Commissioner of Central Excise Commissionerate Vs Dr. Lal Path Lab (P) Ltd.

None

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Sept. 14, 2007

Acts Referred:
Central Excises and Salt Act, 1944 â€" Section 35G#Finance Act, 1994 â€" Section 65, 73, 75, 75A, 76

Citation: (2007) 213 CTR 15 : (2007) 9 VST 700

Hon'ble Judges: M.M. Kumar, J; Ajay Kumar Mittal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

M.M. Kumar, J.
This appeal filed by the Revenue u/s 35G of the Central Excise Act, 1944 challenges order dated August 30, 2006

passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (P 3) by holding that the services rendered by the assessee-

respondent do not fall in any of the category specified in the definition of ""business auxiliary service"" as per Sub-section (19) of Section 65 of the

Finance Act, 1994. The argument raised by the Revenue is that the activity carried out by the assessee-respondent amounted to promotion or

marketing of service provided by its principal M/s Dr. Lal Path Lab, New Delhi has been rejected by the Tribunal. The Revenue has claimed that

the following substantial question of law would arise for the determination of this Court:

Whether the honourable Tribunal is correct in holding that the services rendered by the respondents do not fall under any category specified in the

definition of business auxiliary service" and is within the scope of "technical test and analysis services" and whether service tax is payable on such

services.

2. Facts in brief are that there is a lab known as M/s. Dr. Lal Path Lab (P) Ltd., Collection Centre at Ludhiana, which is engaged in the collection

of blood, urine and stool samples on behalf of its principal M/s. Dr. Lal Path Lab (P) Ltd., New Delhi, for conducting biological tests. The

assessee-respondent based at Ludhiana are given 25 per cent of commission. Sh. Vaneet Grover, proprietor of centre at Ludhiana, in his

statement dated May 26, 2004 recorded by the Superintendent (Anti Evasion) at the time of investigation has stated that he is the sole proprietor

of the assessee-firm, which is franchise of the company based at Delhi in pursuance of an agreement between them. According to the statement

made, the samples so drawn are collected by the collection centre and then sent by them to the company at New Delhi through a courier. Out of

the total collection, 75 per cent of amount was transferred to the principal lab at Delhi by the asses-see-respondent through demand drafts.

3. On the basis of the preliminary investigation held, another show cause notice dated October 6, 2004 was issued to the assessee-respondent as

to why service tax amounting to Rs. 49,251 involved in taxable value amounting to Rs. 6,15,631 should not be demanded from them u/s 73(b) of

the Finance Act, 1994. The show cause notice also contemplated as to why penalty should not be imposed upon them under sections 75A, 76 and

77 of the Act for failure to get itself registered and for non-payment of service tax and also for not filing ST 3 return. The show cause notice was

contested and after detailed discussion, the Assistant Commissioner, Central Excise, Division-Ill, Ludhiana passed an order on November 30,

2004 confirming the demand of service tax by placing reliance on Section 73(a) by invoking the extended period of five years. He also raised

demand of interest from the assessee-respondent u/s 75 of the Act and imposed penalty equal to the amount of tax payable u/s 76. Therefore,

penalty of Rs. 1,000 for contravening provision of Section 75A of the Act to get itself registered with the Central Excise Department u/s 77 of

Central Excise Act, was imposed.

4. On appeal before the Commissioner, the demand of tax was upheld being covered by Section 65(19)(ii) of the Act. However, the interest

demanded was upheld as the payment of service tax was delayed. However, he deleted the penalties imposed under sections 76 and 75A of the

Act, holding that the element of mens rea was totally missing.

5. On further appeal filed by the assessee-respondent, the Tribunal came to the conclusion that the activities of the assessee-respondent were not

covered by the provisions of Section 65(19)(ii) of the Act. The view of the Tribunal is discernible from paras 11 to 14 of its order, which reads as

under:

11. There is no dispute that testing and analysis carried out in the specialised laboratories constitute "technical testing and analysis service"

contemplated under the law. Those laboratories are also not subjected to, including in relation to the drawing of blood samples, service tax,

treating those tests and analysis as relating to human beings. The services rendered by the appellants drawing, processing and forwarding of

samples is integral to the testing of those samples. As already noted, one of the impugned orders has also noted that the drawing of test samples

may form part of test and analysis. All the same, they are being subjected to tax on the plea that those services are separate from the scope of

testing and analysis service and are taxable as business auxiliary service. This approach is hard to understand. There could be no denying that in the

absence of drawing of blood samples, there can be no testing. Further, even if the two services are seen as entirely separate and different services,

drawing of sample and initial processing of the same are clearly, connected or incidental or ancillary to testing and analysis. We have already

reproduced the definition of "technical testing and analysis service" in para 4 of this order. That definition is very broad in its scope. It covers "any

service in relation to testing and analysis service". Thus, drawing of sample will come within the scope of the definition. The dispute as to whether

drawing of sample forms part of testing and analysis service is not relevant in view of the sweeping nature of the definition. If the service is "in

relation to" testing the service will get classified under technical testing and analysis. It is inconceivable that "relationship" of sample drawing and

initial processing to testing can be denied. The relationship may be incidental or auxiliary. Whichever way it is, its connection to testing and analysis

service is clear, integral and undeniable. Thus, in the factual situation of the case, and the broad scope of the definition, definitely bring the services

rendered by the collection centres within the scope of technical testing and analysis service.

12. It is well-settled that once there is a specific entry for an item in the tax code, the same cannot be taken out of that specific entry and taxed

under any other entry. In the present case, Revenue is seeking to discard the specific entry and to bring the appellants" services under a very

general entry, only because under the specific entry no tax is payable. This approach is contrary to the scheme of the legislation. What is

specifically kept out of a levy by the Legislature cannot be subjected to tax by the Revenue administration under another entry.

13. There is also no substance in the learned SDR"s contention that since through definition, testing in relation to human beings or animal is

excluded from the levy, those tests and analysis are liable to be taxed under some other general heading. Legislature has specifically recognised

technical testing and analysis as a separate service for the purpose of levy. As to how the technical test and analysis are to be taxed under that

heading is also for the Legislature to decide. In the present case, through definition, the Legislature has excluded "testing or analysis of human

beings or animal" outside the levy. The definition clearly states the legislative intention not to impose any tax on such excluded technical testing and

analysis. If the Legislature had any intention to tax the testing or analysis in relation to human being or animal at a different rate than other technical

test and analysis service, the Legislature would have separately specified the levy. In the present case, clearly the intention of the Legislature is not

to impose any levy at all on testing or analysis of human beings or animals. Therefore, the contention of the learned SDR to the contrary is not a

legally correct view.

14. The services rendered by the appellants herein also do not seem to fall under any category specified in the definition of ''business auxiliary

service''. The agreements make it clear that the appellants are not engaged for promotion or marketing of testing and analysis service. The

appellants'' business is organised for drawal of samples and for processing and forwarding of those samples. They are also not in the business of

marketing or business promotion. The expertise, through technical staff (phlebotomist) is for rendering service in connection with human blood

testing. Similarly, equipment available are for drawing, processing and preserving of samples. Thus, clearly, the appellant cannot come under serial

No. (ii) of business auxiliary service. Serial No. (iv) brings ''any incidental or auxiliary support service'' within the scope of business auxiliary

service. Type of services covered therein are illustrated in the definition ''billing, collection or recovery of cheques, accounts and remittance/ etc.

The drawing of sample and processing and forwarding of such samples are not in the same genre as any of the illustrative services mentioned under

serial No. (iv). Serial No. (iv) makes it clear that only incidental or auxiliary support services such as the ones mentioned therein would fall within

the definition. As already noted, the services provided by the appellants do not come within the categories of services mentioned in the definition.

Therefore, these services cannot fall within serial No. (iv).

6. Learned Counsel for the Revenue has argued that there is element of promotion or marketing provided by the assessee-respondent to the

principal client and, therefore, the activities of the assessee-respondent are covered by Section 65(19)(ii) of the Act. According to the learned

Counsel, by virtue of the activity of the assessee-respondent drawing samples of blood, urine and stool, etc., they end up advertising and

advancing the business interest of its principal and, therefore, the aforementioned activity should be sufficient to bring the assessee-respondent

within the definition of ""business auxiliary service"".

7. Having heard the learned Counsel and closely perused the order passed by the Tribunal, we are of the considered view that this appeal is liable

to be dismissed because in pith and substance, the activity of the assessee-respondent is confined to a collection centre with facilities and trained

employees for drawal of blood samples and to carry out essential processing (serum separation) of blood and forwarding the samples to the

principal lab at Delhi through courier. The collection centres are also responsible for disposal of waste arising in the process. The case of the

assessee-respondent appears to be covered by the exception postulated by Sub-section (106) of Section 65, which defines the expression

technical testing and analysis"". The provision is reproduced hereunder for facility of reference:

''technical testing and analysis'' means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or

material or any immovable property but does not include any testing or analysis service provided in relation to human beings or animals ;

Explanation.-For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing

and analysis undertaken for the purpose of clinical testing of drugs and formulations ; but does not include testing or analysis for the purpose of

determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals.

8. A perusal of the aforementioned provision makes it clear that the expression ""technical testing and analysis"" does not include any testing or

analysis service provided in relation to human being or animals. The Explanation goes to the extent of excluding from the aforementioned definition,

a testing or analysis for the purposes of determination of the nature of diseased condition, identification of a disease, prevention of any disease or

disorder in human beings or animals. Such being the statutory provision, we do not entertain any doubt that merely because any incidental service is

rendered by the assessee-respondent like putting across or dropping of the name of the principal company, it would become part of the definition

of ""business auxiliary service"" within the meaning of Section 65(19)(ii) of the Act. The view taken by the Tribunal is unassailable and deserves to be

upheld.

9. For the reasons aforementioned, this appeal fails and the same is dismissed.