(2023) 11 CESTAT CK 0009

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40009 Of 2023

M/S. The Indian Medical Practitioners? Co-Operative Pharmacy And Stores Ltd — APPELLANT

Vs

Commissioner Of GST And Central Excise — RESPONDENT

Date of Decision : 03-11-2023

Acts Referred:
Constitution Of India, 1950 — Article 265
Finance Act, 1994 — Section 66E(e), 73(1), 75, 78(1)

Citation : (2023) 11 CESTAT CK 0009

Hon'ble Judges : Vasa Seshagiri Rao, Member (T)

Bench : Single Bench

Advocate : N. Viswanathan, Harendra Singh Pal

Final Decision : Disposed Of

Judgement

Vasa Seshagiri Rao, Member (T)

1. M/s. Indian Medical Practitioners Co-Operative Pharmacy & Stores Limited is a Multi-State Co-Operative Society engaged in manufacturing of Ayurveda, Unani and Siddha Medicines has filed this appeal assailing the Order- in-Appeal No. 58/2022 dated 03.11.2022 passed by the Commissioner of GST and Central Excise (Appeals), Anna Salai, Chennai wherein demands of Service Tax under Reverse Charge Mechanism along with interest and imposition of equal penalty on man power recruitment and supply agency service was confirmed and regarding demand of Service Tax on GTA services was remanded to the original adjudicating authority and also setting aside the demand of Service Tax on Notice-Pay.

2.1 Brief facts of this appeal indicate that the audit of the accounts of the appellant for the period from August 2012 to June 2017 has revealed: -

i. Non-payment of Service Tax on Manpower Supply and Agency Service (MRA) under RCM,

ii. Non-payment of Service Tax on Security Services under RCM,

iii. Non-payment of Service Tax on Goods Transport Agency Service (GTA) under RCM, and,

iv. Non-payment of Service Tax on Notice-Pay collected from employee.

2.2 Consequently a Show Cause Notice No. 10/2018 (AC) dated 12.04.2018 was issued proposing to demand: -

i. Service Tax of Rs.29,92,325/- (Rupees Twenty Nine Lakhs Ninety Two Thousand Three Hundred and Twenty Five only) on Manpower Supply and Agency Service under RCM for the period from October 2012 to June 2017 under the proviso to Section 73(1) of Finance Act, 1994;

ii. Service Tax of Rs.5,06,398/- (Rupees Five Lakhs Six Thousand Three Hundred and Ninety Eight only) on Security Services under RCM for the period from October 2012 to June 2017 under the proviso to Section 73(1) of Finance Act, 1994;

iii. Service Tax of Rs.2,33,638 (Rupees Two Lakh Thirty Three Thousand Six Hundred and Thirty Eight only) on Good Transport Agency Services (GTA) under RCM for the period from June 2014 to June 2017 under the proviso to Section 73(1) of Finance Act, 1994; and,

iv. An amount of Rs.2,485/- (Rupees Two Thousand Four Hundred and Eighty Five only) as Service Tax along with applicable CESS on Notice-Pay under declared service under Section 66 E(e) of Finance Act, 1994, for the month of December 2014, under the proviso to Section 73(1) of Finance Act, 1994;

v. Interest at appropriate rates under Section 75 of the Finance Act, 1994 on the amounts demanded [as detailed in (i), (ii), (iii) and (iv) as above]. and,

vi. Imposing penalty under Section 78(1) of the Finance Act, 1994 on the amounts demanded (as detailed in [(i), (ii), (iii) and (iv) as above].

2.3 After due process of adjudication, the original adjudicating authority have confirmed the Service Tax demands raised on Manpower Recruitment and Supply Agency Services and GTA Services under Reverse Charge Mechanism. An amount of Rs.2,485/- was also confirmed as Service Tax on 'Notice-Pay' along with interest and penalties were imposed under Section 78(1) of the Finance Act, 1994 on the above confirmed Service Tax.

2.4 However, an appeal was filed to the Commissioner of GST and Central Excise (Appeals), Anna Salai, Chennai, who have confirmed the Service Tax demand in respect of Manpower Recruitment and Supply Agency Services along with interest but remanded the issue of demand of Service Tax on GTA Services and demand of Service Tax on Notice-Pay was set-aside. The appellate authority has also justified invoking the extended period.

2.5 The appellant had received Manpower Recruitment and Supply Agency

Services and also Security Services from the service providers viz., Spark the Solutions, Care Detective Security Service, Vigilant Security Service and Rhino Security & Allied Services, who are all proprietorship / partnership firms. In accordance with the relevant provisions during the impugned period, the appellant as a service recipient has to discharge Service Tax liability of :-

i. 75% on gross value from 01.07.2012 till 31.03.2015 and

ii. 100% on gross value from 01.04.2015 to 30.06.2017 of service received towards Manpower Supply and Agency Service.

2.6 The appellant had stated that they had entered into agreements with these service providers and as per the agreements service charges along with the applicable Service Tax was paid to the service providers who are registered with the Department and must have paid the Service Tax collected to the Government.

2.7 The original adjudicating authority has observed that the appellant had failed to submit

a) Any proof like challans,

b) ST3 returns filed by the service providers,

c) Any agreement signed between the service recipient and providers and

d) Any declaration received from the service providers for evidencing

i. Such payment to the exchequer

ii. Not availed any CENVAT credit

iii. Non-adjustment of the wrongly discharged liabilities during the following month or quarter while filing the statutory returns monthly or quarterly.

iv. Not claimed any refund against the wrongly discharged Service Tax to the exchequer.

3.1 The Ld. Advocate Shri N. Viswanathan representing the appellant before the Tribunal has submitted that they have availed the services in respect of Manpower Reqruitment and Supply Agency Services and these service providers are registered with the Service Tax Department and have raised bills on IMPCOPS charging Service Tax which has been paid as evidenced by few copies of sample invoices. As the service providers who are registered with the Service Tax Department are required to pay Service Tax so collected from the IMPCOPS and demanding the same tax amount which was already paid to the service providers would tantamount to double taxation and be violative of the provisions of the Finance Act, 1994 as well as Article 265 of the Constitution of India.

3.2 The appellant had relied upon CBEC Circular F. No. 178/1/2002-CE dated 07.01.2003 and also on the decisions in the cases of Nagaraja Printing Mills Vs. Commissioner of Central Excise [2010 (19) STR 828 (Tri. Mad.)], Elkos Pens Ltd.

Vs. Commissioner of Central Excise [2019 (24) GSTL 652], Ind Sil Electro Smelts Ltd. Vs. Commissioner of Central Excise [2018 (17) GSTL 434] and the decision of the Hon'ble Madras High Court in the case of D.Y. Beathel Enterprises Vs. STO [Data Cell] in W.P. No. 2127 of 2021.

3.3 The Ld. Counsel has argued that the demands have been confirmed by invoking the extended period as the Show Cause Notice issued which was 12.04.2018 covered the period from October 2012 to June 2017. Extended period of time can be invoked only when the special ingredients are available and in their absence, larger period is not be invokable. In the appellant's case, the applicable Service Tax has already been paid to the service providers and in view of such a factual position the allegation that the appellant has suppressed the receipt of service with an intention to evade payment of Service Tax cannot be justified. The demand has been made under Reverse Charge Mechanism which cannot be an acceptable ground for invoking the extended period. It is submitted that the impugned order is in direct conflict with the instructions issued by CBIC Circular No. 1053/02/2017-CE dated 10.03.2017, wherein the Board after referring to the judgment of the Apex Court in the case of Cosmic Dues & Chemical Vs. Collector of Central Excise, Mumbai has categorically recorded that extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice along with evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period. It is submitted that the Revenue could not find any contumacious conduct or any fraud with an intention to evade payment of tax on the part of the appellant to justify invocation of larger time period.

3.4 The Ld. Counsel has also argued on revenue neutrality and relied on the judicial pronouncements in the following cases:-

i. Asmitha Micro fin Ltd. Vs. Commissioner of Service Tax, Hyderabad [2020 (33) GSTL 250 (Tri. Hyd.)].

ii. Hyundai Motors Ld. Vs. Commissioner of Service Tax, LTU, Chennai [2019 (29) GSTL 452 (Tri. Chennai)].

iii. BCCI Vs. Commissioner of Service Tax, Mumbai [2019 (29) GSTL 304 (Tri. Mum.)]

4. The Ld. Authorized Representative Shri Harendra Singh Pal representing the Department has reiterated the findings of the lower adjudicating authority. He has argued that in respect of Manpower Recruitment and Supply Agency Services and Security Services, the service receiver is required to pay 75% or 100% of Service Tax under Reverse Charge Mechanism which the appellant has failed to do. As there is clear contravention of the law, the demands raised are justified.

5. Heard both sides and have carefully considered the submissions and evidences on record.

6. The following issues arise in this appeal for decision:-

i. Whether confirmation of demands of Service Tax for receipt of Manpower Recruitment and Supply Agency Service, Security Service and Goods Transport Agency Service on Reverse Charge Mechanism basis against the appellant is justified?

ii. Whether invocation of extended period in terms of proviso to Section 73(1) of the Finance Act, 1994 is maintainable or not in the facts of this case?

7.1.1 The facts of this case indicate that the appellants have reportedly paid the service charges along with the tax applicable thereon to the service providers. As evidence, the Ld. Advocate has produced copies of invoices raised by the service providers.

7.1.2 The lower appellate authority has confirmed the demand of Service Tax in respect of Manpower Recruitment and Supply Agency Service and Security Service, but, regarding the demand of Service Tax on Goods and Transport Agency Service was remanded to the original adjudicating authority as the appellant was found to have submitted details relating to freight charges paid which were below Rs.750/- and so exempted from payment of Service Tax. The appellant has not furnished any proof by way of summary statement indicating payments made by them towards invoices raised in respect of Manpower Recruitment and Supply Agency Service and Security Service. The lower adjudicating authority also has observed that the appellant has failed to submit Challans, ST-3 Returns of service providers as an evidence that the Service Tax paid was remitted to the Government account or agreement signed between the appellant and the service providers or any declaration or certificate from the service providers evidencing payment of Service Tax collected to the Government account.

7.1.3 The Ld. Advocate in his submissions has raised a legal plea that the appellant has paid the service charges along with Service Tax and demanding again the Service Tax for the receipt of services would amount to double taxation which is against the provisions of a Service Tax law. To this effect, he has relied on the decisions rendered in the cases of: -

i. ELKOS Pens Limited Vs. Commissioner of Service Tax, Kolkata – I [2019 (24) GSTL 652 (Tri. – Kolkata)] wherein it was held that the appellant was not liable to pay Service Tax when service provider has already collected Service Tax and deposited the same with the Government.

ii. Transpek Silox Industries Pvt. Ltd. Vs. Commissioner of Central Excise, Vadodara – I [2018 (17) GSTL 434 (Tri. – Ahmd.)] wherein the Tribunal Ahmedabad held:-

“6. I find that as per Notification No. 30/2012-S.T., dated 20-6-2012 there is no dispute that the appellant was required to pay 75% of the Service Tax on ? Manpower Recruitment Agency Service? availed. For the initial period, on pointing out by the Revenue the appellant immediately paid Service Tax. In that circumstance, the said demand is not sustainable against the appellant. For the another invoice on which the appellant did not pay Service Tax but the service provider paid the 100% of Service Tax. In that circumstance, the appellant is not required to pay 75% of the Service Tax in terms of Notification No. 30/2012-S.T., dated 20-6-2012. I also observed that if the payment has made by the appellant, the same shall become double taxation against the appellant which is not permissible in the law. In that circumstance, the demand of Service Tax in terms of Notification No. 30/2012-S.T., dated 20-6-2012 is not sustainable against the appellant.”

iii. Nagaraja Printing Mills Vs. Commissioner of Central Excise, Salem [2010 (19) STR 828 (Tri. – Chennai)], the Tribunal, it was held as follows: -

“The assessees herein contend that the entire Service tax amount of Rs. 3,052/- confirmed against them on the ground that they were the ?consignee? and hence liable to pay Service tax on GTA services, has already been paid by the GTA to whom the assessees made payment along with freight. This submission is borne out by documentary evidence. The lower appellate authority before whom this plea was raised has not controverted the submission of payment of tax by the GTA. In the circumstances, I agree with the assessees that the present demand against them cannot be sustained, as it would amount to double payment, set aside the impugned order and allow the appeal.”

7.1.4 The appellant is all along arguing that Service Tax payments were made to the service providers along with the service charges which is evident from the copies of the invoices produced which are in the appeal. These invoices clearly indicate that these service providers were registered with the Service Tax Department. It should have been possible for the appellant to call for copies of ST-3 returns filed or any certificate or declaration from the service providers to the effect that the Service Tax collected has been paid to the Government account. As the payment of the Service Tax liability in respect of services received in RCM basis rests on the appellant, the minimum that would have been done after issuance of the Show Cause Notice is to get this evidence from the service providers that the tax collected has been paid to the credit of the Government account. Otherwise, it is not possible to conclude whether there is double taxation or not. In view of the above discussion, I am of the considered view that the appellant is required to produce necessary evidence to the Departmental authorities regarding payment of Service Tax collected from the appellant by the service providers to Government account. So, it becomes necessary to remand the issue of demand of Service Tax on Manpower Recruitment and Supply Agency Service and Security Service to the original adjudicating authority for carrying out verification of copies of ST-3 returns filed by the service providers / documents or any certificate or declaration to pass a speaking order in strict observance of principles of natural justice. The appellant is also directed to produce any of these evidences after collecting from the service providers to ensure that the Service Tax collected was in fact paid to the Government account.

7.2.1 Regarding the second issue of invocation of extended period, the Show Cause Notice No. 10/2018 (AC) dated 12.04.2018 was issued covering the period from October 2012 to June 2017 in terms of proviso to Section 73(1) of Finance Act, 1994.

7.2.2 I find that the appellant has produced many copies of the invoices raised by the service providers of Manpower Recruitment and Supply Agency Services and also Security Services. It is no more res integra that extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that such ingredients are present in a given case is on the Revenue. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period. As all along, the appellant is arguing vehemently that applicable Service Tax was paid to the service providers on the basis of invoices raised by them which is also revealed by the sample copies of invoices produced, intent to evade, cannot be attributed to the conduct of the appellant and as such, I hold invoking extended period is not justified in this case.

8. For these reasons, as discussed above, I hold that the demand of Service Tax for extended period is not maintainable. Even for normal period, the issue of demand of Service Tax on Manpower Recruitment and Supply Agency Service, Security Service and Goods and Transport Agency Service is remanded to the original adjudicating authority to carry out verification of evidences the appellant provides whether the Service Tax paid by the service providers have been deposited to the Government account or not and pass orders in compliance to the strict principles of natural justice.

9. This appeal is disposed of on above terms.

