vashi, Navi Mumbai

APPEARANCE:

Shri Udayan Choksi, Advocate for the appellant
Shri Prabhakar Sharma, (AR) for the respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85966/2023

DATE OF HEARING : 21.12.2022

DATE OF DECISION : 19.06.2023

Per: AJAY SHARMA

This appeal has been filed from the impugned Order dated 23.04.2019 passed by the Commissioner of Central Tax (Appeals), Raigad by which the appeal filed by the appellant was rejected.

2. The issue involved herein is about the 'corporate commission' given by the appellant herein to its holding company abroad i.e. M/s. Thyssenkrupp, Germany which,

according to revenue, is liable to be taxed as '*Business Support Service*'. Whereas according to the appellant, no service was provided by the holding company to the appellant and the commission was paid to the holding company for providing monetary guarantee to appellant's client that in case the appellant is unable to execute the work, the ultimate holding company will compensate the client and when the commission has been given to the holding company without receiving any service from them, they are not liable to pay any service tax on that commission amount.

3. The appellant herein are engaged in providing taxable services viz. "*Consulting engineer services & Erection, commissioning and installation service*". During the course of service tax audit it was observed that there were expenses under the head '*Corporate Commission*' which was paid to their ultimate holding company *M/s. Thyssenkrupp AG, Germany* which was made for paying commission in foreign currency to the said company which is located in a non-taxable territory, which according to Revenue is liable to be taxed under *reverse charge mechanism* under the provisions of Section 66B of Finance Act, 1994 & Para I-B of Notification No. 30/2012(ST) dated 20.6.23012 and since the appellant has failed to discharge the service tax on the services received from abroad, falling under the category of *Business Support Service*, a show cause notice dated 22.11.2016 was issued to them after invoking extended period for the year 2013-14 and also for the normal

period 2014-15 demanding total service tax amounting to Rs.12,93,203/- alongwith interest and penalty. Admittedly, immediately after being pointed out by the audit, the appellant paid the amount vide challan dated 20.7.2017 'under protest'. The Adjudicating Authority vide Order-in-Original dated 29.11.2017 confirmed the demand alongwith interest and penalty and the amount of service tax of Rs.12,93,203/- deposited by the appellant was ordered to be appropriated. On appeal filed by the appellant, the 1st Appellate Authority vide impugned order dated 23.4.2019 rejected the same except issue of imposition of penalty u/s. 77(2) ibid.

4. According to learned counsel M/s. Thyssenkrupp AG, Germany extended 'corporate guarantee' to the appellant's client M/s. Praxair India Pvt. Ltd. in India for setting up 7.5 TPH Hydrogen plant in Odisha for which commission was reimbursed to them and therefore the appellant was under a bonafide belief that since no service has been received by the appellant but by its client therefore they are not liable to pay any tax and in that scenario no suppression can be attributed to the appellant. He further submits that the appellants were filing their statutory return from time to time and the department could have asked the details of anything they found irregular in the said return and since they did not raise any such objection during that period therefore they cannot invoke extended period by attributing suppression on the part of the appellant. He further submits that their bona fide can be gathered from the fact that as soon as

audit pointed out the shortcoming they immediately paid the tax although 'under protest'. Learned counsel further submits that during the period in issue the appellant had paid the Service tax amounting to Rs.18,06,88,379/- in cash which is far more than the amount demanded and had the appellant known about the tax liability then they would have paid the tax during that period itself and the credit would have been adjusted against tax payable, which fact also demolishes the case of alleged suppression against the appellant. Per contra learned Authorised Representative submits that the appellant's main defense against the allegation of willful suppression that they have paid service tax demand immediately after being pointed out by audit, is not sustainable as the same has been paid *under protest*. He also submits that the appellant has not raised any issue about classification or taxability of the service at the time of audit or at time of payment of service tax and that since they have not paid the tax on time therefore interest and penalty have rightly been demanded from them. Learned Authorised Representative prayed for dismissal of Appeal.

5. I have heard learned counsel for the appellant and learned Authorised Representative for the revenue and perused the case records including the synopsis/written submission and case laws placed on record. With effect from 1.7.2012 section 66B(44), Finance Act, 1994 defined "service" as "*any activity carried out by a person for another for consideration and includes a declared service*". There is nothing wrong in the findings of the

authorities below that 'commission' per se would fall under the ambit of the definition of 'service' (supra). After 1.7.2012 once the activity falls within the definition of 'service' it is taxable and the fact that some wrong classification by revenue has been given to it, is not of much help of the assessee as prior to 1.7.2012 services were distinguished under different categories u/s. 65(105) *ibid* and service tax was charged u/s. 66 therein but w.e.f. 1.7.2012 section 66 *ibid* was replaced by section 65B *ibid* for charging service tax. I am of the view that the commission reimbursed by appellant to Thyssenkrupp AG, Germany during the period FY. 2013-14 & F.Y. 2014-15 is taxable in view of the provision of S.66B *ibid* w.e.f 1.7.2012. Admittedly the appellant had deposited the duty immediately after being pointed out by the audit which, in the facts of this case, strengthens the stand of the appellant that there was no willful or deliberate suppression on their part. So far as the period 2013-14 is concerned the duty is demanded after invoking the extended period of limitation by attributing willful suppression on the part of the appellant. Suppression etc. cannot be imputed against the appellant merely because they failed to pay the tax on time. It is settled legal position that mere allegation of suppression is not sufficient, it has to be established through some evidence as mere omission to give some information will not always be termed as suppression with intention to evade tax, something more needs to be brought on record by the department. The Hon'ble Supreme Court in the

matter of *Continental Foundation vs. CCE, Chandigarh-I*; 2007(216 ELT 177 (SC) has laid down that the expression "suppression" has been used in the proviso to Section 11A of Central Excise Act, 1944 accompanied by very strong words as "fraud" or "collusion" and therefore, has to be construed strictly and mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Similarly in the matter of *Pahwa Chemicals v. CCE - 2005 (189) E.L.T. 257 (S.C.)* it has been laid down by Hon'ble Supreme Court that mere failure to disclose does not amount to misdeclaration or wilful suppression. Therefore in view of the fact that immediately after being pointed out by the audit, the appellant paid the amount vide challan dated 20.7.2017 coupled with the fact that during the period in issue the appellant had paid the Service tax amounting to Rs.18,06,88,379/- in cash which is far more than the amount demanded and had the appellant known about the tax liability they would have paid the tax during that period itself and the credit would have been adjusted against tax payable, no suppression can be attributed to the appellant. Admittedly the appellant was under obligation to discharge service tax under reverse charge mechanism on the commission paid for corporate guarantee provided by its parent company and if any service was taxed under reverse charge mechanism, they will be entitled to the benefit of Cenvat credit of the service tax paid. Therefore, the entire exercise is revenue neutral. In such a situation this Tribunal in the matter of *Jet*

Airways (I) Ltd. v. CST, Mumbai; 2016 (44) S.T.R. 465 (Tri.-Mum.) has held that in view of the fact that the demand is completely revenue neutral, extended period of limitation cannot be invoked and therefore I am of the considered view that the demand for the period 2013-14 is hit by limitation and accordingly set aside. So far as the period 2014-15 is concerned, certainly the demand is within normal period. As it has already been observed in this order that no willful suppression can be attributed to the appellant, therefore no penalty can be imposed. If there is some delay in depositing the tax then certainly interest is chargeable which the lower authority can calculate and therefore it is appropriate to remand the matter back to the adjudicating authority for calculating the amount of tax alongwith interest, if any, for the period 2014-15 and to adjust the same from the tax already deposited by the appellant vide challan dated 20.7.2017.

6. In view of the discussions made hereinabove, the appeal is partially allowed so far as the period 2013-14 is concerned and for the period 2014-15 the same is remanded for the purpose of calculation of duty for the normal period alongwith interest, if any.

(Pronounced in open Court on 19.06.2023)

(Ajay Sharma)
Member (Judicial)