

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. 1593 Of 2011

[Arising out of OIA No. 196/BK/GGN/2011 dated 23.06.2011 passed by the

Commissioner (Appeals) of Central Excise, Delhi-III]

Sarvan Kumar S/o Inder Singh

185, Shivaji Gali, D. N. College Road, Hissar...

Appellant (s)

Vs

CCE-Rohtak SCO. No. 6, Sector 1, Rohtak...

Respondent (s)

APPEARANCE:

Shri Atul Gupta, Chartered Accountant for the Appellant

Shri Ravinder Jangu, Departmental Representative for the Respondent

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

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

ORDER No. A/60512/2023

Date of Hearing: 17.10.2023

Date of Decision: 17.10.2023

Per : S. S. GARG

The present appeal is directed against the impugned order dated 23.06.2011 passed by the Commissioner (Appeals) of Central Excise, Delhi-III whereby the Ld. Commissioner (Appeals) has rejected the appeal of the appellant and has confirmed the demand of service tax of Rs. 1,53,979/- alongwith interest under Section 75 of the Finance Act, 1994. The Ld. Commissioner (Appeals) has also imposed equal penalty under Section 76 and 78 of the Finance Act, 1994 and also penalty of Rs. 1,000/- under Section 77 of the Finance Act, 1994.

2. Briefly the facts of the present case are that the appellant was engaged in maintenance & handling of corporation owned and contractor operated (COCO) retail outlet site of M/s Indo British Petroleum Ltd., Panipat (merged with IOCL in May, 2007) at Arya Nagar, Hisar from where petroleum products, mainly motor spirit and High-Speed Diesel are sold. For the said arrangement, an Agreement dated 01.09.2005 was entered between IBP Co. Ltd. and the appellant.

- Revenue has entertained a view that the appellant is evading service tax which they are liable to pay under Business Auxiliary Service as commission agent as cited in Explanation (a) to clause (vii) of Business Auxiliary Service defined under Section 65(19) of the Act. Department invoked the extended period of limitation alleging suppression on the part of the appellant.
- On these allegation, a show cause notice dated 12.02.2009 was issued to the appellant which was strongly contested by the Respondent by filing the appeal.
- After following due process, the original authority confirmed the demand as proposed in the show cause notice.
- Aggrieved by the said order, the appellant filed appeal before the Ld. Commissioner (Appeals) who upheld the same by dismissing the appeal of the appellant.
- Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Ld. Consultant appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and law. He further submits that the order-in-original as well as order-in-appeal both have been passed in mechanical manner without appreciation of complete facts and there are apparent factual mistakes in both the orders. He further submitted that the appellant has entered into an agreement dated 01.09.2005 with M/s IBP Co. Ltd and prior to that date they had not rendered service to the M/s IBP Co. Ltd. and this fact has been confirmed by PIO & Dy General Manager (E), Delhi State Office of IOCL vide its reply dated 07.09.2010 pursuant to RTI filed by the Appellant. He further submitted that the appellant has also filed a copy of ITR for the Financial Year 2003-04 & 2004-05 which shows that there was no income of the Appellant from M/s IBP Co. Ltd. in these years.

- Ld. Consultant further submitted that the appellant is eligible for SSI Exemption for the period from September 2005 to march 2007 because there charges are less than 4.00 Lacs in a Financial Year and as per the SSI Exemption provided under Notification No. 06/2005 S.T. dated 01.03.2005, the appellant are not liable to pay any tax for the said period and this fact is fortified from the reply received in pursuance of the RTI Application and confirmed by IOCL. He further submits that Revenue has denied the SSI Exemption on the ground that the appellant is selling the branded product of M/s IOCL. To rebut this argument, the Ld. Consultant cited the decision of the Tribunal in the case of Commissioner of Central Excise, Chandigarh v. Loan Zone, cited in 2015 (39) S.T.R. 329 (Tri. - Del.) (Para 2 & 4) wherein identical facts were involved and it was held that when service is not provided to independent persons but to service recipient who is itself brand name owner, SSI exemption is allowed.

- Ld. Consultant also submits that the impugned services are not covered under Business Auxiliary Services and the same are covered by Business Support Service (inserted w.e.f. 01.05.2006) as held by the following cases:-

- Fifth Avenue Sourcing Pvt. Ltd. v. Commissioner of C. Ex. & S.T., Chennai, reported in 2023 (73) G.S.T.L. 93 (Tri. - Chennai)
- Shoppers Stop Ltd. v. Commissioner of Service Tax, Mumbai - II, cited in 2018 (8) G.S.T.L. 405 (Tri. - Mumbai)

He further submits that during the period, Business Auxiliary Service was taxable under Section 65(105) (zzb) which provides for "to a client, by a commercial concern

in relation to business auxiliary service". The words "commercial concern" was substituted by any person by the Finance Act, 2006 w.e.f. 01.05.2006 and hence, prior to 01.05.2006, no Service tax liability can be demanded under Business Auxiliary Service from the Appellant who is an individual and not a commercial concern. For this submission, he relied upon the following decisions -

- C.S.T., New Delhi v. Kamal Lalwani, cited in 2017 (49) S.T.R. 552 (Tri. - Del.)
 - Pratap Singh Jyala v. Commissioner of C. Ex. & S.T., Meerut - II, reported in 2015 (40) S.T.R. 333 (Tri. - Del.)
 - C.S.T., New Delhi v. Jitender Lalwani, cited in 2017 (51) S.T.R. 312 (Tri. Del.)
 - Circular No. 62/11/2003-S.T., dated 21.08.2003
- Ld. Consultant further submitted that the revenue has wrongly invoked the extended period of limitation by alleging that the appellant did not pay tax, nor got service tax registration and did not file any Service tax returns. He further submitted that mere non- payment of tax or non-filing of Service tax returns do not amount to 'suppression' as held in the following cases:-
 - Punjab Technical University v. Commr. of C. Ex. & S.T., Ludhiana, reported in 2016 (42) S.T.R. 474 (Tri. - Del.)
 - K.T. Murukan v. Commissioner (Appeals - I), C. Ex., Cus, & S.T., Cochin, reported in 2017 (5) G.S.T.L. 248 (Ker.)
 - Commissioner of Service Tax, Bangalore I v. Karnataka Udyog Mitra, reported in 2020 (35) G.S.T.L. 382 (Kar.)

He further submits that the charges received from M/s IBP Co. Ltd are duly reflected in ITR filed by the appellant which shows that there was no intention to evade the payment of service tax.

- Ld. Consultant further submits that the penalties under Section 76 and 77 are mutually exclusive and cannot be imposed simultaneously as held in the case of Commissioner of Central Excise vs. First Flight Courier Ltd. 2011 (22) STR 622 (P &H).
- Besides this, the Ld. Consultant also pointed out that the service tax has been wrongly computed in the present case and further the impugned order-in-appeal as well as order-in-original has not discussed many submissions made by the appellant and passed the orders in mechanical manner.

5. On the other hand, the Ld. DR reiterated the findings in the impugned order and submitted that the services rendered by the appellant fall under the category of Business Auxiliary Service as defined under Section 65(19) of the Finance Act, 1994. He further submits that the extended period has rightly been invoked because the appellant did not pay the tax, did not get the registration and did not file the service tax returns. He further submitted that the appellant is not entitled to SSI exemption as they fall under the proviso to the exemption because they are providing branded services.

6. After considering the submissions of both the parties and perusal of material on record, we find that the demand of service tax for the period from 1st April 2003 to March 2005 is prima facie wrong because the appellant has started rendering services to M/s IBP Co. Ltd. from 01.09.2005 as is clear from the agreement dated 01.09.2005 which has been accepted in the order-in-original.

6.1 Further, we find that the appellant is entitled to SSI exemption for the period 2005-2006 because their turnover was less than 4.00 lacs in that financial year which entitles them for SSI exemption in terms of Notification No. 06/2005-ST dated 01.03.2005.

6.2 Further, we find that in the case of Commissioner of Central Excise, Chandigarh vs. Loan Zone cited (supra) wherein identical facts were involved and it was held that the service is not provided to independent persons but to service recipient who is itself brand name owner.

6.3 Further, we find that in the present case, invoking the extended period of limitation is not justified simply on the ground that there was no payment of tax and no return was filed as held in the case of Punjab Technical University and other cases cited (supra)

6.4 We also find that the charges received by the appellant from M/s IBP Co. Ltd. are duly reflected in ITR filed by the appellant which shows that there was no intention to evade and moreover the issue of services provided by commercial concern and individual in Business Auxiliary Service was in dispute and lot of confusion was there during the relevant time.

6.5 Besides this, we also find that the imposition of penalty under Section 76 and 77 are bad in law as per the judgement of the Hon'ble Punjab and Haryana cited (supra).

6.6 Further, we find that the order-in-appeal as well as the order-in- original have been passed in a mechanical manner and the grounds raised by the appellant before both the authorities have been brushed aside. The adjudicating authority in Para 15 of Order-in-Original has observed that no agreement was produced by the appellant, however, on the contrary, in Para 11 of the Order-in-Original itself accepted that the appellant had produced copy of Agreement dated 01.09.2005. Both the orders have been passed without appreciation of complete facts.

6.7 Further, we also find that the hearing took place before the Assistant Commissioner as per the hearing notice but the order-in- original has been passed by the Deputy Commissioner and this fact was raised before the Ld. Commissioner (Appeals) but he did not give any finding on this issue.

7. In view of our discussion above, we hold that in the present case, the entire demand is barred by limitation and we also hold that the appellant was entitled to the SSI exemption in view of the facts of this case.

8. In the result, we set-aside the impugned order by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Operative part of the order pronounced in the open Court)
