

Sify Technologies Ltd Vs. Commissioner of Central Excise and Service Tax, Largest Tax Payer Unit, Chennai

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Chennai

Decided On : Nov-08-2010

Judge : The Honourable Ms. Jyoti Balasundaram, Vice-President

Appeal No. : Appeal No.ST/279 of 2010

Appellant : Sify Technologies Ltd

Respondent : Commissioner of Central Excise and Service Tax, Largest Tax Payer Unit, Chennai

Advocate for Pet/Ap. : Shri G. Natarajan, Advocate. Ms. Indira Sisupal, JDR.

Judgement :

1. The appellants herein, who are providing services such as Telecommunication Service (Leased Circuit Service), Internet Telecommunication, Tour Operator, Air Travel agency, Internet Cafi etc., provided “Leased Circuit Services” to M/s.Sify Communications Ltd. which is their associated enterprise. Prior to the introduction of Finance Bill 2008, they had been remitting service tax on associated enterprise transactions on collection basis and subsequent thereto, they had been remitting the service tax on associated enterprise transactions on raising service invoice. They had raised three invoices towards providing services of infrastructure, manpower and bandwidth charges to M/s.Sify Communications Ltd. for the quarter

ending 31.3.2008 on the same date and three more invoices for the quarter ending 30.6.08 on the same date. On 5.9.2008, they had remitted Rs.5,78,10,547/- towards service tax on account of associated enterprise transactions vide two challans dt. 5.9.08 under "Leased Circuit Services" category based on the service invoices issued for the quarter ending 31.3.08 and 30.6.08. An amount of Rs.24,19,303/- was paid towards interest on 5.9.08 for delayed payment of service tax on the above invoices, calculating interest @ 13%, considering the due date of payment as 31.3.08 for the bills raised for the quarter ending 31.3.08 and 6.7.08 as the due date of payment for the invoices raised for the quarter ending 30.6.08 and had calculated the delay in payment of tax in terms of months instead of number of days delayed, resulting in excess/short payment of interest. Claim for refund of Rs.8,44,029/- being interest paid in excess on delayed payment of service tax, was filed on 1.12.08 on the ground that since amendments in the Finance Bill, 2008 took effect only from 10.5.08, service tax on the transactions between associated enterprise became payable only w.e.f. 5.6.08 for invoices raised on associated enterprise, whereas they had paid interest considering the due date as 31.3.08 instead. The department was of the view that the actual due date for payment of service tax in respect of invoices raised for the quarter ending 31.3.08 would be 31.3.08 as per the third proviso to Rule 6 (1) of Service Tax Rules, 1994 whereas the service tax in respect of these invoices had been paid only on 5.9.08, resulting in 158 days delay in payment. In respect of invoices dt. 30.6.08, the tax was paid only on 5.9.08 instead of 5.7.08 and as per Rule 6(1) (ii), there was a delay of 62 days in the payment of service tax and therefore the assessee was required to pay interest @ 13% per annum for 158 days on Rs.2,69,24,788/- being the total service tax payable on 31.3.08 and interest for 62 days on Rs.3,08,85,760/- being the total service tax payable on 5.7.08. Accordingly, the total interest payable worked out to Rs.21,97,191/- instead of Rs.24,19,302/- wrongly paid and it appeared therefore that the assessees were eligible only for refund of Rs.2,22,111/- and not Rs.8,44,029/- as claimed by them.

2. Show-cause notice proposing rejection of refund of Rs.6,21,918/- (difference between the amount claimed and the amount actually eligible); the Asst. Commissioner adjudicated the notice by rejecting the claim for refund of Rs.6,21,918/- and ordering refund of Rs.2,22,111/- only. This order was upheld by

the Commissioner (Appeals); hence this appeal before the Tribunal.

3. I have heard both sides. Section 67 of the Finance Act, 1944 defines “value of taxable service”. The Section is reproduced herein below: -

SECTION [67. Valuation of taxable services for charging service tax.

“(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. “For the purposes of this section,”

(a) “consideration” includes any amount that is payable for the taxable services provided or to be provided;

(b) “money” includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) “gross amount charged” includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.” (emphasis supplied)

4. By the amendment introduced in the Finance Act, 2008 w.e.f. 10.5.08, service tax in respect of transactions between associate enterprises was required to be paid as soon as the transactions were entered in the books of account instead of waiting for the actual remittances. The objective of the amendment has been set out in CBEC’s letter D.O.F.No.334/1/2008 dt. 29.2.2008 which is reproduced herein below: -

6. Transactions between associated enterprises:

“6.1 Service tax is levied at the rate of 12% of the value of taxable services (section 66). Section 67 pertaining to valuation of taxable service for charging service tax states that value shall be the gross amount charged for the service provided or to be provided and includes book adjustment. As per rule 6 of the Service Tax Rules, 1994, service tax is required to be paid only after receipt of the payment.

6.2 It has been brought to the notice that the provision requiring payment of service tax after receipt of payment are used for tax avoidance especially when the transaction is between associated enterprises. There have been instances wherein service tax has not been paid on the ground of non-receipt of payment even though the transaction has been recognized as revenue/expenditure in the statement of profit and loss account for the purpose of determining corporate tax liability.

6.3 As an anti-avoidance measure, it is proposed to clarify that service tax is leviable on taxable services provided by the person liable to pay service tax even if the amount is not actually received, but the amount is credited or debited in the books of account of the service provider. In other words, service tax is required to be paid after receipt of payment or crediting/debiting of the amount in the books of accounts, whichever is earlier. However, this provision is restricted to transaction between associated enterprises. This provision shall also apply to service tax payable under reverse charge method (Section 66A) as taxable services received from associated enterprises. For this purpose section 67 and rule 6(1) are being amended.

6.4 The term “associated enterprise” has the same meaning as assigned to it in section 92A of the Income Tax Act, 1961. It is a relative concept i.e. an enterprise is an associated enterprise when it is viewed in relation to other enterprises. This concept is used in the Income Tax Act for applying transfer pricing provisions. An enterprise which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise is considered as associated enterprise. It also covers an enterprise in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

6.5 Section 92A(2) of the Income Tax Act specified various situations under which two enterprises shall be deemed to be associated enterprises. Enterprise means a person who is engaged in the provision of any services of any kind. For details, relevant provisions of Income Tax Act may be referred to.”

5. Pursuant to the above amendment, following Explanation was inserted in Rule 6 of the Service Tax Rules, 1994, w.e.f. 10.5.08: -

Explanation. “ For the removal of doubts, it is hereby declared that where the transaction of taxable service is with any associated enterprise, any payment received towards the value of taxable service, in such case shall include any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person

liable to pay service tax”

6. The statutory provision for demanding service tax in respect of transactions between associated enterprises, immediately upon amendment, has been introduced only w.e.f. 10.5.08. Prior to 10.5.08, neither the Finance Act, 1994 nor the Service Tax Rules, 1994 contain any provision enabling demand of service tax prior to the realization of taxable services, in any circumstances. This being so, it is not legally permissible to give retrospective effect to the Explanation inserted in Rule 6 of the Service Tax Rules. The Legislative intention behind the amendments was explained by the Board as for plugging avoidance of tax on the ground of non-realization of money from associated enterprises and the intention of the Legislature in bringing the amendments is to introduce a new provision and not to remove any doubts in the existing provision. It is not, nor can it be, anybody's case, that Explanation shall always take effect retrospectively. In the case of Commissioner of Customs Vs Skycell Communications Ltd. [2008 (232) ELT 434], the Larger Bench of the Tribunal has held that Explanation placing restrictions prejudicial to the assessee will not be retrospective. In the case of CCE Shillong Vs Vinay Cement Ltd. [1999 (114) ELT 753], the Tribunal has held that since a notification inserting an Explanation has specifically stated that it would be effective from the date of its publication, it takes effect only from that date. In the instant case also, Notification No.19/08 introducing Explanation to Rule 6 of the Service Tax Rules, 1994 contains a provision that it shall be effective only from the date of its publication. The amendment to Section 67 is a substantive one and will be applicable only from the date of its introduction and not retrospectively, even though the Explanation uses the expression “for removal of doubts”. The decision of the Tribunal in CCE Pune Vs Bajaj Auto Ltd.

[1999 (111) ELT 846] relied upon by the lower appellate authority to conclude that the amendment, which is clarificatory in nature, is retrospective, is not applicable in the facts of the present case, as the Tribunal held in that case, that clarificatory amendments are retrospective only when they did not materially change the existing provisions, while in the instant case, there was no provision either in Section 67 of the Finance Act or Rule 6 of the Service Tax Rules to suggest that in the case of transactions between associated enterprises, service tax has to be

paid immediately on entry of the transaction in the books of account.

7. In the light of above discussion, I agree with the contention of the assesseees that there was no delay in payment of service tax and that therefore they were entitled to refund of interest of Rs.6,21,918/-, set aside the impugned order and allow the appeal.

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