**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**NEW DELHI**

PRINCPAL BENCH - COURT NO. 1

**Service Tax Appeal No. 50379 of 2021**

(Arising out of Order-in-Original No. 37/TPS/PC/CGST/DSC/2020-21 dated 26.11.2020 passed by the Principal Commissioner of Central Goods & Service Tax, New Delhi)

**Principal Commissioner of Central Goods & Service Tax, Delhi South Commissionerate** **.....Appellant**
3rd Floor, E.I.L Annexe Building
BhikajiCama Place,
New Delhi- 110066

VERSUS

**M/s. Boeing India Defense Pvt. Ltd.** **...Respondent**
3rd Floor, DLF Centre, Parliament Street,
New Delhi- 110001

**APPEARANCE:**
Shri Rajeev Kapoor, Authorized Representative of the Department
Shri K. Sivarajan Vikash Agarwal, Chartered Accountant for the Respondent

**AND**

**Service Tax Appeal No. 50477 of 2021**

(Arising out of Order-in-Original No. 37/TPS/PC/CGST/DSC/2020-21 dated 27.11.2020 passed by the Principal Commissioner of Central Goods & Service Tax ("GST"), New Delhi)

**M/s. Boeing India Defense Private Limited** **.....Appellant**

VERSUS

**Principal Commissioner of Central Tax, New Delhi** **.....Respondent**

**APPEARANCE:**
Shri K. Sivarajan Vikash Agarwal, Chartered Accountant for the Appellant
Shri Rajeev Kapoor, Authorized Representative of the Department

**CORAM :**
**HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)**
**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 28.03.2023**
**Date of Decision: 10/5/23**

**FINAL ORDER NO. 50638-50639 /2023**

**HEMAMBIKA R. PRIYA**

These two appeals have been filed to assail the Order-in-Original dated 26.11.2020 passed by the Commissioner. The appellant has filed the Service Tax Appeal No. 50477 of 2021 challenging the demand of Rs.46,67,212/- confirmed along with interest and equal penalty. The department has filed the Service Tax Appeal No. 50379 of 2021 challenging the dropping of the service tax demand of Rs.1,68,14,783/- by the adjudicating authority.

2. The Appellant, having its registered office at 3rd Floor, DLF Centre, Sansad Marg, Delhi, had entered into an agreement with its holding company, namely The Boeing Company[1] for providing services on a cost plus mark-up basis. In order to provide service effectively and efficiently, the Appellant employed employees of TBC on secondment basis. The Appellant entered into a salary reimbursement agreement with TBC to facilitate secondment of employees from TBC to it and payment of remuneration to the seconded employee in their home country. Pursuant to service tax audit by the department, the impugned show cause notice was issued demanding service tax on the expenditure incurred

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**1. "TBC"**

towards hotel stay, school tuition fees for the disputed period considering the same as part of the consideration paid for import of manpower services from April 2015 to June 2017.

3. The Appellant has filed the instant appeal Service Tax appeal No. 50477 of 2021 challenging the impugned order against the confirmation of the demand of service tax of Rs.46,67,212/- along with interest and penalty of Rs. 46,67,212/- and Rs.10,000/- under section 78 and 77 of the Finance Act respectively. The department filed the Appeal no. ST/50379/2021 challenging the dropping of the demand of Rs. 1,68,14,783/- by the adjudicating authority.

4. The learned counsel submitted that as per the clauses of the agreement and employment contract, the seconded employees were on the payroll of the Appellant and the Appellant had paid the salary and other perquisites after due deduction of income tax, employee provident fund contribution, as per applicable Indian laws to the seconded employees. The Appellant also issued Form 16 to the seconded employees. For administrative convenience, the said salary was deposited by the parent company in the bank account of the seconded employees in the home country, based on details provided by the Appellant and thereafter a debit note was issued on the Appellant.

5. The counsel stated that in terms of the employment letter issued to the secondees, the Appellant was arranging facilities like providing accommodation, hotel stay, car and education (school tuition fees) of dependent children of the seconded employees.

The expenses for the same were incurred by the Appellant directly, except for school tuition fee where payment was made by the seconded employees and then reimbursement was claimed. He added that an employer-employee relationship came into existence between the Appellant and the seconded employees and such arrangement will not fall under the definition of 'service' under Section 65B(44) of the Finance Act. Further, provision of service by an employee to the employer in the course of or in relation to his employment has been excluded from the definition of service under Section 65B(44) and hence does not attract service tax.

6. The learned counsel also submitted that the expenses incurred in India, by way of reimbursement of school tuition fee (on actuals) to such seconded employee would not form part of the value of 'taxable service for the purpose of payment of service tax under reverse charge mechanism. It is a settled principle of law that expenses incurred by the service recipient, or any goods or services provided by the service recipient to the service provider is not liable to be included in the value of taxable service for the purpose of payment of service tax.

7. The learned counsel placed reliance on the decision of Hon'ble Supreme Court in the case of **Commissioner of Service Tax** Vs **Bhayana Builders (P) Ltd**[2], wherein in Para 13, the Supreme Court held that the value of goods/ materials provided by service recipient free of charge are not required to be included

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**2. 2018 (10) GSTL 0118 (S.C.)**

in the gross amount charged. He also relied on the following decisions:

**(i)** **SBI Life Insurance** vs. **Principal Commissioner of CGST[3],** wherein it was held that "the only condition under which such expenditure shall be includable for the purposes of levy of service tax is that the expenditure should be borne by the service provider and the same should be charged to the service recipient. Therefore, in the facts and circumstances of the case, we find that the expenses incurred by the appellants are not goes required to be included in terms of the explanation under Section 67D. Therefore, we find that demands confirmed on the various expenses incurred by the appellants are not sustainable. Accordingly, they need to be set aside. When the demands are liable to set aside various penalty imposed are also not sustainable".

**(ii)** **Telenor Consult AS** vs. **Delhi-I[4]**, wherein on the similar facts, the Hon'ble Tribunal has held that service tax will not be applicable on the benefit provided by the service recipient to the secondee.

8. He stated that the issue regarding taxability of secondment of manpower has been settled in favour of assessee, as held in the following decisions-

- **M/s Target Corporation India Put Ltd** vs **C.C.E. - Bangalore-II[5]**
- **M/s Yutaka Auto Parts India Private Limited** vs **The Commissioner, Central Excise & Service Tax Commissionerate, Alwar[6]**.
- **M/s Volkswagen India Pvt Ltd** vs **Commissioner of Central Excise[7]**. The appeal filed by the department against the order before Hon'ble Supreme Court was dismissed as time barred (2016 (1) TMI 1320 –SC ORDER)
- **Nissin Brake India Pvt. Ltd**. vs **Commissioner of C. Ex., Jaipur-I[8]**. The decision has been affirmed by the Hon'ble

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**3. 2022(7) TMI 547-CESTAT MUMBAI**
**4. 2019 (2) TMI 955 - CESTAT NEW DELHI**
**5. 2021 (1) TMI 712 - CESTAT BANGALORE**
**6. 2021 (3) TMI465 - CESTAT NEW DELHI**
**7. 2013(11)TMI298-CESTAT MUMBAI**
**8. 2019 (24) G.S.T. L. 563 (Tri. - Del.)**

Supreme Court as reported in **Commissioner** v. **Nissin Brake India Put. Ltd**[9].

- **The Commissioner of Central Excise** vs M**/s. Computer Sciences Corporation India Put. Ltd**[10].

9. The learned counsel submitted that the extended period of limitation under section 73(1)/ Penalty under section 78 cannot be invoked in the instant case, as the none of the ingredients for invoking extended period of limitation or for imposing penalty under Section 78 are present in the instant case.

10. The learned authorised representative submitted that the Adjudicating Authority, had failed to appreciate that as per Section 67(4)(c) of the Act 'gross amount charged' will include any form of payment, including credit note, debit note, book adjustment to any account by the person liable to pay service tax. The service tax paid by the appellant to the venders providing the said services is a different transaction which is not related to the service being received by the appellant from the parent company. He added that section 67(1) (i) of the Act specifically provides inclusion of such value of non-monetary consideration in taxable value.

11. We have heard the learned counsel for the appellants and the authorised representative. The issue of payment of service tax on secondment has been settled by the Supreme Court in the case of **Commissioner of Customs, C.Ex and Service Tax, Bangalore (Adj.) Vs Northern Operating Systems Pvt Ltd**[11].

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**9. 2019 (24) G.S.T.L. J171 (S.C.)**
**10. 2014 (11) TMI 125 – ALLAHABADHIGH COURT**
**11 2022(61)GSTL129(SC)**

The issue is whether reimbursable expenses are includible in the gross value for levy of service tax. We note that the issue is no longer res integra. The Hon'ble High Court of Delhi in the case of **Intercontinental Consultants & Technocrats Pvt Ltd Vs. Union of India**[12] held that reimbursements of amounts it received cannot be charged to service tax. The relevant para of the judgment is reproduced herein after:-

> **"18.** Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as *quid pro quo* for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is *ultra vires*. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure

[12] 2013(29)STR 9(Del)

> and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule."

12. We note that this issue with regard to non-payment of service tax on the reimbursable expenses travelled upto Hon'ble Apex Court wherein it got settled by the decision in the case of **Union of India and Anr. v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd.**[13] The Apex Court has held as per Section 67 (un-amended prior to 1st May, 2006) or after its amendment with effect from 1st May, 2006, the only possible interpretation of the said Section 67 is that for the valuation of taxable services for charging service tax, the gross amount charged for providing such taxable services only has to be taken into consideration. Any other amount which is not for providing such taxable service cannot be the part of the said value. It was clarified that the value of service tax cannot be anything more or less than consideration paid as quid pro quo for rendering such services. Accordingly, it was held that Section 67 of Finance Act, 1994 do not allow inclusion of reimbursable expenses in valuation of service rules.

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**13 2018 (3) TMI 357 (S.C.) = 2018 (10) G.S.T.L. 401 (S.C.)**

13. In view of the same, we allow the Service Tax Appeal No. 50477 of 2021 and dismiss the Department's Service Tax Appeal No. 50379 of 2021.

(Order pronounced in the open court on 10/5/23 )

**(DR RACHNA GUPTA)**
**MEMBER(JUDICIAL)**

**(HEMAMBIKA R. PRIYA)**
**MEMBER (TECHNICAL)**

Archana/ss