

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, ALLAHABAD.**

Date of hearing/Decision:12.07.2017

Appeal No.ST/1817/2011-CU(DB)

[Arising out of Order-in-Original No.12/Commr/LKO/ST/2010-11 dated 12.08.2011 passed by the Commissioner of Central Excise & Service Tax, Lucknow].

M/s .Hindustan Aeronautics Ltd.

...Appellant

(Rep by Shri Nishit Gupta,Consultant)

VERSUS

CCE, Lucknow

...Respondent

(Rep. by Shri Sandeep Kumar Singh, AR)

CORAM :

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI ANIL G.SHAKKARWAR, MEMBER (TECHNICAL)

Final Order No.71843/2018

Per Anil Choudhary:

The issue in this appeal is whether service tax of Rs. 1, 31, 98, 941/- has been rightly demanded under “Consulting Engineer Services” from the appellant under reverse charge mechanism along with equal amount of penalty under Section 78 as well as penalty under Section 77 (1) (a) of the Finance Act.

2. The brief facts are that the appellant is a PSU and engaged in the manufacture and overhaul of various kinds of electronic items, which are used in the manufacture of aircraft, aircraft engine and its parts. They are registered under the taxable category of Management Maintenance or Repair Service” with the Service Department.

3. The appellant entered into an agreement with Federal-State Unitary Enterprise Rosoboronexport, Moscow, Russia in conformity with the Inter-governmental agreement between the Government of India and the Government of Russian Federation on the organisation of SU– 30 MKI aircraft licence production in India. The terms of agreement provided for transfer of technology in the form of technical documentation, technical assistance for setting up the manufacturing facility and training of employees, etc. The Supt of Central Excise, Jagadishpur vide letter dated 17/04/2008 asked the appellant to furnish the details of fees or consideration paid for transfer of technology and technical assistance agreement entered with Rosoboronexport, for production of aircraft and its parts. Such details were provided vide letter dated 10/09/2010. Further, the details of payment, as required under the agreement were also be provided vide letter dated 4th March 2010 and 06/08/2010. The applicant could not produce a copy of the agreement, due to national security reasons.

4. Thereafter, show cause notice dated 14/09/2010 was issued alleging that the appellant was liable to discharge service tax in terms of Section 66 A of the Finance Act, 1994 under the classification – “Consulting Engineering Services” for payment made for transfer of technology and technical assistance fees. It was further alleged that the appellant has willfully suppressed the fact of receiving taxable services viz. “Consulting Engineer Services”, from the Department. As a consequence, the extended period of limitation has been invoked to demand service tax and cess of Rs.1,31,98,941/- in terms of the proviso to Section 73(1) of the Act along with interest and further penalties were also proposed. The SCN was

adjudicated on contest and the proposed demand was confirmed along with equal amount of penalty under Section 78 of the Act and further penalty was imposed under Section 77 (1) (a) of the Finance Act, 1994 of Rs.200/- per day from the date of providing service till the date of taking registration under the head “Consulting Engineer Service”.

5. Being aggrieved, the appellant /assessee is before this Tribunal.

6. The learned Counsel for the appellant states that the conditions precedent for invoking the extended period of limitation are not available and as such, the show cause notice is not maintainable. The elements for invoking the extended period like fraud, collusion, willful misstatement, suppression of facts or contravention of the provisions of the Act and the Rules being not available. The issue of show cause invoking extended period is bad and against the provisions of the Act.

7. Further, the issue relates to interpretation of statutes and hence extended period of limitation cannot be invoked. The appellant is a PSU (Navratan) and hence, without any strong allegation, mala fide cannot be alleged against it. The transaction is duly recorded in the books of accounts maintained in the ordinary course of business and they are subject to audit by the CAG.

7. So far the merits are concerned, the Id. Counsel urges that payment to Rosoboronexport for transfer of technology and providing technical assistance, training and documentation are not taxable under “Consulting Engineering Services”, even the classification is erroneous. The technical assistance and training provided is towards transfer of technology and not in isolation. It is further

submitted that transfer of technology envisages transfer of technical documentation, technical assistance for setting up the manufacturing and overhaul facility including training of employees, etc. Accordingly the payments have been made by the appellant on specific elements of the technology transfer like documentation, deputation of technocrats, training activities, etc. During the period in dispute, the appellant has made payments towards technology transfer and on-site/offsite training rendered to the appellant's employees. It is further alleged that such payments have been made in pursuance to the Inter-Governmental Agreement (IGA) as per the direction of the Ministry of Defence for its need. There is no element of business or commerce in the said transaction. It is further urged that transfer of technology under agreement should not be looked into isolation. The fees relating to technical assistance rendered while setting up a manufacturing plant, training of employees, etc. are to fulfil the main objective or intent of Technology Transfer. It is not a separate or distinct service. The Id. Counsel also relies on the ruling of this Tribunal on **Nova Chemicals (International) SA Vs. CCE, Kanpur – 2008 (11) STR 281**, wherein this Tribunal has held that agreement for transfer of technology/know-how would not fall under the category of “Consulting Engineer Service”, in spite of certain components of service like technical assistance, training being imparted in pursuance of the agreement. It was held that the relationship between M/s. GAIL and the applicant may not fall under the category of “Consulting Engineer as the relationship between them is of licensor and licensee. It is further submitted that similarly the relationship between Rosoboronexport and the appellant is that of licensor and licensee respectively and

accordingly, the same is not covered under the head “Consulting Engineer Service”.

8. Section 65(31) of the Act defines a “Consulting Engineer” as – “Consulting Engineer” means any professionally qualified engineer or any body corporate or any other firm, which either directly or indirectly, renders any advice, consultancy or technical assistance, in any manner, to any person, on one or more disciplines of engineering. It is further urged that technology transfer agreement to manufacture aircraft in India would not amount to provision of any advice, consultancy or technical assistance in the field of engineering and accordingly the same would not be covered under ‘Consulting Engineer Service’. It is further urged that there is separate contract under which the appellant has sent its employees to Russia for the purpose of training and consultations. As the training of employees has taken place outside India, it is not taxable. It is further urged that the transfer of right to use the technology is generally taxable under ‘Intellectual Property Right Service’. It is further urged that transfer of right to use technology in the nature of undisclosed information is not patentable in India and hence not covered under the IPR services also. It is further urged that the levy of service tax under the impugned order under reverse charge is bad, as transfer of technologies is not used for business or commerce. It is further urged that transfer of technology and documentation is goods and not taxable to service tax. Further, under the facts and circumstances the transactions were duly recorded in the books of accounts maintained in the ordinary course of business and no case of any suppression, mala fide on the part of the appellants is made out, and as such, extended period of

limitation is not invokable. Accordingly, there is no condition precedent available for imposition of penalty.

9. The learned counsel further relies on the ruling of Coordinate bench of this Tribunal in the case being **CCE versus Hindustan Aeronautics Ltd - 2015 (40) STR 289 (Tribunal-Mumbai)**, wherein under similar facts and circumstances of transfer of technology by the Nasik unit, service tax was demanded under reverse charge mechanism for the period October 2006 to October 2007. This Tribunal observed, after considering the agreement, that the appellant/assessee is a Government of India organization engaged in the manufacturing of defence-related equipments. On perusal of the agreement, the Tribunal found that the said agreement is for transfer of licence technical documentation for the manufacture of fighter aircraft, in the facility of HAL. As the agreement being confidential and secret, it was not reproduced in the order. Further, the Tribunal observed that the agreement is for 'transfer of technology' for the manufacturing of fighter aircraft, for the purposes of which experts from the foreign company are required to visit and help the appellant assessee. On backdrop of such factual matrix, after examining the definition of service under the head "Scientific and Technical Consultancy Service" that provides that service means any advice, consultancy or scientific or technical assistance, to be rendered by the scientist or a technocrat. The foreign-based company "Rosoboronoexport" is not a scientist or a technocrat. It was further observed that this foreign-based company is a joint stock company, part of the 'Russian Technologies State Corporation', which is responsible for import/export of the full range of defence and dual use end products, technologies

and services. It was also observed that the said company only has the right to supply the world market with a full range of arms and military equipments manufactured by the Russians Defence Industrial Complex and Approval. It was further observed that the official status of Rosoboronexport of Russia is an exclusive state intermediary agency and provides guaranteed state support for all export import operations. Thus, the said status of Rosoboronexport indicates that it is neither science nor technical institution or organisation. Accordingly, the service tax is not leviable under the similar facts and circumstances, as held by the coordinate Bench of this Tribunal. The learned counsel further relied on the notification no. 11/2006 – ST, as amended by notification no. 28/2012 – ST which provided Rules for taxation of services provided from outside India and received in India, Rules, 2006, wherein under Rule 3(iii)(c) it is provided that – subject to Section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services specified in Clause 105 of Section 65 of the Act, but excluding – those specified in clause (ii) of this Rule, be such services as are received by a recipient located in India for use in relation to ‘business or commerce’.

10. The learned AR for Revenue have relied on the findings in the impugned order.

11. Having considered the rival contentions, we are satisfied that the payment made by the appellant company is for transfer of technology under intergovernmental agreement and not for receipt of any services in India in relation to business or commerce. We further find that under Section 65 (105)(g) “taxable

service” under ‘consulting engineers service’ means provided or to be provided to a client by consulting engineer in relation to advise consultancy or technical assistance in any manner in one or more disciplines of engineering. In the present facts and circumstances, there is no relation of any Consulting Engineering Service with any client or appellant. Thus we hold that in the facts and circumstances, Service Tax is not attracted under the head “Consulting Engineer Services” on reverse charge basis. Accordingly, we allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefit in accordance with law.

[Operative portion already pronounced in open court]

(Anil Choudhary)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

Ckp