2022 (12) TMI 1146 - CESTAT AHMEDABAD

DISHMAN PHARMACEUTICALS & CHEMICALS LTD VERSUS C.S.T. -SERVICE TAX - AHMEDABAD

Service Tax Appeal No. 474 of 2012

Order No. - A /12243/2022

Dated: - 22-12-2022

Levy of Service Tax - Banking and other Financial Services - charges paid by them in respect of their foreign currency transaction on reverse charge basis - HELD THAT:- It is noticed that the matter has been examined in detail in the case of M/S RAJ PETRO SPECIALITIES P LTD VERSUS C.C.E. & S.T. - SILVASA [2018 (8) TMI 1179 - CESTAT AHMEDABAD] where it was held that *any bank charges paid by Indian Bank to the Foreign Banks even though in connection with import and export of the goods and the same was debited to the appellant, the service tax liability does not lie on the appellant.*

In the instant case there are no allegation that any payment has been made directly by the appellant to the foreign bank. In this circumstances we find that no service tax can be demanded from the appellant.

Appeal allowed.

Judgment / Order

MR. RAMESH NAIR, MEMBER (JUDICIAL) AND MR. RAJU, MEMBER (TECHNICAL)

Shri R.Subramanya, Advocate appeared for the Applicant

Shri G.Kirupanandan, Superintendent (AR) for the Respondent

ORDER

This appeal has been filed by M/s Dishman Pharmaceuticals against the demand of service tax under the category of Banking and other Financial Services on charges paid by them in respect of their foreign currency transaction on reverse charge basis.

2. Learned counsel for the appellant pointed out that the appellant is manufacturer of bulk drugs. In the process of realization of export proceeds from buyers use services of foreign bank as well as Indian Bank. In this process some commission is paid to Foreign Bank by Indian Bank. The Indian Bank charge the reimbursement of the said commission from the appellant. He pointed out that's revenue is seeking to tax this charges paid by the appellant to the Indian Bank for the Services provided by the Foreign Bank on reverse charge basis. Learned counsel pointed out that this issue has been examined in the following judgments :

- Raj Petro Specialties Pvt Ltd Vs. CCE - 2018 (8) TMI 1179- CESTAT Ahmedabad
- Cylwin Knit Fashions & Others Vs, CCE - 2017 (9) TMI 96 – CESTAT Chennai
- Greenply Industries Ltd Vs. CCE - 2018 (38) STR 605 (Tri. Delhi)

3. Learned AR relies on the impugned order.

4. We have considered the rival submission. We find that the issue under examination in this case is if the appellant is required to pay service tax on reverse charge basis for the charges paid by them in respect of the foreign currency transaction between their local foreign banks engaged in facilitating the transfer of foreign exchange. It is noticed that the matter has been examined in detail in the case of Raj Petro Specialties Pvt Ltd Vs. CCE - 2018 (8) TMI 1179- CESTAT Ahmedabad. In the said case following has been observed:-

> *The appellant are engaged in the manufacture of excisable goods namely, different type of Industrial Oil, Lubricating Oil and Petroleum Jelly falling under chapter 27 to the first schedule of the Central Excise Tariff Act, 1985. During the course of audit, on scrutiny of the General Ledgers of the appellant for the year 2010-11, it was noticed that the appellant have made payment of ₹ 3,16,46,565/- under the head of Foreign Banks Charges to the Foreign Banks towards interest, Foreign Bank Commission / Charges, Foreign Bank Charges for LC-retired and other charges. It was also observed that the appellant has exported their goods and Foreign Bank collected report proceeds and after deducting their commission, they made payment to the appellant. The appellant has booked expenditure of such commission in their books of account under the head of Foreign Bank Charges. Thereafter, the appellant has provided the details of Foreign Bank Charges paid by them to the Foreign Banks for the period from April 2008 to March 2013. On the basis of the information and further clarification by the appellant, a SCN was issued wherein the demand of service tax amounting to ₹ 2,24,86,235/- was proposed during period 2008-08 to 2012-13. The adjudicating authority after consideration of submission made in their written reply, additional submission and during personal hearing adjudicated the SCN, wherein the following order was passed:*
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> > *(1) I confirm the demand of the Service Tax amounting to ₹ 2,222,99,270/- [Rupees Two crore Twenty Two Lakhs Ninty Nine Thousand Two Hundre4d Seventy Only] as demanded under proviso to Section 73 (1) of Finance Act, 1994 and order to recover the same from M/s Raj Petro Specalities Pvt. Ltd, Survey No. 146/2/3, Madhuban Dam Road, Village Karad, Silvassa under Section 73(2) of Finance Act, 1994.*
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> > *(2) I appropriate an amount of the amount of ₹ 6,27,335/- alsonwith interest of ₹ 1,54,786/- already paid by M/s Raj Petro Specialties Pvt. Ltd, Survey No. 146/2/3, Madhuban Dam, Road, Village-Karad, Silvassa against the demand at Sr. No. (1) Above and order to pay the remaining amount of service tax liability forthewith.*
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> > *(3) M/s Raj Petro Specialties Pvt. Ltd, Survey No. 146/2/3, Madhuban Dam Road Village Karad, Silvassa shall pay the interest at the appropriate rates on the Service Tax demanded at Sr.No (1) above under Section 75 of Finance Act, 1994.*
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> > *(4) I impose penalty of ₹ 2.22,99,2970/- [Rupees Two Crore Twenty Two Lakhs Ninty Nine Thousand Two Hundred Seventy only] on M/s Raj Petro Specialityes Pvt. Ltd, Survey No. 146/2/3 Madhuban Dam Road, Village Karad, Silvassa, under Section 78 of Finance Act, 1994.*
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> > *However, if the above amounts of service tax are along with interest within 30 days of receipt of this order, the said penalty imposed shall be treated as 25% penalty should also be paid amount of service tax provided that the amount of said 25% penalty should also be paid within 30 days of receipt of the order intems of proviso to Section 78 of Funance Act, 1994.*
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> > *(5) I impose penalty of ₹ 5,000/- [Five Thousand Only] on M/s Raj Petro Specialties Pvt. Ltd Survey No. 146/2/3/ Madhuban Dam Road , Village-Karad, Silvassa under Section 77 of the Finance Act, 1994.*

(6) I impose penalty of ₹ 200/- per day for every day during which ffailure in payment of service tax continued or at the rate of 2% of such ta, per month, whichever is higher, strating with the first day after the due date till the date of actual payment of the outstanding amount of service tax on M/s Raj Petro Specialties Pvt. Ltd. Survey No. 146/2/3, Madhuban Dam Road, Village-Karad, Silvassa under Section 76 of Finance Act, 1944 for the period from 01.04.2008 to 09.05.2008 provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

(7) I impose penalty of ₹ 2,00,000/- [Rupees Two Lakhs only] on Shri chandrashekhar Chincolikar, Assistant Manager (Commercial) & Authorised Signatory of M/s Raj Petro Specialties Pvt. Ltd Survey No. 146/2/3, Madhuban Dam Road, Village-karad, Silvassa, under Section 77 of Finance Act, 1994.

For the purpose of confirmation of above demand the adjudicating authority invoked Section 66A of Finance Act, 1994 and Rule 3(2) of the Taxation of Service (Provided form out-side India and received in India) Rules, 2006 under Reverse Charge Mechanism. Being aggrieved by the Order in Original, the appellant filed present appeal.

2. Sh. Vinay S. Sejpal Ld. Counsel appearing on behalf of the appellant at the outset submits that the appellant had no contract for dealing with the Foreign Banks directly. All the service charge were paid by the Indian Banks to the Foreign Banks for which there was arrangement between both the banks where the appellant is not the party, therefore the appellant is not service recipient from the Foreign Banks. Therefore, the payments on such charges were also not made by the appellant to Foreign Banks. In this position the Indian Banks are the service recipient of the service provided by Foreign Banks therefore, the appellant is not liable to pay service tax. He also referring the Board Circular No. 20/2013-14-ST-I (Commissioner of ST-I, Mumbai T.N.) dated 10.02.2014, relied upon the following judgment of this Tribunal:

- *Greenply Industries Ltd. Vs. CCE, Jaipur-I 2015 (38) STR 605 (Tri.-Del.)*
- *Raymond Ltd. Vs. CST, Mumbai-II 2018-TIOL-1250-CESTAT-MUM.*
- *M/s Dileep Industries Pvt. Ltd Vs. CCE, Jaipur 2017-TIOL-3755-CESTAT-DEL.*

3. Sh. J. Nagori Ld. Additional Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He further submits that the service charges paid by the appellant, even though to the Indian Banks, but it is towards the service provided by the Foreign Banks, therefore, the appellant is not liable to pay service tax under Reverse Charge Mechanism.

4. We have carefully considered the submission made by both the sides and perused the records. We find that on the very same issue the Board has clarified in the Circular dated 10.02.2014 as referred by the Ld. Counsel in the said Circular, the relevant para of the Circular is reproduced below:

> *“4. In order to understand the obligations of the foreign banks, the banks in India and importer/exporter, the said URC 522/UCP 600 were examined. Article Nos. 4, 8, 10, 11, 16, 21, 26 of URC 522 and Article Nos. 3, 4, 7, 8, 9, 13, 37 of UCP 600, read with other relevant Articles in these two brochures are relevant for the present issue. A combined reading of these Articles shows that there is an implied contract between a bank in India and a foreign bank, whereby, the foreign bank recognizes only the Bank in India for providing their services and for collection of their charges. In case of any clarification on any issue regarding their activity, there is always correspondence between the foreign bank and the bank in India. Even the amount of charges collected by foreign bank is informed only to the bank in India. The exporter or the importer in India comes to know about these charges*

through their own bank in India. In fact the most interesting aspect is that the importer or the exporter in India is not even aware of the quantum of charges which are charged by the foreign bank. Further, in case of export transactions, if the remittance could not be paid by the foreign importer, in that case the foreign bank recovers the charges from banks in India only and in case of import transactions, if the foreign exporter does not bear the foreign bank charges, the same are recovered by the foreign bank from the bank in India. The combined reading of the relevant articles in the said two internationally accepted conventions, undoubtedly show that services are provided by the foreign bank to the bank in India. Therefore, as per the Service Tax law, as a recipient of service, the bank in India, is required to pay Service Tax under erstwhile Section 66A of the Finance Act prior to 1-7-2012 and under the provisions of Notification No. 30/2012-S.T., dated 20th June, 2012 after 1-7-2012.

5. The views of the banks that services provided by the foreign bank are received by the importer or exporter in India is not factually and legally correct because, for a person to be treated as recipient of service, it is necessary that he should know who the service provider is and there should be an agreement to provide service, which may be oral or written. In the present case, the importer and exporter does not even know who the service provider is, as they are not aware of the identity of the foreign banks which would be providing services. Exporter or importer in India does not have any formal or informal agreement with the foreign bank. Importer or exporter in India does not even know the quantum of charges which the foreign bank would be recovering. Therefore, in view of the above mentioned factual position and also in view of the various articles of URC 522/UCP 600, it is clear that services are provided by the foreign bank to the bank in India. Further, Tribunals have also prima facie held that in such cases, services are provided by the foreign bank to the Indian bank and not to the Indian Exporter. [M/s. Gracure Pharmaceuticals Ltd. v. Commissioner of Central Excise, Jaipur-I - 2013 (32) S.T.R. 249 (Tri.-Del.), M/s. Gujarat Ambuja Exports Ltd. v. Commissioner of Service Tax, Ahmedabad - 2013 (30) S.T.R. 667 (Tri.-Ahmd.)].

6. It is therefore clarified that, in cases where the foreign banks are recovering certain charges for processing of import/export documents regarding remittance of foreign currency, the banks in India would be treated as recipient of service and therefore required to pay Service Tax."

From the above Circular it is abundantly clear that when the Indian Banks are collecting charges including the charges of Foreign Banks toward import and export of the goods of their client. In such case, as regard the service tax liability under Reverse Charge Mechanism, the Indian Banks are recipient of service, therefore, the appellant cannot be held as recipient of service provided by Foreign Banks to the Indian Banks. Accordingly, the appellant is not liable to pay service tax under Reverse Charge Mechanism. This very same issue has been considered by this Tribunal in the case of Greenply Industries Ltd (Supra), wherein Division Bench of this Tribunal passed following order:

"The appellants are exporters. They receive the export proceeds through ING Vyasa Bank. The foreign bank through which the payment had given channelised charged some amount from the appellant's bank ING Vyasa Bank which in turn recovered the same from the appellant. The department demanded Service Tax on the amount which the foreign bank charged from ING Vyasa Banker which, in turn, was recovered from the appellant. On this basis, Service Tax demand of ₹ 96,392/- was confirmed against the appellant along with interest and penalties were imposed under Sections 76 and 78. This order of the Asstt.

Commissioner was upheld by Commissioner (Appeals) vide order-in-appeal dated 17-4-2008 against which this appeal has been filed.

2. Heard both sides.

3. Shri R.S. Sharma, learned Counsel for the appellant pleaded that similar demand has been confirmed against the appellant for the previous period by the original adjudicating authority which had been set aside by the Commissioner (Appeals) vide Order-in-Appeal No. 114/DK/S.T./JPR-I/2008, dated 12-11-2008, that in any case since the appellants have neither received any service from the foreign bank nor has directly paid any amount to the foreign bank, they cannot be treated as service recipient and no Service Tax can be charged from them under reverse charge mechanism and that it is ING Vyasa Bank which has received the services, from the foreign bank for which the Service Tax cannot be demanded from the appellant. He, therefore, pleaded that impugned order is not correct.

4. Shri R. Puri, learned DR defended the impugned order by reiterating the finding of the Commissioner (Appeals).

5. We have considered the submissions from both sides and perused the records. We find that no documents have been produced showing that foreign bank has charged any amount from the appellant directly. The facts as narrated in the impugned order clearly indicate that it is the ING Vyasa Bank who had paid the charges to the foreign bank. In view of this, the appellant cannot be treated as service recipient and no Service Tax can be charged from them under Section 66A read with Rule 2(l)(2)(iv) of the Service Tax Rules, 1994. Moreover, we also find that in Appellant's own case for the previous period similar order had been passed by the original adjudicating authority and on appeal being filed against the same, the Commissioner (Appeals), vide order-in-appeal dated 12-11-2008 has set aside that order and as per the appellant's counsel, no appeal has been filed against that order. In view of this, the impugned order is not sustainable. The same is set aside and the appeal is allowed."

5. As per above judgment it was held that when the assessee is not directly making the payment to the Foreign Banker towards any service provided by the said Foreign Banker to the Indian Bank, the assessee is not liable to pay service tax. With this settled position, we hold that any bank charges paid by Indian Bank to the Foreign Banks even though in connection with import and export of the goods and the same was debited to the appellant, the service tax liability does not lie on the appellant. However, we are not going into the exact calculation of the service tax and demand, in case any service charges is paid directly by the appellant to Foreign Banker towards the service received by the appellant from the Foreign Bank in such case the service tax liability will be on the appellant.

6. With this observation, we remand the matter to adjudicating authority to verify the quantification and if any service tax liability arises, the same may be demanded from the appellant. The appeal is allowed by way of remand to the adjudicating authority.

4.1 In the instant case there are no allegation that any payment has been made directly by the appellant to the foreign bank. In this circumstances we find that no service tax can be demanded from the appellant.

5. In view of the above the demand cannot be sustain and the same is set aside. Appeal is allowed.

(Pronounced in the open court on 22.12.2022)

Citations: in 2022 (12) TMI 1146 - CESTAT AHMEDABAD

1. 2018 (8) TMI 1179 - CESTAT AHMEDABAD
2. 2018 (4) TMI 675 - CESTAT MUMBAI
3. 2017 (10) TMI 1231 - CESTAT NEW DELHI
4. 2017 (9) TMI 96 - CESTAT CHENNAI
5. 2015 (12) TMI 80 - CESTAT NEW DELHI
6. 2014 (8) TMI 585 - CESTAT AHMEDABAD
7. 2014 (1) TMI 452 - CESTAT NEW DELHI