
(2023) 05 CESTAT CK 0022

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 10370 Of 2014

Messrs Aarvee Denims & Exports Ltd

APPELLANT

Vs

C.S.T.-Service Tax - Ahmedabad

RESPONDENT

Date of Decision : 12-05-2023

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 5

Finance Act, 1994 — Section 65(19), 65(105)(zzb), 66A, 67, 73, 73(1), 76, 78

Citation : (2023) 05 CESTAT CK 0022

Hon'ble Judges : C.L.Mahar, Member (T)

Bench : Single Bench

Advocate : Amal Dave, Bina D Jani

Final Decision : Partly Allowed

Judgement

C.L. Mahar, Member (T)

1. The brief facts of the matter are that the appellant are engaged in the business of manufacturing and export of garments. The department initiated an inquiry and came to know that the appellant had appointed some agents in foreign countries for promotion, marketing and sale of their goods in foreign countries on payment of brokerage /commission. The department formed a view that the appellant have been receiving service of foreign agents for which they have not discharged the service tax liability as per the provision of the Finance Act, 1994. It has been the contention of the department that as per the provisions of section 66 A of the Finance Act, 1994 read with Section 65 (19) of the Finance Act, 1994 and Section 65 (105) (zzb) of the said act with regard to the Business Auxiliary Service, the appellant should have paid service tax on the services received by him from the persons based outside Indi.

1.2 After detailed inquiry following show cause notices came to be issued:-

(i) Show cause notice No F. No. STC/4-20/O&A/2008 dated 17.03.2008 covering period from 01.07.2003 to 31.03.2007 and demanding the service tax amounting

to Rs. 56,93,236/- under Section 73 (1) of the Finance Act, 1994 invoking larger period of 5 years of demand.

(ii) Show cause notice F.No. STC-176/O&A/SCN/Aarvee/ADC/R- IX/D-II/09 dated 20.03.2009 covering period from April 2007 to March 2008 demanding service tax amount of Rs. 10,96,848/-.

1.3 The matter was adjudicated by the Learned Adjudicating Authority vide impugned order dated 10.01.2014 wherein the following order has been passed:-

“(i) I consider the expenses made by Ms Aarvee Denims & Exports Limited. Ahmedabad towards brokerage/commission paid to foreign agents as taxable service under the category of Business Auxiliary Service as defined under Section 65(19) and Section 65(105)(zzb) of the Finance Act. 1994 and consider these expenses as taxable value under Section 67 of the Finance Act, 1994 from 18.4.2006 onwards.

(ii) I confirm the demand of service tax amounting to Rs.21.57.937-(Rupees Twenty One Lakhs Fifty Seven Thousand Nine Hundred And Thirty Seven only) in respect of SCN F.No. STC 4-20 O&A 2008 dated 17.03.2008. against M/s Aarvee Denims & Exports Ltd.. Ahmedabad, under first proviso to Section 73(1) of the Finance Act. 1994, as amended.

(iii) I confirm the demand of service tax amounting to Rs 10.96,848 (Rupees Ten Lakhs Ninety Six Thousand Eight Hundred And Forty Eight only) in respect of SCN F.No.STC-176/O&A SCN Aarvee ADC/R-IX/D-11/09 dated 20.03.2009. against M/s Aarvee Denims & Exports Ltd.. Ahmedabad. under first proviso to Section 73(1) of the Finance Act. 1994, as amended. Further, an amount of Rs 9,65,370- paid them on 27.04.2009 for the period from 01.04.2007 to 31.03.2008 is ordered to be appropriated towards the demand of service confirmed above”.

2. The Learned Advocate appearing on behalf of the appellant at the outset submits that he is not contending the matter on merit but only on the points of limitation. It has been submitted by the learned Advocate that the adjudicating authority has dropped the demand for the period 01.07.2003 to 18.04.2006 on the ground that provision of Section 66 A of the Finance Act, 1994 came into operation only on 18.04.2006. It is submitted that appellant was not aware of the concept of reverse charge which came in effect from 18.04.2006 and during the relevant period of time there was lot of confusion regarding the payment of service tax under the reverse charge mechanism.

2.1 The Learned Advocate has forcefully put forward his point of view that extended time proviso under section 73 cannot be invoked in their case as the element of suppression of fact, fraud or mis- declaration with intent to evade service tax are not present. It also been submitted that at the relevant point of time the appellant was eligible to avail cenvat credit of the tax paid under reverse charge mechanism and therefore the issue is primarily revenue neutral.

At the same time, since the payment of tax pertains to export of goods, the appellant would have been eligible to claim refund under Rule 5 of Cenvat Credit Rules, 2004.

2.2 The Learned Advocate for the appellant have submitted that this Tribunal in the case of M/s. Marck Bioscience Ltd in Final Order No A/ 11070/2019 dated 04.07.2019 has held that during the relevant period cenvat credit of tax paid on services rendered by the foreign sales commission agent under reverse charge mechanism would be available to the assessee by virtue of decision of Hon'ble Punjab & Haryana High Court in the case of Ambika Overseas reported under 2012 (25) STR 348 (P&H). Since the cenvat credit of the tax paid by the assessee was available to them, the assessee could not have any malafide intention of evading payment of service tax and therefore , the extended period for demand of service tax is not invocable in their case.

2.3 The Learned Counsel on this point also submitted that the Tribunal in the following cases has taken the similar view.

- Shree Ranie Gums & Chemicals Pvt. Ltd vs. CCE , Jaipur-II – 2017 (4) GSTL 340 (Tri.Del)
- Texyard International Vs. CCE, Thichy – 2015 (40) STR 322 (Tri. Chennai)
- HT India Ltd Vs. CST, New Delhi – 2017 (7) GSTL 364 (Tri. Del)
- Acl Mobile Ltd Vs. CCE, Delhi – 2019 (20) GSTL 362 (Tri.Del)

In all the above decision it has been held by this Tribunal that there was a lot of confusion in the trade and a lot of litigation on the point of payment of service tax under reverse charge mechanism and hence the demand under the extended period of limitation is not sustainable.

2.4 The learned advocate on the basis of above decision have submitted that confirmation of demand for the period 18.04.2006 to 31.03.2007 could not have been confirmed by the adjudicating authority as the extended time period was not invocable in their case.

2.5 With regard to the second show cause notice where under the service tax has been confirmed for the period April 2007 to March 2008 which for which show cause notice was issued on 20.03.2009, the learned advocate submitted that second show cause notice is also barred by the period of limitation as same has been issued by invoking the extended period of demand. The show cause notice should have been issued during the normal period of demand as show cause notice dated 17.03.2008 has already been issued under the provision of Section 73 (1) of the Finance Act, 1994 alleging suppression of facts with intention to evade payment of service tax and invoking larger period of demand.

3. I have also heard Learned Departmental Representative and after hearing both the sides, I am of the view that so far as the confirmation of service tax demand under the first show cause notice dated 17.03.2008 , I follow the

decision of this Tribunal in the case of M/s. Marck Bioscience Ltd vide Final Order No. A/11070/2019 dated 04.07.2019 where under it has been held that in case of sales commission to overseas commission agent under reverse charge mechanism, the extended time proviso is not invocable. The relevant extract of above Tribunal decision is reproduced below:-

"5. We have carefully considered the submissions made by both the sides and perused the record. As conceded by the Id. Counsel, we are not going in the merits of the case. As per the submissions of the Id. Counsel, the demand is not sustainable for the extended period. We find that during the relevant period, in the light of the Hon'ble Punjab

& Haryana High Court judgment in the case of Ambika Overseas (supra), the appellant was entitled for the Cenvat credit in respect of the service tax payable on commission paid to overseas commission agent. Therefore, even if the service tax was payable, there was a Revenue neutral situation hence, since there is no gain to the appellant, it cannot be said that there was mala fide intention on the part of the appellant in non-payment of service tax. Therefore, extended period was clearly not invocable in the facts of the present case. Accordingly, we set-aside the demand for the longer period. The demand for the normal period is maintained, if any.

6. For the same reason, the penalty imposed under Section 78 is also not sustainable, accordingly the same is also set-aside. As regards, the penalty imposed under Section 76, the same is also not sustainable in the light of the judgment of Hon'ble Gujarat High Court in the case of Raval Trading Company - 2016 (42) STR 210 (Guj) and the same is also set-aside. The appeal is partly allowed in the above terms. "

On the basis of above decision I set aside the impugned Order-In-Original with regard to confirmation of demand of service tax of Rs. 21,57,937/-under Section 73 (1) of the Finance Act, 1994 and imposition of penalties etc.

4. With regard to the second show cause notice dated 20.03.2009 where under the adjudicating authority has confirmed the demand of Rs. 10,96,848/- also invoking relevant penal provision. In this regard, I find that show cause notice has been issued on 20.03.2009 demanding the duty for the period April, 2007 to March, 2008 by invoking larger period of limitation under Section 73 (1) of the Finance Act, 1994. I am of view that since the first show cause notice has already been issued on 17.03.2008 invoking a period of five years and therefore, the second show cause notice should have been for normal period of demand and department should not have invoked the extended time period for demanding service tax .

4.1 From the facts, I find that the second show cause notice dated 20.03.2009 is beyond normal period of limitation and therefore, the matter is remanded back to the original adjudicating authority to re-adjudicate the matter in view of the above observation and confirm the service tax for the normal period of demand

as provided under Section 73 (1) of the Finance Act, 1994.

5. The appeal is partly allowed with regard to demand of Rs. 21,57,937/-and is being remanded back for de novo adjudication only with regard to the second show cause notice dated 20.03.2009

6. The appeal is decided in above manner.