
(2024) 11 CESTAT CK 1282

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 52518 of 2014

**M/s. Info Edge (India) Ltd. @APPELLANT @Hash Commissioner of
Service Tax @RESPONDENT**

Date of Decision : 11-11-2024

Acts Referred:

Finance Act, 1994 — Section 65(75), 65(104c), 65(105)(zh), 66A, 73(1), 75, 77, 78, 80
Service Tax Rules, 1994 — Rule 2(1)(d)(iv)

Citation : (2024) 11 CESTAT CK 1282

Hon'ble Judges : Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : B.L. Narasimhan, Kunal Aggarwal, Shagun Arora, Rajeev Kapoor

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. M/s. Info Edge (India) Ltd., the appellant has filed this appeal for setting aside the order dated 28.01.2014 passed by the Commissioner adjudicating the three show cause notices dated 21.04.2009, 23.10.2009 and 21.12.2012 covering the period from 18.04.2006 to 16.05.2008. The Commissioner has held that the services received by the appellant from M/s Verio Inc, USA, Verio USA are classifiable under 'support services of business or commerce', BSS under section 65 (104c) of the Finance Act 1994, the Finance Act and accordingly has ordered for recovery of service tax under the proviso to section 73(1) of the Finance Act with interest under section 75 of the Finance Act and penalties under sections 78 and 77 of the Finance Act.

2. The appellant claims to be engaged in the provision of 'online information and database access or retrieval', OIDAR service defined under section 65(75) of the Finance Act and made taxable under section 65(105)(zh) of the Finance Act.

3. During the relevant period in dispute, the appellant entered into an agreement with Verio USA for providing NTTA platform hosting. Under the agreement, Verio USA was to provide various dedicated servers and an operating software Red Hat

Enterprise Linux. The scope of the agreement includes providing data storage and access services wherein Verio USA will make available various servers such as intel-based high end data base server, back linked server, high end application server for storage of data on server space. Verio USA would also provide operating software and equipment used for internet connectivity. The agreement also provides that Verio USA would exercise no control over the content, accuracy or quality of information passing through or on the equipment.

4. An audit of the records of the appellant was conducted for the period 2004-08. A letter dated 12.02.2008 was sent to the appellant to furnish the breakup of its foreign expenditure under various heads namely (a) server charges; (b) advertising expenses; (c) promotion; marketing expenses; and (d) IPO related expenses. The appellant provided the data by a letter dated 18.03.2008 and informed the department that it had deposited service tax with interest on 13.03.2008 for the payments made in foreign currency relating to promotion and marketing expenses, advertisement expenses and IPO related expenses, but has not paid any service tax on server charges due to its non-taxability.

5. A show cause notice dated 21.04.2009 was issued to the appellant proposing demand of service tax with interest and penalties on the following issues. An amount of Rs. 88,07,884/- which was paid by the appellant was appropriated against the aforementioned proposed demand:

Sl. No.

Issue

Amount

Amount paid and proposed to be appropriated

1.

Appellant received OIDAR services from Verio USA which is taxable under reverse charge in terms of section 66A of the Finance Act read with rule 2 (1) (d) (iv) of the Service Tax Rules, 1994, the 1994 Rules.

Rs. 1,33,10,145/-

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2.

Appellant received business auxiliary services, BAS from Minik Enterprises USA which is taxable under reverse charge in terms of section 66A of the Finance Act read with rule 2 (1)(d)(iv) of the 1994 Rules.

Rs. 3,70,579/-

3.

Differential service tax for the period 18.04.2006 to 10.05.2007 under section

66A of the Finance Act read with rule 2(1)(d)(iv) of the 1994 Rules on the ground that the appellant is receiving IPO related service which is covered under the definition of commission agent service under BAS

Rs. 1,63,756/- (total demand was of Rs. 13,41,923/-)

Rs. 11,78,167/

4.

Differential service tax for the period 01.10.2003 to 09.09.2004 under section 66A of the Finance Act read with rule 2(1)(d)(iv) of the 1994 Rules on the ground that the appellant received promotion and marketing related services liable to service tax under BAS.

Rs. 61,029/- (total demand was of Rs. 3,47,730/-)

Rs. 2,86,701/-

5.

Differential service tax for the period 10.09.2004 to 31.03.2008 under section 66A of the Finance Act read with rule 2(1)(d)(iv) of the 1994 Rules on the ground that the appellant received advertisement agency' service from outside India.

Rs. 2,82,995/- (total demand was of Rs. 76,26,011/-)

Appropriated Rs. 73,43,016, however, paid amount was of Rs. 78,54,405/-

Total

Differential demand of Rs. 1,41,88,504/- (total demand was of Rs. 2,29,96,388/-)

Rs. 88,07,884/-

6. In continuation to the aforesaid show cause notice another show cause notice dated 23.10.2009 was issued to the appellant for the period 2008-09 demanding service tax of Rs. 32,29,837/- under section 73(1) of the Finance Act with interest and penalties.

7. A third show cause notice dated 21.12.2012 was also issued to the appellant under section 73(1) of the Finance Act for the period 2011-2012 on the ground that the OIDAR service provided by the appellant to the SEZ Units are not exempted services as the appellant had not fulfilled the conditions of the Notification 17/2011 - ST dated 01.03.2011, the Notification dated 01.03.2011.

8. All the three show cause notices were adjudicated by the Commissioner by an order dated 28.01.2014. The entire demand of service tax under reverse charge mechanism for the period prior to 18.04.2006 in the first show cause notice was dropped, following the decision of the Bombay High Court in Indian National

Shipowners Association vs. Union of India, 2009 (13) STR 235 (Bom.) in which it was held that taxation of import of services was permissible only after introduction of section 66A of the Finance Act w.e.f. 18.04.2006. Consequently, the following demands were dropped:

S.No.

Demand Particular

Amount of Service Tax demand dropped (in Rs.)

1.

Charges paid to Verio

40,27,699

2.

Charges paid to Minik

2,43,575

3.

Promotion and marketing expense

3,47,730*

4.

IPO related charges

13,41,923**

5.

Advertisement expenses

21,74,707

TOTAL

81,35,634

* This demand has been entirely dropped as this demand was made for a period prior to 18.04.2006.

** This demand has been entirely dropped as the Commissioner also held that the appropriate classification for the related services is Legal Consultancy service.

9. The demand of service tax of Rs. 17,80,463/- demanded under the second show cause notice was dropped on the ground that services provided to SEZ Units are exempted services.

10. The order also dropped the entire service tax demand of Rs. 3,60,76,863/-

under the third show cause notice on the ground that exemption under Notification dated 01.03.2011 cannot be denied on account of procedural lapses.

11. Service tax of Rs. 1,07,3,820/- under the first show cause notice and Rs. 14,49,374/- under the second show cause notice have been confirmed under BSS for the period from 18.04.2006 to 10.05.2007 on the ground that provision of I.P. Address for accessing the server and space for storage of data by Verio USA to the appellant would amount to 'infrastructural support' services and the appellant would be liable to pay service tax under reverse charge mechanism. While confirming the demand under BSS, the Commissioner also held that the said service does not fall under OIDAR service.

12. The Commissioner has also confirmed the demand of service tax under BAS on the professional fee paid to Minik Enterprises for the period after 18.04.2006. The Commissioner also held that since the entire demand of service tax after 18.04.2006 has been deposited by the appellant prior to issuance of the show cause notice, the same would be appropriated without imposition of any penalty.

13. The Commissioner has also confirmed the demand of service tax of Rs. 54,51,304/- under advertisement services for the period after 18.04.2006. The same has been appropriated from the excess service tax of Rs. 73,43,016/- paid by the appellant without imposition of any penalty. However, the demand of Education Cess and SHE Cess of Rs. 19,289/- has been confirmed against the appellant.

14. The confirmed demand and penalties imposed are contained in the following chart:

Sl. No.

Issue involved

Period for confirmed demand

service tax demand confirmed in Rs.

Amount appropriated in Rs.

Penalty under section 78 in Rs.

Penalty under section 77 on confirmed demand in Rs.

1.

Service received from Verio USA

18.04.2006 to 01.03.2008 (first show cause notice)

92,82,446/-

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1,07,31,820/-

1,00,000/-

01.04.2008 to 16.05.2008 (second show cause notice)

14,49,374/-

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2.

Services received from Minik Enterprises, USA

18.04.2006 to 01.03.2008 (first show cause notice)

1,27,004/-

1,27,004/-

NIL

3.

Advertising services from foreign entity

18.04.2006 to 01.03.2008 (first show cause notice)

1,25,799 for Ed. Cess & SHE Cess

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1,68,440/- equivalent to Ed. And SHE Cess remaining unpaid

18.04.2006 to 01.03.2008 (first show cause notice)

53,25,505/-

53,25,505/-

Total

1,63,10,128/-

54,52,509/-

1,09,00,260/-

1,00,000/-

15. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Kunal Aggarwal and Ms. Shagun Arora, made the following submissions:

(i) The demand proposed in the first show cause notice which is mentioned at serial no. 1 of the aforesaid chart was under OIDAR service but it has been confirmed under BSS. This is not permissible as the Commissioner could not have gone beyond the show cause notice. In this connection reliance has been placed on the decision of the Tribunal in *Inox Leisure Ltd. vs. Commissioner of service Tax, Hyderabad, 2022 (60) G.S.T.L. 326 (Tri.-Hyd.)*;

(ii) The demand at serial no's. 2 and 3 of the Chart are not sustainable of the reason that the amount of Rs. 73, 43,016/- that has been paid by the appellant comprised both service tax and Education and SHE Cess;

(iii) The amount of Rs. 42,641/- has been wrongly confirmed because in paragraph 67.01 of the order the Commissioner has calculated the service tax on advertising service after 18.04.2006 as Rs.53,25,505/- and Education Cess as Rs. 1,06,510/-and SHE Cess as Rs. 19,289/- but while confirming the demand of Education Cess and SHE Cess, the amount of Education Cess has been taken as Rs. 1,49,151/- ;

(iv) The amount appropriated is Rs. 54,09,868/-, but the amount paid is Rs. 53,25,505/- towards service tax on advertising service and Rs. 1,27,004/- on the service received from Minik Enterprises. Thus, the total amount of Rs. 54,52,509/- was paid but only an amount of Rs. 54,09,868/- has been appropriated. Thus, there is a short appropriation of Rs. 42,641/-;

(v) An amount of Rs. 20,17,511/- has been paid in excess on advertising service, which amount needs to be adjusted towards other liability of the appellant or refunded;

(vi) The extended period of limitation was not invokable in the facts and circumstances of the case;

(vii) Interest was not recoverable nor penalty could be imposed.

16. Shri Rajeev Kapoor, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference in this appeal. Learned authorized representative submitted that even if the demand was proposed under a particular category of service, it could be confirmed if it actually fell under a different category.

17. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

Issue No. 1 of the Chart

18. The first show cause notice proposed to demand service tax on the services received from Verio USA under OIDAR service. The order accepts the contentions of the appellant and holds that to be covered under OIDAR service, data or information belonging to the service provider should be provided to the service receiver but the appellant did not provide any data or information owned by Verio USA as Verio USA only provided infrastructure facilities in the form of server space and other facilities which are necessary for the appellant to store the data. Accordingly, the order holds that services provided by Verio USA to the appellant are not taxable under OIDAR service. However, the order proceeds to hold that such services are in the nature of infrastructure support and are taxable under BSS.

19. Thus, the order has confirmed the demand under BSS though the demand made in the show cause notice is for OIDAR service.

20. A show cause notice is the foundation and since, the taxability under BSS was not proposed in the first show cause notice, the demand could not have been confirmed under the said category.

21. In this connection reliance can be placed on the decision of the Tribunal in *Inox Leisure*, wherein it has been held that no demand can be confirmed under a head not alleged in the show cause notice. The relevant portion of the order is reproduced below:

"21. The impugned order has confirmed the demand on the basis that the appellant provided 'infrastructure support services' to the appellant. However, the show cause notice alleged that the appellant was providing 'operational and administrative assistance' with supplier. The Commissioner could not have gone beyond the scope of the show cause notice to confirm the demand."

22. The Civil Appeal filed by the department against the aforesaid order of the Tribunal was dismissed by the Supreme Court and the decision is reported in [2022 (61) G.S.T.L. 342 (S.C.)], *Commissioner of Service Tax vs. Inox Leisure Ltd.* decided on 28.02.2022. The order of the Supreme Court is reproduced below:

"No case is made out to interfere with the impugned Order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has taken an absolutely correct view, to which we agree. Hence, the Civil Appeal stands dismissed."

23. In this view of the matter the demand confirmed under BSS cannot be sustained.

24. It would, therefore, not be necessary to examine the contention advanced by the learned counsel for the appellant that even otherwise the services received by the appellant are not taxable under BSS.

Issue No's. 2 and 3 of the Chart

25. It needs to be noted that the Commissioner has confirmed the demand of service tax of Rs. 54,51,304/- under advertising service for the period after 18.04.2006, as would be seen from paragraph 67.04 of the order. This amount has been appropriated from the excess service tax of Rs. 73,43,016/- paid by the appellant without imposition of any penalty. However, the demand of Education Cess of Rs. 1,49,151/- and SHE Cess of Rs. 19,289/- has been confirmed against the appellant holding that it has not been paid by the appellant.

26. Learned counsel for the appellant pointed that the demand of service tax of Rs. 54,51,304/- includes Education Cess of Rs.1,06,510/- and SHE Cess of Rs. 19,289/- and no reason has been given in the impugned order to conclude that the appellant had not paid Education Cess and SHE Cess.

27. In paragraph 67.01 of the impugned order, service tax on advertising service after 18.04.2006 has been determined for an amount of Rs. 53,25,505/- with Education Cess of Rs. 1,06,510/- and SHE Cess of Rs. 19,289/-. However, while confirming the demand of Education Cess and SHE Cess, the amount of Education Cess has been taken as 1,49,151/-. The contention, therefore, of the learned counsel for the appellant is that an amount of Rs. 42,641/- has been wrongly confirmed.

28. It has also been submitted by learned counsel for the appellant that the amount that has been appropriated is Rs. 54,09,868/- but the amount paid towards service tax on advertising service is Rs. 43,25,505/- and Rs. 1,27,004/- on the service received from Minik Enterprises. Thus, the total amount of service tax that was paid is Rs. 54,52,509/- but only an amount of Rs. 54,09,868/- has been appropriated. According to the learned counsel for the appellant, there is a short fall of Rs. 42,641/- in appropriation,

29. Learned counsel for the appellant also submitted that an amount of Rs. 20,17,511/- has been paid in excess on advertising service and, therefore, it may also be adjusted towards or refunded to the appellant.

30. The aforesaid errors that have been pointed out by the learned counsel for the appellant can be pointed out by the appellant to the Commissioner by moving an appropriate application and in case such an application is filed, the Commissioner shall examine the same and pass an appropriate order.

Penalties

31. Learned counsel for the appellant submitted that penalty to the extent of Rs. 1,07,31,820/- under section 78 of the Finance Act on the demand of service tax with respect to issue at serial no. 1 is not sustainable as the demand on merits is not sustainable.

32. This submission of learned counsel for the appellant deserves to be accepted. The demand of Rs. 1,07,31,820/- at serial no. 1 has been found to be unsustainable. Thus, the penalty of Rs. 1,07,31,820/- under section 78 of the Finance Act deserves to be set aside.

33. Learned counsel for the appellant also submitted that the penalty of Rs. 1,00,000/- under section 77 of the Finance Act in regard to issue no. 1 deserves to be set aside as the demand itself has been set aside.

34. This submission of learned counsel for the appellant also deserves to be accepted as the demand again serial no. 1 has been set aside. The penalty of Rs. 1,00,000/- under section 77 of the Finance Act is, therefore, set aside.

35. Learned counsel for the appellant also submitted that the penalty of Rs. 1,68,440/- confirmed under section 78 of the Finance Act on the demand of Education Cess and SHE Cess also deserves to be set aside as the demand itself deserves to be set aside.

36. The issue as to whether the demand of Rs. 1,68,440/- can be sustained or not is being remitted to the Commissioner. The imposition of penalty under section 78 of the Finance Act will, therefore, depend upon the decision to be taken by the Commissioner. This issue of penalty will, therefore, also have to be examined by the Commissioner.

37. Learned counsel for the appellant also submitted that benefit of section 80 of the Finance Act permitting waiver of penalty should also be extended to the appellant. This issue can also be examined by the Commissioner.

Conclusion

38. The demand contained at issue no. 1 is set aside. As the demand has been set aside the penalties imposed under section 78 and 77 of the Finance Act are also set aside.

39. The demand confirmed against issue no's. 2 and 3 are remitted to the Commissioner. The appellant shall point out the errors by moving an appropriate application which shall be considered by the Commissioner and an appropriate order will be passed.

40. The imposition of penalty of Rs. 1,68,440/- under section 78 of the Finance Act shall also be examined by the Commissioner afresh and an appropriate order shall be passed.

41. The issue relating to grant of benefit under section 80 of the Finance Act shall also be examined by the Commissioner.

42. The appeal is, accordingly, allowed to the extent indicated above.

(Order Pronounced on 11.11.2024)