Legal Update

Service Tax

LD/66/167

Sundaram Finance Ltd.

vs.

CCE&ST, LTU

16th November, 2017

When the assessee NBFC extended loans to its clients and sold the assets receivables to bank/trust for discounted price and simultaneously entered into an arrangement with such bank/trust for collecting the EMIs from clients as per EMI schedule and remitting the same to bank/trust, for which assessee received some fees, Tribunal held that such arrangements being on principal to principal basis cannot be regarded as 'business auxiliary services'

Facts:

The appellant, a non-banking financial company, is engaged in business of extending loans to various clients for purchase of vehicles etc., which are paid back on regular EMI basis. The appellant-assessee entered into an agreement with another person viz. "Trust/Special Purpose Vehicle (SPV)" to whom they have sold the receivables towards these loans extended to various clients. On sale of such future receivables, appellant received a discounted consideration when compared to actual receivables, which included interest. Simultaneously, they have entered into an agreement with the Trust/SPV which mandates the appellant-assessee to collect all these receivables on the fixed periodicity from the loan clients and deposit the same in return of the said consideration received on sale of receivables. For such operation of receiving EMI payments and remitting the same to SPV/Trust, the appellant-assessee is paid a consideration in percentage terms. This amount is named as "Securitisation Service Fee". The appellant also entered into similar agreement with ICICI Bank.

Revenue took a view that the activities of the Appellant are clearly incidental or auxiliary to the support service relating to billing, collection, recovery of cheque, remittance of amount and will be taxed under the head business auxiliary services. As regards transactions with ICICI Bank, the Revenue also contended that, the appellant are in fact service providers of services which are incidental or auxiliary to bill collection by depositing the cheques of the obligors with the ICICI bank as per the predetermined obligation for which they are showing very nominal amount as fee towards collection and deposit of receivables from the obligors into bank account and showing a substantial amount as profit on sale of receivables. This is nothing but a device arranged by the appellant-assessee to avoid tax liability.

Held:

Hon'ble Tribunal noted that the contractual arrangement between the appellant assessee and the Trust/SPV is on principal to principal basis and the obligation to collect the cheque and deposit as per the schedule of agreement is nothing but an obligation in pursuance of the main agreement of upfront sale of future receivables which would be recouped on regular basis later. Similarly, as regards transaction with ICICI Bank, Hon'ble Tribunal held that appellant assessee cannot be called as 'collection agent' of bank for providing business auxiliary services, as such collection agents are generally dealing an amount or instrument which is due to an institution from a third party for which the agent acts as a middleman. Tribunal noted that, in the present case, it clear that instrument or amount is intended and remitted to the appellant by way of cheque. The said amount has to be transmitted to ICICI bank as per the agreed schedule towards servicing of already obtained consideration by the appellant. Hence there is no tripartite arrangement. The role of the appellant is mainly with reference to discharging the obligation of servicing the amount already received. All these conditions are put by ICICI bank with reference to various loans extended to different identified obligors. This by itself does not make the appellant as a collection agent of the amount from the identified obligors to be paid to the ICICI bank. Tribunal also noted that even in case of non-collection of such amounts from obligors, the appellant has to discharge the amount due to ICICI bank, from their resources. This will only indicate that the transaction is a financial arrangement on principal to principal basis between the appellant and ICICI bank. The conditionalities of such transaction between the two principals will not determine and make one of the contracting party an agent of the other. Tribunal also held that the conditions of transactions and schedule of payment will not influence the nature of activity as agreed

upon between two contracting parties, hence there is no element of business auxiliary services in arrangement between appellant and the bank. Accordingly, Tribunal held that the cheque and other bills collected by the appellant are on their own account which are further passed on in terms of agreement with ICICI bank.

LD/66/168

CCE&ST

vs.

Analog Devices India Pvt Ltd.

13th November, 2017

Tribunal held that though the marketing support services are rendered to foreign holding company, in respect of buyers in India, since the benefit has accrued to such foreign company, the place of provision of service would be outside India and thus, such transactions would not be liable to service tax

Facts:

The respondent assessee is a subsidiary of Analog Devices Holding BV, Netherlands, which in turn is subsidiary of Analog Devices International. Respondent provided services of consulting engineers and marketing services, to its holding companies located abroad. Treating the same as export of services, respondent filed refund claim for unutilised cenvat credit in terms of Rule 5 of Cenvat Credit Rules, 2004, which was partly rejected by lower adjudicating authority and on appeal, allowed by first appellate authority. Aggrieved by the same, revenue filed present appeal alleging that services provided by respondent assessee are 'intermediary services', thereby, the place of provision cannot be regarded as outside India and conditions laid down in Rule 6A of Service Tax Rules, 1994 would not get fulfilled i.e. such services provided by assessee would not be regarded as 'export of services'.

Held:

Tribunal noted that the foreign holding company of the respondent assessee is located in Ireland i.e. outside India and is the sole recipient of services rendered by them and the respondent locate potential customers for the products of foreign company. Further, Tribunal observed that though the services are provided with respect to buyers in India, the benefit of the same accrued to the company located abroad and respondent assessee does not render any service to Indian customers and benefit is derived by foreign recipient only. Accordingly, Tribunal upheld order of first appellate authority that services rendered by respondent assessee are not intermediary services but correctly regarded as 'export of services' u/r 6A of STR, 1994 and dismissed revenue's appeal.

LD/66/169

Mumbai Police

vs.

CST

23rd March, 2018

The activity of deploying additional police force on payment basis to maintain public security and peace, being sovereign function, the police department, an agency of state government, cannot be regarded as "person" engaged in business of running security services.

Facts:

Appellant are providing security to banks, individuals, security for cricket matches, Mumbai port trust, Mazagaon dock, Tata Power, FCI and for other functions. Revenue contended that charges recovered by appellant for providing such security would be chargeable to service tax under category of 'security agency service'. While rebutting the same, appellant submitted that alleged service tax demand would not sustain for they being performing sovereign functions, as held in case of *Dy. Commissioner of Police, Jodhpur 2017 (48) STR 275 (Tri-Delhi)*.

Held:

While deciding the present case, Hon'ble Mumbai Tribunal observed that in *Dy. Commissioner of Police, Jodhpur (supra)*, as relied upon by appellant, the Hon'ble Delhi Tribunal, *inter alia*, noted that the term "business" connotes that it is an activity undertaken with the intent of earning profit, whereas the charges recovered by police are in the nature of cost recovery for the additional police force deployed on request for maintaining security and law and order. Further, as submitted by the police department that the deployment of additional police force at the request of banks and other institutions or other events has been done only for maintenance of law and in the absence of which, there could arise major security issues in relation to person or property. It was accordingly held that such activities undertaken by the police, for which charges have been recovered, cannot be held to be in the nature of business activity.

Further, Hon'ble Tribunal in *Dy. Commissioner of Police, Jodhpur (supra)*, also held that the fees/charges collected for deploying additional police force can be regarded as part of statutory functions, by observing that the police department has the mandatory duty to maintain public peace and order, which is in the nature of sovereign function and no charges are recoverable from the citizens for the same; though the police department has recovered fees for deploying additional police personnel on request, however, the statutory functions of the police of the State Govt. make it explicit

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that such activity, even at request of the other person, is to be carried out only for the purpose of public security or for the maintenance of public peace or order and the charge for deployment of such additional force is also prescribed by the statutory notification issued by the State Govt, thereby confirming that the activity of deploying police personnel on payment basis is to be considered as part of statutory function of the State Govt. and the fees recovered are to be considered as statutory. Consequently, the police department, which is an agency of the State Govt., cannot be considered to be a "person" engaged in the business of running security services. Thus, Tribunal set aside impugned demand by holding that present case is squarely covered by decision of *Dy. Commissioner of Police, Jodhpur (supra).*

Note:

In *M/s UP Police vs. CCE&ST*, similar decision has been given by Hon'ble Allahabad Tribunal that service tax demand on police department under category of 'security agency services' would not sustain for providing security is a statutory function.

Excise

LD/66/170

Commissioner of Central Excise
vs.
Advance Steel Tubes Limited
06th March, 2018

Assessee's accounting for duty paid under protest as expenditure in balance sheet does not give rise to presumption that same had been passed onto the buyer, and thus refund of excise duty cannot be restricted on grounds of unjust enrichment.

The assessee is engaged in the manufacturing of M. S. Tubes & Pipes (Black & Galvanised) classifiable under chapter subheading No. 7306.90 of Central Excise Act, 1985 and was availing Cenvat Credit Rules, 2001. On visit to assessee's factory, Revenue found variation in the finished goods vis-à-vis balance shown in RG-1. The stock of finished products viz. Zinc Ash was also found short. The stock of H. R. coils viz. inputs was found excess as compared to the stock register. Consequent to investigation, the assessee debited an amount of ₹15 lakhs and another sum of ₹3.75 lakhs under protest on account of the said discrepancies.

2 show cause notices were issued. The first notice adjudicated and a demand of ₹2,84,389/- was confirmed. A penalty of ₹1,00,000/- was also imposed. This amount was appropriated out of the sum of ₹15 lakhs deposited by the party under protest. The penalty of ₹1 lakh was deposited by the party by way of a challan separately. The appeal against adjudication order was dismissed by CESTAT, which was accepted by Revenue (Commissioner).

With respect to the second notice, a demand of ₹32.38 lakhs (approx.) was raised, and the matter was referred to Settlement Commission, who settled the additional duty liability of ₹5.55 lakhs (approx.), which was also appropriated from the amount which was deposited by the assessee under protest. Immunity from payment of penalty and interest was also granted by the Settlement Commission.

Since the matters relating to discrepancies were settled by the Settlement Commission for a total sum of ₹8.40 lakhs, the assessee filed a refund claim for ₹10.34 lakhs. The refund claim was rejected by the Adjudicating Authority by holding that the assessee had accounted for the duty paid under protest as expenditure in the balance sheet and costing of the products were finalised by taking into account the cost of raw materials along with manufacturing and other expenses and hence, the presumption was that the same has been passed on to the buyer in the form of incurred/enhanced costing for current and further supplies of the party's products.

Being aggrieved thereby, assessee approached the CESTAT.

There was a difference of opinion between the 2 CESTAT Members, due to which the matter was referred to the third member. The third member held that this was not the case of the unjust enrichment because the duty was not paid at the time of clearance of goods, but subsequently during the course of investigation for the past period. The goods had already been cleared earlier. The third member also emphasised that the confirmed duty was adjusted from the pre-deposit made at the time of investigation by treating it as a sanctioned refund. Insofar as the sum of ₹8.40 lakhs was concerned, it was held that the same had been taken without considering the cost structure of the goods and despite that, the Revenue was invoking the bar of unjust enrichment to the balance amount for which refund had been claimed, which was not tenable.

Aggrieved by this order, Revenue approached the High Court. High Court affirmed the order of the third member and thus ruled in favour of the assessee.