IN THE CUSTOMS, EXCISE AND SERVICE TAX

APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH, COURT NO. II

Service Tax Appeal Nos. 651 -652 of 2009

[Arising out of Order -In-Appeal No. 22-23/ST/Appeal/CHD-II/ /2009 dated 19.5.2009 passed by Commissioner of Central Excise (Appeals), Chandigarh II]

For approval and signature:

Hon'ble Mr. R K Singh, Member (Technical)

Hon'ble Ms. Sulekha Beevi C S, Member (Judicial)

1
Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2
Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3
Whether Their Lordships wish to see the fair copy of the Order?

4
Whether Order is to be circulated to the Departmental authorities?

M/s. Surya Pharmaceuticals Ltd. Appellants

Vs.

Commissioner of Central Excise Chandigarh II — Respondent

Appearance:

Ms. Priyanka Goel, Advocate for the Appellants

Shri Rajeev Gupta, AR for the Respondent

CORAM:

Hon'ble Mr. R K Singh, Member (Technical)

Hon'ble Ms. Sulekha Beevi C S, Member (Judicial)

Date of Hearing : 19.11.2015

Date of decision : 09.12.2015

FINAL ORDER NO. 53790-53791/2015-ST(Br)

Per Sulekha Beevi C S:

The appellants are registered with Central Excise department for the manufacture of Bulk drugs and are also registered under the Service Tax Rules, 1994 for Goods Transport Agency (GTA) service and Business Auxiliary (BAS) service. The appellants are service recipient of GTA services and are liable to pay service tax under reverse charge mechanism as per sub-section (2) of Section 68 of the Finance Act, 1994. They are also service recipient of BAS from foreign based export agents to whom they pay commission and by reverse charge, again, they are liable to pay service tax under provisions of Section 66A of the Finance Act, 1994, read with Rule 2(i)(d)(iv) of Service Tax Rules, 1994.

2. During the scrutiny of ST-3 returns for the half year ending March, 2007 to September, 2007, it was found that appellants had made payment of service tax under GTA and BAS services by utilizing their credit in Cenvat Credit account instead of paying the same in cash. The department entertained the view that as per Rule 5 of Taxation of Services

Rules, 2006, the appellants ought to have paid the service tax in cash and they are not entitled to utilize Cenvat Credit for payment of their service tax liability. A show cause notice was issued, and after adjudication, the original authority confirmed the demand of service tax of Rs. 13,18,181/- and Rs. 5,93,232/- along with interest and also imposed equal amount of penalty. The appellants filed appeal before the Commissioner (Appeals) who vide the order impugned herein upheld the same. Being aggrieved, the appellants are before the Tribunal.

3. The issue involved in the present case is whether appellants are entitled to use the Cenvat Credit to discharge their service tax liability in regard to GTA and BAS service, when they are not the service provider for such services.

4. The learned DR fairly conceded that the issue with regard to whether the service recipient who is liable to pay the service tax can use the accumulated Cenvat Credit to discharge service tax towards GTA services is settled by various judgments. Some of the decisions placed before us are as follows:-

1. CCE vs. Panchmahal Steel Ltd.

   [2015 (37) STR 965 (Guj)];

2. CST vs. Hero Handa Motors Ltd.

   [2013 (29) STR 358 (Del)]

3. CCE, Chandigarh vs. Nahar industrial Enterprises Ltd.

   [2012 (25) STR 129 (P&H)]

5. In the above judgments, it has been categorically held that the assessee can utilize Cenvat Credit to discharge the service tax liability towards GTA services. Following the dictum laid in the above judgments, we hold that the appellant succeeds with regard to the issue of GTA services. So in the present case, the dispute narrows down to the question whether the appellants can utilize Cenvat Credit to

pay the service tax towards BAS services i.e., the services received from foreign based export agents.

For better appreciation the relevant provisions are noticed as under:

Rule 2(i)(d) of Service Tax Rules, 1994 defines a person liable for paying service tax and clause (iv) of the definition is:

(iv) in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under section 66A of the Act, the recipient of such service.

Rule 2(p) of Cenvat Credit Rules, 2004, prior to 1.3.2008 read as under:-

Output service means any taxable service provided by provider of taxable service to a customer, client subscriber, policy holder, or any other person, as the case may be, and the expressions Provider and provided shall be construed accordingly.

Rule 2(r) of Cenvat Credit Rules, 2004 defines

provider of taxable service include a person liable for paying service tax.

Rule 2(q) of Cenvat Credit Rules, 2004 defines

person liable for paying tax has the meaning assigned to it is clause (d) of sub rule (1) of Rule 2 of Service Tax Rules, 1994. Rule 5 of Taxation of Service (Provided from Outside India and received in India) Rules, 2006 (hereinafter referred to as Taxation of Service Rules, 2006) is as under:

Rule 5 : Taxable services not to be treated as output services:-

The taxable services provided from outside India and received in India shall not be treated as output services for the purposes of availing credit of duty of excise paid on any input

or service tax paid on any input services under Cenvat Credit Rules, 2004.

6. The appellant is liable to pay service tax on BAS received from non-resident commission agents on reverse charge mechanism enshrined in Section 66A of the Finance Act, 1994.

7. The learned Counsel appearing for appellant Ms. Priyank Goel argued very strongly referring to the various provisions noticed above. She urged that by reading Rule 2(p) and Rule 2(r) together, the appellant being a person liable for paying service tax shall also be treated as a provider of output service. In such scenario, the appellant is eligible to utilize the credit to pay the service tax under the Cenvat Credit Rules. That the Cenvat credit scheme has been framed for the purpose of availing and utilizing credit. In the said rules, the term provider of taxable service has been defined to include a person who ultimately pays service tax. The intention is to entitle the person liable to pay service tax to utilize the credit for paying such tax. If a person liable to pay service tax is not allowed to utilize the credit to pay service tax, then this definition would be nugatory.

8. The learned DR on the other hand, relied on Rule 5 of Taxation of Services Rules, 2006 and the CBEC, New Delhi Instruction F. No. B 1/14/4/2006 TRU dated 19.4.2006. It is argued that the appellants who are liable to pay service tax under the reverse charge mechanism on services provided from outside India have to pay the same in cash and cannot utilize the credit for discharging the liability.

9. In the impugned order Commissioner (Appeals) has observed as under:

From the perusal of the provisions of Section 66 A and Rule 5 of the Taxation Services (Provided from outside India and received in India) Rules, 2006, it is very clear that appellant is deemed service provider only for the purpose of service tax liability and for the purpose of Cenvat Credit they cannot be treated as provider of taxable services and I agree with the adjudicating authority that these provisions are specific and

will prevail over general provisions. Hence the appellant was not entitled to utilize cenvat credit for payment of such service tax liability and the same is recoverable and payable in cash along with interest in term of section 75 of the Act.

10. After hearing the submissions made by either side, we find that the view of the Commissioner (Appeals) is devoid of any legal infirmity. The Finance Act, 1994 is the law which deals with taxability of services. Taxation of Service Rules, 2006 enacted under the Finance Act, 1994 inter alia lays contains provisions governing the services which are provided from outside India and received in India. Rule 5 of the said Rules prevents the utilization of credit for discharging Service Tax on taxable services provided from outside India and received in India. In view thereof the demand of service tax as deemed provider of BAS services as per the impugned order does not warrant any interference. The same is upheld. The impugned order to the extent of demand of service tax on account of GTA services as discussed above, is set aside.

11. The Commissioner (Appeals) has upheld the penalty imposed under Section 76 of Finance Act, observing that the appellant ought not to have paid the service tax from Cenvat credit, but should have paid in cash. The issue being interpretational and as the appellant has already discharged the service tax, we consider that imposing penalty would not be appropriate and the same is set aside in terms of section 80 of the Finance Act, 1994. We would also like to observe that though the Commissioner states that the penalty imposed under Section 70 read with Rule 7(2) is proper and upheld, no such penalty is seen imposed by the original authority.

12. In the result, the impugned order is modified to the extent of setting aside the demand in regard to service tax on GTA services and the penalties imposed. The demand of service tax on BAS is sustained. The appeal is partly allowed in above terms.

(pronounced in the open court on )

( Sulekha Beevi C S )

Member(Judicial)

( R K Singh )

Member (Technical)

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