IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40253 of 2013

(Arising out of Order in Original No. 37/2012 dated 26.10.2012 passed by te Commissioner of Central Excise, Chennai – III Commissionerate)

M/s. Stahl India Pvt. Ltd. **Appellant**
No. 84, Vanapadi Road,
Ranipet 632 403.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
Newry Towers, No. 2054, I Block
12th Main Road, Anna Nagar
Chennai – 600 040.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40411/2023

Date of Hearing: 06.06.2023
Date of Decision: 09.06.2023

Per Ms. Sulekha Beevi C.S.,

Brief facts of the case are that the appellants are engaged in manufacture of leather chemicals, intermediaries, dyes etc. and are registered with the Central Excise Department. They are also registered with the Service Tax Department for the purpose of payment of service tax on Management Consultancy Service, Transport of Goods by Road and Intellectual Property Rights service.

2. On scrutiny of records, it was noticed that the appellant had entered into a Service Level Agreement (hereinafter refereed to as SLA) with their holding-company M/s. Stahl Holdings, BV, Netherlands

and the appellant had been paying service tax under the head Management or Business Consultancy service on amounts received from their holding-company. In addition to the SLA charges, the holding-company at Netherlands had also collected VAT @ 19% from the appellant on which the appellant had not paid any service tax. On verification of documents and accounts of the appellant, for the year 2005 – 2009, it was noticed that the appellant has not included VAT amount in the value of taxable service to arrive at the service tax payable by them which has resulted in short-payment of service tax. Further, there was short-payment of tax on the fee paid under SLA charges. Show Cause Notice dated 29.9.2011 was issued to the appellant proposing to recover the service tax of Rs.58,22,933/0 being the service tax payable on SLA charges including VAT amount for the period 2005 – 06 and 2006 – 07 along with interest and for imposing penalties. After due process of law, the adjudicating authority came to the conclusion that the appellant has paid service tax on the SLA charges and has not paid service tax on the VAT amount which has been subsequently refunded to the appellant. The demand of Rs.20,98,243/- being the service tax on the VAT amount was confirmed along with interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

3. The learned counsel Ms. Radhika Chandrasekar appeared and argued on behalf of the appellant. It is submitted by her that the demand of service tax is under Management or Business Consultancy service as provided under section 65(105)(r) of the Finance Act, 1994. The appellant had entered into SLA with their holding-company Stahl

Holdings, Netherlands. In terms of the agreement, the appellant received services in the nature of general management, finance, technology and research, safety and environment, legal counsel service etc. The holding-company raised invoices for the services rendered along with 19% VAT payable thereon as per Dutch Regulations on monthly basis till February 2006. Subsequent invoices were raised on June 2006 for the period March 2006 to June 2006 and in December 2006 for the period July 2006 to December 2006. The value of the services and the VAT amount was separately shown in the invoices raised by the holding-company. Being a member of the European Union, tax laws in Netherlands required the holding-company to recover VAT from the service recipient at the rate of 19% which was shown separately in the invoices. After collection from the appellant, the amount being eligible for refund, was refunded to the appellant by the holding-company. The appellant has discharged service tax under reverse charge mechanism in respect of service charges paid to the holding-company for the disputed period. The service tax was discharged as and when the payments were made to the holding-company as the service tax was payable on receipt basis prior to 2011.

4. The appellant has not discharged service tax on the VAT portion as the same is not a consideration for the services rendered. The VAT paid being as statutory levy, the same will not form part of the gross value of services. The Show Cause Notice has proposed to levy service tax on VAT paid to holding-company and thus alleging that the appellant has short-paid service tax. The appellant had produced evidence before the adjudicating authority that the appellant had

already discharged the service tax in respect of the service charges received under the agreement. The adjudicating authority then dropped the demand in respect of the service charges. The amount that has been confirmed as per the impugned order is only on the VAT charges that has been collected from the appellant by the holding-company and later refunded to the appellant.

5. The learned counsel submitted that the major portion of the demand is prior to 18.4.2006 on which date Section 66A has been introduced in the Finance Act, 1994. There is no liability to pay service tax under reverse charge mechanism prior to this date. To support this argument, the learned counsel relied upon the judgment of the Hon'ble High Court of Bombay in the case of Indian National Shipowners' Association Vs. Union of India reported in 2009 (13) STR 235 (Bom). It is submitted that the said decision has been affirmed by the Hon'ble Supreme Court as reported in 2010 (17) STR J57 (SC).

6. The second submission put forward by the counsel is that being an associated enterprise, the liability to pay service tax on book adjustment is only with effect from 10.5.2008. For the period after 18.4.2006 and prior to 10.5.2008, being an associated enterprise, the appellant is liable to pay service tax only at the time of making payment and not on book adjustments. The statutory provision for demanding service tax in respect of the transactions between associated enterprises immediately on making book entry was introduced only with effect from 10.5.2008. Prior to this date, neither the Finance Act, 1994 nor the Service Tax Rules, 1994 contained any provision enabling demand of service tax prior to the realization of

consideration for the taxable service. The service tax was payable only on receipt basis and only with effect from 10.5.2008, the appellant is liable to pay service tax on the book adjustments between associated enterprises. To support her argument, the learned counsel relied upon the decision in the case of Sify Technologies Ltd. Vs. CCE, LTU, Chennai as reported in 2015 (39) STR 261 (Tri. Chennai). In the case of Nortel Networks (I) Pvt. Ltd. Vs. Commissioner of Service Tax, New Delhi reported in 2017 (52) STR 489 (Tri. Del.), it was held that the amendment brought forth with effect from 10.5.2008 making an associated enterprise liable to pay service tax on book adjustments is only prospective and does not have any retrospective application.

7. Again, it was argued by the learned counsel that the entire situation is revenue neutral. Even assuming without admitting that the activity is liable to tax, the amount paid as service recipient would be eligible for CENVAT credit. To support this argument on revenue neutrality, the learned counsel relied upon the decision in the case of Asmitha Microfin Ltd. Vs. CCE, Hyderabad as reported in 2020 (33) GSTL 250 (Tri. Hyd.).

8. The learned counsel has also put forward arguments on the ground of limitation. It is submitted by the learned counsel that the appellant had discharged the service tax on the consideration paid by them to the holding-company situated in Netherland. The present demand is only on the VAT portion which is not a consideration for the services received by them. During the relevant period, the appellant was not liable to pay service tax under reverse charge mechanism as there was no provision in the Finance Act to collect the taxes from the

service recipient. Even then the appellant has paid service tax on the charges excluding the VAT amount as per the SLA. In such circumstances, Show Cause Notice invoking extended period may be set aside.

9. The learned AR Smt. K. Komathi appeared for the department. It is submitted by the learned AR that the appellant has received refund of the VAT amount from the holding company at Netherlands. The agreement also says that applicable VAT and other taxes has to be paid by the service recipient. The entire amount received by appellant therefore is a consideration for services and subject to levy of service tax. She prayed that the appeal may be dismissed.

10. Heard both sides.

11. On perusal of the impugned order, it is seen that the adjudicating authority has taken note of the payments made by the appellant on the service charges raised in the invoices and has set aside the demand pertaining to the service charges. The demand that has been confirmed is only with regard to the VAT amount. The learned counsel has put forward arguments contending that VAT being a tax, there cannot be a further demand of service tax on such amount.

12. It is also seen that the period involved is prior to 18.4.2006. The appellant has been called upon to pay service tax under reverse charge mechanism. Section 66A was introduced in the Finance Act, 1994 only with effect from 18.4.2006. The judgment of the Hon'ble High Court of Bombay in the case of Indian National Shipowners' Association which has been affirmed by the Hon'ble Supreme Court has held that the service recipient cannot be called upon to pay service tax under reverse

charge mechanism for the services rendered prior to the introduction of Section 66A. Following the said decision, we are of the considered opinion that the demand upto 18.4.2006 is required to be set aside, which we hereby do.

13. Part of the demand is also confirmed from 18.4.2006 to July 2007. It is submitted by the learned counsel that the amounts were paid under book adjustments. So also VAT refunds were received by such book adjustments from their associated enterprise, situated at Netherland. The demand has been made on the book adjustments which are made prior to 10.5.2008. When the entries are made in the books of accounts of the appellant in respect of the amounts which are to be paid to the overseas entities, prior to 10.5.2008, there is no liability to pay service tax merely on such accounts. The provision to make such book entries taxable came into existence after the amendment in section 67 with effect from 10.5.2008. The decision of the Tribunal in the case of Sify Technologies (supra) as well as Nortel Networks (I) Pvt. Ltd. (supra) have considered the issue and held the issue in favour of the assessee. After appreciating the facts and following the case laws cited above, we hold that the demand for the period after 18.4.2006 also cannot sustain and requires to be set aside, which we hereby do.

14. The learned counsel has argued on the ground of limitation also. It is seen that the issue as to whether the recipient of service is liable to pay service tax under reverse charge mechanism to an overseas service provider was under dispute and the Hon'ble Supreme Court in the case of Indian National Shipowners Association (supra) had held

that the demand cannot be made prior to the introduction of section 66A in the Finance Act, 1994. Further, the situation is revenue neutral as the appellant would be able to take credit of the service tax paid under reverse charge mechanism for the relevant period. The department has not been able to establish any positive act of suppression of facts with intent to evade payment of tax on the part of the appellant. In such circumstances, we are of the view that the demand raised invoking the extended period cannot sustain and the Show Cause Notice is time-barred.

15. In the result, the impugned order is set aside. The appeal succeeds both on merits as well as on limitation. The appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 9.6.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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