# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

**Service Tax Appeal No. 30209 of 2018**

(Arising out of OIO No. HYD-EXCUS-003-COM-001-17-18 dt.28.11.2017 passed by Commissioner of Central Tax, Hyderabad)

**Vainavi Industries Ltd**
Vainavi Towers, Prakash Nagar,
Begumpet, Hyderabad – 500 016 **.....Appellant**

*VERSUS*

**Commissioner of Central Tax**
**Secunderabad - GST**
Kendirya Shulk Bhavan, LB Stadium Road,
Basheerbagh, Hyderabad – 500 004 **.....Respondent**

**and**

**Service Tax Appeal No. 30210 of 2018**

(Arising out of OIO No. HYD-EXCUS-003-COM-001-17-18 dt.28.11.2017 passed by Commissioner of Central Tax, Hyderabad)

**B. Satish Kumar**
Managing Director, Vainavi Towers,
Prakash Nagar, Hyderabad – 500 016 **.....Appellant**

*VERSUS*

**Commissioner of Central Tax**
**Secunderabad - GST**
Kendirya Shulk Bhavan, LB Stadium Road,
Basheerbagh, Hyderabad – 500 004 **.....Respondent**

**Appearance**
Shri T. Satya Murthy, Advocate for the Appellants.
Shri M. Anukathir Surya, AR for the Respondent.

**Coram:**
**HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)**

**FINAL ORDER No. A/30426-30427/2023**

**Date of Hearing: 19.10.2023**
**Date of Decision: 14.12.2023**

**[Order per: ANIL CHOUDHARY]**

The Appellant – Vainavi Industries Ltd., is registered with the Department for rendering taxable services under the heard "Online Information and Database Access Service or Retrieval Service" (OLIDAR) and other services. It

appeared to the Revenue, pursuant to inquiry, that the company is an Internet Service Provider (ISP). They also undertake Works Contract with various other ISPs for designing and installing network. They also engage at times in buying and selling of used tyres, which activity does not attract service tax being a trading activity. The Appellant is charging and collecting service tax from the customers with respect to OLIDAR services and Works Contract Services (WCS). However, due to frequent change of accounting staff and also shifting of office premises, they have not filed ST3 returns for some period. They had filed returns up to the period ended September 2015.

(i) Accordingly, it appeared to Revenue that Appellants have not deposited service tax of Rs.58,02,022/- on a portion of income shown in the Profit & Loss account for the Financial Year 2011-12 and 2012-13. Demand confirmed.

(ii) Appellants have availed irregular Cenvat credit of Rs.3,25,04,101/-, after more than one year from the date of issue of invoice for the period April 2011 to February 2016, and the same is hit by the provisions of Rule 4(1) of CCR. Demand confirmed.

(iii) Appellants have short paid service tax of Rs.3,83,94,795/- during the period April 2011 to March 2016. Demand confirmed

(iv) Appellants have also not paid under Reverse Charge Mechanism (RCM) as required under Notification No.30/2012-ST, tax totaling Rs.4,13,824/-, out of which Rs.1,04,555/- was dropped and the balance amount of Rs.3,09,270/- was confirmed.

(v) Further, an amount of Rs.17,67,729/- was proposed to be disallowed being irregular availment of Cenvat credit for the period April 2013 to September 2013 and the same was confirmed.

(vi) An amount of Rs.12,41,170/- for the period 2010-11 was confirmed payable on the value of Rs.1,20,50,190/- for alleged hosting of website and irregular availment of exemption.

(vii) Few other demands were raised in the SCN which were dropped.

2. SCN dated 13.06.2017 was issued invoking the extended period of limitation. The Appellants contested the SCN by filing reply dated 16.10.2017. Revenue also issued a corrigendum to the SCN dated 02.08.2017 for change in the Adjudicating Authority.

3. Being aggrieved, the Appellants are in Appeal before this Tribunal against the impugned OIO dated 28.11.2017. Learned Counsel for the Appellant, inter alia, urges as follows:

a) Regarding amount of Rs.3,25,04,101/- Cenvat credit:-

4. In the Impugned Order it has been observed that Appellants have irregularly availed Cenvat credit on the invoices which were issued more than one year prior to the date of taking such credit. As per the amendment to Rule 4(1) of CCR (as amended w.e.f. 01.03.2015), the manufacturer or provider of output service shall not take credit after one year from the date of issue of any of the documents specified in Rule 9(1) of CCR.

5. Assailing the findings, learned Counsel urges that Revenue has erred by presuming the date of filing the ST3 return, as the date of taking credit and accordingly, held that the credit on the invoices concerned has been taken after more than one year from the date of issue of invoice. The said finding is wholly erroneous as there is no provision to support this presumption of Revenue, that Cenvat credit has been taken only on the date of filing the ST3 return. In fact, the Appellants have maintained proper Cenvat register and books of accounts and have been taking credit regularly within due time upon receipt of input services and input/capital goods along with the related Cenvat invoices. The Appellants have also maintained proper Cenvat account as contemplated under the provisions of Rule 9(5) of CCR. A copy of Cenvat account was also enclosed with reply to SCN, wherein it is evident that Appellants have been taking credit regularly upon receipt of the inputs/services with the relevant invoices/documents.

6. Admittedly, it is not the case of the Revenue that Appellants have not maintained proper record of transactions or not maintained the required Cenvat register/account. Admittedly, Revenue has relied on the books of accounts and P & L account maintained by the Appellants for raising demand of service tax. For delayed filing of ST3 returns, there can be no presumption that Appellants have not taken Cenvat credit within the prescribed time. Further, Appellants have been disclosing the amount of Cenvat credit taken periodically during the period 2011-12 to 2015-16 and also in the ST3 returns filed by them. Appellants have also been using the said Cenvat credit by making debit at the end of each month for payment of the output tax. It is further urged that amendment was brought in Rule 4(1) of CCR w.e.f. 01.09.2014 restricting the

period for taking credit from the date of invoice. Prior to this, there was no restriction or time limit in taking the Cenvat credit.

7. During the course of argument, the Appellant demonstrated by referring to the extract of their Cenvat account/Register from which it is evident that they have been taking credit regularly.

8. Learned AR for Revenue, on this issue, has relied upon the Impugned Order.

9. Having considered the rival contentions on this issue, we find that the Appellants have regularly taken Cenvat credit and no case is made out of having taken credit after more than one year from the date of invoice. In this view of the matter, this ground is allowed in favour of the Appellant.

b) Regarding amount of Rs.3,83,94,795/- on OLIDAR service:-

10. The demand relates to the period April 2011 to March 2016. The investigation was taken up during April 2015 by the department. Returns for the period October 2014 to March 2016 were filed beyond the due date, or during the course of investigation. It appeared to Revenue that Appellants have suppressed the taxable turnover by not filing the returns in time. Accordingly, it appeared that service tax is recoverable under proviso to Sec 73(1) (extended period of limitation). The Appellants had already paid service tax of Rs.40,82,962/- in cash and had also utilized Cenvat credit of Rs.3,43,11,332/-, which appeared to be irregular.

11. The Adjudicating Authority held that non-declaration of Real Gross Value in absence of returns, tantamount to suppression of material facts. The Appellants had contended in reply to SCN that as per their returns, they have disclosed the turnover and paid the applicable tax including interest. At the time of issuance of SCN, there was no case of non-payment or short payment of service tax. Further, when the tax has been admittedly paid, the situations envisaged for invocation of extended period did not exist or available to Revenue. It is the fact that Revenue has relied on the Balance Sheet, P & L Account for the period 2010-11 to 2015-16 as well as the Expenditure Ledger extracts. Thus, it clearly indicates that there is no suppression on the part of the Appellant.

12. Learned Commissioner recorded the finding that Appellant was required to declare the gross value of service, consideration and also declare deductions,

if any, from the gross value for calculating the taxable turnover. It was further observed that from the records, it is not evident what deductions have been made for arriving at the taxable turnover. Thus, it appeared to the learned Commissioner that the apparent difference in the turnover disclosed in the ST3 return as compared with Profit & Loss Account, is by way of suppression. Accordingly, learned Commissioner was pleased to hold that Appellant was liable to pay service tax as demanded under this head.

13. Assailing the findings of Commissioner, learned Counsel urges that it is evident from the ST3 returns filed, that the Appellants have not claimed any deductions from the gross value of the services. There is no difference in the gross value declared in the ST3 returns filed and the gross value adopted by the Revenue for the period 2011-12 to 2015-16. Learned Commissioner has erroneously observed that on the gross value of turnover for services of Rs.30,33,66,032/-, service tax of Rs.3,83,94,795/- is payable. Further, learned Commissioner observed that Appellants have paid service tax of Rs.40,82,962/- in cash and the balance amount of Rs.3,43,11,332/- paid by debiting to Cenvat account is irregular.

14. Learned AR for Revenue has relied on the findings in the Impugned Order.

15. Having considered the rival contentions, we find that evidently Appellants have not disputed the amount of turnover as calculated by the Revenue and the same is matching with their financial records for the period April 2011 to March 2016. We have already held herein above that the Cenvat credit availed by the Appellant is legal and proper and the same is not irregular. Thus, we hold that Appellants have rightly discharged the service tax as noted herein above and there is no case of escaped service tax. Accordingly, this ground is allowed in favour of the Appellant and the demand is set aside.

c) Regarding demand of Rs.58,02,022/- for the period 2011-12 & 2012-13:-

16. It is alleged in the SCN that on comparison of revenue from sales/provision of services shown in Profit & Loss Account, vis-à-vis ST3 returns for the said period, there appeared to be difference in the value, of Rs.2,91,41,064/- for the period 2011-12 and Rs.2,26,57,706/- for the period 2012-13, totaling Rs.5,17,98,770/- on which it appeared that service tax has not been discharged. Relying on the statement of Mr. G. Ramesh Krishna, Authorized Signatory, to whom question was asked – Is the company providing

any exempted services. In reply, he stated – We are not providing any exempted services except VAT sales. Accordingly, it was held that Appellants have suppressed the turnover and service tax was confirmed. The contention of the Appellant that said amount relates to 'sale of goods', was held to be not tenable by observing that proper supporting evidence was not produced.

17. Learned Counsel urges that demand is apparently raised on the basis of assumption and presumption without establishing that the amount of alleged escaped turnover is towards provision of service. Demand, admittedly, relates to pre-negative list regime. The Appellants have also been selling goods which was erroneously booked under the head "sales of service" in the Profit & Loss Account. The Appellants have maintained separate ledgers towards provision of service and sale of goods. The Appellant is also registered with VAT department of the state Government and has disclosed their turnover towards sale of goods and has paid appropriate sales tax/VAT. The Appellants have also maintained VAT payment ledger in their books of accounts. The Appellants, during the course of argument, have demonstrated from their ledger extracts, the transactions for sale of electronic goods, customer application forms, brochures and pamphlets sold in relation to providing of internet connection to their clients. The income received from such sales is reflected in the books of accounts. The sale of goods also include sale of tyres by way of trading. It is demonstrated from the extract of the ledger account as well as from the Assessment Order under provisions of VAT for the period May 2011 to June 2014 that Appellants have got turnover of Rs.2,17,13,547/- for the period 2011-12, Rs.78,07,366/- for the period 2012-13 and Rs.14,38,56/- for the period 2013-14. They have accordingly paid the sales tax as per the VAT Assessment Order.

18. Learned AR for Revenue relied on the Impugned Order.

19. Having considered the rival contentions, we find that Appellants have got matching turnover for sales of goods, which is not exigible to service tax during the period of dispute. Accordingly, we allow this ground in favour of the Appellant and set aside the demand.

d) <u>Regarding amount of Rs.12,41,170/- for the period 2010-11 for irregularly availing exemption</u>:-

20. It is alleged in the SCN that Appellants have availed exemption/deduction in terms of Notification No.01/2006-ST in respect of services rendered under

the category of OLIDAR during the period 2010-11 valued at Rs.1,20,50,190/-. Further, Appellants have charged/received an amount of Rs.52,21,747/- towards multimedia presentation, an amount of Rs.24,10,039/- towards website hosting and Rs.44,18,404/- towards domain registration. The Appellants had contended that these receipts will not fall under OLIDAR, as proposed in the SCN. It was also contended that Appellant was not put to notice regarding the classification of services rendered, if any, during 2010-11. The Appellants relied on the ruling of the Hon'ble Madras High Court in the case of Zinc Products vs UOI [1992 (57) ELT 222 (Mad)], wherein it was held that no demand can be made without classification of service. Learned Commissioner observed that Appellants have only disputed the classification but have not submitted the exact nature of the activity and its classification according to the Assessee. Accordingly, observing that the benefit of doubt goes in favour of Revenue, he was pleased to confirm the demand.

21. Assailing the finding of Revenue, Appellant reiterates that they were not put to notice regarding the classification of this demand, if any, for this period and that the demand is not sustainable.

22. Learned Counsel further urges that website hosting and domain registration activities are not classifiable under the category of OLIDAR as alleged by the Revenue. Admittedly, Appellant is not maintaining any database, which is available to people or public/subscribers for accessing or retrieval. Thus, the activity of website hosting and domain registration does not fall under the category of OLIDAR. Thus, for wrong classification of service, which is the onus of Revenue, the demand is fit to be set aside. The Appellant also relies on the ruling of Coordinate Bench at Chennai in Philips Electronics India Ltd vs CST, Chennai [2019 (21) GSTL 450 (Tri-Chennai)], wherein it was held that IT infrastructural services provided by overseas group entity to units worldwide by way of 'private wide network services' is not taxable under OLIDAR. For taxing activity under OLIDAR, service should not only facilitate online information but also database access or retrieval. Infrastructural services are provided only in nature of providing intra connectivity between units worldwide, and payment made by the Assessee towards maintenance (shared by all units) and not fees for supplying OLIDAR service and hence not taxable. Accordingly, he prays for allowing the ground.

23. Learned AR for Revenue relies on the findings of the learned Commissioner.

24. Having considered the rival contentions, we find that in the facts and circumstances of the case, Appellants have simply provided multimedia presentation, website hosting and domain registration services which are not taxable under the category of OLIDAR service. Accordingly, we allow this ground in favour of the Appellant and set aside the demand.

e) Regarding demand of Rs.3,09,270/- (Rs.1,68,286/- towards security service and Rs.1,40,984/- towards consultancy service) under RCM:-

25. Assailing the demand, it is urged that M/s Satya Security and Management services, was the lone service provider, provided security services during this period. The invoices raised by the service provider reveals that service provider has charged full amount of service tax as applicable on the gross consideration and the Appellants have reimbursed the same to the said service provider by making payment along with the full amount as charged in the invoices. Thus, it is evident that the full amount of applicable service tax has been discharged. Thus, the demand of service tax for security services from this Appellant under RCM, amounts to double taxation, which is not permissible. The Appellant relies on the ruling of the Coordinate Bench at Ahmedabad in Transpek Silox Industries Pvt Ltd vs CCE, Vadodara [2018 (17) GSTL 434].

26. So far Consultancy service is concerned, the same is not a specified service under Notification No.30/2012-ST. Further, in respect of services provided by individual Advocate or a firm of Advocates, by way of legal services, the receiver of such service has to pay service tax under RCM. In the facts of the case, Appellants have not received any legal service from an individual Advocate or a firm of Advocates. During the period 2013-14 to 2015-16, the Appellants have incurred charges of Rs.11,40,646/- towards Consultancy for Provident Fund, ISO 9001 Certification, ROC filing, Agency charges, IP services, Software development consultancy, CMA data preparation, Auditor fees, Tally servicing, Documentation charges for purchase or vehicle, RTA charges, etc., which have not been received from individual Advocate or a firm of Advocates. Thus, these services do not fall under RCM, as provided by Notification No.30/2012-ST. Further, the Appellant, as a provider of output services, was entitled to Cenvat credit of the same and the situation is wholly revenue neutral. Accordingly, the demand for extended period is not tenable.

27. Learned AR for Revenue relies on the Impugned Order.

28. Having considered the rival contentions, we find that the expenses in question, incurred by the Appellant, have not been received from Advocate or a firm of Advocates towards legal services. Accordingly, we hold that no service tax demand is attracted under RCM. Accordingly, this ground is allowed and the demand is set aside.

f) Extended period of limitation:-

29. Having considered the rival contentions on this issue, we find that as the returns of the Appellant were in arrears almost for a period of two and half years, the returns were filed during the course of investigation. Accordingly, we hold that extended period of limitation is rightly invokable. It is the statutory duty of the Appellant to file their returns in time.

30. So far the penalties imposed are concerned, we find that no case of suppression of any facts is made out, save and except the delay in filing the returns. Further, we have allowed all the grounds on merits and no demand survives. In this view of the matter, we set aside all penalties imposed on the Appellants. Accordingly, the Appeal is allowed, except the ground of limitation. In view of our findings and observations, we set aside the Impugned Order. Appellants shall be entitled to consequential benefits, in accordance with law.

(Pronounced in Court on 14.12.2023)

**(ANIL CHOUDHARY)**
**MEMBER (JUDICIAL)**

**(A.K. JYOTISHI)**
**MEMBER (TECHNICAL)**

Veda