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

REGIONAL BENCH-COURT NO.3

SERVICE TAX APPEAL NO. 10305 of 2020-DB

(Arising out of OIA-VAD-EXCUS-002-APP-464-2019-20 dated 29/11/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

SULPHUR MILLS LTD **........Appellant**
PLOT NO. C-1-B, 1904, GIDC, PANOLI
BHARUCH, GUJARAT

VERSUS

Commissioner of C.E. & S.T.-VADODARA-II **.......Respondent**
1ST FLOOR... ROOM NO.101,
NEW CENTRAL EXCISE BUILDING,
VADODARA, GUJARAT,390023

APPEARANCE:
Shri Vinay Kansara, Advocate appeared for the Appellant
Shri NeilPrakash G Makwana, Superintendent(AR) appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No.13124/2024

DATE OF HEARING: 04.12.2024
DATE OF DECISION: 10.12.2024

RAMESH NAIR

The issue involved in the present case is that whether the commission paid by the appellant company to its Managing Director and Executive Director in addition to their salary is liable to service tax under reverse charge mechanism as per Sr. No.5A of Notification No.30/2012-ST dated 20.06.2012 as amended by the Notification No.45/2012 dated 07.08.2012.

2. Shri Vinay Kansara, Ld. Counsel appearing on behalf of the appellant at the outset submits that the issue is no longer res-integra, in view of the following judgments including the judgment in the appellant's own case:-

- CESTAT Order No. 12193/2024 dated 26-09-2024 in the appellant's own case for the earlier period
- Bengal Beverages Pvt. Ltd. V/s CGST & Excise, Howrah-2020 (11) TMI 622- CESTAT Kolkata.

- Gujarat Guardian Ltd. V/s CCE-Bharuch- 2024 (2) TMI 910 -CESTAT Ahmedabad.
- Ratnamani Metals And Tubes Ltd. V/s CCE-Ahmedabad-III-2024 (3) TMI 10 CESTAT Ahmedabad.
- Maithan Alloys Ltd. V/s CCE, Bolpur- 2019 (4) TMI 1595-CESTAT Kolkata.
- Allied Blenders & Distillers Pvt. Ltd. V/s CCE & ST, Aurangabad - 2019 (24) GSTL 207 (T).
- Supreme Treves Pvt. Ltd. V/s CCE, Daman-2024 (1) TMI 935- CESTAT Ahmedabad.
- Oil & Natural Gas Corporation Ltd. V/s CCE-(2024) 20 Centax 589 (T-Del).
- NRB Industrial Bearings Pvt. Ltd. V/s CCE, Aurangabad-2019 (8) TMI 600 - CESTAT Mumbai.
- CCE, Rangareddy-GST V/s Granules India Ltd.-2024 (4) TMI 9 - CESTAT Hyderabad

3. Shri NeilPrakash G Makwana, Ld. Superintendent(AR) appearing on behalf of the Revenue, reiterates the findings of impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that the issue involved in the present case that whether the commission paid to the Directors are liable to service tax under reverse charge mechanism in the hands of the appellant has been settled in the appellant’s own case vide Order No.12193/2024 dated 26.09.2024 which is as under:-

“4. We have carefully considered the submissions made by both the sides and perused the record. We find that as per claim of the appellant, the service provided by Director as an employee to the employer i.e. Company is not liable to pay service tax as per Section 65B (44). For the ease of reference, we reproduce the same as under:-

“(44) "Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) …….. (i) to (iii) ……… ………… ………

(b) A provision of service by an employee to the employer in the course of or in relation to his employment;

As per the above sub clause (b) of sub-Section (44) of Section 65 of Finance Act, 1994, it is clear that provision of any service by an employee to the employer in case of his employment does not fall under the definition of service. As per the facts in the present case, the Directors to whom the commission was paid by the appellant are employees of the Company as per the Board's resolution. The Directors in the capacity of employees provided service to the employer i.e. present appellant Company. Therefore, the service whatsoever provided by the Directors to the appellant is in the course of their employment with the appellant Company. Therefore, the same is out of the purview of service in terms of Section 65B(44) (b) of the Finance Act, 1994. Moreover, we find that the appellant have also booked the payment made to the Directors as salary in their books of accounts and the same has been accepted by the Income Tax department. The TDS was also deducted under the head salary under Section 192 of the Income Tax Act. All these facts go on to prove that the considerations paid to the Directors are in course of employment of the Directors. Therefore, the same is not taxable being not a service as per definition of service under Section 65B(44) of the Finance Act, 1994. We further notice that the CBEC vide Circular No. 115/9/2009-ST dated 31.07.2009 clarified the expression as under:-

"Below mentioned issues have been referred to the Board seeking clarifications,-

(i) applicability of service tax under 'Business Auxiliary service' on commission paid to Managing Director / Directors (whole time, or Independent) by the company,

(ii) applicability of service tax on Independent Directors who are part of the Board of Directors under 'Management Consultant service'.

2. Both the matters have been examined by the Board and the clarifications are as under, -

(i) Some Companies make payments to Managing Director/Directors (Whole-time or Independent), terming the same as 'Commissions'. The said amount paid by a company to their Managing Director/Directors (Whole-time or Independent) even if termed as commission, is not the 'commission' that is within the scope of business auxiliary service and hence service tax would not be leviable on such amount.

(ii) The Managing Director / Directors (Whole-time or Independent) being part of Board of Directors perform management function and they do not perform consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. The payments made by Companies, to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is clarified that the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax.

3. In view of the above, it is clarified that remunerations paid to Managing Director / Directors of companies whether whole-time or independent when being compensated for their performance as Managing Director/Directors would not be liable to service tax. Pending issues may be resolved in line with the above."

From above Circular it is clear that any commission paid to the Directors of the Company is not a commission i.e. within the scope of Business Auxiliary Service hence service tax would not be leviable on such amount. This Circular is binding on the departmental authorities therefore, the lower authorities *ought not to have confirmed the demand taking a view against the view taken by Board vide Circular dated 31.07.2009.*

5. This issue was also considered in various judgments which are as under:-

(a) In the case of Bengal Beverages Pvt. Ltd. vs. CGST & Excise, Howrah, the Tribunal passed the following order:-

> *"8. In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'wholetime director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the company secretory states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.*
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> *9. Further, the judgment of this Tribunal in the case of MAITHAN ALLOYS LTD Versus COMMISSIONER OF C. EX. & S.T., BOLPUR (supra) is squarely applicable to the facts of the case. Further, the Ld. Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable."*

(b) In the case of Gujarat Guardian Limited vs. CCE- Bharuch-2024 (2) TMI 910 - CESTAT Ahmedabad, this Tribunal taken the following view:-

> *"4. After considering the submissions made by both the sides, we find that matter is no longer res-Integra as this Tribunal in the case of M/s Bangal Beverages Pvt. Ltd. Vs. CGST & Excise, Howrah reported under 2020 (11) TMI 622-CESTAT Kolkata has held as follows:-*
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> *"8. In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'wholetime director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the company secretory states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole- time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in*

capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

9. Further, the judgment of this Tribunal in the case of MAITHAN ALLOYS LTD Versus COMMISSIONER OF C. EX. & S.T., BOLPUR (supra) is squarely applicable to the facts of the case. Further, the Ld. Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable." Since, the facts and circumstance of the present case are akin to, the above mentioned decision of this Tribunal and therefore same is squarely applicable in the present case also. 5. Accordingly, we hold that impugned order-in-original is without any merit and we set aside the same. Thus the appeal is allowed."

(c) In the case of Ratnamani Metals And Tubes Limited, this Tribunal has passed the following order:-

"4. We have carefully considered the submissions made by both the parties and perused the records. We find that the issue involved in the present appeal is whether service tax should be levied on the remuneration paid by the Appellant to its directors under reverse charge mechanism or not. In the light of the records submitted by the Appellants, in terms of Board Resolution and Income tax returns submitted under Form – 16, we are of the considered view that the Directors have been appointed as employees of the Appellant's Company. We find that the matter is no longer res- integra as the same has already been deliberated upon and decided by this Tribunal. The issue has been squarely covered by this Tribunal under similar facts and circumstances. For the said purposes relevant portion of the judgements have been extracted below:-

In the case of Bengal Beverages Pvt. Ltd. v CGST & Excise, Howrah 2020 (11) TMI 633

"8. In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'wholetime director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the company secretory states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

9. Further, the judgment of this Tribunal in the case of MAITHAN ALLOYS LTD Versus COMMISSIONER OF C. EX. & S.T., BOLPUR (supra) is squarely applicable to the facts of the case. Further, the Ld. Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable." In the case of Allied Blenders and Distillers Pvt. Limited vs. CCE&ST, Aurangabad reported at 2019 (24) GSTL 207 (Tri.

Mumbai), the Mumbai Bench of this Tribunal has made the following observations:-

"5. The short issue involved in the present appeal for determination is whether remuneration paid to the Directors by the appellant is chargeable to Service Tax and the appellants are required to discharge Service Tax under reverse charge mechanism in accordance with Notifications No. 45/2012-S.T., dated 7-8-2012 and 46/2012-S.T., dated 7-8-2012. Revenue's allegation is that the Directors namely, Shri K.R. Chhabria, Shri U.K. Ganguli, Shri Deepak Roy and Shri Jitendra Hemdev, who were paid remuneration during the period July, 2012 to March, 2015 amounting to Rs. 1,01,02,55,057/- by the appellant, Service Tax of Rs. 12,48,67,525/- was required to be discharged by the appellant. Opposing the said contention of the Revenue, the appellant has argued that the amount paid to the said Directors are in the nature of the salary paid to them, since the said Directors are whole time directors and employees of the company, accordingly, it is not a 'service' within the definition of 'service' prescribed under Section 65B(44) of the Finance Act, 1994.

….16. Also, from the documents produced by the appellant it is crystal clear that the Directors who are concerned with the management of the company, were declared to all statutory authorities as employees of the company and complied with the provisions of the respective Acts, Rules and Regulations indicating the Director as an employee of the company. No contrary evidence has been brought on record by the Revenue to show that the Directors, who were employee of the appellant received amount which cannot be said as ' salary' but fees paid for being Director of the company. The Income Tax authorities also assessed the remuneration paid to the said directors as salary, a fact cannot be ignored. The judgments cited by the revenue cannot be applied to the present case as the facts are different and the finding of Income tax authorities accordingly also different in the said case."

In the case of Supreme Treon Pvt. Limited v Commissioner of Central Excise, CESTAT – Ahmedabad this Tribunal under identical facts and circumstances has passed the following order:-

"Since the facts of the matter in hand are similar to the one as decided by the abovementioned decision of this Tribunal. Following the judicial discipline, we follow the same and hold that impugned order-in-original is without any merit. The appeals are allowed" We also consider the submissions made by the Learned Counsel with regards to clarification issued by the Central Board of Excise and Customs vide Circular No. 115/09/2009 – ST dated 31.07.2009 that states that the remunerations paid to such Directors would not be considered "commission' as envisaged under Service tax category. The relevant portion has been produced below:

"it is clarified that remunerations paid to Managing Director / Directors of companies whether whole-time or independent when being compensated for their performance as Managing Director/Directors would not be liable to service tax.

05. In view of the aforesaid discussions and findings, we are of the considered view that the directors of the Appellant are employees of the Appellant Company and following the judicial discipline on the similar issue, we hold that the impugned order is not sustainable, hence the same is set aside as it is without any merit. The appeal is allowed."

(d) In the case of Maithan Alloys Limited, Kolkata bench of this Tribunal has passed the following order:-

"5. Heard both sides and perused the appeal records.

6. In the instant case, it is not in dispute that service tax has been duly paid on remuneration paid to directors who are not whole time employee directors. The only dispute herein is for payment of remuneration to whole time directors, which is a fact on record. The provisions of Companies Act, 2013, contained in section 2(94), duly defines 'whole time director' to include a director in the whole-time employment of the company. A whole-time director refers to a director who has been in employment of the company on a fulltime basis and is also entitled to receive remuneration. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he *is an officer in default [as defined in clause (60) of section 2] for any violation or noncompliance of the provisions of Companies Act. Thus, in our view, the whole time director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer – employee relationship and the mere fact that the whole time director is compensated by way of variable pay will not in any manner alter or dilute the position of employer – employee status between the company assessee and the whole time director. We are thoroughly convinced that when the very provisions of the Companies Act makes whole time director (as also in capacity of key managerial personnel) responsible for any default / offences, it leads to the conclusion that those directors are employees of the assessee company.*

7. Further, in the present case, the appellant has duly deducted tax under section 192 of the Income Tax which is the applicable provisions for TDS on payments to employees. This factual and legal position also fortifies the submission made by the appellant that the whole time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries. This factual position cannot be faulted in absence of any evidence to the contrary. The submission of Ld. DR as well as the finding made by the Commissioner in the impugned order that since the whole time directors are compensated by way of variable pay and hence not employees, does not have any legal basis and is completely misplaced, and the same cannot be sustained. The decision of the Tribunal in Rent Works India (Supra) has clearly set the legal position that when the Income Tax Department considers payment in the nomenclature 'consultancy fee' as salaries, on which TDS is also made, the said payments cannot be said towards rendition of taxable service for levy of service tax. The decision in case of PCM Cement Concrete Pvt Ltd. (Supra) has set the legal proposition that consideration paid to whole time directors would be treated as payment of salaries inasmuch as there would be employer – employee relationships and in such case the levy of service tax cannot be sustained.

8. In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred above, demand of service tax on remuneration paid to whole time directors cannot be sustained and hence set aside. Since demand of service tax is set aside, penalty and interest are also not sustainable."

6. In view of the above judgments and other judgments cited by the appellant it is settled beyond any doubt that the commission paid to the Directors by the Company does not fall under the service as Business Auxiliary Service accordingly, not liable to service tax. Therefore, impugned order is set-aside and the appeal is allowed."

In view of the above order and also the decisions in the other cases cited by the Learned Counsel, the issue is no more under dispute and stands decided in favour of the assessee.

5. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in the open court on 10.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi