
(2021) 05 CESTAT CK 0029

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 338 Of 2012

Nayara Energy Limited

APPELLANT

Vs

C.C.E. And S.T.--Rajkot

RESPONDENT

Date of Decision : 24-05-2021

Acts Referred:

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

Finance Act, 1994 — Section 66A, 68, 69, 70, 73(1), 73(1)(a), 73(3), 75, 76, 77, 78

Citation : (2021) 05 CESTAT CK 0029

Hon'ble Judges : Ramesh Nair, J;Raju, Technical Member

Bench : Division Bench

Advocate : Vipin Jain, Vishal Agrawal, Dimple Gohil, Alifiya, S.N.Gohil

Final Decision : Allowed

Judgement

1. The brief facts of the case are that the appellant raised finance through â?? External Commercial Borrowingsâ?? (ECB) & â??Foreign Currency

Convertible Bondsâ?? (FCCB) for which they have received services of various service provider viz. Merchant Bankers, Lead Managers, Advisors,

Financial Advisors, Principal Agents, Legal Advisors, Management Consultants, Under writers,etc. who are based outside India and have charged

fees for their services in Foreign Currency for raising funds through ECB & FCCB. Since these service provider were located outside India, as per

Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 the appellant being recipient of the services were liable to pay service tax on such services under the

category of Banking and Financial Services.

1.1 During the investigation the appellant were issued a letter dated 31.10.07 to inform as to whether they have obtained service tax registration as

contemplated under Section 69 of the Finance Act, 1994 and whether they have

paid service tax at the rate specified under Section 66A of the Finance Act, 1994 and filed the prescribed return in the stipulated time period as prescribed under Section 70 of the Finance Act, 1994. For the above activities carried out they were also asked to furnish various documents. In reply to the said letter, the appellant vide letter dated 26.12.07 informed that they had raised the finance through FCCB & ECB and had discharged their service tax liability to the tune of Rs.1,56,85,943/- (including interest of Rs.19,34,555) on 24.11.07 for the transaction made with ICICI Bank Ltd., Bahrain. The appellant further stated that as regard the service of Lead Manager related to under writing Commission they are not liable to pay service tax as the said service was rendered prior to 16.6.05. The appellant further vide letter dated 3rd July, 2008 contended that they have paid service tax and interest of Rs.1,56,85,943 on 24.11.07 on the payment made towards front end fees and processing fees except the same were payable by them and it pertain to foreign currency made to the service provider on 28.9.06 and 11.08.07 and not pertaining to the period prior to 18.4.06/16.06.05. Thereafter the Show Cause Notice dated 28.01.10 was issued to the appellant wherein, it was proposed to;

- i) Recover the service tax of Rs.2,86,34,615/- under Section 73(1)(a) of Finance Act, 1994 read with section 68 ibid and to appropriate and adjust the amount of Rs.1,37,51,388/- paid by the Noticee on 24.11.07 against the said service tax liability;
- ii) Charge and recover interest at the appropriate rates under Section 75 of the said Act and an amount of Rs.19,34,555/- paid by the Noticee was also proposed to be appropriated against their interest liability.
- iii) Impose penalty under Section 76 of the said Act;
- iv) Impose penalty under Section 77 of the said Act for obtaining service tax registration late and late filing of ST-3 returns; and
- v) Impose penalty under Section 78 of the said Act for suppressing the facts by not disclosing the value of taxable service.

1.2 The said show cause notice was adjudicated by the Commissioner, Customs and Central Excise, Rajkot vide impugned order dated 23.03.10

whereby, the following order was passed:

I. I drop the demand of Service tax amounting to Rs. 1,48,83,228/-(Rs.One crore forty eight lakhs eighty three thousand two hundred two

eight only);

II. I confirm the demand of service tax amounting to Rs.1,37,51,388/- (Rs. One Crore thirty seven lakhs fifty one thousand three hundred

eighty eight only) under proviso to section 73(1) of Finance Act, 1994 made against M/s. ESSAR OIL LTD., post box No: 24, Head P.O.

Khambhalia, Dist:Jamnagar 361 305 and since an same has been paid by the noticee vide challan dated: 24.11.2007 I order for its

appropriation;

III. I order for levy of interest under Section 75 of Finance Act, 1994 on the amount of service tax, as confirmed at (II) above above named

M/s. ESSAR OIL LTD., post box No:24, Head P.O. Khambhalia, Dist: Jamnagar 361 305 and since an amount of Rs.19,34,555/- has

already been paid by the noticee vide challan dated:24.11.2007, I order for its appropriation.

IV. I impose penalty of Rs.1,37,51,388/- (Rs. One Crore thirty seven lakhs fifty one thousand three hundred eighty eight only) on the

noticee, M/s. ESSAR OIL LTD., post box No:24, Head P.O. Khambhalia, Dist: Jamnagar 361 305, under Section 78 of Finance Act, 1994.

However, as provided in proviso to section 78 ibid, if the noticee pays the amount of service tax confirmed along with interest thereon,

within 30 days from the communication of this order, the amount of penalty shall be 25% of the penalty imposed above. The benefit of

reduced penalty shall be available only if the amount of penalty so determined has also been paid within 30 days from the receipt of this

order.

V. I impose penalty on the noticee M/s. ESSAR OIL LTD., post box No:24, Head P.O. Khambhalia, Dist:Jamnagar 361 305, under Section

76 of the Finance Act, 1994 and accordingly order that the noticee shall pay in addition to service tax and interest on that tax amount in

accordance with the provision of Section 75 ibid, as ordered at SL.No.(II) and (III) above, penalty at the rate of Rs.200 or at the rate of 2%,

of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of outstanding

amount of service tax. However, the total amount of penalty under this Section shall not exceed the service tax due and confirmed.

VI. I impose penalty of Rs.1000 (Rs. One Thousand Only), on the noticee, M/s. ESSAR OIL LTD., post box No:24, Head P.O. Khambhalia,

Dist: Jamnagar 361 305, under Section 77 of Finance Act, 1994 upon the noticee.

The Show Cause Notice No.V.ST/AR-JMN/COMMR/20-2010 dated 28.01.2010 is decided in above terms.

1.3 Being aggrieved by the said impugned order, the appellant filed the present appeal.

2. Shri Vipin Jain, Mrs. Dimple Gohil and Ms. Alifiya Advocates appeared on behalf of the Appellant. Shri Vipin Jain mainly submits that the Show

Cause Notice was issued invoking the extended period whereas, neither there is any mala fide intention nor any suppression of fact on the part of the

appellant has been proved. Therefore, extended period of demand could not have been invoked. He submits that initially for service in question the

ICICI Bank, India has discharged the service tax and debited to the appellant. Subsequently, when they realized that service tax was payable by the

appellant the ICICI Bank has credited the amount of Service Tax to the account of the appellant. Thereafter, this process could not be communicated

to the Indirect Tax Department of the appellant therefore, the payment of Service Tax was delayed and the appellant has made good by paying the

interest. He submits that only due to delay in payment extended period could not have been invoked. He further submits that since there is no mala

fide intention on the part of the appellant, penalties imposed in the impugned order is not correct and legal.

2.1 He vehemently submitted that the service tax payment in the present case is on reverse charge mechanism, had the appellant paid service tax on

time they were eligible for Cenvat Credit therefore, the entire exercise was revenue neutral. Post hearing he also submitted some documents showing

that during the relevant period they were paying huge amount of duty from PLA therefore, the service tax which was demanded was available as a

Cenvat Credit and to that extent the payment in Cash from PLA in respect of excise duty could have reduced. Thus, this is a clear case of revenue

neutrality; for this reason also neither the extended period could have been invoked nor penalty can be imposed. He further submits that since the

appellant had discharged service tax along with interest before issuance of Show Cause Notice their case is squarely covered under Section 73(3) of

Finance Act, 1994. In such case no show cause notice was required to be issued. In support of his submission he placed reliance on the following

judgments:-

- JAI RESEARCH FOUNDATION v/S. CCE, 2019 (25) GSTL 473 (T);
- CST v/S. RELIANCE COMMUNICATION LTD.; 2019 (22) GSTL 203 (T);
- EMI TRANSMISSION LTD. v/S. CCE, 2019 (20) GSTL 259;
- RELIANCE SECURITIES LTD. v/S. CST, 2019 920) GSTL 265 (T);
- ESSAR STEEL LTD. v/S. CCE, 2008-TIOL-2048-CESTAT-AHM.
- CCE v/S. JSW STEELS LTD. 2017 (6) GSTL 397 (MAD.),
- PUSHPAM PHARMACEUTICALS COMPANY v/S. CCE, 1995 (78) ELT 401 (SC)
- ITW SIGNODE INDIA LTD. v/S. CCE, 2003 (158) ELT 403 (SC)
- CCE v/S. TEJAS AGENCY, 2014 (34) ELT 803 (GUJ.)

2.2 On query of the bench that whether the appellant is contesting the taxability of the service, he answered in affirmative. In this regard he submits

that the service was provided by the ICICI Bank-Bahrain branch, however, they have their head office in India. Only in that case where the service

provider from overseas does not have office in India, the service recipient is required to pay service tax on reverse charge mechanism not otherwise.

3. On the other hand Shri S.N.Gohil, learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding

given in the impugned order. He also placed reliance on the following judgments:-

- 2019 (365) ELT 22 (GUJ.) LONSENKIRI CHEMICALS INDUSTRIES v/S. CCE, VADODARA-I
- 2015-TIOL-836-CESTAT-MUM-AUTOMOTIVE STAMPINGS & ASSEMBLIES LTD. v/S. CCE, PUNE-I
- 2018-TIOL-1069-CESTAT-DEL.-WORLD PHONE INTERNET SERVICES P LTD. v/S. CST, DELHI
- 2018 (362) ELT 382 (TRI-MUM.)-MAHINDRA & MAHINDRA LTD. v/S. CCE, MUMBAI-V
- 2019 (29) GSTL 304 (TRI-MUM)- BOARD OF CONTROL FOR CRICKET IN INDIA v/S. CST, MUMBAI-II
- 2015 (324) ELT 656 (SC)- STAR INDUSTRIES v/S. CC(IMPORTS), RAIGAD.

4. We have carefully considered the submissions made by both the sides and perused the record. As regard the issue of taxability of service in

question, we find that the appellant has neither raised this issue seriously before the adjudicating authority nor even in the appeal memo filed before us.

It is also observed that the appellant have vehemently argued that their case is covered under Section 73(3) Finance Act, 1994. Section 73(3) applies

only in such case where the assessee undisputedly accepting the liability discharged the service tax and interest before issuance of Show Cause

Notice subject to some other conditions as laid down in Section 73(3) therefore, since the appellant having not contested the issue of taxability of

service at any point of time before the adjudicating authority as well as in this appeal, we hold that that the service received by the appellant is liable to

service tax.

4.1 As regard the limitation and imposition of penalty, we find that the appellant had raised an important point of revenue neutrality even before the

adjudicating authority. The adjudicating authority on the point of revenue neutrality given the following finding:

â??22.1 I find that noticee has also argued that the case is completely revenue neutral in as much as they are entitled to cenvat credit of the

service tax and hence show cause notice should not have been issued to them.

In this regard, I find that it is a fact that noticee had not paid the service tax at the relevant time. Further if the service tax is not paid then

there is a liability to pay interest which the noticee has paid. Therefore, it cannot be said that situation is revenue neutral. The issue

eligibility of cenvat credit is not before me for adjudication in this case. Therefore, I am not deliberating upon that. However, even if, for

the sake of argument it is assumed that the cenvat credit is available as input services then also it cannot be said that no service tax is

payable on the services received by the noticee under section 66A of the Finance Act, 1994.

I find that noticee has placed reliance on the judgment of the apex court in the case of Commissioner of Central Excise, pune Vs. CocaCola

India Private Limited reported at 2007 (213) ELT 490 (SC). Upon perusal of the said judgment I find that in backdrop of the fact regarding

dispute of classification of goods it has been held that classification of non-

alcoholic beverages bases/concentrates manufactured which are supplied to bottlers, who in turn use the same as raw material in manufacture of beverages on which Central Excise duty is paid.

Therefore, it has been held that situation is revenue neutral. I find that said case is not applicable in the present case as in the instant case

there is a element of intention to evade payment of Service Tax therefore benefit of revenue neutrality on account of credit is not available

where there is fraud, collision or wilfull misstatement or suppression of facts. I find that my views are supported by the decision of the

Tribunal in the case of COMMISSIONER OF CENTRAL EXCISE, VISAKHAPATNAM V/ S. DECCAN VANNER PRIVATE LIMITED reported

at 2008 (223) ELT 263 (Tri.BANG.) wherein it has been held that revenue neutrality is not available when short payment is due to fraud,

collision or wilfull misstatement or suppression of facts. Since, the facts of the present and the relied upon case law are similar the ration

thereof is squarely applicable.

Apart from above I also find that dispute regarding imposition of penalty in the case of revenue neutrality has been put to rest by the Apex

Court in their judgment in the case of PUNJAB TRACTORS LIMITED V/S. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH

reported at 2005 (181) ELT 380 (SC) wherein it has been held that in the case of revenue neutrality if there is violation of rules then penalty

is imposable. I find that the ration of the said judgment is squarely applicable to the present case as there is violation of the provision of the

Finance Act, 1994 and rules made thereunder.â??

4.2 From the above finding, we observed that firstly the adjudicating authority has not verified any fact related to revenue neutrality. Secondly, he has

relied upon certain judgments of DECCAN VANNER PVT. LTD.(supra) and upon PUNJAB TRACTORS LIMITED. However, the appellant have

submitted certain documents before us showing that they were eligible for Cenvat Credit which they have already availed in respect of Service tax

paid by them and during the relevant period they have discharged the excise duty of a substantial amount from their PLA account. As regard the issue

of revenue neutrality learned counsel has relied upon various judgments which have been passed much after the judgments relied upon by the

adjudicating authority on the point of revenue neutrality.

4.3 Therefore, in our considered view the limitation as well as imposition of penalty needs to be reconsidered on the point of the revenue neutrality

particularly on the document submitted by the appellant before us along with the various judgments cited before us.

5. Therefore, We allow the appeal by way of remand to the adjudicating authority.

(Pronounced in the open court on 24.05.2021)