CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.71261 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-002-APP-1704-17-18 dated 19/02/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

M/s Nippon Tubes Ltd., ...**Appellant**
(1009, Bisrakh Road, Ghaziabad)

VERSUS

Commissioner of Central Excise &

CGST, Ghaziabad ....**Respondent**

(CGST, Commissionerate, Ghaziabad)

APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

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

FINAL ORDER NO.70908/2024

DATE OF HEARING : 12 November, 2024
DATE OF DECISION : 12 November, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. NOI-EXCUS-002-APP-1704-17-18 dated : 19.02.2018 of Commissioner (Appeals) Central Goods & Service Tax, Noida. By the impugned order, O-in-O No. 35-36/AC/ST/D-V/GZB/2016-17 dated 29.12.2016 holding as following has been upheld:

"ORDER

(i) I confirm the recovery of Service Tax amounting to Rs. 1,25,536/- (57309+68227) (Inclusive of Edu. Cess & SH Edu. Cess.) and order to recover the same from M/s Nippon

Tubes Limited, 1009, Bisrakh Road, Chapraula, Ghaziabad under the proviso of Section 73(1) of the Finance Act, 1994.

(ii) I order to recover the interest at appropriate rates under Section 75 of the Finance Act, 1994 from the party on the above amount

(iii) I impose penalty of Rs.20,000/- in each case upon the party under Section 77 of the Finance Act, 1994 for failure to submit proper and correct periodical return under Section 70 read with Rule 7 of the Service tax Rules, 1994 within the stipulated time and in prescribed proforma in respect of` the Show Cause Notice No.05/DC/Audit-I/2015-16 dated 13.05.15

(iv) *I impose penalty amounting to Rs.1,25,536/- equal to the demand of service tax upon the party under the provisions of Section 78 of` the Finance Act, 1994 for suppression of facts and contravention of the provisions of the Finance Act,1994 and rules made thereunder However, a option has been given to party under sub Section (1) (i) of Section 78 of the Finance Act, 1994 that if the Service Tax alongwith interest is deposited within thirty days of communication of this order, the amount of penalty liable to be paid by the party shall be twenty five percent of the Service Tax so determined in the order, Provided that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period."*

2.1 Appellant) is having Central Excise Registration No. AAACCC3888KXM001 for manufacture of manufacture of excisable goods "steel tubes and pipes" falling under Ch. Heading No. 73069090 of the First Schedule to the Central Excise Tariff Act, 1985 and also availing the facility of CENVAT Credit on Inputs, Input Services and Capital Goods.

2.2 During audit, the officers found that certain amount has been paid to the directors of the company, but did not discharged due service tax on the same under reverse charge mechanism in view of the provisions of Notification No. 30/2012-ST dated 20.06.2012 read with Notification No. 45/2012-ST dated 07.08.2012

2.3 Two Show Cause Notices dated 13.05.2015 and 21.04.2016 for the period 2012-13 to 2013-14 & 2014-5 were issued to them alleging that they have not paid due service tax amounting to Rs. 57,309/- and Rs. 68,227/- respectively on the "amount paid to the Directors of the company" under "Reverse Charge Mechanism" as per the Notification No. 30/2012-ST dated 20.06.2012.

2.4 The show cause notices were adjudicated as per the order in original referred in para 1 above.

2.5 Aggrieved appellant preferred appeal before the Commissioner (Appeal) which has been dismissed as per the impugned order.

2.6 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Rajesh Chibber, Advocate for the appellant and Shri A K Choudhary, Authorized Representative for the revenue.

4.1 We have considered the impugned order along with the submissions made in appeal.

4.2 Impugned order records the findings as follows:

> *4. I have considered at length the material available on record, appeal memorandum and submissions made by the appellant. The dispute involves applicability of service tax on Directors' Remuneration and payment thereof under reverse charge mechanism in terms of Notification No. 30/2012-ST dated 20.06.2012 I observe that the Negative List based comprehensive approach to taxation of Service come into effect from 01.07.2012 and in Section 65 (44) of Finance Act, 1994 the 'Service' is defined as*
>
> > *"Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-*

(a) An activity which constitutes merely,

(i) A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) A transaction in money or actionable claim;

(b) A provision of service by an employee to the employer in the course of or in relation to his employment; (emphasis supplied in view of the discussion in Para infra).

(c) Fees taken in any Court or tribunal established under any law for the time being in force."

Consequently, all services other than those enlisted in Section 66 D of Finance Act, 1994 (popularly known as the Negative List) and those specifically exempted vide Notification No. 25/2012-ST dated 20.06.2012 (the Mega Exemption Notification), were brought into the ambit of the Service Tax. Further vide Circular No. 61/12/2012-ST dated 96.07.2012 clarified that the categorization of taxable service ceased to exist and directions were issued to account all taxable services under the accounting code 00441089 and hence, the categorization of taxable services become infructuous and vide Circular No. 165/ 12/2012-ST dated 20.11.2012 a new service category viz. 'Other taxable Services (Services other than 119 listed) was introduced

Further I find that vide Notification No. 46/2012-ST dated 07.08.2012 new sub rule was inserted in Rule 2(1)(d)(EE) of Service Tax Rules, 1994 so as to notify a specific service viz. 'Service provided or agreed to be provided by a Director of a Company to the said Company which mandated the recipient of Service (i.e., the Company) liable for paying Service Tax and vide Notification No. 45/2012-

ST dated 07.08.2012, the percentage of Service Tax payable by the person receiving the service was determined as 100%, by inserting a row as Sl.No. 5A in the said table.

Further vide Notification No. 09/2014-ST dt. 11.07.2014 Rule 2(1)(d)(EE) was amended SO as to include Directors of body corporate in the tax net, which read as "Rule 2 (1)(d)(EE) - 'in relation to service provided or agreed to be provided by a Director of a Company or body corporate to the said Company or body corporate, the recipient of such service''

From the above it transpires that "what is taxable under this category of service is the Service by a Director of a Company or body corporate provided to the said Company.' Further Section 2 (34) of Companies Act, 2013 defines a Director as a Director appointed to the Board of a Company and as per Section 2 (10) of Companies Act, 2013, 'Board of Directors or a Board in relation to a Company, means the collective body of the Directors of the Company. Thus it seems that all those who are part of the Director Board is/are a director(s).

Further Section 2 (54) ibid reads "Managing Director means a Director who by virtue of the article of a Company or a resolution passed in its general meeting, or by its Board of Directors is entrusted with substantial powers of management of the affairs of the Company and includes a director occupying the position of Managing Director by whatever name called" and Section 2 (94) ibid reads "a whole time Director includes, a Director in the whole time employment of the Company"

It, therefore, appears that every person occupying a position in the Director Board, including the Managing Director and whole time Director is essentially a DIRECTOR, and the service provided by them to the Company or body corporate is leviable to Service Tax. Having identified the *taxable service, the valuation of the same has to be arrived at However, before embarking on the valuation, it appears that, it is only proper to call for an examination of a particular area in the definition of 'service' viz. "a provision of service by an employee to the employer in the course of or in relation to his employment". This activity is excluded from the ambit of Service as defined in Sec. 65 (44) of Finance Act, 1994, w.e.f 01.07.2012. As employee-employer relationship is excluded from the definition of service and as it is not a service, the same is placed in pari passu with 'Goods, Immovable Property, Money, actionable claim' etc. The employee-employer relationship is normally referred and converted to as 'salary'*

In view of the above explicit provision in the definition, salary, ipso facto, is not taxable which is just like a Goods, Immovable property, money or actionable claim. A salary is a form of periodic payment from an employer to an employee, which may be specified in an employment contract. It is contrasted with piece meal wages, where each job, hour or other unit is paid separately, rather than on a periodic basis. That is why Service Tax is not demanded from a Manager of a Company as it is not a service, Whereas, the remuneration/consideration received by any Director from the company, by whatever name it is called, shall form part of a taxable value of the service viz."Directors service". I observe that in the instant case the same has been paid and TDS has been deducted under Section 194J of the Income Tax, 1962

As per Section 67 of Finance Act, 1994, the value of a taxable service, in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider of such service provided or to be provided by him, and in a case where the provision of service is for a consideration not wholly or partially consisting of money, be such amount in money as with the *addition of Service Tax charged, is equivalent to the consideration. In other words, the money charged and the money equivalent of the non- monetary consideration received by the director - let it be any goods, immovable property or 'SALARY' together forms the gross value of the service by a Director to the Company. The reimbursable expenditures also should invariably form part of the consideration. It is an admitted fact that the consideration is any money or its equivalent given or passed to any person for services rendered by him and includes perquisites*

Thus, it can be judiciously concluded that, in the case of a service provided by a Director to the Company, the gross amount of the taxable service shall be the consideration received in terms of money, which is normally referred to as 'sitting fees' in addition to the money equivalent of the non-monetary consideration including the 'salary and the perquisites (travelling/food/accommodation charges etc.), if any, and in the instant case as professional fee and Service Tax is leviable at the appropriate rate. And in view of the Notification No 30/2012-ST dated 20.06.2012 service tax is payable by the company on Directors Remuneration under reverse charge mechanism

In the instant case both directors Sh. Ganesh Kumar Aggarwal and Smt. Poonam Aggarwal gave services to the appellant for which they were paid remuneration under the guise of "fees for professional or technical services" and as evident from the FORM 26AS TDS was deducted under Section 194J of the Income Tax Act, 1962. The ledger forming the part of the balance sheets for the respective financial years aptly shows that the amount paid is Director Remuneration", this evidently establishes the beyond doubt that the directors were paid for their services, but TDS was deducted under Section 194J of the Income Tax Act, 1962 *as to put on a veil and to disguise it under "employee-employer" category.*

Therefore, I don't find any force in the argument of the appellant. The case law cited by the appellant is different and is not applicable in the present case. I also find that the appellant has not presented any credible defense for not paying due service tax as discussed above and hold that the appellant has failed to demonstrate any infirmity in the impugned orders to justify any interference. The charge of interest is a normal consequence once the amount is held as payable on due dates, also the penal provisions are correctly imposed by the original authority

Considering the above facts and contradiction, it is concluded that the appellant could not make any strong assertion against the action confirmed under the impugned order."

4.3 The only issue for consideration is whether Shri Ganesh Kumar Aggarwal and Smt Poonam Aggarwal gave services to the appellant as whole time Directors and were being paid salary for the services provided in their capacity has whole time Directors or were professional who were being sitting fees for the services rendered. The fact that on the remuneration made to them TDS was deducted under Section 194J of the Income Tax Act, 1962. In the 26AS return the same was reflected as "fees for professional or technical services". Whether for this reason alone Shri Ganesh Kumar Aggarwal and Smt Poonam Aggarwal will be considered as professional directors to whom sitting fees has been paid for the services rendered.

4.4 During the course of arguments, Counsel for the appellant produced the certificate of the Company Secretary along with the Board Resolution appointing Shri Ganesh Kumar Aggarwal and Smt Poonam Aggarwal as whole time Directors of the Appellant. We reproduce the said documents below:

CS

SUMAN LATA & ASSOCIATES
PRACTICING COMPANY SECRETARY

523-524G Nyay Khand-1, Indirapuram, Ghaziabad, Uttar Pradesh-201014 Mobile:-9821174168,9013951948 Email:-[illegible]uman@gmail.com

FILED IN COURT
07 MAY 2024
ADV/AR
CESTAT ALLAHABAD

TO WHOMSOEVER IT MY CONCERN

This is to certify that Shri Ganesh Kumar Agarwal holding Director Identification No. 00042985 and Smt. Poonam Agarwal holding Director Identification No. 02896264 were appointed as Executive Director in M/S Nippon Tubes Limited w.e.f 06th Sep 2013 as whole time Director. No amount on account of sitting fee has been paid to them during the period from 06th Sep 2013 to 31st March 2024. They are paid salary on monthly basis since their appointment as Director.

Suman Lata & Associates Practicing Company Secretaries C.P. No.- 24006

For Suman Lata & Associates
Company Secretaries
Membership No: - 51857
Certificate of Practice No: - 24006

Place New Delhi
Date 06.05.2024

Nippon Tubes Limited

(Formerly Classic Tubes (India) Limited)

ISO 9001 : 2008 Co.

Manufacturer & Exporter of : ERW BLACK & STEEL TUBES & PIPES

REGD. OFFICE : Room No. AS-4, II Floor, Jaisav Palace, Hauz Qazi, Delhi-110006
Ph. : (O) 011-23234858, Email : govt@gargtubes.com

Ref. No.......................... Dated..........................

EXTRACT OF THE MEETING OF THE BOARD OF DIRECTORS OF THE M/S NIPPON TUBES LIMITED HELD ON SATURDAY, THE 20TH DAY OF APRIL, 2013 AT 1.00 P.M. AT THE REGISTERED OFFICE OF THE COMPANY AT ROOM NO AS-4 IIND FLOOR, 5006 JAISAV PALACE, HAUZ QAZI, DELHI-110006 TO TRANSACT THE FOLLOWING BUSINESS.

Appointment of Sh. Ganesh Kumar Aggarwal as Additional Director

The Chairman of the meeting proposed the Name of **Mr. Ganesh Kumar Aggarwal** to appoint him as the director of the Company, after short discussion following resolution was passed:

"**RESOLVED THAT,** pursuant to the provisions of Section 260 of the Companies Act, 1956 and other applicable provisions of Articles of Associations of the Company, the Board of Director of the Company be and is hereby accorded to appoint Mr. Ganesh Kumar Aggarwal, S/o. Shri Ved Prakash Aggarwal, R/o. KL-143, Kavi Nagar, Ghaziabad-201001, Uttar Pradesh, as director of the Company w.e.f. 20.04.2013 to hold office up to the date of ensuring Annual General Meeting of the Company.

RESOLVED FURTHER THAT Mr. Rahul Aggarwal, Director of the Company be and is hereby accorded to authorize to file and submit Form 32 with the Registrar of Companies, N.C.T. of Delhi & Haryana and enter her name in the register of Directors."

Certified true copy
For Nippon Tube Limited

Director

For Nippon Tubes Limited

Director

CORP OFFICE : C-49, Ist Floor, RDC, Raj Nagar, Ghaziabad (U.P.)
Ph. 0120-4178400 (20 Lines)
WORKS : Khasra No.-1009, Bisrakh Road, Village Chhaproula, Distt. Gautam Budh Nagar (U.P.)
Fax No. : 0120-2674530

Nippon Tubes Limited

(Formerly Classic Tubes (India) Limited)

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Ph. : (O) 011-23234858, Email : govt@gargtubes.com

ISO 9001 : 2008 Co.

Ref. No.......................... Dated..........................

EXTRACT OF THE MEETING OF THE BOARD OF DIRECTORS OF THE M/S NIPPON TUBES LIMITED HELD ON TUESDAY, THE 2nd DAY OF APRIL, 2013 AT 12.00 P.M. AT THE REGISTERED OFFICE OF THE COMPANY AT ROOM NO AS-4 IIND FLOOR, 5006 JAISAV PALACE, HAUZ QAZI, DELHI-110006 TO TRANSACT THE FOLLOWING BUSINESSES

1. **Appointment of Smt. Poonam Aggarwal as Additional Director**

The Chairman of the meeting proposed the Name of **Mrs. Poonam Aggarwal** to appoint her as the director of the Company, after short discussion following resolution was passed:

"RESOLVED THAT, pursuant to the provisions of Section 260 of the Companies Act, 1956 and other applicable provisions of Articles of Associations of the Company, the Board of Director of the Company be and is hereby accorded to appoint **Mrs. Poonam Aggarwal**, D/o. Shri Fateh Chand Agarwal, R/o. KL-143, Kavi Nagar, Ghaziabad-201002, Uttar Pradesh, as director of the Company w.e.f. 02.04.2013 to hold office up to the date of ensuring Annual General Meeting of the Company.

RESOLVED FURTHER THAT Mr. Rahul Aggarwal, Director of the Company be and is hereby accorded to authorize to file and submit Form 32 with the Registrar of Companies, N.C.T. of Delhi & Haryana and enter her name in the register of Directors."

Certified true copy
For Nippon Tube Limited

Director

For Nippon Tubes Limited

Director

CORP OFFICE : C-49, Ist Floor, RDC, Raj Nagar, Ghaziabad (U.P.)
Ph. 0120-4178400 (20 Lines)
WORKS : Khasra No.-1009, Bisrakh Road, Village Chhaproula, Distt. Gautam Budh Nagar (U.P.)
Fax No. : 0120-2674530

4.5 From the perusal of the above it is clear that the Shri Ganesh Kumar Aggarwal and Smt Poonam Aggarwal were whole time directors with the appellant and were drawing salary from him. Thus they are covered by the "employer-employee" relationship used in the exclusion clause of Section 65B (44) of the Finance Act, 1994. Hence the services provided by them to the appellant cannot be subjected to service tax.

4.6 In case of Allied Blenders And Distillers Pvt. Ltd [2019 (24) G.S.T.L. 207 (Tri. - Mumbai)] Mumbai Bench has observed as follows:

> ***"13.****The Learned Advocate submits that the Board of Directors exercises control which includes removal of the Director from the post and there may not be a strict day to day supervision of the work of the Director, but the employment of the Directors continue till the Board of Directors desired to do so. It is his contention that the officer of a company as per Sec. 2(60) of the Companies Act, who defaults in compliance with the provisions of the Act is liable for punishment, which includes whole time Directors. Thus, the whole time Directors are amenable to criminal action like an officer of the company.*
>
> ***14.****The Revenue, on the other hand, referring to the judgment of Hon'ble Allahabad High Court in the case of Sardar Harpreet Singh v. Commissioner of Income Tax - 1990 SCC Online All 929, submitted that merely on deduction of Income Tax at source cannot be considered that the Director and the Company has employer and employee relationship. It is the agreement between the employer i.e. company and the Director would reveal the exact relationship between them. In the present case, no such agreement exists between the employer and the Directors, hence there exists no employer-employee relationship.*
>
> ***15.****We do not find merit in the argument of the Revenue inasmuch as during the course of investigation, the statement of Shri Atit Dalai, Vice President (Finance & Accounts) of the appellant company was recorded by the investigating officers on 4-6-2015. Answering the question No. 3. Mr. Dalal informed that there were four directors in the company and they were appointed in accordance with the provisions of Companies Act and Regulation of Article of Association of Company for managing day-to-day affairs of*

the company. Further answering to question No. 4, he has stated that the company are paying them remuneration which is nothing but salary. All the necessaiy deductions on account of Provident Fund, Professional Tax and TDS under Section 192 of the Income Tax Act are made as applicable; also they were issuing Form-16 like it is issued to all other employees. Even in the salary return filed by the appellant company before the Income Tax authorities, the director's names have been included. The company does not pay the director's sitting fee to any of the directors. To discredit the said statement, no contrary evidence was produced by the Revenue to establish that the directors are not involved in the day-to-day function of the Company, but participate only in Board Meetings and consequently paid remuneration.

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."*

4.7 In case of Maithan Alloys Ltd [2020 (33) G.S.T.L. 228 (Tri. – Kolkata)] Kolkata Bench has observed as follows

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 full-time 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 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.*

7. *Further, in the present case, the appellant has duly deducted tax under Section 192 of the Income-tax Act 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.*

4.8 We do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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