
(2021) 10 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 52549, 52550 Of 2015

M/s Raymond Limited

APPELLANT

Vs

Commissioner, Central Excise Customs And Service Tax

RESPONDENT

Date of Decision : 04-10-2021

Acts Referred:

Finance Act, 1994 — Section 66A, 68, 71A, 73

Finance Act, 2000 — Section 116, 117

Service Tax Rules, 1994 — Rule 2(1)(d)

Citation : (2021) 10 CESTAT CK 0004

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Both these appeals are by the same assessee relating to the period 16.11.1997 to 01.06.1998, on the same issue, hence are being disposed of together.

2. The issue involved is-

(i) whether show cause notice dated 28.09.2001 has been validly issued, for raising demand of service tax on GTO/GTA services received by the appellant for the disputed period, in terms of the prevailing Section 73 under reverse charge, and

(ii) Whether the appellant is entitled to refund of the amount of service tax Rs. 43,89,613/-, paid under protest which have been demanded vide aforementioned show cause notice dated 28.09.2001, pending adjudication.

3. Brief facts and the chequered history in these appeals is as under:-

Dates

Events

16.11.1997 to 01.06.1998

The appellant availed services of goods transport operator services.

28.09.2001

A show cause notice dated 28.09.2001 was issued demanding service tax of Rs.43,89,613/- payable on Goods Transport Operator Services, alongwith interest and penalty.

07.11.2003

The appellants deposited an amount of Rs. 43,89,613/- vide challan dated November 07, 2003 "under protest".

03.11.2004 and 10.11.2004

A corrigendum dated 03.11.2004 was issued purporting to amend the SCN dated 28.09.2001 by inserting various amended provisions vide Finance Act, 2003 and 2004, and demanding service tax by invoking extended period of limitation. The said corrigendum was received by the appellant on 10.11.2004.

31.01.2005 01.06.2005

Order in Original dated 31.01.2005 was issued by Assistant Commissioner of Central Excise confirming the demand of Service Tax of Rs.43,89,613/-, which was also upheld by the Commissioner of Central Excise (Appeals) vide order in appeal dated 01.06.2005.

16.01.2007

This Tribunal vide Final Order No. 25/2007/ST dated 16.01.2007 remanded the matter to the adjudicating authority to decide the matter afresh in light of the judicial rulings/ precedents.

23.01.2014

The appellant filed refund claim of Rs. 43,89,613/- paid "under protest" on 07.11.2003.

The legal and judicial development on the disputed subject istabulated hereunder:-

Dates

Events

27.07.1999

The Hon'ble Supreme Court in the case of Laghu Udyog Bharati vs. UOI 1998 (112) ELT 365 (SC) inter alia held that the provisions of Rule 2(d) of Service Tax Rules, in so far as it made persons other than goods transport operators responsible for collecting service tax, is ultra vires the Finance Act, 1994.

12.05.2000

Introduction of levy of service tax on Goods transport operators, under 'Reverse charge mechanism', vide Section 116 and 117 of the Finance Act, 2000 enacted on 12.05.2000, revalidating and amending the provisions of Finance Act, 1994 for the period 16.07.1997 to 16.10.1998 (retrospectively).

27.07.2005

The Hon'ble Supreme Court in the case of CCE, Meerut vs. LH Sugar Factories Ltd. 2006 (3) STR 715 (SC) held that - person required to file return under Section 71A of the Act was not covered by Section 73 of the Act, as it stood on the date of issuance of the show cause notice.

14.05.2003

Retrospective amendment to Section 68 of the Act and insertion of Section 71A, through the validating provisions, by Finance Act, 2003.

10.09.2004

Section 73 was amended prospectively with effect from 10.09.2004 to include cases where return has to be filed under Section 71A.

4. Learned Counsel urges that vide impugned order-in-appeal dated 16.02.2015 against which Appeal No. ST/52549/2015 have been filed in this Tribunal, the demand of Rs. 43,89,613/- which was raised by the aforementioned show cause notice dated 28.09.2001, read with corrigendum dated 03.11.2004, purporting to amend the show cause notice, the Commissioner (Appeals) have upheld the demand observing that the appellants' contention that the show cause notice was time barred is rejected. It has been observed that similar issue was before the Tribunal in Mangalam Cement Limited and Agauta Sugar Chemicals - 2010 (19) STR 849 (Tri. LB) where such objection have not been entertained by the Tribunal. It has been specifically held in Mangalam Cement that show cause notice can be issued within one year of relevant date which in this is the date of filing of return on 10.11.2003. Further, observed that in the case of Pandurang SSK Ltd., vs. CCE, Pune -II 2011 (23) STR 300 (Tri. Mum.), this Tribunal upheld the liability in cases where show cause notice or corrigenda to show cause notice were issued after 10.09.2004.

5. So far the issue of limitation is concerned, with respect to show cause notice/corrigenda, issued after 10.09.2004 and within one year of relevant date, prescribed under Section 73 of the Finance Act came up before the Hon'ble Gujarat High Court in Emco Elecon Ltd., -2010 (20) STR 603 and the issue was decided against the Department. Further observed that Hon'ble Madras High Court in the case of L&T & Others reported in 2010 (35) STR 32 (Mad.) has upheld the validity to revise show cause notice vide corrigenda issued after 10.09.2004, within a period of one year from the relevant date.

6. Accordingly, learned Commissioner (Appeals) has held that the show cause

notice dated 28.09.2001 read with the corrigenda dated 03.11.2004, has been validly issued within the period of one year from 10.11.2003. As such the show cause notice is not hit by limitation.

7. The other Appeal No. ST/52550 of 2015 is with respect to denial of refund by the impugned order-in-appeal dated 18.02.2015, amounting to Rs.43,89,613/-, paid under protest on 07.11.2003, as aforementioned.

8. Assailing the impugned order, learned Counsel for the appellant Shri Gopal Mundhra urges that the issue is no longer res integra and is squarely covered in favour of the appellant by catena of judgments of this Tribunal and higher Court.

9. In the case of CCE, Meerut vs. L.H. Sugar Factories Ltd., -2005 (187) ELT 5, the Apex Court has held that the amended section 73 (w.e.f. 10.09.2014) prospectively, the 'person' required to file return under Section 71A of the Act, was not covered by Section 73 of the Act, as it stood on the date of issuance of the show cause notice. Section 73 covers the case of an assessee, who is liable to file return under Section 70. The class of person on whom liability to file return is caste, under section 71A, is not brought under the net or purview of Section 73, and therefore no show cause notice can be issued on such person/ assessee under Section 73 of the Act.

10. Thus, reliance is placed by the Commissioner (Appeals) on the ruling of various High Courts is of no avail. Further, Hon'ble Rajasthan High Court in the case of Mangalam Cement Ltd. vs. CC-2015 (40) STR 461 have held that the ruling of Larger Bench of this Tribunal in Agauta Sugar Chemical (supra) is not a good law and have been overruled.

11. This Tribunal in the subsequent appeal of Agauta Sugar Chemical - 2012 11 TMI 740, after taking note of the judicial development have decided similar issue in favour of the assessee and against the Revenue.

12. It is further urged by the appellant that corrigenda were issued to the original show cause notice. Thus when the notice itself is invalid or not tenable, the subsequent corrigenda cannot give it a fresh lease of life. Further extended period of limitation is not invocable in the facts and circumstances, there being no contumacious conduct on the part of the appellant, or mis-statement or fraud, which are the condition precedent for invocation of extended period of limitation. Accordingly, he prayed for allowing both the appeals with consequential benefits.

13. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

13. Having considered the rival contentions, I find that the issue of levy of service tax on GTO service, on the receiver of service under reverse charge mechanism was held ultra virus by the Hon'ble Supreme Court in the case of L. H. Sugar (supra) by judgment dated 27.07.2005. It was categorically held that 'person' required to file return under Section 71A of the Act was not covered under Section 73, as it stood on the date of issuance of the show cause notice. I

find that it is admitted fact that the appellant have taken service tax registration and are filing the periodical returns regularly. The appellant have maintained proper books of accounts in the normal course of business. The only allegation in the show cause notice is that the appellant have not discharged the service tax liability on 'reverse charge basis' on Goods Transport Service, received during the period 16.11.1997 to 01.06.1998. It is further alleged in the show cause notice that service tax was imposed as transport of goods of service w.e.f. 16.11.1997 vide Notification No. 41/1997-ST dated 5.11.1997. Further, the Central Government vide Notification No. 42/1997-ST dated 5.11.1997 amended the Service Tax Rules and in Rule 2(1)(d) clause (xvii) was inserted which read as follows:-

"In relation to services provided by a GTO, every person who are liable to pay the freight either himself or through his agent for transportation by road in a goods carrier."

14. I take notice that Hon'ble Bombay High Court in the case of Indian National Shipowners Association have held that service tax cannot be levied under reverse charge mechanism prior to 18.04.2006, when Section 66A was introduced and/or inserted in the Finance Act, providing for levy of service tax from the receiver of service, under reverse charge mechanism. This ruling have been confirmed by Hon'ble Supreme Court.

15. I further take notice that in para 11 of the show cause notice it is observed that Hon'ble Supreme Court in case of Laghu Udyog Bharati by its judgment dated 27.07.1999, have held the provision of levy under reverse charge basis, as per Rule 2(1)(d) of the Service Tax Rules in the case of GTO service, as ultra virus the Finance Act, 1994. Accordingly, in these facts and circumstances and in view of the law pronounced by the Apex Court, I hold that the extended period of limitation cannot be invoked, as admittedly the show cause notice have been issued after the normal period of limitation. I further find that the whole proceedings and the show cause notice is ab initio void in view of the ruling of the Hon'ble Supreme Court, noticed herein above.

16. The revenue is directed to grant refund of the amount of Rs.43,89,613/- to the appellant (paid under protest) with interest @ 12% per annum (as held by this Tribunal in the case of Parle Agro) for the period from 08.11.2003 till the date of payment, within a period of sixty days from the date of receipt/ service of the copy of the order. Accordingly, both the appeals are allowed and the impugned orders in appeal are set aside.

(Pronounced on 04.10.2021).