Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

SERVICE TAX Appeal No. 11512 of 2016 - DB

(Arising out of OIO-AHM-EXCUS-002-COMMR-06-ST-2015-16 dated 21/03/2016 passed by Commissioner of Central Excise and Service Tax-AHMEDABAD-II)

ADANI BUNKERING PVT. LTD **.....Appellant**
Formerly Known As M/s Chemoil Adani Private Limited
Adani House, Nr. Mithakali Circle, Navrangpura,
Ahmedabad, Gujarat

VERSUS

COMMISSIONER OF C.E., AHMEDABAD-ii **.....Respondent**
Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat- 380009

APPEARANCE:
Shri Amit Laddha, Advocatet for the Appellant
Shri Anoop Kumar Mudvel, Superintendent (AR), for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10190/2024

DATE OF HEARING: 21.09.2023
DATE OF DECISION: 22.01.2024

RAMESH NAIR

The issue involved in the present case is that whether the appellant is liable to pay service tax on the TDS, deposited to the Income Tax department in relation to the payment made to the Foreign Service Provider and when the TDS is over and above the invoice value of service.

2. Shri Amit Laddha Learned Counsel appearing on the behalf of the appellant submits that the issue is no more res-Integra, in the view of the following decisions wherein it was held that service tax is not liable to be paid on TDS if the same is paid over and above invoice amount and the same is borne by the service recipient. He placed reliance on the following decisions:-

- Mangarpatta township Dev.& construction co.Ltd. vs. C.C.E., pune –III -2016 (43) S.T.R. 132 (Tri.- Mumbai)
- Hindustan Oil Exploration Co. Ltd. Vs. Commr. of GST & C. EX., Chennai 2019 (25) G.S.T.L. 252 (Tri. Chennai)

- Indian Additives Ltd. Versus Commissioner of GST & Central Excise Chennai, Outer Commissionerate 2021 (10) TMI 487 CESTAT Chennai
- VSL India Private Limited Versus Commissioner of Service Tax, Chennai 2023 (3) TMI 802 CESTAT Chennai
- T.V.S. Motor Company Ltd. Vs. CCE-2021 (55) G.S.T.L. 459 (Tri. Chennai)
- Garware Polyester Ltd. Vs. Commissioner of C. EX. & CUS., Aurangabad 2017 (5) G.S.T.L. 274 (Tri. Mumbai)
- Centre For High Technology Vs. C.S.T. -Service Tax Delhi (8) TMI 243 CESTAT New Delhi

2.1 He further submits the Section 67 of the Finance Act, 1994, provides the mechanism for computation of value of taxable services for charging Service tax. It means the gross amount charged by the service provider for such service provided or to be provided by him in case consideration is charged in terms of money. Accordingly, the gross amount charged in the present case is the invoice value and not over and above therefore the service tax is payable only on the invoice value. The TDS was separately deposited by the appellant over and above the invoice in the treasury of the Central Government and the same was borne by them. Therefore, the TDS amount was not collected by appellant from the service provider. Hence, same is not liable to service tax.

2.2 Without prejudice, he further submits that the services were availed & consumed within SEZ, and therefore exemption under Section 26 of the SEZ Act cannot be denied in terms of settled law that in case of conflict between Finance Act and/or SEZ Act, provisions of SEZ Act would prevail. This view gets strengthen with the judgment of Hon'ble Andhra Pradesh High Court in case of GMR Aerospace Engineering Ltd. Vs. Union of India reported at 2019 (31) GSTL 596 (A.P.) duly affirmed by Hon'ble Supreme Court vide Judgment dated 26.07.2019 passed in SLP (C) Diary No. 22140/2019.

2.3 He further submits that in present case the Barges which taken on the rent were exclusively used for the authorized operations of SEZ carried out by the Appellant. In terms of Section 26 of Special Economic Zone Act, 2005 read with Notification No.12/2013-ST dated 01.07.2013, as amended,

the Appellant was entitled for refund of service tax paid on services used for the Authorized operation. Since both barges were exclusively used for the authorized operation, the Appellant was entitled for refund of service tax on such services and accordingly, even otherwise the entire situation is revenue neutral in nature. He placed reliance upon the following case laws:

- Chiripal Polyfilms Ltd. Vs. Commr. of C. EX. & S.T., Vadodara-1 2022 (67) GS.T.L. 454 (Tri-Ahmd.)
- Commissioner of CUS & C. EX. Vs. Textile Corpn. Marathwada Ltd. 2008 (231) ELT. 195 (S.C.)
- Texyard International Vs. Commissioner of Central Excise, Trichy 2015 (40) S.T.R. 322 (Tri Chennai)
- Precot Mills Ltd. Vs. CCE, 2014 (313) ELT 789 (T)

2.4 He also submits that the show cause notice is barred by limitation. The essentials of proviso to section 73 were not fulfilled in the present case to invoke larger period of limitation. Further, there was no clinching evidence brought on record by the Respondent to show that there was any mala fide intention on the part of Appellant to evade service tax on TDS. Therefore, since there is no suppression of fact with intent to evade service tax on the part of the appellant, demand is barred by limitation. He takes support of the following judgments:-

- Simplex Infrastructures Ltd. Vs. Commissioner of Service Tax, 2016 (42) S.T.R. 634 (Cal.)
- Delhi International Airport Ltd. Vs. Commissioner of CGST-2019(24) GSTL 403 (T).
- Binjrajka Steel Tubes Ltd. Vs. Commissioner of C. Ex., 2016 (342) EL T 302 (T)
- Roma Henny Security Service Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi, 2018 (8) G.S.T.L. 239 (Del.)

3. Shri Anoop Kumar Mudvel, Learned Superintendent (AR) appearing on the behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that as per the un-disputed fact the appellant have paid the service tax on the total value of the invoice raised by the Foreign Service Provider under reverse charge mechanisms. As per

the Income Tax Act, the appellant have discharged the TDS on the invoice value and the same was borne by the appellant. In this position, since the TDS is not a part and partial of gross value of the service, the same cannot be taxed under Finance Act, 1994. As per Section 67, it is clear provision that the only the gross value towards the service paid or payable shall be chargeable to Service Tax. In this case the gross value is the value of invoice on which service tax was discharged.

4.1 Merely, for the reason that TDS was deposited by the appellant, the same cannot be taxed. If the TDS is deducted from the gross value of invoice and the same is deposited then only the same shall be included in the gross value of service and tax will be chargeable on that. In the present case, neither the TDS was part of the invoice value nor the appellant have paid the amount towards TDS to their service provider. In this case, the TDS amount cannot be charged to service tax. This issue has been considered in various judgments as follows:-

a) Magarpatta Township Dev. & Construction Co. Ltd (Supra):-

> *"7. Undisputedly, the appellant has entered into an arrangements/agreement with foreign architect for receiving his services. The said agreement also indicates an amount to be paid as consideration by the appellant to such architect appellant has discharged the Service Tax liability on such an amount paid to the appellant is required to pay the Income Tax on such amount, which he has done so from his own pocket. On this factual matrix it requires to architect. As per provision of Income Tax Act be seen whether the relevant provision of Section 67 of the Finance Act, 1994 gets attracted We reproduce the said Section;-*
>
> ***"Valuation of taxable services for charging Service Tax**.*
>
> *67. (1) Subject to the provisions of this Chapter, where Service Tar 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 of 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."

It can be seen from the above reproduced Section 67 that it contemplates how the valuation of taxable service for charging Service Tax needs to be arrived and sub-section 1(1) provides for valuation wherein consideration paid in money, be the gross amount charged by the service provider. The phrase "gross amount charged also is explained in the said Section. Reading holistically, we find that Section 67(1) very clear mandates for discharging the Service Tax liability amount which is charged by the service provider is the amount.

8. Service Tax Valuation Rules, 2006 before amendment by Notification No. 24/2012-S.T., specifically Rule 7 needs to be read to arrive at the correct value of taxable service provided from outside India relevant Rule is reproduced

"7. Actual consideration to be the value of taxable service provided from outside India

1) The value of taxable service received under the provisions of Section 66A, shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.

(2) Notwithstanding anything contained in sub-rule (1), the value of taxable services specified in clause (1) of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as are partly performed in India, be the total consideration paid by the recipient for such services including the value of service partly performed outside India."

It can be seen from the above reproduced Rule that for the purpose of discharge of Service Tax for the service provided from outside India, the value is equal to

the actual consideration charged for the services provided or to be provided. In the case in hand, we specifically asked for the invoice/bill raised by the service provider and on perusal of the same, we find that appellant had discharged the consideration as raised in the said invoice/bill. There is nothing on record that indicates that the appellant had recovered that amount of Income Tax paid by them on such amount paid to the service provider from the outside India and any other material to hold that this amount is paid as consideration for services received from service provider."

b) Hindustan Oil Exploration Co. Ltd (Supra) :-

"5.1 The first issue is with regard to non-inclusion of TDS part which is paid under reverse charge mechanism for the services provided by foreign company. The Ld. Counsel for appellant has explained that there were two types of contracts and in the second category, the tax has to be borne by the service recipient which is the appellant herein. There is no dispute with regard to the service tax that is payable under the first category as a service provider. The demand is only with regard to the second type of contracts. The appellant has furnished documents to show that though TDS amount is deposited the same is borne by the appellant and has not been made part of the consideration. On perusal of documents, we are convinced that TDS has been borne by the appellant. For example, the letter dated 10-5-2006 shows that the appellant has to pay USD 319710 to the foreign company, namely, Thai Nippon Steel Engineering & Construction Corporation Ltd. The said amount has been fully paid as per the foreign certificate remittances. They have not deducted TDS but in fact have discharged the TDS liability. The appellant has borne the same as expenses of their company. On such score, we find that the demand of service tax alleging that TDS has not been included in the gross value is incorrect on facts and cannot sustain. We find that the issue is covered by the decision relied upon by the Ld. Counsel in the case of Magarpatta Township Development & Construction Co. Ltd. (supra), wherein the facts are as under-

> *"3 The Learned Counsel took us through the facts of the case and submits that the agreement entered by the appellant with the foreign architect is very clear as the said agreement states that amount to be paid by the foreign architect not to be taxed Le. by the appellant. He would take us through the agreement and bring to the notice specific clauses, appellant has discharged the Service Tax liability on the actual amount paid by them to such consultant. He would then take us through the provision of Section 67 of the Finance Act, 1994 and submit that the said section contemplates discharge of Service Tax lability on the gross amount charged by the service provider. He would submit that the architect has charged the gross amount that Indicated in the agreement. Subsequently, Leamed Counsel woukt take us through the provision of Service Tax (Determination of Value) Rules, 2006 as per Rule 7 during the relevant period, the provisions were very clear as to actual consultant charges need to be taxed. For this purpose, he relied upon the judgment of the Tribunal in the case of Commissioner of Central Excise Raigad v. Jawaharlal Nehru Port Trust P. Ltd-2015 (40) STR. 533 (Tr.-Mumbai)"*

The Tribunal in the above decision had set aside the demand. Following the same, the demand under this category requires to be set aside, which we hereby do."

c) Indian Additives Ltd. (supra) :-

"5. The issue to be decided is whether the levy of service tax on the TDS portion borne by the appellant is legal and proper. The issue stands decided by the order of the Tribunal in the appellant's own case for a different period. The Tribunal had relied upon the decision in the case of Magarpatta Township Development and Construction Co. Ltd. (supra). The relevant portion of the order is reproduced as under-

8. Service Tax Valuation Rules, 2006 before amendment by Notification No. 24/2012-S.T., specifically Rule 7 needs to be read to arrive at the correct value of taxable service provided from outside India relevant Rule is reproduced:-

"7. Actual consideration to be the value of taxable service provided from outside India

(1) The value of taxable service received under the provisions of Section 66A, shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.

(2) Notwithstanding anything contained in sub-rule (1), the value of taxable services specified in clause (ii) of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as are partly performed in India, shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India."

It can be seen from the above reproduced Rule that for the purpose of discharge of Service Tax for the service provided from outside India, the value is equal to the actual consideration charged for the services provided or to be provided. In the case in hand, we specifically asked for the invoice/bill raised by the service provider and on perusal of the same, we find that appellant had discharged the consideration as raised in the said invoice/bill. There is nothing on record that Indicates that the appellant had recovered that amount of Income Tax paid by them on such amount paid to the service provider from the outside India and any other material to hold that this amount is paid as consideration for services received from service provider.

9. In our considered view, the plain reading of Section 67 with Rule 7 of Service Tax Valuation Rules, in this case in hand, Service Tax liability needs to be discharged on amounts which have been billed by the service provider."

d) VSL India Private Limited (supra):-

"24.1 Now, we shall consider the issue of includability of TDS amount in the value of taxable services. Section 195 of the Income tax Act, 1961 deals with Tax to be deducted at source when payment is made to non-residents or foreign companies. This is basically to plug revenue loss that may occur if by any chance the non-resident doesn't file income tax return in India. Further, under said section, such sum alone is taxable which has the character of 'income'. Thus, the TDS is a tax obligation which can never partake the character of value or consideration for the transaction or of the goods or of services. It is not uncommon that any business

contract/agreement inter-se parties primarily focuses on the value/consideration and then spells out as to who would bear the TDS obligation. This cannot be construed as to mean that TDS is also a part of such value/consideration. This is also because, any value/consideration agreed upon is strictly the choice of the parties but the TDS depends on the rate in force at the relevant point of time.

24.2 Thus, when it is contended that the assessee 'grossed up' the TDS, it is understood to mean that the assessee has indeed received only the amount as agreed towards value/consideration and the expenditure towards TDS are met by the assessee. So, when such TDS is not received from the non- resident since it is not towards value/consideration, there is no merit in requiring such assessee to include even the TDS it paid in the value of services, as in the case on hand. There is an argument advanced for the Revenue that as per the terms of agreement, it is for the appellants to bear the TDS and thus it is to be treated as part of the consideration. We are unable to yield to the said contentions since in such agreements where one is a non-resident and such non-resident doesn't have any PE, then it becomes the responsibility of the other party who is an Indian resident, to meet with the TDS obligation arising on account of the agreement in question. Even if such clause is not there in the agreement, still the resident cannot escape the tax liability and hence it becomes incumbent upon it to deduct tax at appropriate rate, at source, before making the payment. We find that the decisions relied upon by the appellant support our above view."

In view of the above judgments, it can be seen that in the identical facts it was held that the TDS deposited which is over and above the invoice value cannot be charged to service tax.

4.2 Since, we decide the matter on merit itself, we are not addressing other issues such as revenue neutral, limitation and same are left open.

5. Accordingly, the demand in the present case is not sustainable, hence the impugned order is set aside. Appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 22.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha