

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 2237 of 2012

[Arising out of Order-in-Appeal No. 95/2012 dated 15.05.2012 passed by the Commissioner of Central Excise, Customs & ST (Appeals), Cochin]

**Commissioner of Central Excise &
Service Tax, Trivandrum**

T.C. No. 26/334(1&2),
I.C.E. Bhavan, Press Club Road,
Trivandrum, Kerala 695001

.....Appellant

VERSUS

Kerala State Electricity Board

Vaidyuthi Bhavan, Pattom P.O.
Thiruvananthapuram, Kerala

.....Respondent

APPEARANCE:

Present for the Appellant: Sh. Dyamappa Airani, Authorized Rep.

Present for the Respondent: None

CORAM:

HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)

HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21258/2023

DATE OF HEARING: 31.07.2023

DATE OF DECISION: 17.11.2023

PER D. M. MISRA

None present for the respondent despite notices having been issued from time to time. The matter has been listed on several occasions; therefore, further adjournment would not yield any fruitful result. Therefore, the matter is taken up for disposal

on the basis of records and after hearing the Ld. A.R. for the Revenue.

2. This appeal is filed by the Revenue against Order-in-Appeal No. 95/2012 passed by the Commissioner of Central Excise, Customs & ST (Appeals), Cochin.

3. The respondent have filed a refund claim of Rs.1,42,48,182/- on 08.01.2010. Brief background of the case leading to the claim are that the respondent had entered into a contract with M/s SNC Lavalin, Canada to implement a project work and received 'Consulting Engineer Service' from the said overseas firm and paid consultancy charges to them. Two show cause notices were issued to the respondent on 28.04.2003 and 19.08.2003 demanding service tax of Rs.1,38,21,517/- and Rs.5,03,247/- respectively. On adjudication, the said demand was confirmed on 08.10.2003. Consequently, the said amount was paid by the Respondent. Aggrieved by the Order of the adjudicating authority, they filed appeal before the Id. Commissioner (Appeals), who vide order dated 12.02.2004 upheld the order of adjudicating authority. Aggrieved by the order of the Commissioner (Appeals), they preferred appeal before this Tribunal and this Tribunal vide order dated 23.02.2005, set aside the order of the Commissioner (Appeals). Against the order of the Tribunal, the Revenue filed an appeal before the Hon'ble High Court of Kerala. The Hon'ble High Court by its order dated

25.07.2006, allowed the appeal filed by the Revenue and restored the order of the adjudicating authority after setting aside the order of the Tribunal. Thereafter, the respondent filed an appeal against the order of the High Court of Kerala before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its order dated 12.12.2007, dismissed the appeal filed by the respondent. A review application thereafter filed by the respondent before the Hon'ble Supreme Court, which was also dismissed by the Hon'ble Supreme Court vide order dated 06.04.2010.

3.1 Since the issue of applicability of service tax on the part of the respondent was confirmed by the Hon'ble Apex Court by rejecting their review petition, show cause notice dated 05.03.2010 was issued to the respondent for rejection of the said refund claim filed on 08.01.2010. On adjudication, the refund claim was rejected by the adjudicating authority. However, on appeal by the respondent, the Id. Commissioner (Appeals) allowed their appeal by setting aside the order of rejection of refund. Hence, the Revenue is in appeal.

4. The Id. AR for the Revenue reiterating the grounds of the appeal has submitted that the present refund filed by the respondent on the ground that the service tax paid by them on receiving 'Consulting Engineer Service' from the overseas firm namely M/s SNC Lavalin, Canada during the period August 1998 to September 2002 is erroneous and the same was not required

to be paid. The service Tax confirmed was paid by them under protest on the insistence of the department. He submits that the leviability of service tax on the transaction between the respondent and the overseas service provider, namely, M/s SNC Lavalin, Canada reached before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed their appeal as well as the review application filed by the respondent. Thus, the Order of the adjudicating authority confirming the demand of service Tax merged with the Order of the Hon'ble Supreme Court. He submits that thus the refund of service tax filed by the Respondent in January 2010 is not maintainable and has become infructuous. It is his contention that the Id. Commissioner (Appeals) allowed the refund claim by setting aside the Order of the adjudicating authority relying upon the judgement of the Larger Bench of the Tribunal in the case of ***Hindustan Zinc Ltd Vs. CCE, Jaipur reported as 2008 (11) STR 338 (Tri. LB)***. It is his contention that the Id. Commissioner (Appeals) has travelled beyond the authority vested on him and the Order is against the judicial discipline; as the matter has already been finally decided by the Hon'ble Supreme Court in the respondent's own case, dismissing the Appeal and Review filed against the Judgement of Hon'ble Kerala High Court, therefore, binding on both the parties. In support, he has cited the judgment of Hon'ble Supreme Court in the case of ***UOI Vs. Kamalakshi Finance Corporation Ltd. 1991(55) ELT 433(SC)***.

4.1 Further, he has submitted that the refund application was filed much after the period of one year from the decision of the Tribunal in ***Hindustan Zinc Ltd's*** case (supra). Therefore, on this ground also, refund is liable to be rejected.

5. The short issue involved in the present appeal is: whether the refund of service tax paid by the respondent on receiving the consulting Engineers' service from the Overseas service provider during 1998 to 2002 be admissible to them, even after the Hon'ble Supreme Court upheld the liability to discharge the tax by the Appellant.

6. It is not in dispute that after confirmation of the demand of the service tax for the period by the adjudicating authority, the respondent approached the Id. Commissioner (Appeals) against the order of the adjudicating authority. The Id. Commissioner (Appeals) also upheld the order of the adjudicating authority. However, on appeal by the respondent before the Tribunal, they were allowed relief by the Tribunal by setting aside the order confirming the demand of Rs.1.42 crores. Later, on appeal by the Revenue before the Hon'ble Supreme Court, the order of the Tribunal was set aside and the order of the adjudicating authority was restored. In other words, from the above narration of sequence of events, it is clear that the taxability of services received by the respondent from overseas service provider namely M/s SNC Lavalin, Canada has been ultimately settled by

the order of the Hon'ble Supreme Court dated 12.12.2007 and thereafter, rejection of the review application filed by the Respondent on 06.04.2010.

7. We find that the Id. Commissioner (Appeals) in the impugned order has completely ignored the order of the Hon'ble Supreme Court and by following the judgment of the Larger Bench of the Tribunal in the case of ***Hindustan Zinc Ltd Vs. CCE, Jaipur*** (supra) *de hors* the records of the case, opined that the respondent are not liable to pay service tax during the said period.

8. We are afraid that such an approach of the Id. Commissioner (Appeals) could be sustained in view of the principle of judicial discipline laid down by the Hon'ble Supreme Court in ***Kamalakshi Finance Corporation Ltd.***'s case(supra). The order of the lower authority got merged with that of the order of the Hon'ble Supreme Court and is binding on the concerned parties to the dispute irrespective of subsequent development of law on the issues involved, unless the Final Order is varied/modified by the Apex Court. In the present case, no such order has been obtained from the Hon'ble Supreme Court modifying its earlier order rejecting the Appeal filed by the Respondent, thereby confirming the demand of service tax for the disputed period against the Respondent. On the contrary,

rejection of the review petition filed before the Hon'ble Supreme Court lends finality to the dispute.

9. In these circumstances, the impugned order passed by the Id. Commissioner (Appeals), which is contrary to Judgment of Hon'ble Supreme Court cannot be sustained. Accordingly, the same is set aside and the order of adjudicating authority is restored. Revenue's appeal is allowed.

(Order pronounced in the court on 17.11.2023)

(D. M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

RA_Saifi