

(2021) 11 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 50126 Of 2016

M/s Frisco Foods Private Limited

APPELLANT

Vs

Commissioner, Customs, Central Excise And Service Tax,
Dehradun

RESPONDENT

Date of Decision : 11-11-2021

Acts Referred:

Finance Act, 1994 — Section 65(105), 65(105)(zzb), 66A, 73, 73(1), 75, 78
Service Tax Rules, 1994 — Rule 6A(1), 6A(2)
Central Excise Rules, 1944 — Rule 173Q
Cenvat Credit Rules, 2004 — Rule 5
Central Excise Act, 1944 — Section 11A
Customs Act, 1962 — Section 28

Citation : (2021) 11 CESTAT CK 0023

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In this appeal the appellant is assailing Order-in-Original dated 9.10.2015, impugned order passed by the Commissioner of Customs, Central Excise & Service Tax, Dehradun whereby a demand of Rs.1,98,20,575/- has been confirmed under the provisions of Section 73 of the Finance Act, 1994, the Finance Act along with interest under Section 75 and penalty of Rs. 1,98,20,575/- has been imposed under Section 78.

2. The appellant, a manufacturer of biscuits, is situated in Hardwar and has service tax registration. It receives manpower recruitment/subway agency services, GTA service and works contract service. The appellant also exports biscuits and for this purpose appointed commission agents abroad and paid commission to them in foreign exchange.

3. Its records were audited for the period August 2010 to March 2012 and the audit party pointed out that the appellant was required to discharge service tax under reverse charge mechanism as per Section 66A of the Finance Act on the

amount paid by it to the foreign agents as commission. For the period 2010-2011 and 2011-2012, an amount of Rs. 74,09,083/- was calculated as the service tax due from the appellant. Further details of commission paid during 2012-2013 and 2013-2014 were also obtained by the Department and an amount of Rs. 1,24,11,492/- has been calculated as service tax due. It is the case of the Revenue that as per Section 66A of the Finance Act, if services are rendered by a person outside India and are received by a person in India, the recipient of the service has to pay service tax as if he is the one providing the service. The nature of the service provided by the overseas commission agents is in the nature of business auxiliary service covered under Section 65(105)(zzb) of the Finance Act, which is also covered by the provisions of reverse charge mechanism under Section 66A.

4. The appellant was asked to pay the service tax by letters dated 22.12.2013, 21.1.2014 and 18.2.2014 issued by the Superintendent (Service Tax) Range, Hardwar, Roorkee. In reply, the appellant sent letters dated 16.1.2014, 28.2.2014 and 30.5.2015 as follows :

(i) In respect of service tax chargeable on commission paid to foreign agents, it is submitted that before enactment of Section 66A of the Finance Act, 1994, there was no provision under service tax law that could tax the services provided outside India to the person in India;

(ii) Further, it is submitted that the law has illegally imposed this tax on commission paid to foreign agents. The levy of service tax on commission paid to the foreign agents appointed by the Indian exporters in various countries for generating orders for them is against the basic principle of business law;

(iii) The applicability of service tax on transactions not originating or received in India is seriously in doubt because this extension can change the age old concepts of taxation. For e.g., foreign agents appointed by the Indian company, books order for the supply of goods. However, if the goods are not supplied from India but China now, in this case of third country transaction, though there is no reason for service tax to be paid in India but still with the present interpretation of the field formations taxed to be paid in India."

5. As the appellant declined to pay service tax, a show cause notice dated 3.9.2014 was issued by the Commissioner of Central Excise, Meerut-I which culminated in the issue of the impugned order.

6. We have gone through the records of the case and considered the submissions made by both the sides.

7. It is undisputed that the appellant has paid commission to overseas agents who obtain export orders for their biscuits. This commission was paid in foreign exchange and was mentioned in the shipping bill, Central Excise invoices and the ARE-4 which was filed before the Central Excise authorities. It is undisputed that the 'commission agents service' is under business auxiliary service under Section

65(105)(zzb) and this clause is covered under the reverse charge mechanism under Section 66A. It is also undisputed that the appellant has not paid any service tax on the amounts.

8. Learned Counsel for the appellant submits that the entire demand has been made only under Section 66A read with Section 65(105)(zzb) of the Finance Act but these provisions were repealed with effect from 1.7.2012 after the introduction of negative list regime.

9. When service tax was first levied in 1994 it was to be charged on a few services indicated in Section 65(105) of the Finance Act. This list was expanded from time to time. With effect from 1st July, 2012 every service has been made taxable except those in a negative list. Therefore, the provisions of service tax were revamped completely and both Section 66A and Section 65(105) have been deleted. Learned Counsel submits that the entire demand made with effect from 1st July, 2012 is, therefore, unsustainable and needs to be dropped on this ground alone.

10. He submits that there are new provisions applicable to period post 2012 but there is no demand under them. He further submits that Rule 6A(1) and 6A(2) of Service Tax Rules which were made with reference to the place of provision of services, which could have been applied were held to be ultra vires by the High Court of Delhi in *Indian Association of Tour Operators Vs. Union of India*, 2017 (5) GSTL 4 (Del.) and therefore, even if those provisions were considered, no demand can be sustained.

11. On the other hand, on the issue of demand pertaining to the period post 2012, learned Departmental Representative submits that the judgment of the High Court of Delhi has been challenged before the Supreme Court and the Special Leave Petition has been admitted (*Union of India Vs. Indian Association of Tour Operators*, 2018 (17) GSTL J116 (SC).) He submits that once the Special Leave Petition has been admitted by the Supreme Court, the judgment of the High Court of Delhi is in jeopardy as held by the Supreme Court in *Union of India Vs. West Coast Paper Mills Ltd.*, 2004 (164) ELT 375 (SC) On the question whether any demand can be confirmed or sustained under those provisions of law which were not even invoked in the show cause notice or confirmed in order in original, learned Departmental Representative submits that as long as the allegations in the show cause notice are clear, it does not matter whether the specific provisions have been invoked or not and demand can sustain. He relies on the judgment of High Court of Calcutta in *Unity Paints & Chemical Co. (P) Ltd. Vs. CCE*, 2015 (320) ELT 235 (Cal.) and *Commissioner of Central Excise & Customs, Aurangabad Vs. India Containers Ltd.*, 2017 (355) ELT 326 (Bom.)

12. We have considered the submissions on both sides.

13. It is undisputed that the charging section under which the Department sought to demand service tax under reverse charge mechanism post 1st July, 2012 in this case is Section 66A read with Section 65(105)(zzb). These sections

did not exist after 1 July 2012 and, therefore, we find that any reference to any other legal provisions which may have existed during the relevant period and which could have been invoked is irrelevant. It is a well-settled legal principle that the charging section in any taxing statute must be strictly construed and in case of any ambiguity it should be interpreted in favour of the assessee. This has been clarified in a number of judgments including the Constitution Bench judgment of the Supreme Court in *Commissioner of Customs (Import) Vs. Dilip Kumar & Company*, 2018 (361) ELT 577 (SC). Paragraph 43 of the judgment is reproduced below:

"43. There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view."

14. In the present case, the charging section which has been invoked for the period post 2012 does not exist at all and, therefore, there is no question of any ambiguity. Even if there is an ambiguity, it should go in favour of the assessee.

15. We have considered the judgments of the Bombay High Court in *India Containers Ltd.* and the Calcutta High Court in *Unity Paints & Chemical Co. (P) Ltd.* relied upon by the Revenue. In both these cases the dispute was different. Under the erstwhile Central Excise Rules, 1944 a penalty could be imposed under

Rule 173Q for various violations indicated in various clauses. The penalty was imposed in both the cases mentioning Rule 173Q clearly indicating the violation on the part of the assessee but without mentioning the clause under this Rule. What was held by the High Courts is that not mentioning a clause of the Rule 173Q does not vitiate the imposition of penalty, when the rule itself is clear and so also are the allegations made. The present case is on a completely different footing and the sections under which the charge is made did not exist at all during the relevant period.

16. In view of the above, as far as the period post 1st July, 2012 is concerned, we find that the demand, interest and penalties need to be set aside and we do so.

17. For the period prior to 1st July, 2012, the charging provisions were correctly invoked. The appellant had engaged a commission agent and paid commission in foreign exchange and the nature of services provided by the commission agent fall under Section 65(105)(zzb) of the Finance Act as business auxiliary service. This section is covered under reverse charge mechanism under Section 66A which requires the service recipient in India to pay service tax. However, the demand of service tax for the entire period is beyond the normal period of limitation under Section 73 of the Finance Act and so the extended period of limitation has been invoked.

18. The position taken by the appellant from the time liability was pointed out was not that it was not liable or that it was ignorant about the liability, but it is as follows:

(i) Until Section 66A was enacted there was no provision to tax services provided by a person outside India to a person in India;

(ii) This law (Section 66A) has illegally imposed tax on commission paid to foreign agents;

(iii) Levy of service tax is against the basic principles of business law;

(iv) The applicability of service tax on transactions not originating or received in India is seriously in doubt because it changes concept of taxation;

(v) Had it paid service tax, it could have taken Cenvat credit and utilized it or even sought refund as the commission is relatable to exports;

(vi) Notification No. 17/2008-ST dated 1.4.2008, Notification No. 18/2009-ST dated 7.7.2009 and Notification No. 42/2012-ST dated 29.6.2012 all provide conditional exemption which could have covered the service although they did not claim the benefit of this exemption notifications nor fulfilled any of the procedure required for the same. Not fulfilling those procedural requirement should not deprive them of the substantive benefit of the exemption notification;

(vii) The extended period of limitation cannot be invoked in their case because they had mentioned the commission in ARE-4 Form and Central Excise invoices.

Exports were done under the supervision of the departmental officers. Therefore, the Department was well aware of the commission;

(viii) No interest is chargeable as the demand itself is unsustainable;

(ix) No penalty under Section 78 can be imposed because there was no willful suppression of facts or any of the other elements required for imposing penalty under Section 78;

(x) Export goods should not suffer any tax as is the general principle;

(xi) Since they would have been entitled to Cenvat credit if they had paid the duty, the entire exercise is revenue neutral and, therefore, the extended period of limitation cannot be invoked. Therefore, the demand is time-barred.

19. The Commissioner framed the issues in paragraph 6.1 of the impugned order as follows:

"The main issue to be decided in this case is whether the party is liable to pay service tax under reverse charge mechanism under Section 66A of the Act on services of commission agents located in foreign territories. The invocation of extended period and imposition of penalty and penal interest too are other subsidiary issues being contested by the party."

20. On the question of taxability, the Commissioner concluded that the nature of service is business auxiliary service defined in Section 65 (105)(zzb) of the Finance Act, which is covered by Section 66A and, therefore, the appellant is liable to pay service tax. On the appellant's contention that it was eligible for exemption notifications and procedural lapses should not deprive it of the substantive benefit, the Commissioner found that all the exemption notifications claimed were more or less identically worded and none of them were unconditional. The claimant is required to satisfy various conditions mentioned in table of the said notifications as well as in its proviso, such as giving prior information to the jurisdictional Assistant Commissioner, being registered with export promotion council, holding an Import Export code, filing of half yearly returns, submission of documentary proof of payment of commission and copy of contract or agreement. None of these conditions - all of which are substantial - have been fulfilled. Not only has intimation not been filed by the appellant, but it also did not follow the other conditions of the notifications and, therefore, they cannot claim the benefit of the exemption notification.

21. On the argument of the appellant that it could have availed Cenvat credit and taken refund of unutilized Cenvat credit under Rule 5 of CCR, 2004 and, therefore, the entire exercise is revenue neutral, the Commissioner relied on the judgment of High Court of Gujarat in CCE Vs. Cadila Healthcare Ltd., 2013 (30) STR 3 (Guj) in which it was held that the services of sales commission agents are not eligible as 'input service' under the definition of Cenvat Credit Rules. Therefore, no Cenvat credit would be available to the appellant.

22. The Commissioner has not discussed at all the question of extended period of limitation invoked under Section 73 in the show cause notice. In fact, even in the operative part of the order, the proviso to Section 73(1) has not been invoked but the demand has been confirmed covering the extended period of limitation.

23. However, as far as the imposition of penalty under Section 78 is concerned, the Commissioner observed as follows:

"7. Now, I discuss the issue related to imposition of penalty under various provisions of the Finance Act.

7.1 The said party failed to disclose the true facts in their ST-3 returns, which came into notice of the department at the time of audit. The said party nowhere denied these new data provided by them to the department at a later date and they also have not provided any evidence that the same were known to the department earlier. I observe that the said party has failed to declare true facts to the department in contravention to the provisions of the Finance Act, 1994 by way of non disclosure of true facts and non-payment of Service Tax liability. Thus, I observe that the said party has willfully suppressed and mis-declared the information to the Department, with intent to evade payment of Service Tax liability, for which penalty under Section 78 of the Finance Act, 1994 is imposable on them.

7.2 It is observed that a trust has been reposed on the service provider so far as the service tax is concerned and accordingly measures like self assessment based on mutual trust and confidence have been put in place. As a result, the private records maintained by the service provider for transacting the normal business are accepted for the service tax purposes. From the evidence laid before me, I find that the said party had not taken into account the expenses incurred by them on procurement of services from foreign service providers whereupon the liability of payment of service tax was thruster upon them under reverse charge mechanism as per Section 66A of the Act. This act has resulted in non-payment of their tax liabilities. Thus, such an act in defiance of law had rendered them liable for stringent penal action in terms of provisions of Section 78 of the Act, *ibid* for suppressing and concealing the facts regarding availing taxable services rendered by service providers located outside India with intent to evade payment of service tax payable by them under Section 66A of the Act. In the light of above said discussion, I hold that the said party is liable for penalty under Section 78 of the Finance Act, 1994."

24. Thus, the Commissioner held that the appellant is liable to penalty under Section 78 of the Finance Act.

25. Learned Departmental Representative agrees that there is no clear finding on the invocation of extended period of limitation in the impugned order but asserts that the findings on applicability of Section 78 being identical, must be reckoned for invoking extended period of limitation also.

26. Thus for the period prior to 2012, it is undisputed that Section 65(105)(zzb) read with Section 66A of the Finance Act was applicable and it was rightly invoked for demanding duty. On the question of eligibility of the exemption notification, it is undisputed that the exemption notifications were all conditional and none of the conditions of the exemption notification have been fulfilled. Therefore, the benefit of exemption notification is not available to the appellant. It has been held in Dilip Kumar (supra) as follows:

"52. To sum up, we answer the reference holding as under-

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/ assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

27. On the question of whether the appellant would have been eligible to Cenvat credit of service tax if they had paid, the Commissioner relied on the judgment of High Court of Gujarat in Cadila Healthcare Ltd. and held that no CENVAT credit of service tax paid on input services will be available on the sales commission.

28. Learned Counsel rightly points out that there were contrary judgments by the High Court of Punjab & Haryana and thereafter the law was changed to make it explicit that credit of service tax paid on commission paid to commission agent is available. Therefore, they would have been eligible for Cenvat credit and could have claimed refund under Rule 5 of CCR, 2004.

29. The next question which arises is if the appellant could have claimed CENVAT credit, does Revenue neutrality, per se, exempt the appellant from paying service tax. Learned Departmental Representative cites Taj Mahal Hotel Vs. Commissioner of Service Tax, 2019 (25) GSTL 419 (Tri.-Del.) to assert that revenue neutrality does not itself give the appellant a right not to pay tax when the law requires it to do so.

30. We find that all indirect taxes are essentially revenue neutral at the hands of the tax payer. The assessee pays tax and collects it from its customer. Further, if the customer is himself a tax payer he can take credit of the Cenvat credit paid. For instance, A pays tax on his final product which is supplied to B who immediately takes credit of the tax paid by A and uses it to discharge his own liability. B, in turn, pays tax on his final products and sells them to C who takes credit of the tax so paid. The cycle continues until the final consumer is reached or an exempted good is produced or a non-taxable service is rendered. At that stage, the entire burden of tax gets loaded on to the final consumer or on to the non-excisable good or the non-taxable service. However, this does not mean that

A, B,C, etc. do not have to pay tax which the law requires them to pay. They are also entitled to take credit as per the legal provisions. Therefore, revenue neutrality in itself does not extinguish the tax liability of any person. In fact Section, 73 of the Finance Act, Section 11A of Central Excise Act and Section 28 of the Customs Act do not mention revenue neutrality at all. However, all these sections fix two time-limits within which demands can be raised in case of short payment. The normal period applies in every case and the extended period of limitation can be invoked in case of fraud, collusion, willful misstatement or suppression of facts or violation of the provisions of the Act or Rules with an intent to evade payment of duty. What is important for invoking extended period of limitation is the intent to evade payment of duty. Mere omission or careless mistake is not sufficient. What has been held in a catena of judgments as well as orders of the Tribunal is that in cases where the same assessee who pays the tax can also take credit of the same amount (just as in the case of reverse charge mechanism) it is Revenue neutral and in the absence of any contrary evidence, we cannot presume that there was an intent to evade payment of tax. Nevertheless, in this particular case, right from the beginning when the audit had sent a letter to the appellant, its contention was not that it was ignorant of the provisions of law but, as discussed above, the contention was that it did not agree with such law and will therefore, will not follow it. It also felt that Section 66A is illegal in imposing tax on commission paid to foreign agent. Nowhere has the appellant claimed that it was ignorant or had not paid service tax through oversight. In fact, the appellant was registered under service tax law and was paying service tax under reverse charge mechanism on some other services such as goods transport operator service. It decides on its own not to follow the provisions of Section 66A. The appellant was also aware that it could have followed the law and claimed Cenvat credit and eventually claim refund of unutilized Cenvat credit. The appellant was also aware that it could have followed the requirements of any of the exemption notification applicable during the relevant period and claimed exemption. The payment of commission was also not inadvertently lost sight of by the appellant. In fact, in every invoice and ARE-1 submitted to the Central Excise Range Officer it mentioned the commission. However, it chose not to pay service tax on these amounts. We, therefore, find that the intention in this case need not be inferred from the availability of Cenvat credit or revenue neutrality, etc. It was evident from the appellant's statements themselves.

31. However, the impugned order does not discuss the ingredients necessary for invocation of extended period of limitation nor does it invoke the proviso to Section 73(1) in the operative part of the order. It is for this reason that we have to set aside the impugned order for the extended period of limitation. The demand within the normal limitation is not covered by the charging sections invoked. Therefore, the entire demand needs to be set aside and we do so. Since the penalty under Section 78 is linked to and equal to the demand confirmed, it needs to be set aside as well. Similarly interest under Section 75 also needs to

be set aside.

32. In view of the above, we allow the appeal and set aside the impugned order dated 09.10.2015 with consequential relief, if any.

(Pronounced in Court on 11.11.2021)