CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70010 of 2021

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-501-20-21 dated 24.08.2020 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s Indus Valley Partners (India) Pvt. Ltd., ...Appellant
(SDF B-13, 14 & 15 3rd Floor, Noida)

VERSUS

Commissioner of Central Goods &
Services Tax, Noida ....Respondent
(4th Floor, C-56/42, Renu Tower,
Sector-62, Noida U.P.-201301)

APPEARANCE:

Shri Abhinav Kalra, Chartered Accountant for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70026/2024

DATE OF HEARING : 14 December, 2023
DATE OF DECISION : 17 January, 2024

P. K. CHOUDHARY:

The present appeal is directed against Order-in-Appeal No.NOI-Excus-001-APP-501-20-21 dated 24/08/2020 passed by the Ld. Commissioner, Central Goods and Services Tax (Appeals), Noida whereby the appeal filed against Order-in-Original No.09/Addl. Commr/NOIDA/2019-20 dated 23/10/2019 passed by the Ld. Additional Commissioner, Central Goods and Services Tax, NOIDA has been partly allowed.

2. Briefly stated, the facts of the case are that the Appellant is registered as an SEZ unit and engaged in 'Software Development' activities. The Appellant was having units at more than one place and hence holding centralised Service Tax registration No. AAACI7597RSD002 dated 12/05/2016 for taxable services namely Rent-a-Cab Scheme Operator service,

Security/Detective Agency service, Manpower Recruitment/Supply service, Business Auxiliary service, Transport of Goods by Road service/Goods Transport Agency service, Sponsorship service, Business Support Service, Works Contract service, Information Technology Software service, Legal Consultancy service and other taxable services, i.e., other than 119 services listed in list of services for filing ST-3 returns. The Appellant was availing CENVAT credit under the CENVAT Credit Rules, 2004 in respect of service tax paid on input services received. Records and Books of Accounts of the Appellant for the period from April, 2013 to June, 2017 were subjected to audit by the Officers of Central Tax, Audit Commissionerate, Noida in the month of June, 2018. It was noticed by the Officers during the audit that the Appellant had not paid service tax on some services namely on rent-a-cab service, legal consultancy service under reverse charge mechanism under Notification No.30/12-ST dated 20.06.12. The Appellant had purchased software licence and professional services from Amazon Web Services and Advent Software, respectively, which were located abroad i.e., non-taxable area. Amazon Web Services provided 'cloud services' to the Appellant on monthly payment basis on purchase of license. Further, the Appellant had purchased professional services from M/s Advent Software Services Inc. against payment determined on annual basis. The Appellant had shown income on account of 'notice pay recovery' recovered from the employees for non observance of notice period. The Appellant had incurred expenses of Rs.7,07,70,819/- for procuring rent-a-cab operator service from proprietorship concerns, Rs.15,45,000/- for procuring legal service from Advocates, Rs.2,46,15,791/- towards purchase of cloud services from M/s Amazon Web Services Inc. located in non-taxable territory, Rs.45,74,455/- for purchase of professional services from Advent Software located in non-taxable territory and had shown income of Rs.90,93,954/- as recovery from the employees for not observing notice pay period and accordingly the Appellant had not paid/short paid service tax amounting to Rs.91,46,357/-

involved on legal consultancy service, rent-a-cab operator service, cloud services, software license and notice pay recovery for the period April 2013 to June 2017.

3. In view of the above facts, Show Cause No.08/Addl. Commr/Audit/Noida/2018-19 dated 23/10/2018 was issued to the Appellant for demand of service tax amounting to Rs.91,46,357/- along with interest and equivalent penalty under Section 78 of the Finance Act 1994. The Ld. Additional Commissioner adjudicated the matter and confirmed the demand alongwith interest and penalty. The Appellant filed an appeal against the said Order-in-Original before the Ld. Commissioner, Central Goods and Services tax (Appeals) NOIDA. The Ld. Commissioner (Appeals) set aside the demand confirmed in regard to the Notice pay recovery amounting to Rs.12,01,868/-. However, the remaining demand amounting to Rs.79,44,489/- was confirmed along with interest and equivalent penalty under Section 78 of the Finance Act 1994. Being aggrieved by the impugned Order-in-appeal the Appellant has filed the present appeal.

4. On the issue of demand of legal services and rent-a-cab services under reverse charge mechanism, the Ld. Chartered Accountant appearing for the Appellant submitted that they received the above services from April,13 to June,17 and they were input services for the Appellant. It is a fact that the Appellant was availing Cenvat credit of service tax paid on input services. It shows that if service tax had been paid on said input services by the Appellant under reverse charge mechanism, he would have availed Cenvat credit of such service tax and finally took the refund of that amount being an SEZ unit. Therefore, it is a case of revenue neutrality. The Appellant referred to the order of the Ld. Commissioner, Central Goods and Services Tax (Appeals), Meerut on the same issue in the matter of M/s Weavetex Overseas, a hundred percent Export Oriented Unit. The Appellate Authority, vide Order-in-Appeal No.MRT/EXCUS/000/APPL-MRT/38/2019-20 dated 22/05/2019, set aside the demand raised under reverse charge mechanism

on the ground that even if the tax was paid by the assessee under reverse charge, the same would have ultimately been refunded back, the assessee being an 100% export unit. In support of his contention, the Appellant also referred to the following decisions:-

i. **Jet Airways India Ltd. vs. CST, Mumbai - 2016-TIOL-2072-CESTAT-MUM**.

ii. **National Building Construction Corporation Ltd v. CCE & ST (2011) 23 STR 593 (Tri. Kol).**

iii. **Ashirwad FoundariesPvt. Ltd. Vs. Commissioner of CGST & Central Excise (CESTAT Kolkata).**

iv. Hon'ble Supreme Court in the case of **CCE, Pune Vs Coca-Cola India Pvt. Ltd., 2007 (213) ELT 490 (SC)** and **CCE, Vadodara Vs Narmada Chematur Pharmaceuticals Ltd., 2005 (179) ELT 276 (SC),** has held that if there is no revenue implication involved, then no tax is required to be paid. It has been further held that, if for the same assessee, tax paid is modavable/cenvatable, then no tax is required to be paid.

5. The Ld. Counsel for the Appellant further submitted that it is an admitted fact that w.e.f 01/12/2016, the Appellant duly deposited the service tax under reverse charge mechanism on the value of the cloud services received by them from M/s Amazon Web Services INC. located in non-taxable territory. For the period prior to 01/12/2016, the cloud services were included in the definition of *"Online information and database access or retrieval services".* The place of supply of cloud service for the period prior to 1/12/2016 was the location of the service provider as per rule 2(l)(b) of the Place of Provisions of Services Rules,2012. It was pleaded that the *"Cloud storage services may be accessed through a collocated cloud computing service, a web service application programming interface (API) or by applications that utilize the API, such as cloud desktop storage, a cloud storage gateway or Web-based content management systems."A cloud storage service is a business that maintains and manages its customers' data and makes that data accessible over a network, usually the internet."* As defined under Rule 2(l)

of the Place of Provision of Services Rules, 2012 during 01.07.2012 to 30.11.2016, the definition of *"Online information and database access or retrieval services"* was as under:

> *"Providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network."*

As is evident from the definition of cloud storage service, the cloud service provider maintains and manages its customers' data and makes that data accessible over a network, usually the internet. Thus, the data stored in the cloud is accessible to the customer of cloud service provider. In the instant case M/s Amazon Web Service Inc. had provided cloud service to the appellant. Thus, the data stored in the cloud maintained by M/s Amazon Web Service Inc. was accessible to the appellant in electronic form through computer network. Therefore, it was submitted that the cloud service provided by M/s Amazon Web Service Inc. to the appellant was squarely covered under the definition of 'Online information and database retrieval services.' Amended definition merely mentions cloud services as an example of services covered under the definition and nowhere provides a decisive vision that the definition has been amended in anyways to include cloud services specifically. It was contended that the demand of service tax on cloud services may set aside.

6. On the issue of demand of service tax on purchase of licence from Advent Software, the Ld. Counsel for the Appellant submitted that no findings were given by the Ld. Commissioner (Appeals) while confirming demand on said service. It was simply held that said service was within ambit of 'software service'. It was stated that licence was obtained from M/s Advent Software Inc., Philadelphia, U.S.A. for use of its product 'Geneva' for on s the period from April 2013 to June 2017. "Geneva" is a product of M/s Advent Software Inc. which gives real time insight for complex strategies. Geneva is *global portfolio management and accounting platform empowers fund managers with instant, real-time performance, P&L, position and*

exposure information. With comprehensive instrument coverage – from global equities and fixed income to derivatives and bank debt – Geneva supports even the most complex global strategies, without the need for offline workarounds. Connect your front, middle, and back offices on a single, scalable platform." It thus appears that the product Geneva connects the front, middle and back offices on a single scalable platform and provides data or information to license user. In terms of rule 2(l) of the Place of Provision of Services Rules, 2012, as it existed during 01.07.2012 to 30.11.2016, the definition of online information and database access or retrieval services was "providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network." From the definition of online information and database access or retrieval services it is clear that the data or information had to be provided in electronic form through a computer network and this data or information might be retrievable or otherwise. Since the online information and database access or retrieval services was exempt from payment of service tax upto 30.11.2016 in terms of Rule 9 of the Place of Provision of service Rule 2012, accordingly, the Appellant had not paid the service tax payable on the said services. It was highlighted that even if the service tax is so demanded under reverse charge was duly paid by the appellant, it remains an undeniable fact that the tax so paid would be eligible to be claimed as CENVAT credit by the appellant and ultimately refunded to the appellant in terms of Rule 5 of the CENVAT Credit Rules 2004. Therefore, the present scenario is revenue neutral and as such it must not be lost sight that there is no ultimate loss to revenue.

7. The Ld. Departmental Representative justified the impugned order and prayed that the appeal filed by the Appellant be dismissed being devoid of any merits.

8. Heard both sides and also perused the appeal records.

9. We find that the main contention of the Appellant in the present case is regarding revenue neutrality. Service tax on all four services, namely 'legal services', 'rent-a-cab service',

'clouding service' and 'purchasing licence use of Geneva brand product', relevant to this case was payable under reverse charge mechanism. Legal services and rent-a-cab services were specified services under Notification No.30/12-ST dated 20.06.12 on which service tax was payable by the service recipient under reverse charge mechanism. Clouding services and Authorisation for use of Geneva product were provided by entities located abroad, i.e., non-taxable area. So, service tax on said services was payable by service recipient under reverse charge mechanism. We further find that the Appellant was a registered person under service tax and was eligible for taking Cenvat credit paid on input services. It is a fact that all said services were input services for the Appellant. Whatever tax was paid on said services, the Appellant would have taken back as Cenvat credit. Thus there was no gain to the government exchequer in that case. It is a case of revenue neutrality. We find that the issue of the applicability of revenue neutrality in the circumstances of charging service tax under reverse charge mechanism has been settled in catena of judgments.

In the case of Jet Airways India Ltd [2016-TIOL-2072-CESTAT-MUM], this Tribunal has considered the issue of revenue neutrality where service tax was required to pay under reverse charge mechanism as service provider was foreign based firm. The Tribunal held that as the appellant could have availed CENVAT credit of the service tax paid on reverse charge mechanism, hence a revenue neutral situation arises wherein appellant pays the tax and takes the credit and accordingly set aside the tax demand interest thereon and penalties.

In the case of Jain Irrigation System Ltd. [2015 (40) S.T.R. 572 (T)] the Tribunal holds that revenue neutral situation comes about when credit is available to assessee himself. In the case of Coca-Cola India Pvt. Ltd. [2007 (213) E.L.T. 490 (S.C.)] the Apex Court accepted the stand that the duty payable in respect of beverage basis/concentrates is modvatable. Since the duty payable is modvatable, there is no revenue implication. By applying ratio of above decisions, we find that the present case

is a revenue neutrality case and as such no demand is sustainable.

10. As regards interest and penalty we find that the issue is no more *res integra*. Once demand is not sustainable, interest and penalty under Section 78 of the Finance Act, 1994 would not be imposable. In support of above, reference is made to the following decisions :-

(1) CCE, Pune Vs. Coca-Cola India Pvt. Ltd., 2007 (213) E.L.T. 490 (S.C.);

(2) CCE & C. Vadodara-II Vs. Indeos Abs Ltd. 2010 (254) E.L.T. 628 (Guj.), affirmed by the Hon'ble Supreme Court in [2011 (267) E.L.T. A155 (S.C)

(3) Hindalco Industries Ltd. v. Commissioner of Central Excise, Bhubaneswar-II – 2023-TIOL-403-CESTAT-KOL.

(4) M/S. Jai Balaji Industries Ltd. v. Commissioner of Central Excise, Bolpur – 2023 (6) TMI 1102 – CESTAT KOLKATA.

In the case of CCL Products (India) Ltd. [2012 (927) S.T.R. 342 (T), the Tribunal has held that in the case of revenue neutrality, no penalty is imposable under Section 78 of the Finance Act, 1994.

11. When demand is not sustainable on the ground of revenue neutrality, we do not find it essential to consider other issues raised by the Ld Counsel of the Appellant in relation to classification and invoking extended period.

12. Accordingly, appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefits, in accordance with law.

(Order pronounced in open court on **17th January, 2024**)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS