

Navinon Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-13-2004

Reported in : (2004)(172)ELT400Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Navinon Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. Heard both sides. The assessee is in appeal. The issue pertains to recovery of Service Tax. The appellant has made certain payments to M/s. Ciba Geigy Limited, Switzerland, in the shape of royalty in pursuance of the Agreement dated 22.11.1996 for technical know-how, equipment, skill, expertise and services for production of VAT Dyes.

Show cause notice was issued demanding Service Tax from the appellant under the category of "Consulting Engineer". It is contended on behalf of the appellant that M/s. CIBA Geigy Limited being a manufacturer is not an engineering firm and would not fall under the definition of 'Taxable Service and Consulting Engineer'. On due enquiry, the Additional Commissioner, Central Excise, Thane, confirmed the demand of Service Tax of Rs. 29,15,488/- under Section 73 of The Finance Act, 1994. Interest is also ordered to be recovered. A sum of Rs. 100/- per day is imposed towards penalty from the date the Service Tax was liable to be paid. The Commissioner (Appeals) did not find any grounds to interfere with the Order in

Original passed by the Additional Commissioner, Central Excise, Thane. Hence this appeal.

2. From a perusal of the know-how agreement under which the alleged services were obtained, it is apparent that the agreement shows the payments to be made pursuant to a technical know-how transfer and also the ingredients of the definition of a consulting engineer as given below: "consulting engineer" means any professionally qualified engineer or an engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering".

For the consideration of know-how and technical assistance, the appellants were required to pay royalty of 8% for export and 5% for domestic sales of the net invoice value of the products manufactured and sold by the appellants in accordance with the know-how.

3. The Commissioner (Appeals) has failed to appreciate that service tax is levied on the services provided under Section 66 of the Act by a service provider. Rule 6(1) of the Service Tax Rule, 1944 provides that the said tax is on the value of the taxable services received, which is to be paid to the credit of the Central Government by the 25th of the month. The proviso to this rule prescribes that in case of a person, who is non-resident or is from outside India and who does not have any office in India, and if such a person is liable to pay service tax, the said tax shall be paid by such person or on his behalf by any other person authorized by him. In the present case, from the agreement of transfer of technology and know-how, it is apparent and if its services covered then the appellants herein are the recipient of such services, which are provided by M/s. Ciba Geigy Ltd., Switzerland or their authorized representatives in India. They were required to discharge that obligation and liability. The appellants cannot be fastened with the said tax liability since they are being authorized representative of M/s. Ciba Geigy Ltd., Switzerland, is not forthcoming from the records. Therefore, the Commissioner (Appeals) upholding the order dated 27.08.2003 asking the appellants to discharge the tax liability and imposing penalty on them needs to be set aside.

4. Since Ciba Geigy Ltd., Switzerland, are also manufacturers of the same goods, the definition of consulting engineer and providing the services as per subsection of Section 65 of the Act cannot be upheld. 5. The amounts, which the appellants have to remit to M/s. Ciba Geigy Ltd., Switzerland, are mentioned in the agreement under the heading "Royalty". Payments of royalty in the common parlance are not insisted as payment for a service provided. It is understood as a share of product or profit reserved by owner for permitting another the use of his property. Royalty payments in the present case for the use of technology and know-how cannot be equated with any services to be provided by M/s. Ciba Geigy Ltd. to the appellants and therefore, the order of the lower authorities attracting a levy of tax on royalty payments made are required to be set aside.

6. The reliance of Article 2.1.1.1 of the Agreement providing for making the payments to M/s. Ciba Geigy Ltd., Switzerland, subject to tax and the provisions relating to withholding tax as is being interpreted by the lower authorities, cannot be a reason to fasten the service tax liability on the appellants. There is no provision like the Income Tax Act, 1961 to deduct tax at source in case of service tax and in the absence of such provision, the appellants are not required to deduct service tax and deposit/pay the same to the Department. The amendment made to the provisions of Rule 2(d)(1) in August, 2000 to make the receipt liable for payment of tax cannot be extended to tax the appellants for the period prior to such an amendment.

7. Since there was no liability on the appellants, who approached the Department as regards service tax consequent to the agreement, there can be no failure on the part of the appellants in having not filed Service Tax Returns.

8. In view of the fact that the second proviso to Rule 6(1) of the Service Tax was enacted with effect from 28.02.1999, therefore, even there is a liability on the part of the appellants to have discharged the obligations under the Service Tax Law for the period prior to 28.12.1999, the appellants cannot be found to be having any intention of misleading the Department and therefore the charges of suppression with an intention to evade payment of tax cannot be invoked.

9. Since no tax liability on the appellants, there can be no interest liability determined on them.

10. The appellants are not required to discharge any service as consulting engineers under the provisions of the Service Tax Law and/or required to file declaration or have any application for discharge of liability to duty. They are, therefore, not liable for any penalty in terms of Section 76.

11. In view of the findings, the order is required to be set aside and appeal allowed. Order accordingly.

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