
(2023) 06 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 537, 538 Of 2011

M/s Lakshay International Pvt. Limited And Others	APPELLANT
Vs	
Commissioner Of Central Excise, Ludhiana And Others	RESPONDENT

Date of Decision : 09-06-2023

Acts Referred:

Service Tax Rules, 1994 — Rule 2(1)(d)(iv)
Finance Act, 1994 — Section 65(19), 73, 73(3), 76, 77, 78, 80

Citation : (2023) 06 CESTAT CK 0012

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Sudhir Malhotra, Shivani

Final Decision : Partly Allowed

Judgement

P. Anjani Kumar, Member (T)

1. The appellants, M/s Lakshya International Private Limited (ST/537/2011) and M/s G.D. Tools and Forgings (ST/538/2011) are engaged in manufacture and exports of leather tool bags and polyester bags. Both the appellants have been paying the overseas commission at an agreed percentage of business generated by them to their overseas commission agents who helped them to find customers abroad. It appeared to the Department, in case of M/s Lakshya International Private Limited (ST/537/2011), that the appellants were rendering "Business Auxiliary Service" as per Section 65(19) as a commission agent; as the commission agents are located outside India, the appellants, as receivers of the service are liable to pay service tax under Reverse Charge Mechanism in terms of Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 w.e.f. 09.07.2007 in terms of Notification No.13/2003-ST dated 20.06.2003 as amended. A show cause notice dated 06.04.2009 was issued demanding service tax of Rs.3,30,394/- along with interest; seeking to impose penalties and seeking to appropriate service tax of Rs.1,65,814/- deposited by the appellants on 15.01.2009. The Deputy Commissioner vide order dated 31.05.2010 confirmed the service tax of

Rs.2,96,387/-. On appeals filed by the appellants and the Department (for not imposing penalty under both Sections 76 & 78), Commissioner (Appeals) set aside the demand of Rs.85,516/- for the period 09.07.2004 to 17.04.2006; confirmed service tax of Rs.210871/-, for the period 18.04.2006 to 20.12.2008; upheld the penalties imposed under Section 77; reduce the penalty imposed under Section 78 to Rs.210871/- and upheld penalty imposed under Section 76. Hence, this appeal.

2. In the case of M/s G.D. Tools and Forgings (ST/538/2011), show cause notice dated 09.04.2009 was issued seeking to confirm service tax of Rs.2,45,408/- along with interest; seeking to appropriate the service tax of Rs.1,23,534/- paid by the appellants on 07.11.2008 and 24.11.2008; proposing to impose penalties under Sections 76, 77 & 78. The Original Authority vide order dated 15.06.2010 set aside service tax demand of Rs.24,794/-; confirmed service tax demand of Rs.2,20,834/- for the period 09.07.2004 to 30.09.2008; imposed equal penalty under Section 78 and penalty of Rs.1000 per day under Section 77 and refrained from imposing penalty under Section 76. On appeals filed by the appellant and the Department (for not imposing penalty under both Sections 76 & 78), Commissioner (Appeals) set aside the demand of service tax of Rs.1,12,100/- for the period 09.07.2004 to 17.04.2006; confirmed balance service tax of Rs.1,08,790/- for the period 18.04.2006 to 30.09.2008; upheld the penalty under Section 77 and reduce the penalty under Section 78 to Rs.1,08,790/-

3. Shri Sudhir Malhotra, learned counsel, submits that the issue involved in both the appeals is identical and therefore, the same may be heard and decided together. Accordingly, both the appeals have been heard together and have been taken up for decision.

4. Shri Sudhir Malhotra takes us through the provisions of Statute pertaining to leviability of service tax on commission agent and puts forth his arguments as follows:

- In the instant cases, applicable service tax along with interest have been paid; in case of M/s Lakshya International, penalty of 25% of the service tax of Rs.1,65,814/- also stands paid and therefore, there was no need for the Department to proceed by issuance of show cause notice in terms of Section 73 (3) of Finance Act, 1994.

- There was no mala fide act on the part of the appellants to evade payment of duty as the service tax payable on commission to overseas entities would have been available to them as CENVAT credit. He relies on the following case laws:

(i) CCE Vs Ambika Overseas- 2010 (20) STR 514 (T).

(ii) CCE Vs Ambika Overseas- 2012 (25) STR 348 (P&H)

(iii) Commissioner of CGST VS Orient Refractories Limited- 2019 (26) GSTL 199 (T).

(iv) Metro Shoes Pvt. Ltd. Vs CCE- 2007 (8) STR 502 (T)

- Learned Adjudicating Authority erred in invoking extended period of limitation as there was no mis-statement, concealment or suppression of facts. He relies upon:

(i) CST Vs Naresh Kumar & Company Pvt. Ltd.- 2022 (67) GSTL 324 (Cal.).

(ii) Northern Operating Systems Pvt. Ltd.- 2022 (61) GSTL 129 (SC).

(iii) Uniworth Textiles Pvt. Ltd.- 2013 (288) ELT 161 (SC).

(iv) Cosmic Dye Chemical- 1995 (75) ELT 721 (SC).

(v) K.K. Appachan- 2007 (7) STR 230 (Tri. Bang.)

(vi) ChiripalPolyfilms Ltd.- 2022 (67) GSTL 454 (T)

- Penalty under Section 76 and Section 78 cannot be imposed together as held by Hon'ble Punjab & Haryana High Court in the case of Pannu Property Dealers, Ludhiana- 2011 (24) STR 173 (P&H) and in other cases.

- Penalty cannot be imposed when the issue relates to interpretation of law as held in Kathuria Portfolios- 2003 (158) ELT 355 (T) and A.G. Shibu &Anothers- 2008 (10) STR 317 (T). Also, Section 80 of Finance Act, 1994 provides that penalty may not be imposed when reasonable cause is shown for failure to pay service tax.

5. Ms. Shivani, learned Authorized Representative for the Department submits that the appellants cannot take the plea that the service tax payable by them is available to them as CENVAT credit as this is not an issue in the show cause notice and the appellants have not taken the same at the level of adjudication and first stage appeal. Regarding limitation, she submits that the Order-in-Original discussed in detail the reasons for invoking extended period. She submits that scheme of Service Tax Law is self-assessment; the appellants would take steps to find out whether there is tax liability on them; the appellants never approached the Department for any clarification and evasion of service tax was detected only after an investigation by the Department. She relies upon Vidarbha Cricket Association- 2015 (38) STR 99 (Tri. Mumbai) and Shree Guru Kirpa Construction Company-2019-TIOL-3501-CESTAT-AHM.

6. Heard both sides and perused the records of the case. It is seen that in both cases, the appellants have deposited the applicable service tax and in case of Lakshay International, 25% of the penalty was also deposited. We find that the authorities below have accepted the contention of the appellants regarding the non-applicability of service tax to the appellants before 18.04.2006. While the appellant's claim that the extended period is not invokable as the issue involves interpretation of law, the claim of the Revenue is that the appellants having not registered themselves; having not paid applicable service tax have suppressed material facts before the Department. We find that the Original Authority

observes as follows:

"As regards the defence put up by the Noticee against the issue of imposition of penalty, including the extended period of limitation, under the provisions invoked in the show cause notice, I am not convinced by their plea. Mere recording of the transactions in their record will not suffice. It is not the Noticee's case that they have ever brought the matter in the knowledge of the Department. It was only when the Department had initiated the investigation based on information received from outside that the Noticee disclosed the act of receiving the taxable services and the details thereof. The Noticee neither obtained registration nor filed any returns containing the requisite information. As such, the allegation of suppression stands against the Noticee. Further, the reasons offered by the Noticee for delay in following the statutory provisions, even for the period w.e.f. 18.04.2006 do not commensurate with the quantum of delay. The judgements relied upon by the Noticee for treating their liability at least w.e.f. 18.04.2006 has been delivered much before the Noticee had deposited the dues and that too on being investigated by the Department for fixing the liability. It was only when the Department had pursued the Noticee vigorously by issuing several letters that the Noticee disclosed the information related to the matter. The issue of interpretation of statutory provisions cannot be an excuse for not following the statutory provisions of law.

7. We find that the appellants are not contesting the applicability of service tax to them. However, they dispute the invocation of extended period; quantum of duty confirmed and penalty imposed. Under these circumstances and in view of the facts of the case, we find that the extended period is rightly invoked relying on Vidarbha Cricket Association- and Shree Guru Kirpa Construction Company (supra). Coming to the quantification of the duty, we find that the appellants have produced Chartered Accountant certificates regarding the commissions paid to overseas agents for the period before and after 18.04.2006. We find that the lower authorities have simply relied on the figures proposed in the show cause notice and have not discussed at all the Chartered Accountant certificates. They have not also contradicted the said certificates. We are of the considered opinion that certificates given by Experts in the respective fields cannot be ignored without cogent reasons. Therefore, we find that the duty has been correctly paid by the appellants.

8. The appellants have taken the plea that in the case of G.D. Tools and Forgings, applicable service tax has been paid along with interest before the issuance of show cause notice; in case of Lakshay International, service tax along with interest and in addition 25% of the penalty has been paid. Therefore, we find that the appellants have made out a case under the provisions of Section 73 and Section 80 of the Finance Act, 1994. Accordingly, we find that no penalties can be sustained on the appellants.

9. Coming to the plea of the appellants that they would be eligible for CENVAT credit of the service tax paid by them, we find that as submitted by the learned

Authorized Representative, the issue is not before us in the present proceedings. Therefore, we refrain from offering any findings on the same.¹⁰ In the result, both the appeals are partly allowed in the following terms:

- (i) Duty demand is restricted to the amount already deposited by the appellants along with interest.
- (ii) All penalties are, however, set aside.