Commissioner of Service Tax Vs ITC Ltd.

Court: Delhi High Court

Date of Decision: July 23, 2014

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A
Finance Act, 2005 â€" Section 65(105)(zzb), 65(19)

Citation: (2014) 36 STR 481

Hon'ble Judges: V. Kameswar Rao, J; Sanjiv Khanna, J

Bench: Division Bench

Advocate: Sonia Sharma, Sr. Standing Counsel and Vijay Chandra, Advocate for the Appellant; R. Narain, Ajay Aggarwal, Malika Joshi, Shravani, Ruchika and Rajan Narain, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Sanjiv Khanna, J.

C.M. No. 6350 of 2014

1. The present appeal was admitted for hearing vide order dated 4th April, 2014. Mr. R. Narain, Advocate had then accepted notice on behalf of

the respondent-assessee. The substantial question of law, noted below, was framed on the said date and thereafter, the appeal was listed for

hearing/disposal for today. It is, however, noticed that the appellant-revenue had also filed an application seeking condonation of delay of 38 days

in filing the appeal but this probably escaped from the notice of the Bench, which had admitted the appeal and framed the substantial question of

law on 4th April, 2014. In the application, it is stated that after the impugned order dated 24th July, 2013 was received, it was processed and

examined by the authorities. This took time and thereafter, the file was marked to the Standing Counsel for drafting of the appeal. The annexures to

the appeal however got misplaced in the office of the Standing Counsel and it took time to trace the same from other files.

2. Keeping in view the aforesaid facts, we condone the delay of 38 days in filing the appeal. The application stands disposed of.

CEAC 31/2014

3. This appeal filed by the revenue impugns findings recorded in the order dated 24th July, 2013, 2014 (33) S.T.R. 67 (Tri.-Del.), passed by the

Customs, Excise and Service Tax Appellate Tribunal (CESTAT) (Tribunal, in short), in an appeal filed by the respondent-assessee. By order

dated 4th April, 2014, the following substantial question of law was framed for adjudication:

Did the Tribunal fall into error in rejecting the Revenue''s appeal, holding that the Show Cause Notices in question were not in accordance with

law.

4. We have heard learned Standing Counsel for the revenue and the counsel for the assessee.

5. In order to decide and adjudicate the aforesaid substantial question of law, necessary facts in brief are required to be noticed, as the Tribunal, in

the impugned order, has not gone into the merits, but, has allowed the appeal of the assessee on the ground that the show cause notices dated 21-

4-2010 and 20-4-2011 did not specify the sub-clause of Section 65(19) of the Finance Act, 2005 (Act, in short) and therefore, were bad in law.

The Tribunal has not adjudicated and decided, whether or not the activities in question fell within the clauses (vi) and (vii) of Section 65(19) of the

Act. Thus, whether clauses (vi) and (vii) of Section 65(19) of the Act could have been invoked and applied has not been commented upon and

answered by the Tribunal. The Tribunal while reaching to the said conclusion, referred to the decisions in United Telecoms Ltd. v. CST,

Hyderabad, 2011 (22) S.T.R. 571 (Tri-Bang.) and Kaur and Singh v. C.C.E., New Delhi, 1997 (94) E.L.T. 289 (S.C.) and Union of India

(UOI) Vs. Mohan Lal Capoor and Others, . It has been observed that the show cause notices were issued on the prima facie assumption that the

activities were assessable as service tax as ''Business Auxiliary Services'', but reasons for such assumption were not specified in the show cause

notices and mere extraction of the entire provision of Section 65(19) of the Act did not fulfill the legal mandate. The Tribunal referred to another

decision in United Telecomes Ltd. v. C.C.E., Hyderabad 2011 (22) S.T.R. 571 (Tri.) or in Collector of Central Excise Vs. H.M.M. Limited, ,

relied upon by the assessee, but, the Tribunal rejected the submission no further direction or observation should be made, holding that where the

show cause notice was invalid for violation of due process; and in particular violation of principles of natural justice; a fresh opportunity could be

granted. Accordingly, while allowing the appeal of the respondent-assessee, liberty has been granted to the appellant-revenue to act in accordance

with law.

6. It is correct that in the present case, show cause notice dated 21-4-2010 quotes Section 65(19), which defines ''Business Auxiliary Services'',

applicable w.e.f. 16-6-2005 and the said Section has seven different sub-clauses. Providing services under any of the seven sub-clauses would fall

within the category of ''Business Auxiliary Services''. The said show cause notice also reproduces Section 65(19) as it existed prior to 16-6-2005,

but, it is apparent, that this was done to elucidate and state that services covered under ''Business Auxiliary Services'' were widened and made

more comprehensive after 16-6-2005. After reproducing the amended Section 65(19) w.e.f. 16-6-2005 of the Finance Act, the show cause

notice refers to agreements entered into between the assessee and the service receivers namely M/s. Srinivasa Resorts Ltd., M/s. Laxmi

Distributors P. Ltd., Adyar Gate Hotels owner of Park Sheraton Hotels and Grand Bay. It is stated that M/s. Srinivasa Resorts Ltd. and M/s.

Laxmi Distributors P. Ltd., after expansion of taxable services in the category of "Business Auxiliary Services", had agreed to make payment of

service tax but Adyar Gate Hotels owner of Park Sheraton Hotels and Grand Bay refused to pay service tax on the plea that the service tax was

not applicable at the time of signing of the agreements. It was observed in the show cause notice dated 21-4-2010 that the said contention was not

acceptable. Further, the assessee has stopped payment of service tax, under the category ""management fees"" from April, 2008 onwards. The

show cause notice records that the services rendered by the respondent-assessee were taxable as ''Business Auxiliary Services'', under Section

65(19) read with Section 65(105)(zzb) of the Act. Therefore, by letter dated 17-12-2009, the assessee was asked to furnish month wise receipt

of management fee on which service tax had not been paid. The assessee had furnished the said details amounting to Rs. 11,83,66,385/- for the

period April, 2008 to March, 2009 on which service tax had not been paid. By letter dated 16-2-2010, the assessee also furnished figures for the

period April, 2009 to December, 2009 amounting to Rs. 7,18,46,230/-. The show cause notice elucidated that on scrutiny of ST-3 returns for the

period 2008-09, and April to September, 2009, the assessee had shown certain amount as exempted services under column 5AA(b). However,

no details had been provided in the ST-3 returns. The amounts received were reproduced in the show cause notice.

7. In para. 9 of the show cause notice dated 20-4-2011, provisions of the Finance Act as amended and the provisions of Service Tax Rules, 1994

as amended and applicable were stipulated. Thereafter, para. 10 refers to, whether interest was chargeable and recoverable from the assessee.

Para. 11 refers to the show cause notice dated 21-4-2010 issued for the period April, 2008 to December, 2009, for short payment of Service

Tax of Rs. 2,18,57,540/-. Para. 12 states that demand show cause notice for the subsequent period of 1-1-2010 to 31-3-2011 on the same

issues, was being issued. In para. 13, it is stated that by letter dated 4-4-2011, the assessee was asked to furnish copies of ST-3 returns and

balance sheet for the period 2009-10 and similar request was also made telephonically, but, requisite information had not been furnished. The

show cause notice gives various details of the amounts, which were allegedly short paid or not paid. The assessee was required and directed to

produce all evidence, upon which, it intended to rely in support of its defence and to indicate in the reply, as to whether, they wished to be heard in

person. Reply was required to be filed within 30 days from the date of receipt of the show cause notice.

8. Reply filed by the respondent-assessee is not on record and has not been filed by any of the parties, but, we find that it has been substantially, if

not completely reproduced in the order-in-original, passed by the Commissioner of Service Tax dated 29-5-2012. The reproduction can be found

in the said order of Commissioner of Service Tax under the heading ''Submissions by the Noticee'' in para. 12 and sub-paras thereto. In sub-para

1 of para. 12, the respondent-assessee has accepted that they were earlier paying service tax under the head ''Management Consultancy

Services'', but this was on mistaken interpretation of law. It was submitted that the assessee had filed a refund claim as the service tax paid under

the head ''Management Consultancy Services'' was paid erroneously. In para. 3 of the reply, reference was made to para. 7 of the show cause

notice wherein, details were given with regard to the agreements entered into between the assessee and other hoteliers. It was submitted that the

respondent-assessee was not liable to pay Service Tax on Management Fee received for the properties being managed by them as complete

independent business units. It was pleaded that this would not fall under the category of Management Consultancy Services. In para. 4 of the reply,

it was stated that the services rendered by the assessee were not covered under the definition of Business Auxiliary Services as evident from the

submissions made by them in various sub-paras. Criticizing and referring to the notice, it was stated that the notice did not specify and satisfy

anyone of the conditions provided in the definition of Section 65(19) and it was pleaded that the Commissioner has failed to specify the category

under which the services provided by the assessee could be covered. However, reference was made to several decisions of the Tribunal, to claim

the activities performed being complete independent business, would not fall in the category of Business Auxiliary Services. Reference was also

made to Circular No. 59/8/2003-S.T. dated 20-6-2003 issued by the CBEC clarifying scope of levy under Business Auxiliary Services. In para. 5

of the reply, it was stated by the respondent-assessee as under:

Therefore, applying the ratio of the aforesaid decisions rendered by Hon''ble CESTAT, and clarification provided by the CBEC the issue of non

taxability of operating and managing hotels stands settled as the services provided by the Respondent to the Owner are in the nature of operating,

controlling, administering, running and managing the hotel and are not in the nature of advice, consultancy, or technical assistance and are thus not

in the nature of consultancy services but are in the nature of actual performance of the management function. Thus, these services provided by the

Respondent cannot be subjected to service tax.

9. Thus, in the reply, detailed submissions and contentions as well as authorities were referred to and relied upon. The order-in-original also refers

to the record of the ''personal hearing'', which was given on 30-3-2011. Submission, that no Service Tax could be charged as there was no service

provider and a service receiver, was pleaded. It was submitted that the assessee was engaged in management of business of hotels and properties

and for their management, they received payment from the owner and no service of business management or management consultancy was

involved. The assessee were not engaged in service as they had deployed their own employees and they were paid actual amount of salary without

any markup. Since the main issue itself was not taxable or was not a taxable auxiliary service, nothing was taxable.

10. The order-in-original thereafter refers to the agreements between the assessee and the different hotels, and records that the said concerns,

were into business of hotel industry and it was a service sector industry, the primary objective of the hotelier to provide service of hotel stay, letting

out halls for a consideration for organizing any official, social or business function for different events etc. Reference was made to ''Operating

Service Agreement'' between the respondent-assessee and different hotels. After referring to different clauses of Section 65(19), in para. 15.4, the

Commissioner, has observed as under:

15.4 As rightly submitted by the noticee, in order to attract levy of service tax under the category of ''Business Auxiliary Services'' it is essential

that the service must satisfy anyone of the conditions provided under, the above definition. On going through the details of the services provided by

the noticee and the definition of Business Auxiliary Services as above, I find that the services provided by the noticee to their clients (Hotel owners)

are squarely covered under (vi) and (vii) of the above definition of Business Auxiliary Services.

In para. 15.7, it has been held as under:

15.7 Whereas in the instant case the service provided by the noticee are consumed by the customers of their clients. Whereas their clients are

themselves service providers. And were duty bound to provide services to their customers for a consideration. In other words they are providing

services on behalf of their clients to their (client"s) customers and hence are squarely covered under service tax under the taxable service category

BAS. Accordingly, the reliance placed by the Noticees on the decisions of the Hon"ble CESTAT is misplaced. The said decisions do not support

the contention of the Noticees?

11. What is apparent from the order-in-original, is the fact that the Commissioner had drawn attention of the assessee to Section 65(19), which

defines "Business Auxiliary Services". In the show cause notice, it was pleaded that the services provided were covered under "Business Auxiliary

Services" under Section 65(19) since it appeared to satisfy all definitional ingredients spelt out. The assessee had entered into agreements with

service receivers namely M/s. Srinivasa Resorts Ltd., M/s. Laxmi Distributors P. Ltd., Adyar Gate Hotels owner of Park Sheraton Hotels and

Grand Bay. It was stated that M/s. Srinivasa Resorts Ltd. and M/s. Laxmi Distributors P. Ltd., had agreed to make payment of service tax;

whereas, Adyar Gate Hotels owner of Park Sheraton Hotels and Grand Bay had raised a dispute. Their submission was that they were not liable

to pay Service Tax because the agreements in question were entered into before introduction of the Finance Act. After the issue of show cause

notice and the reply filed by the assessee, personal hearing, was given and issue discussed. The order-in-original specifically refers to clauses (vi)

and (vii) of Section 65(19) of the Finance Act, which were finally relied upon by the Commissioner to give his findings.

12. In the light of the aforesaid factual matrix, we do not think, that the Tribunal was right in quashing the show cause notices itself, observing that

there was violation of principles of natural justice. It is not a case wherein, the respondent-assessee was taken by a surprise, as relevant facts on

which, the Commissioner relied and provisions of Section 65(19) invoked, were set out and mentioned in the show cause notices itself. Further,

personal hearing was given in which the question whether the services were covered and could be treated as "Business Auxiliary Service" was

discussed. In case, the assessee wanted to file further reply or wanted further time to explain and put forth their point of view, they could have

asked for an adjournment or further time before the Commissioner of Service Tax.

13. The object and purpose of issue of show cause notice is to inform the assessee so that reply or submissions can be made and relevant facts

which are in the knowledge of the assessee can be brought on record. After examining and consideration of the show cause notices, we feel that

the assessee was informed and made aware of the contention of the revenue and their stand and stance. The specific agreement(s) which were

sought to be brought and charged to Service Tax under the head "Business Auxiliary Services" were stated. No doubt, Tribunal has permitted the

appellant-revenue to act in accordance with the law, but, they would not able to proceed in terms of and for the periods specified in the show

cause notices, which were the subject matter of the order-in-original dated 29-5-2012.

14. Section 65(19) defines what is meant by the term Business Auxiliary Service for the purpose of Service Tax and has seven different sub-

clauses. However, anyone reading the said sub-clauses alongwith the assertions made in the notice making reference to the agreements between

the respondent-assessee and M/s. Srinivasa Resorts Ltd., M/s. Laxmi Distributors P. Ltd., Adyar Gate Hotels owner of Park Sheraton Hotels and

Grand Bay would understand that reference was with regard to sub-clauses (vi) and (vii). The question was whether the activities performed and

undertaken by the respondent-assessee under the agreement would fall in the category and within the meaning of Business Auxiliary Service. It was

obvious that sub-clauses (i) to (iv) were not applicable. This leaves only sub-clause (v) and (vi). Sub-clause (vii) relates to service incidental or

auxiliary to the activities specified in sub-clauses (i) to (vi). Read in the manner we do not think that it can be said that respondent-assessee was in

dark or unaware as to what he had to answer and argue. Any ambiguity in such circumstances would have been removed at the time of oral

hearing. Para. 13 of the order of the Tribunal dated 24-7-2013 clearly indicates that the order is premised on the fact that the principles of natural

justice were violated as the assessee did not have full opportunity to meet the case of the revenue for taxation of the services under the head

''Business Auxiliary Services'', in respect of the agreements mentioned above. As noted above, we find that the notices were clear and do specify

the activities which were sought to be brought to tax as services under the head ''Business Auxiliary Services''.

15. Learned counsel for the respondent-assessee has relied upon decision of the Supreme Court in Amrit Foods v. Commissioner of Central

Excise, U.P., 2005 (190) E.L.T. 433 (S.C.). In the said decision, the Tribunal had set aside the order of the Commissioner, in respect of the

classification of milk shake mix etc. The Supreme Court while examining the appeal filed by the revenue against the order of the Tribunal, deleting

the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944, observed that the said Rule i.e. Rule 173Q had six clauses, the

ingredients of which are not same, and it was therefore necessary for the assessee to be put on notice as to the exact nature of contravention for

which the assessee was liable. Similarly, in Kaur and Singh (supra), the Supreme Court, was dealing with the situation wherein, Rule 9(2) of the

Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944 had been invoked but in the show cause notice, it was not

specified that whether the assessee was guilty of fraud or collusion or willful misstatement or suppression of facts or contravention with intention to

evade the payment of Excise duty. The show cause notice did not set out any such particulars and did not even make a bare allegation. It was

observed by the Supreme Court that it was impermissible to assume a ground to be implicit in the show cause notice. In Collector of Central

Excise Vs. H.M.M. Limited, , extended period of 5 years under Section 11A of the Central Excise Act, 1944 was sought to be invoked in the

show cause notice, but, without specifying or making an averment that excise duty was intentionally evaded etc. In these circumstances, the show

cause notice was quashed. We do not find that the aforesaid decisions can help the respondent-assessee, keeping in view the factual matrix in the

present case, which we have been noticed and discussed in detail.

16. When we examine the Show Cause Notice, we have to take into consideration that the object and purpose is to inform the recipient of the

allegations against him so that he can meet them effectively and is not prejudiced by manifestly vague notice which leaves him confused and unable

to answer/reply. The assessee must be given a reasonable and real opportunity and made aware as to what he has to meet. But, the notice cannot

be read as a legislative enactment which is to the point, precise and required to show exceptional lucidity. What is required to be seen is whether

the allegations made have been conveyed and set forth, to enable the recipient/assessee to get an opportunity to defend himself against the charges.

Notice should not suffer from obscurity and unintelligibility as to deny a fair and adequate chance to the recipient/assessee to get himself fully

exonerated and avoid incidence of tax. What transpired after the notice was served, conduct of the parties thereafter, hearing given, are all factors

that have to be examined to ascertain as to any prejudice was caused resulting in an arbitrary and unjust decision. Principle of prejudice resulting

from vagueness and uncertainty has to be examined in pragmatic and a reasonable manner.

17. At this stage, learned counsel for the respondent-assessee submits that no substantial question of law arises for consideration in the present

appeal. It is not possible to agree with the said submission. As noticed above, substantial question of law was framed on 4th April, 2014. Tribunal

in the impugned order has held that the show cause notices itself were vague and in violation of the principles of natural justice, and has set aside

the order-in-original, which was passed. The show cause notices, averment made therein and principle of prejudice caused was not considered in

proper legal perspective. Tribunal has not disposed of the appeal filed by the respondent-assessee on merits in respect of the findings given by the

Commissioner of Service Tax, holding that the activities were taxable under the head "Business Auxiliary Services". Thus, we hold that substantial

question of law arises for our consideration and decision.

18. On remand, it will be open to the respondent-assessee to contend before the Tribunal that the findings of the Commissioner of Service Tax,

that the considerations received were covered under "Business Auxiliary Services", were incorrect and wrong. Learned counsel for the

respondent-assessee states that they would want to place additional evidence on record. The respondent-assessee will be at liberty to file an

appropriate application for the said prayer before the Tribunal, which, we perceive, will be favorably considered. To cut short the delay, the

parties are directed to appear before the Tribunal on 9th September, 2014.

19. The question of law is accordingly answered in favour of the appellant-revenue and against the respondent-assessee. We clarify and observe

that observations made in this decision will not be treated and held to be binding finding and conclusions relating to merits. Whether or not, Section

65(19) is applicable, will be decided on merits without being influenced by the findings recorded by us.

20. The appeal stands disposed of in above terms. No costs.