

Complete text of the judgment on the aforesaid issue argued by APRA & Associates LLP is reproduced below: -

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 59189 Of 2013

[Arising out of Order-in-Appeal No.111/ST/APPL/CHD-II/2013 dated 01.05.2013

passed by the Commissioner of Central Excise (Appeals), Chandigarh-II]

Dr.Jagjeet Singh Parwana

514-SSST Nagar, Rajpura Road, Patiala- Punjab... Appellant (s)

Vs

The Commissioner of Central Excise And Service Tax,

**Chandigarh-II Plot No.19, Central Revenue Building, Sector-17C, Chandigarh-
160017.. Respondent (s)**

APPEARANCE:

Shri Atul Gupta, CA for the Appellant

Shri Raman Mittal, Authorised Representative for the Respondent

CORAM:

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60243/2023

Date of Hearing: 01.08.2023

Date of Decision: 07.08.2023

Per: P. ANJANI KUMAR

The appellant, Shri Jagjeet Singh Parwana, was engaged in providing Marketing Service/ Distributorship and promotion of health care products of M/s Daehsan Trading India Pvt. Limited and were also working as distributor of M/s DTI; the work of the appellant included canvassing for the merits of becoming an agent/ distributor of M/s DTI and to enroll new agents/ distributors. It appeared to the Department that the services rendered by the appellant to the multi-level marketing company attract service tax. Accordingly, a show-cause notice dated 13th December, 2011 was issued to the appellant; Deputy Commissioner vide order dated 13th June, 2012 confirmed the service tax of Rs.6,29,315/- along with interest and penalties; on an appeal filed by the appellant, Commissioner (Appeals) vide impugned order gave relief to the appellant from the service tax on the amounts received under the Head “Commission out of India” and sustained the rest of the demand. Hence, this appeal.

2. Shri Atul Gupta, learned Consultant, appearing on behalf of the appellant, submits that the demand was raised on amounts received by the appellant like commission received in the multi-level marketing, commission received as proprietor of Vision Network, out of India commission, incentives and commission in respect of Omega Global. At the outset, the learned consultant submits that the show-cause notice is flawed inasmuch as though the demand was raised under the Head “Business Auxiliary Service”, no particular sub-clause, under Section 65(19) of the Finance Act, 1994, was specified. He submits that in the following cases, the Tribunal has set aside the demands on this count alone:

- *Kalpataru Power Transmission Ltd.- 2023 (69) GSTL 54 (Tri. Ahmedabad).*
- *Forward Resources Pvt. Limited- 2023 (69) GSTL 76 (Tri. Ahmd.).*
- *Swapnil Asnodkar- 2018 (10) GSTL 479 (Tri. Mumbai).*
- *Balaji Enterprises- 2020 (33) GSTL 97 (Tri. Del.).*

3. Learned Consultant also submits that the issue is time barred. The demand pertains to the year 2006-07 to 2010-11 and show cause notice has been issued on

13th December, 2011; the argument of the Department is that the appellants have not taken registration, have not filed ST-3 Returns and have not paid applicable duty; however, these omissions in themselves do not constitute suppression of fact with intent to evade payment of tax so as to attract invocation of extended period and equal penalty. He relies on the following:

- *Charanjeet Singh Khanuja- 2016 (41) STR 213 (Tri. Del.).*
- *Chanda Bohara- 2018 (1) TMI 1132- CESTAT New Delhi.*
- *Prabhjeet Kaur- 2018 (9) TMI 1146-CESTAT Chandigarh- 2018 (9) TMI 1146.*
- *Shri Heera Lal- 2019 (4) TMI 1562-CESTAT New Delhi.*
- *Bajarang Lal- 2019 (5) TMI 231-CESTAT New Delhi.*
- *Shri Ramdiya and others- 2020 (2) TMI 191-CESTAT Chandigarh*
- *Shri Bhairu Dan Karwa and others- 2016 (10) TMI 1295-CESTAT New Delhi.*

4. Learned Consultant further submits that it is incorrect to tax the amounts received towards sharing of international profit as held in Charanjeet Singh Khanuja (supra); incentives received cannot be taxed as held in Bajaj Allianz Life Insurance Co. Ltd.- 2015 (38) STR 1159 (Tri. Mumbai) and Asveen Air Travels (P) Ltd.- 2022 (64) GSTL 551 (Tri. Chennai); learned Commissioner (Appeals), though has given relief on account of “Out of India Commission” for the year 2010-11, did not give relief for previous years i.e. 2007-2010, by oversight. Learned Consultant fairly concedes that as held in Charanjeet Singh Khanuja (supra), the Commission earned in multilevel marketing, and other incentives are taxable; however, looking into the fact that the impugned order is liable to be set aside for demanding tax without specifying the service and on limitation, these issues do not require any consideration. He submits that if the argument on limitation is accepted, the demand needs to be limited to the period 2010-11 alone; in that case too no service tax would be payable by the appellant as the total taxable value for 2010-11 falls within the exemption limit prescribed for Small-Scale Units.

5. Shri Raman Mittal, Learned Authorized Representative for the Department reiterates the findings of the OIA and relies upon Charanjeet Singh Khanuja (supra); C.M Sapkal- 2016 (43) STR 106 (Tri. Mumbai) and Krishan Murari Gupta- 2016 (44) STR 682 (Tri. Del.) for the merits of the case. He relies on Dharmपाल Satyapal- 2005 (183) ELT 241 (SC) and Vidarbha Cricket Association- 2015 (38) STR 99 for limitation.

6. Heard both sides and perused the records of the case. The learned Consultant for the appellant argues that the show-cause notice is non-specific and hence, is not

maintainable. We find that the Tribunal in the case of Kalpataru Power Transmission Ltd. (supra) held that:

“ 5.3. The demand for Service Tax under the category of “Business Auxiliary Services” has been made on the ground that Appellant employed sales commission agent, marketing agent, technical advisors for liaising activity with various customers and agencies, advisory or consultancy for settlement of dispute in connection with promotion of their business interest abroad. The revenue alleges that service tax ought to be paid on such expenses under the Business Auxiliary Service under reverse charge mechanism. However, we observe that definition of ‘Business Auxiliary Services’ contained numerous sub-heads and it was necessary for Revenue to point out under which head of the said definition the demand was raised. It is important to classify the activity under the specific sub-clause before confirming the demand. We find that the same has not been done in the present matter. In the absence of the specification of the exact sub-clause under which the demand was raised the said demand cannot be sustained. In this regard, the judgment relied upon by the appellant in the case of United Telecoms Ltd. v. Commissioner of Service Tax - 2011 (22) S.T.R. 571 (supra), Sharma Travels - 2017 (52) S.T.R. 272 (supra) and Balaji Enterprises v. C.Cx. & S.T. - 2020 (33) G.S.T.L. 97 (Tri. - Del.) (supra) support their case. The said decisions are squarely applicable to the facts of the present case and hence we find that the demand for service tax cannot be sustained on this ground alone.

5.4 Without prejudice, we also find that provisions of Section 66A(1) of the Finance Act, 1994 reproduced below provide as under :

“Charge of service tax on services 66A. received from outside India. —

(1) Where any service specified in clause (105) of Section 65 is,

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be

taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply :

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

Where a person is carrying on a business (2) through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.”

Above Section 66A(2) and its Explanation-I make it clear and to fix service tax liability on recipient of services under reverse charge mechanism that both the permanent establishments in India and abroad of a business person are to be treated as separate persons. The above clarification made in Section 66A is only for making an identification to determine whether a service is provided and consumed in India or abroad. A comprehensive reading of Section 66A of the Finance Act, 1994, make it clear that a person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country and such establishment situated abroad as a ‘separate person’, will be understood to have been prescribed only to determine the provision of service whether in India or out of India. In the present matter we find that department has not disputed the facts that the payment to overseas consultant/agents/service providers was made from the overseas

projects site branch/ office of the Appellant and said Foreign Service providers have charged local VAT/ GST/ Service tax as applicable in the respective foreign countries in invoices issued by them to foreign site/ project office/ Branch office of Appellant. The said facts clearly established that the services have been provided by the foreign agents to the foreign site office/branch office of Appellant and thus, the service cannot be said to be received in India when the same is provided outside India, used outside India and paid outside India. Therefore, demand of service tax in the impugned matter legally not correct on this ground also.

7. We find that the Tribunal in the case of Charanjeet Singh Khanuja (supra) has held that:

“16. Another plea raised in these appeals is regarding limitation. It is the contention of the assesseees that there was absolutely no suppression or mis-statement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to evade payment of Service tax. The Department’s contention, on the other hand, is that the assesseees neither obtained service tax registration nor did they declare their activities to the jurisdictional Service tax authorities nor did they file ST-3 Return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assesseees did not apply for Service Tax Registration or did not file ST-3 Returns or did not declare their activities to the jurisdictional central excise authorities, it cannot be inferred that this was a wilful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals) after analyzing the activities of the assesseees had taken the view that the same is not covered by the definition of “Business Auxiliary Service” under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994. When on the issue involved in this group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assesseees was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of Continental Foundation Joint Venture v. CCE, Chandigarh reported in 2007 (216) E.L.T. 177

(S.C.) when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11A(1) cannot be invoked and in our view, the ratio of this judgement of the Apex Court is applicable to the facts of these cases. Therefore, the longer limitation period of 5 years under proviso to Section 73(1) of the Finance Act, 1994 would not be invokable and duty can be demanded only for normal limitation period of one year from the relevant date.

8. In view of the above, we find that the impugned order cannot be sustained as there is no specific allegation in the show-cause notice on the category of the 'Business Auxiliary Service'. We find also that the impugned order is not sustainable on limitation. Even though the demand is restricted to normal period, we find that the total value of taxable services is within the small-scale exemption. Either way, the impugned order is not sustainable.

9. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced on 07/08/2023)
