SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Bajaj Auto Ltd. Vs. Commissioner of C Ex. and Cus.

Bajaj Auto Ltd. Vs. Commissioner of C Ex. and Cus.

SooperKanoon Citation : sooperkanoon.com/36713

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-06-2004

Reported in : (2005)(179)ELT481Tri(Mum.)bai

Judge : J Balasundaram, Vice-, A M Moheb

Appellant : Bajaj Auto Ltd.

Respondent : Commissioner of C Ex. and Cus.

Judgement :

1. By the impugned order, the Commissioner (Appeals) has confirmed adjudication order of demand of Service Tax of Rs. 3,74,01,709/- computed at the rate of 5% of the total value of taxable service of Rs. 74,80,34,172/- paid by M/s. Bajaj Auto Ltd. (hereinafter referred to as BAL) to M/s. Kawasaki Heavy industries, Japan (hereinafter referred to as KHI) in respect of consulting engineering services rendered by KHI together with interest as per Section 75 of the Finance Act, 1994 and imposition of penalty of Rs. 3,84,500/-.

2. The brief facts of the case are that BAL manufacture, inter alia, motor vehicles falling under Chapter 87 of the Schedule to the Central Excise Tariff Act, 1985. One variety of motor vehicle is two wheeled motor cycles sold under the brand name "Kawasaki Bajaj-KB 100" for the manufacture of which the appellants entered into periodic agreements with KHI, Japan. Agreements are dated 6-8-94, 9-3-98, 2-2-02 and 7-11-02. In terms of the agreements, KHI provided technical know-how, technical assistance and patents for the above mentioned variety of

motor cycle. Show cause notice dated 29-7-2002 was issued to BAL and KHI proposing recovery of service tax under the provisions of Section 68, levy of interest under Section 75 and imposition of penalty under Section 75A, 76 and 77 for contravention of provisions of Section 68 and 70 of Finance Act, 1994. Service lax was proposed to be recovered on the ground that the services rendered by KHI, Japan were "Engineering Consultation Services" on which service tax was payable at the rate of 5% with effect from 7-7-1997 under Notification No.23/97-S.T., dated 2-7-97. The notice proposed recovery of service lax from BAL for further reason that under Rule 6 of the Service Tax Rules, 1994, in case a person from outside India does not have any Office in India and is liable to pay Service Tax on taxable services provided in India, the service tax thereon shall be paid by such person or on his behalf by any other person authorized by him and BAL was treated as the person authorized by KHI for payment of service tax in terms of the agreement between KHI and BAL. BAL filed reply to the show cause notice submitting inter alia that they are not liable to pay service tax as they are service receivers while liability for payment of service tax is on service providers, that in any event, no service tax is payable for the period prior to 28-2-99 which is the date the second proviso to Rule 6 came into effect which stipulated that in the case of a person from outside India who does not have any office in India, Service Tax is to be paid by him or on his behalf by any other person authorized by him; that the service receiver (BAL) is a client being charged for the service and cannot be the agent of the service provider for the purpose of payment of Service Tax in terms of Rule 6. They also raised a plea that the proviso to Rule 6 is prospective in nature and cannot be made applicable retrospectively and therefore, the amount of Rs. 8,96,728/- being the service tax for the period 7-7-97 to 27-2-99 could not be demanded. Their further contention was that the royalty payments under the agreement were in the nature of licence fees for the use of the "Kawasaki" brand name and cannot be treated as value of "services" rendered by consulting engineers. They also submitted that the expression "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 and since KHI, Japan are neither professionally qualified engineers or engineering firm rendering the said

services, consulting engineer's service has not been provided to them by KHI. The extended period of limitation invoked in the show cause notice was also contested on the ground that they had not wilfully suppressed/concealed the fact of rendering consulting engineer's service to them by KHI, Japan. Lastly they relied upon clause (iv) of Rule 2 of the Service Tax Rules, 1994, which was inserted with effect from 1-8-02 by Notification No. 12/2002-S.T. which provided that in the case of any taxable service provided by a person who is a non-resident or is from outside India who does not have any office in India, the person receiving taxable service in India to pay service tax, to support their contention that the demand which was for the period prior to 1-8-2002, was not sustainable. The Jt. Commissioner of Central Excise & Customs, Aurangabad rejected the defence of BAL and hence confirmed the demand and ordered its recovery together with interest under Section 75 of the Finance Act, 1994, in terms of Section 68 of the Act, imposed penalty of Rs. 1500/- for failure to obtain registration under Section 69 and for failure to furnish the prescribed return under Section 70 and imposed penalty of Rs. 3,83,000/- under Section 76 for failure to pay the Service Tax. The Commissioner (Appeals) upheld the Adjudication Order in its entirety; hence this appeal.

3. We have heard Shri A. Hidayalullah, Sr. advocate appearing along-with Shri A. Sheerazi, advocate for the appellants and Shri S.V.Parelkar, JDR for the Department. The terms of payment by BAL to KHI are set out in the agreements.

Article 9 of the first agreement provides that in consideration of the supply of know-how including technical information for the product from KHI, BAL shall pay the following amount, subject to deduction of tax in India.....1. Lumpsum payment of.....for use of the know how; 2. Royally at the rate of.....

In the agreement dated 9-3-98, the relevant article providing for payment is Article 11.01, 11.04 and 11.05.

Article 11.01 stipulates that in consideration of the supply of know-how etc. BAL shall pay KHI royalty subject to deduction of applicable tax in India.

Article 11.04 provides that remittance, after deduction, if any under the Indian Tax Laws as applicable, shall be effected in US Dollars by transfer to a Bank

Accountant in Japan to be designated by KHI. Article 11.05 provides that all tax concerning payments to KHI shall be made by BAL directly to the Government of India on behalf of KHI and BAL will send certificates of such tax payments to KHI. In the agreement dated 2-2-2000, Article 6 deals with payment.

Article 6.1 provides that in consideration of supply of know how, technical information and assistance by KHI, BAL shall pay KHI the following amounts subject to deduction of applicable taxes in India..., Articles 6.07 and 6.08 provide that all tax deductions made from payments to KHI shall be remitted by BAL directly to the Government of India on behalf of KHI and BAL will send certificates of such tax payments to KHI and the remittance after deduction, if any, under the India tax laws as applicable, will be effected by transfer to a Bank Accountant in Japan to be designated by KHI. In the agreement dated 7-11-2000, Article 11 provides for payment.

Article 11.01 provides that in consideration of supply of know-how etc. BAL shall pay lumpsum to KHI subject to deduction of applicable taxes in India; Article 11.06 talks about remittance after deduction to be sent to Bank Accountant in Japan and Article 11.07 provides that all tax concerning payments to KHI shall be paid by BAL directly to the Government of India on behalf of KHI.4. The submission of BAL is that these articles provide for deduction of Income Tax at source and remitted the balance to KHI, in view of the fact that the requirement to issue a certificate for deduction of tax at source is applicable under the Income Tax Act 1961 and there is no provision for payment of Service Tax, as no such procedure for issuing certificate existed under the Finance Act, 1994 or the Service Tax Rules. The ld. Counsel supports this argument with reference to the provisions of Section 195 and 199 read with Section 203 of the Income Tax Act, 1961 which provide for deduction of income tax by any person responsible for paying to a non-resident or to a foreign company, any interest or any other sum chargeable under the provisions of Income Tax Act, at the time of credit of such income to the account of the non-resident or foreign company and that credit shall be given to the person from whose income the deduction was made, on production of a certificate furnished under Section 203.

5. We see great force in the above submission, having regard to the language of the relevant provisions of Income Tax Act, 1961 and to the provisions of Finance Act and Service Tax Rules and to the Tribunal's decision in the case of M/s. Navinon Ltd. v. CCE, Mumbai-VI [2004 (172) E.L.T. 400 (T)] (Order No. A-713/WZB/2004/C.III, dated 13-8-04). In this order relating to recovery of service tax from the appellants for consulting engineers service rendered to Ciba Geigy Ltd., the Tribunal has held that there is no provision like in the Income Tax Act, 1961, to deduct tax at source in case of service tax and in the absence of such provisions the appellants are not required to deduct service tax and deposit/pay the same to the Department. The Bench has also held that amendment made to Rule 2(d)(1) in August, 2002 to make a person outside India and who has no office in India liable for payment of service tax for the period prior to August, 2002 cannot be extended to tax the service receiver for the period prior to such amendment. In the light of the above order, the plea of the BAL that no liability for payment of service tax can be fastened upon them is required to be accepted.

6. There is yet another reason for holding that service tax cannot be levied upon BAL. The second proviso to Rule 6 under which the demand of service tax has been confirmed against BAL reads as under:- "The Service tax on the value of taxable services received during any calender month shall be paid to the credit of the Central Government.....

provided further that, in the case of a person who is a non-resident or is from outside India, does not have any office in India and is liable to pay service tax on taxable services provided in India (1) the service tax thereon shall be paid by such person or on his behalf by any other person authorised by him, who shall submit to the Commissioner of Central Excise in whose jurisdiction the taxable services have been rendered, a return, containing the following details, (b) name and address of the client to whom the taxable services were rendered; along with a copy of the bill raised on the client to whom services have been rendered, a copy of the contract or agreement regarding the provision of such services to the client, and a demand draft payable to the Commissioner of Central Excise towards his service tax liability".

7. In the present case BAL is the Service Receiver. In other words, BAL is the client of KHI, Japan who is the Service Provider. The contention of the BAL that they cannot be both client and agent simultaneously, is, therefore, well founded. The proviso is obviously only to ensure that the service provider outside India not having any office in India, does not escape liability to pay if he has a representative in India/agent in India and to ensure that such representative/agent docs not wriggle out of liability for payment of service tax on the ground that he did not render any taxable service in India. We also see substance in the contention of the appellants that the amendment to Rule 2 of the Service Tax Rules 1944 by insertion of clause (iv) providing for payment of service tax by service receiver in India in relation to taxable service provided to a person outside India and not having any office in India, can only operate with prospective effect and cannot apply retrospectively so as to cover the period in dispute.

We, therefore, hold that the appellants are not liable for payment of service tax.

8. The contention of the appellants that payment of royally is not subject to levy of service tax also requires acceptance in the light of Tribunal's order in Aviat Chemicals Pvt. Ltd. v. CCE (ST), Mumbai [2004 (170) E.L.T. 466], wherein it has been held that right to use trade mark is a transaction in property and not consultancy or advice and that no consultancy or advice is involved in lease or sale of trade mark as it is a transaction in intangible property and in the present case, as clearly seen from the agreement, BAL has right to use trade mark/trade name of KHI, as per Article 7 (agreements dated 9-3-98 and 7-11-00) which deals with Industrial property rights and brand names.

9. In the result, we set aside the demand and penalty and allow the appeal on merits without recording any finding on the plea of time bar raised by the appellants.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com