CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.55935 Of 2013

[Arising out of OIO No.20/ST/Commr./DM/RTK/2012 dated 30.11.2011 passed by the Commissioner of Central Excise, Rohtak, Haryana]

M/s ITD ITD Cem Joint Venture : Appellant (s)
301-302, 3rd Floor, Sagar Tower,
Centre Janakpuri, New Delhi

Vs

The Commissioner of Central Excise, Rohtak : Respondent (s)
SCO No.6 to 8 & 10, Sector-1, Huda Market,
Rohtak, Haryana-124001

APPEARANCE:
Shri T. Shanmugam, Advocate for the Appellant
Shri Aneesh Dewan and Shri Yashpal Singh, Authorised Representatives for the Respondent

CORAM:
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60027/2024

Date of Hearing: 14.12.2023

Date of Decision: 30.01.2024

Per: P. ANJANI KUMAR

M/s ITD ITD Cem Joint Venture (JV), the appellants have secured works contract in the Delhi Metro Rail Corporation for design and construction of civil work including tunnel boring etc; in execution of their work, they engaged foreign service providers i.e. M/s Amberg, Singapore for technical support in the execution of work related to tunnel boring machine; during the audit of the appellant, Departmental officers found that the appellants had discharged the service tax, on Reverse Charge Mechanism on the services availed by
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them from the foreign suppliers, during 2007-08 and up to October 2008 in 2008-09, including the amount paid towards TDS of Income Tax and thereafter, they did not include the TDS amount for discharging the service tax. Accordingly, a show-cause cum demand notice dated 02.09.2011 was issued to the appellants demanding service tax of Rs.1,15,23,010/- for the period 2008-09 to 2010-11; the impugned show-cause notice was adjudicated vide impugned order dated 30.11.2011 vide which the demanded duty was confirmed along with interest and equal penalty in addition to penalty under Section 77 of Finance Act, 1994. Hence, this appeal.

2. Shri T. Shanmugam, learned Counsel for the appellants, submits that the issue is barred by limitation; the Department was fully aware of the fact that the appellant initially paid the service tax on the TDS amount and later under the bona fide belief that the same is not includable for the purpose of payment of service tax and have not paid the same on the TDS amount; there was no suppression of fact as the issue involved was of interpretation of the provisions of taxation; extended period is not invokable.

3. Learned Counsel submits that consideration for the service as per Section 2(31) and Section 67 of Service Tax is the gross amount charged by the service provider for the service; the appellant received the invoice of the overseas vendors as per the contract and have paid service tax; in terms of Section 195A of Income Tax Act, 1961, they have paid the TDS to the Government treasury; the said TDS has not been reimbursed to the appellant by the service providers; in terms of

Section 195A, the person responsible for paying the foreign entity, instead of the recipient, is liable to deduct the service tax due to a deeming fiction; the agreement provides that taxes and duties are to be borne by the appellant; agreement dated 02.11.2007 with M/s ITD, Thailand was shown to the Adjudicating Authority; the Adjudicating Authority did not appreciate the theory of the whole taxation and TDS under Income Tax; however, service tax is to be levied on the consideration paid for the service and not on other taxes and duties.

4. Learned Counsel further submits that the issue is no longer *res integra* having been decided by the Tribunal in the case of TVS Motor Company Ltd. – 2021 (55) GSTL 459 (Tri. Chennai); further, in their own case Commissioner (Appeals) has dropped the proceedings initiated against them for the further period from 2012-13 to 2014-15. He relies upon the following cases:

- Magarpatta Township Development & Construction Co. Ltd. – 2016 (43) STR 132 (Tri. Mumbai)
- Garware Polyester Ltd. – 2017 (5) GSTL 274 (Tri. Mumbai)
- Indian Additives Ltd. – 2018 (6) TMI 523-CESTAT, Chennai
- Hindustan Oil Exploration Co. Ltd. – 2019 (25) GSTL 252 (Tri. Chennai)
- Centre for High Technology – 2018 (8) TMI 243-CESTAT, New Delhi
- Pushpam Pharmaceuticals Company – 1995 (78) ELT 401 (SC)
- International Merchandising Company LLC – (2023) 3 SCC 641

5. Shri Aneesh Dewan, assisted by Shri Yashpal Singh, learned Authorized Representative for the Department, reiterates the findings of the impugned order and submits that as per the appellant's own write up dated 08.09.2010, the appellant is a joint venture Italian-

Thai Development Public Company Thailand and ITD Cementation India Ltd. w.e.f. 20.12.2006; Central Government has entered into a Double Taxation Avoidance Agreement with Kingdom of Thailand on 22.03.1985; as per the provisions of the Section 195A of Income Tax Act, the Indian Company (the appellant) is liable to deposit the TDS with the Government by grossing up and the same shall be passed on to the beneficiary (service provider) in his country by way of credit against the tax payable there; thus, the service provider is getting both the consideration towards the service provided and tax relief in lieu of TDS; as per Section 67(3) of Finance Act, 1994, 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. Learned Authorized Representative further submits that the case of TVS Motor Company (supra) is not applicable as the facts the different. He further submits that the appellants did not provide the copy of the agreement to the Adjudicating Authority in respect of the invoices considered in the impugned order.

6. Heard both sides and perused the records of the case. Brief issue that requires our consideration in the impugned case is as to whether, TDS paid by the appellants to the Income Tax Department, in terms of Section 195A of the Income Tax Act, should be included in the gross amount for the purpose of calculation of service tax payable by the appellants in terms of Rule 2 (1)(d)(iv) of Service Tax Rules, 1994 read with Section 66A of Finance Act, 1994. We find that learned Counsel for the appellants has relied upon the judgment of the

Chennai Bench of the Tribunal in the case of TVS Motor Company (supra). We find that the Bench finds as follows:

> **14.1.1** Section 67 of the Finance Act, as reproduced above, would show that Service tax is payable on the gross amount charged by the service provider. The Department does not dispute that the TDS amount is borne by the appellant. The case of the Department is that when the TDS amount is grossed up with the actual consideration agreed between the parties, the TDS portion would become part of the consideration and has to be included in the taxable value.
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> **14.1.2** Section 195 of the Income-tax Act, 1961, is basically concerned with the Tax Deducted at Source (TDS) for the non-residents. The Act lays out a provision to avoid revenue loss as a result of tax liability in the hands of a foreign resident, by deducting such tax at source from the payments made to them. This is to ensure that the tax due from non-residents is secured at the earliest point of time so that there is no difficulty in its collection for the reason that the non-resident may sometimes have no assets in India. Failure to do so will render the person liable to penalty.
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> **14.1.3** On perusal of Section 195, it uses the word "any sum chargeable under the provisions of the Act". Unlike other provisions in Chapter XVII (TDS provisions), Section 195 uses "any sum" instead of "any income by way of". This would mean any sum that is paid to the non-resident which bears the character of income and gross amount, the whole of which may or may not represent income or profits. It is also a requirement that the document should mention that the Indian Counterpart of the transaction would bear the tax for deducting TDS by grossing up the value. To comply with this provision, as per the accounting practice, the appellant has grossed up the TDS amount with the actual consideration. Section 195A of the Income-tax Act reads as under :
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> "where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is

payable, be equal to the net amount payable under such agreement or arrangement."

14.1.4 The TDS is paid/deposited to Government by the appellant out of a statutory liability. Such activity of deducting the tax at source is a legal obligation and the amount so deducted cannot be taken as consideration for services rendered. The amount on which the parties have reached a *consensus ad idem* can only be the consideration for the services. Further, the amount of tax deducted varies and depends upon the rate in force. There is no agreement by the parties with regard to the amount of TDS that has to be deducted. It wholly depends upon the law prevailing in the direct tax regime.

14.2.1 Section 2(d) of the Indian Contract Act, 1872, defines "consideration". Compliance with statutory provisions cannot be considered as rendering of service. Again, "consideration" is not doing something which a person is bound by law to do. When the amount is paid at the will of a person not party to the agreement, such amount does not bear the character of consideration. It has to be noted that in the present case, there is no consent from the foreign counterpart to reduce his consideration by deducting the income tax liability from the agreed consideration. While doing business with the foreign counterpart and making payment, they are bound to deduct the tax and deposit with the Government. The appellants have thus grossed up the TDS and complied with the statutory obligation. The situation would be different if the TDS is deducted from the actual consideration and is not borne by the Indian counterpart. When the foreign counterpart does not agree to forego the TDS portion from the consideration agreed, then it becomes legally incumbent upon the appellant to gross up the value as under Section 195A.

7. We further find that the in above decision, the Tribunal has referred to the judgments of the Tribunal in the case of Indian Additives Ltd. (supra) and Centre for High Technology (supra) and concludes that the amount of TDS paid is not includable in the gross value for the purpose of payment of service tax. We further find that Commissioner (Appeals) in the Order dated 20.09.2019, for the

further period, holds that the agreement provides for payment of TDS by the appellant in addition to the consideration paid to the overseas service providers and they have not deducted the same from the payment made to the overseas service providers.

8. We find that during the impugned period also, the agreement is not different from the above. The agreement clearly provides, at Clause No.3.5 that:

> "The payments are to be exclusive of Value Added Tax or any national, federal or local service tax levied by the tax authorities of India. Such taxes shall include, but not be limited to, corporate taxes, taxes on equipment or the lease of equipment, import and export duties, withholding taxes, and taxes on personnel. Pursuant to this Agreement, should any such taxes or duties be imposed on the Leasor in the course of mobilization/ demobilization, or during the deployment of the plant and equipment (during the execution of the Main Contract), the Lessee shall indemnify and hold the Leasor harmless from any and all tax liabilities levied upon the Leasor by the Indian Statutory/ Government Authorities."

9. In view of the agreement as above, we find that the facts of the case are not different than that of TVS Motor Company (supra) or the case decided by the Commissioner (Appeals) in favour of the appellants in their own case for the subsequent period. Therefore, we are of the considered opinion that the issue is no longer *res integra*. We do not find any reason to come to a conclusion that the facts of the case are different as submitted by the learned Authorized Representative for the Department. Moreover, we find that the impugned show-cause notice and the Order do not base their arguments on the conditions of the contract; they hold that TDS per

se is includable in the gross value for calculation of service tax. In view of the judgments discussed or cited above, principally, the same is not tenable. The learned Counsel for the appellants submits that the SCN is barred by limitation. Looking into the facts of the case and the judicial pronouncements at a later date, we are of the considered opinion that the appellants are entitled to have a different interpretation than the one arrived at by the appellants notwithstanding the fact that the appellants have initially included the TDS amount for the payment of service tax. Moreover, there is nothing in the show-cause notice and the impugned order to prove any of the ingredients like suppression, mis-statement etc. with intent to evade payment of service tax; therefore, no case is made for invocation of extended period.

10. In view of the above appeal is allowed both on merits and limitation.

(Pronounced on 30/01/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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