M/S. Verve Consulting Private Limited Vs Commissioner Of Central Excise & Service Tax, Bhubaneswar-I

Court: Customs, Excise And Service Tax Appellate, Kolkata

Date of Decision: Aug. 1, 2023

Acts Referred: Central Excise Rules, 1944 â€" Rule 9(2)
Finance Act, 1994 â€" Section 11A, 11A(1), 65(65), 65(105), 65(105)(r), 73

Hon'ble Judges: Ashok Jindal, Member (J); K. Anpazhakan, Member (T)

Bench: Division Bench

Advocate: Shreya Mundhra, S.S.Chattopadhyay

Final Decision: Allowed

Judgement

,,,,,,

K. Anpazhakan, Member (T)",,,,,,

1. The Appellant is engaged in providing services as a Management Consultant. A Show Cause Notice dated April 7, 2006 was issued to them",,,,,,

demanding Service tax of Rs. 13,02,318/- along with interest and penalty for the period 2000-01 to 2004-05. The demand of service tax along with",,,,,,

interest and penalty was confirmed by the adjudicating authority vide the Order-in-Original dated 14.05.2019. On appeal, the Commissioner (Appeal)",,,,,,

upheld the demands confirmed in the said order vide O-i-A dated 04.12.2009, along with interest and penalty. Aggrieved against this impugned order,",,,,,,

the Appellant has filed the present appeal.,,,,,,

2. In their Grounds of appeal, the Appellant made the following submissions:",,,,,,

(i) They provide a comprehensive range of services such as data collection and analysis, manpower mobilization, liaison, training supervision,",,,,,,

management consulting, software development etc. Apart from above, they provide services under a consortium arrangement in the capacity of sub-",,,,,,

contractor.,,,,,,

(ii) The Notice in this case was issued solely based on the audit objection raised by the AG (Orissa) during verification of Income Tax Returns, filed",,,,,,

by them for the aforesaid period. The Notice neither states the date of scrutiny of such Income tax returns by the AG (Orissa) nor provides a copy,,,,,,

the audit report to them. Purely on the basis of the said audit objection and without causing any independent enquiry to ascertain the correctness of the,,,,,,

alleged short payment, the Notice was issued.",,,,,,

(iii) The entire demand was barred by limitation. For the Financial Years 2001-02 to 2004-05, the demand is clearly barred by limitation in as much as",,,,,,

no allegation of willful suppression, mis-statement, fraud or collusion has been made in the SCN. It is a settled position of law that in the absence of",,,,,,

any such allegation in the SCN, extended period of limitation cannot be invoked. In support of this contention, the Appellant relied on the following",,,,,,

decisions:,,,,,,

Kaur & Singh v. Collector 1997 (94) ELT 289 SC Collector v. HMM Ltd. 1995 (76) ELT 497 (SC),,,,,,

Poddar Alloys Private Limited v. Commissioner 2015 (38) S.T.R. 1208 (Tri. - Del.),,,,,,

West End Minerals & Exports Private Limited v. Commissioner 2019 (9) TMI 580 - CESTAT BANGALORE,,,,,,

Nokia Seimens Network Pvt. Ltd. v. Commissioner 2017 (6) TMI 817 Ã¢â‚¬" CESTAT Chandigarh,,,,,,

Nahan Foundry Ltd. v. Collector 1998 (104) ELT 369 (Tri.),,,,,,

(iv) In the present case, they have regularly filed ST-3 returns consequent upon obtaining Service tax registration on 17.08.2001. Therefore, the",,,,,,

demand for short levy, non-levy, non-payment and short payment if any, was required to be issued within one year from the relevant date, in terms of",,,,,,

Section 73 of the Act.,,,,,,

(v) Even for the Financial Year 2000-01, extended period of limitation is not invocable as they were under a bonafide belief that no Service tax was",,,,,,

payable during such period. To support this contention, they placed their reliance in the case of Commissioner v. Karnataka State Warehousing",,,,,,

Corporation 2011 (23) S.T.R. 126 (Kar.).,,,,,,

(vi) It is a settled position of law that information derived from the Income tax returns cannot be merely used to confirm the demand of Service tax by,,,,,,

invoking extended period of limitation. In support of this contention, they relied on the decisions in the following cases.",,,,,,

a. Commissioner v. Hindustan Cables Ltd. 2022 (382) ELT 188 (Cal.),,,,,,

b. Maa Kalika Transport Pvt. Ltd. v. Commissioner 2023 (7) TMI 435 Ã¢â‚¬" CESTAT Kolkata,,,,,,

(vii) The entire demand has been based upon the Audit observation without any independent examination. It is well-settled that quasi-judicial authority,,,,,,

must act independently as held by the Supreme Court in Orient Paper Mills Ltd. v. Union of India reported in 1978 (2) E.L.T. J345 (S.C.).Reliance is,,,,,,

also placed on the judgment of Maithan Ispat Limited v. Commissioner 2022 (10) TMI 7 Ã¢â‚¬" CESTAT Kolkata.Thus, the demand is liable to be set",,,,,,

aside.,,,,,,

(viii) The impugned Order has traversed beyond the Show Cause Notice in as much as it invoked extended period for the entire period of dispute,",,,,,,

whereas the SCN had not even alleged willful misstatement or suppression of facts with an intent to evade payment of tax for the FY 2001-05.,,,,,,

Accordingly, the demands confirmed in the impugned order is liable to be set aside.",,,,,,

(ix) The demand is unsustainable on merits. The services rendered in the field of deployment of staff, software development, repair & maintenance",,,,,,

and public relation etc., cannot be taxed under the category of management consultancy services. Deployment of mobile team, software development,",,,,,,

repair and maintenance, and providing public relation service etc. does not come within the ambit and scope of management consultancy service",,,,,,

during the material period.,,,,,,

(x) Section 65(65) of the Act as applicable during the period in dispute provides that:,,,,,,

Ã¢â‚¬Å“Ã¢â‚¬ËœManagement or business ConsultantÃ¢â‚¬â„¢ means any person who is engaged in providing any service, either directly or indirectly, in connection",,,,,,

with the management of any organisation in any manner and includes any person who renders any advice, consultancy or technical assistance, relating",,,,,,

to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organisationÃ¢â‚¬â€<",,,,,,

Further, taxable service has been defined in Section 65(105)(r) of the Act as:",,,,,,

Ã¢â‚¬Å“any service provided to a client, by a management consultant in connection with the management of any organization, in any mannerÃ¢â‚¬â€<.",,,,,,

From the above definition, it can be seen that the levy of Service tax under Section 65(105)(r) read with Section 65(65) of the Act consists of:",,,,,,

Any service either directly or indirectly in connection with the management of any organization in any manner would be a management consultancy,,,,,,

service.,,,,,,

It includes rendering of any advice, consultancy, or technical assistance relating to conceptualizing, devising, development, modification, rectification or",,,,,,

up gradation of any working system of any organization.,,,,,,

Such service has to be provided by the service provider to a client.,,,,,,

In the present case, none of the three criterias are satisfied in either of the activities undertaken by the Appellant during the period of dispute. Thus,",,,,,,

the finding vide the impugned order is liable to be set aside.,,,,,,

(xi) Public relation service was brought under the service tax purview with effect from 01.05.2006 and cannot be treated as management consultancy,,,,,,

service prior to the said date. Further, deployment of mobile team will not come within the definition of management consultancy service, as held by",,,,,,

the Tribunal in the case ofGlaxo Smithkline Pharmaceuticals Vs. CCE Ã¢â‚¬" (2005) 188 ELT 171.Reliance is also placed on the ruling of Basti Sugar,,,,,,

Mills 2007,,,,,,

(7) STR 431 (Tri.) which has been affirmed by the HonÃ¢â‚¬â„¢ble Supreme Court in 2012 (25) STR J154 (SC). In this case it was also held that,,,,,,

executory services would not fall under management consultancy service.,,,,,,

(xii) Services in the nature of repair and maintenance etc., which were rendered prior to 01.07.2003 cannot be subjected to levy of service tax since",,,,,,

the repair and maintenance service was brought under the tax net with effect from 01.07.2003.,,,,,,

(xiii) Services in the nature of software development provided by the Appellant is exempt from payment of Service tax in terms of Notification No.,,,,,,

16/2004-ST dated September 10, 2004.",,,,,,

(xiv) Therefore, the demand confirmed vide the impugned order is liable to be set aside.",,,,,,

(xv) The services rendered in the capacity of sub-consultant are not liable to be taxed in the hands of the Appellant. The services rendered by the,,,,,,

Appellant in the capacity of sub-contractor to principal contractors i.e., Adam Smith Institute, Bhubaneswar, Administrative Reforms & Public",,,,,,

Grievances, Price Water House Cooper (P) Ltd., European Union, BASIX & OERC etc., during the period under dispute, cannot be subjected to levy",,,,,,

of Service tax in the hands of the Appellant in terms of the legal provisions existed at the material time. The aforesaid services cannot be considered,,,,,,

to have been provided to Ã¢â‚¬Å“a clientÃ¢â‚¬â€‹ in as much as the same have been provided to the main contractor engaging the Appellant as a sub-contractor.,,,,,,

Thus, the said service provided by the Appellant is outside the ambit of Section 65(105)(r) of the Act. In support of this contention they relied on the",,,,,,

decision of the Tribunal in the case of Indfos Industries Ltd. v. Commissioner 2012 (26) STR 129 (Tri.-Del)as affirmed in 2015 (40) S.T.R. 220 (All.).,,,,,,

(xvi) The expenditures incurred during execution of job and reimbursed by the customers, is not to be treated as fees and made excisable to levy of",,,,,,

Service tax. The reimbursements received by them from its customers are outside the ambit of service tax and is therefore not taxable.,,,,,,

(xvii) Providing service to Govt. bodies and World Bank funded projects cannot be subjected to levy of service tax.,,,,,,

(xviii)No interest is imposable and no penalty is payable.,,,,,,

3. The Ld. A.R. reiterated the findings in the impugned order.,,,,,,

4. Heard both sides and perused the appeal files.,,,,,,

5. We observe that the Notice was issued to the Appellant solely on the basis of audit objection raised by the AG (Orissa) during verification of,,,,,,

Income Tax Returns, filed by them for the aforesaid period. It is also observed that the department has not conducted any independent enquiry to",,,,,,

ascertain the said amount was received towards rendering of any taxable service.,,,,,,

6. The Appellant contended that the entire demand was barred by limitation. For the Financial Years 2001-02 to 2004-05, the demand is clearly barred",,,,,,

by limitation in as much as no allegation of willful suppression, mis-statement, fraud or collusion has been made in the Notice, and hence the impugned",,,,,,

order traversed beyond the Notice. It is a settled position of law that in the absence of any such allegation in the Notice, extended period of limitation",,,,,,

cannot be invoked. In support of their contention the Appellant cited various decisions.,,,,,,

7. In the case of Kaur & Singh v. Collector 1997 (94) ELT 289 SC, the HonÃ¢â‚¬â„¢ble Supreme Court has held as under:",,,,,,

2. The assessee was issued a notice dated 10th December, 1981, to show cause why a penalty should not be imposed upon it under Rule 9(2) of the",,,,,,

Central Excise Rules, 1944, and why Central Excise duty should not be collected from it on goods cleared without payment of the same during the",,,,,,

year 1980-81. The notice, it is common ground, was issued after the expiration of the period of six months. It could, therefore, have been issued only",,,,,,

upon the basis that the assessee was guilty of fraud or of collusion or of wilful mis-statement or suppression of facts or of contravention of the,,,,,,

provisions of the Act or the Rules with intent to evade payment of Excise duty; this because, by the time the show cause notice was issued, Rule 9(2)",,,,,,

had been amended to incorporate therein the period specified in Section 11A of the Act. The show cause notice does not set out any particulars in,,,,,,

respect of fraud or collusion or wilful mis-statement or suppression of facts or contravention with intention to evade the payment of Excise duty. Not,,,,,,

only does it not give any such particulars, it does not even make a bare allegation.",,,,,,

3. This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a,,,,,,

requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so",,,,,,

when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him,",,,,,,

and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See Collector of Central Excise v. H.M.M.,,,,,,

Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narayan Singh Sugar Mills Limited v. Union of India, 1996 (88) E.L.T. 24]."",,,,,,

4. The appeal is allowed and the order of the Tribunal under appeal is set aside.,,,,,,

8. In the case of Collector v. HMM Ltd. 1995 (76) ELT 497 (SC), the HonÃ¢â‚¬â„¢ble Supreme Court has held as under:",,,,,,

2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of,,,,,,

Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the,,,,,,

ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute,,,,,,

Sl.

No.",Description,2000-01,2001-02,2002-03,2003-04,2004-05

1.,"Consulting fee

(other than

Management

consulting)","12,13,560","44,40,000","13,75,991","24,000","5,67,322

2.,"Reimbursable

expense","1,87,500","24,24,717","1,35,000","9,14,311","3,17,242

3.,Sub-contract,"2,10,000","2,52,000","10,49,478","66,29,939","20,94,636

4.,"Repair and

maintenance","2,83,136",-,-,-,-

5.,"Payment not

received from

client",-,-,"5,20,000",-,-

6.,"Software

development",-,-,-,-,"11,50,000

Total,,"18,94,196","71,16,717","30,80,469","75,68,250","41,29,200

supervision in addition to management consulting. These activities are not liable to be classified under Ã¢â‚¬Ëœ Management Consultancy ServiceÃ¢â‚¬â„¢. The,,,,,,

impugned order has classified the entire activity under management consultancy and demanded service tax. To levy of Service tax under Management,,,,,,

Consultancy service as defined in Section 65(105)(r) read with Section 65(65) of the Act , the following conditions must be satisfied.",,,,,,

Any service either directly or indirectly in connection with the management of any organization in any manner would be a management consultancy,,,,,,

service.,,,,,,

It includes rendering of any advice, consultancy, or technical assistance relating to conceptualizing, devising, development, modification, rectification or",,,,,,

up gradation of any working system of any organization.,,,,,,

Such service has to be provided by the service provider to a client.,,,,,,

12. In the present case, none of the above criteria are satisfied in either of the activities undertaken by the Appellant during the period of dispute. The",,,,,,

impugned order also has not given any finding as to how the Appellant are liable to pay service tax for the above said services under the category,,,,,,

Ã¢â‚¬Ëœ Management ConsultancyÃ¢â‚¬â„¢. Accordingly, we hold that the demand on this account confirmed in the impugned order is liable to be set aside.",,,,,,

(ii) Reimbursable expenses Ã¢â‚¬" Rs. 3,17,242",,,,,,

13. In their submissions, the Appellant stated that the expenditures incurred during execution of job and reimbursed by the customers, is not to be",,,,,,

treated as fees and made liable to levy of Service tax. The reimbursements received by them from its customers is outside the ambit of service tax,,,,,,

and is therefore not taxable. We observe that the impugned order has not brought in any evidence to substantiate the allegation that the,,,,,,

reimbursements received were towards rendering of any taxable service rendered by the Appellants to their clients. In the absence of any such,,,,,,

evidence, we hold that the demand on this count is not sustainable.",,,,,,

(iii) Sub-contract Ã¢â‚¬" Rs. 20,94,636",,,,,,

14. The Appellant submitted that the services rendered by them in the capacity of sub-contractor to principal contractors i.e., Adam Smith Institute,",,,,,,

Bhubaneswar, Administrative Reforms & Public Grievances, Price Water House Cooper (P) Ltd., European Union, BASIX & OERC etc., during the",,,,,,

period under dispute, cannot be subjected to levy of Service tax in the hands of the Appellant in terms of the legal provisions existed at the material",,,,,,

time. They also submitted that the aforesaid services cannot be considered to have been provided to Ã¢â‚¬Å“a clientÃ¢â‚¬ in as much as the same have been,,,,,,

provided to the main contractor engaging the Appellant as a sub-contractor. Thus, the said service provided by the Appellant is outside the ambit of",,,,,,

Section 65(105)(r) of the Act. In this regard they placed their reliance on the decision of the HonÃ¢â‚¬â„¢ble CESTAT in the case of Indfos Industries,,,,,,

Ltd. v. Commissioner 2012 (26) STR 129 (Tri.-Del)as affirmed in 2015 (40) S.T.R. 220 (All.), the relevant para of the decision is reproduced below:",,,,,,

14. Now the argument that they were not the main contractors but were only sub-contractors needs to be examined. This issue whether sub-,,,,,,

contractor needs to pay service tax has arisen because of certain clarifications issued by the Board in the early stage of evolution of service tax levy,,,,,,

and connected laws. These instructions were issued in view of different factors like,",,,,,,

(i) Even prior to the introduction of Cenvat Scheme for service tax, the policy of the government was to tax the same service only once, that is in the",,,,,,

hands of the main person providing the service. There was no intention to tax the same value twice in the hands of two different parties rendering,,,,,,

different part of the same service. This situation is most aptly demonstrated by the service rendered by a stock broker and that rendered by a sub-,,,,,,

broker to a broker. Sub-broker receives payment from the brokerage charged by the broker who was already paying tax on the full brokerage. Similar,,,,,,

was the situation in the case of advertising agency. Many persons do different parts of the job of advertising like conceptualisation, the making of the",,,,,,

advertisement, display of the advertisement etc. The policy was to tax the amount involved only once that is when the main advertising agency raises",,,,,,

bill on the client who benefits from the advertisement. Though many Circulars were quoted the text of only one could be seen that is the Circular F.,,,,,,

No. B-11/3/98-TRU, dated 7-10-1998 para 5.6. This is with reference to the specific service of interior decorators and is subject to the condition that",,,,,,

the main contractor pays tax on the value inclusive of the value of work done by the sub-contractor. No circular laying down a principle that sub-,,,,,,

contractors are not liable to pay tax, with no condition attached, has been produced.",,,,,,

(ii) There was another issue that the definition of the service concerned could not cover the activity carried by some of the sub-contractors and,,,,,,

therefore in some cases clarifications were issued to the effect that the person who bills for the complete service which will fall with the service as,,,,,,

defined will only be taxable.,,,,,,

(iii) There was also the issue that in initial stages services were not defined as a specified service provided to Ã¢â‚¬Å“any personÃ¢â‚¬ by Ã¢â‚¬Å“any other,,,,,,

personÃ¢â‚¬ as is the case for most of the entries in Section 65(105) of the Finance Act, 1994 as it stands today. Earlier the nature of the person",,,,,,

providing service as well as the nature of the person availing service was specified in many of the taxable entries. For example if service provided to a,,,,,,

customer by a telegraphic authority was taxed, the service provided by one telegraphic authority to another telegraphic authority for the former to",,,,,,

render service to the customer was not under the tax net. Such issues came up also in the case of service provided to a client by a consulting,,,,,,

engineer. The sub-contractor who was carrying out part of the activity may not have fitted into the definition of Ã¢â‚¬Å“consulting engineerÃ¢â‚¬ and the,,,,,,

consulting engineer sub-contracting the work might not have fitted into the definition of Ã¢â‚¬Å“a clientÃ¢â‚¬. It is in such situations that the impugned,,,,,,

clarifications were issued by the Board. The clarifications issued by Board do not expose a legal position that no sub-contractor is liable to pay service,,,,,,

tax on any taxable activity.,,,,,,

15. The liability to tax has to be decided with reference to the definition the concerned taxable service at the relevant period of time and the activities,,,,,,

carried out and the contract governing such activity. Some of the case laws quoted do not discuss any provision of any statute to come to the,,,,,,

conclusion that there shall be no levy of service tax on sub-contractors. In fact the decision in Semac Pvt. Ltd v. CST - 2006 (4) S.T.R. 475 (Tri.-,,,,,,

Bang.) is given considering that the main contractor had paid tax for the full value. However the policy that if the main contractor has paid service tax,",,,,,,

the sub-contractor need not pay tax again on the same service, for periods prior to introduction of Cenvat Scheme is reasonable and acceptable based",,,,,,

on the BoardÃ¢â‚¬â„¢s Circulars, for maintaining equality before law. In this case no argument is raised that the main contractor namely, HAL has",,,,,,

discharged service tax liability. But if evidence is produced to that effect the demand on the sub-contractor is not maintainable.,,,,,,

16. The argument that they can claim an exemption at any stage of the proceedings is now settled because of the decision of Apex Court in Share,,,,,,

Medical Care v. UOI - 2007 (209) E.L.T. 321. The Commissioner (Appeal) has erred in not considering the claim of the Appellant for exemption,,,,,,

under Notification No. 12/2003-S.T., when evidence regarding value of goods sold was apparently produced by the Appellant.",,,,,,

17. The finding of the adjudicating authority has not explained the reasons for finding in para 4.7 without contradicting the claims of the Appellant as,,,,,,

recorded in 3.9 of the order. If the entire matter could be decided just by resolving this faulty finding we would have gone ahead to do so. Since the,,,,,,

matter requires examination of other facts and laws we refrain from giving any finding on this issue at this stage.,,,,,,

15. We observe that the service rendered by the Appellant to the main contractor was not liable to service tax during the material period. Presently it,,,,,,

has been specified that service provided by Ã¢â‚¬Å“any personÃ¢â‚¬ to Ã¢â‚¬Å“any other personÃ¢â‚¬ are liable to service tax, which was not the case during the",,,,,,

relevant period. Hence, we agree with the contention of the Appellant that the services rendered by the sub contractor to the main contractor was not",,,,,,

liable to service tax during the material period.. Accordingly, the demand on this count is liable to be set aside.",,,,,,

(iv) Software development,,,,,,

16. We observe that Services rendered in the nature of software development provided by the Appellant was exempted from payment of Service tax,,,,,,

in terms of Notification No. 16/2004-ST dated September 10, 2004. Accordingly, no service tax was payable on the amount received towards",,,,,,

software development.,,,,,,

17. In view of the above discussion and by following the various decisions mentioned above, we hold that the demands confirmed in the impugned",,,,,,

order are not sustainable on merit as well as on limitation. Since, the demand itself is not sustainable, the demand of interest and imposition of penalty",,,,,,

is also not sustainable.,,,,,,

18. In view of the above, we allow the appeal filed by the Appellant.",,,,,,