CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 57405 of 2013

[Arising out of Order-in-Original No. 1/AKM/CST/ADJ/2013 dated 31.01.2013 passed by the Commissioner of New Delhi]

M/s Xerox India Ltd **......Appellant**
Block One 5th and 6th Floor, Vatika Business park, sector 49 Sohna Road, Gurgoan, Haryana 122003

VERSUS

Commissioner of Service Tax, Delhi **......Respondent**
17-B I.A.E. A House M.G. Road, I.P. Estate New Delhi, 110002

APPEARANCE:

Present for the Appellant: Ms. Krati Singh, Advocate

Present for the Respondent: Shri Rajeev Gupta, Shri Siddharth Jaiswal, Shri Aneesh Dewan and Shri Yashpal Singh , Authorized Representatives

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60069/2024

DATE OF HEARING: 31.10.2023
DATE OF DECISION: 23.02.2024

PER S. S. GARG

The present appeal is directed against the impugned order dated 31.01.2013 passed by the Commissioner, Service Tax (Adjn.) New Delhi whereby the Ld. Commissioner has confirmed the demand of service tax amounting to Rs. 65,10,497/- against the appellant under 'banking and other financial services' for the period 16.08.2002 to 31.12.2005 under Section 73 of the Finance Act 1994 along with interest under Section 75 of the Act. Ld. Commissioner has also imposed penalties of not less than Rs. 100 per day and not more than Rs. 200 per day during the period when the failure to pay service tax continues subject to the maximum limit of Rs. 65,10,497/- under Section 76 of the Act, Rs. 1,000/- under Section 77 of the Finance Act and Rs. 75,00,000/- under Section 78 of the Finance Act 1994.

2. Briefly the facts of the present case are that the appellant is engaged in the manufacturing of photocopying machine, accessories and has got centralized service tax registration from 04.08.2003 and for the category of 'Maintenance and Repair' and 'Banking and other financial' services from 04.11.2004. During the course of Audit conducted by the department, it was notices that the appellant apart from the manufacturing is also involved in Repairs and Maintenance service/lease and equipment finance pertaining to their products.

3. The appellant has shown interest income under the head "Lease and Equipment Finance Income" in their annual report/balance sheets pertaining to the periods 2002-03 and 2004-05. However, they obtained registration for Banking and Financial service "Lease and Equipment Finance w.e.f. 04.11.2004 whereas service tax on leasing and equipment financing service by body corporate is leviable to service tax w.e.f. 16.08.2002. After several rounds of audit objections and counter replies a show cause notice dated 22.10.2007 was issued to the appellant proposing to demand service tax of Rs. 65,10,497/- under Banking and Financial Services ('BOFS') on the amounts collected as 'interest income-rental', 'interest income-funding',

finance income-income-facility management' during the relevant period. After following the due process, the Ld. Commissioner vide the impugned order confirmed the demand along with interest and penalty after invoking the extended period of limitation. Hence, the present appeal.

4. Heard both the parties and perused the record.

5. Ld. Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. She further submits that appellant is not a 'body corporate' engaged in providing banking services. She further submits that Section 65(12)(a) of the Act clearly provides that services under BOFS shall mean services specified under sub-clause (a) provided by:

a. banking company; or

b. a financial institution including a non-banking financial company; or

c. any other body corporate; or

d. commercial concern.

6. She further submits that the appellant is not a body corporate engaged in providing banking services, therefore, there is no liability to discharge service tax under BOFS. She also relied upon the circular dated 04.07.2006, wherein it is clarified that the word 'any other person' in Section 65(105)(zm), has to read by applying the principle of ejusdem generis with the preceding words. In support of this submission, she relied upon the following decisions :

- CCE Rohtak v. Jindal Stainless Steel 2023 (6) [Final Order No. 60169/2023]

- Banswara Syntec v. Commissioner of Central Excise 2010 (18) S.T.R. 68 (Tri. - Del.)

- Kansai Nerolac Paints Ltd. v. Commissioner of Customs 2017 (52) STR 334 (Tri.-Mum.)

- Commissioner of Central Excise v. Mohanrao Shinde SSK Ltd. 2016 (46) STR 742 (Tri.-Mum.)

7. She also submits that as the appellant is not engaged in providing banking services, therefore, the demand cannot sustain under BOFS. Hence, the impugned order is liable to be set aside.

8. Without prejudice to the above said argument She further submits that in the impugned order, the Ld. Commissioner has confirmed the demand of service tax under BOFS for providing financial leasing services without considering the actual nature of transactions of Rs. 9,37,76,673/- under following three heads:

- Interest Income- Rental (Rs. 6,69,75,182/-)

- Interest Income- Funding (Rs. 1,44,71,761/-)

- Finance Income- Facility Management (Rs. 1,23,29,729/-)

9. She further submits that as regards the interest income rental, the demand of service tax has been confirmed for providing equipment as per the agreement under head BOFS. The Ld. Counsel

further submits that the appellant entered into operating lease with its clients wherein it provided equipment on short term basis which was to be returned at the expiration of the agreement. The agreement specifically barred client from transferring, disposing off, selling, pledging or encumbering the equipment or change the location of the equipment. Further, the ownership of the asset always vested with the appellant and the client was not entitled to purchase the asset at the end of lease agreement.

10. Ld. Counsel also refers to article 3 of the agreement which is on record to prove this arrangement. She also submits that the term 'Financial Leasing' was inserted under BOFS in section 65(12) of the Act through an explanation from 01.06.2007 having retrospective effect. She also referred to the letter no. F.No. 334/1/2007-TRU 28.02.2007 and submitted that the said circular provides that every transaction of sale and lease should be examined on its terms. She also submitted that the lessee is not entitled to own the equipment at the end of the lease period. She also submits that the service provided by the appellant does not fulfil all essential requirement of financial lease and therefore the demand is liable to be set aside.

11. She also relied upon the following decisions wherein the difference between an operating lease and a financial lease have been considered by the courts:

- CCE&ST, New Delhi v. M/s. Lease Plan India Ltd. [2018-TIOL-550- CESTAT-DELJ

- Canon India Private Ltd. v. CCE&ST, LTU, Delhi [2018-TIOL-942-CESTAT- CHDJ

- Praxair India Ltd. v. CCE&ST, Bangalore-l [2018-TIOL-3088-CESTAT- BANG]

- M/s. Sundaram Finance Ltd. v. CCE&ST, Large Taxpayer Unit, Chennai [2019-TIOL-1677-CESTAT-MAD]

12. She also submits that the renting of equipment other than right to use goods is covered under supply of tangible goods service from 16.05.2008 and accordingly the appellant had already paid VAT/Sales Tax on rental income and therefore on the same transaction service tax cannot be imposed as it is in the nature of sale which are subjected to State Levy and for this submission she relied upon the case of M/s. Cooper Elevators India Pvt. Ltd. v. Commissioner of GST & Central Excise, Chennai [2022-TIOL-187-CESTAT-MAD].

13. As regards the demand of service tax on interest income-funding confirmed in the impugned order. Ld. Counsel submits that as per section 67 of the Act, the interest income on loans is excluded from the value to calculate service tax on any service and for this she relied upon the circular No. 80/10/2004-S.T. dated 17.09.2004.

14. As regards the service tax on finance income-facility Management she submits that in the impugned order, the demand of service tax was confirmed on the income received for supplying the printing/copying equipment along with an operator on the premises

specified by the customer. She further submits that the appellant paid service tax on this income under Business Support Service ('BSS') from 01.05.2006 and the department has accepted the above classification vide Order-in-Original dated 30.11.2010 and it has not preferred an appeal against the said order. She further submits that financial leasing by a body corporate is brought under service tax from 16.08.2002 and therefore the appellant will be liable for service tax only on amount received from financial leasing contracts entered into post 16.08.2002.

15. She also submits that the computation of demand is incorrect because the department has not considered the tax and interest already paid while raising the demand against the appellant. She also submits that the present demand should be reduced to the extent of Rs. 4,94,806/- already paid on agreements entered into after 16.08.2002. Further, Rs. 2,38,161/- was paid under Service Tax Amnesty Scheme, 2004 should be adjusted against the interest liability and further, cum-tax benefit is also available to the appellant.

16. She further submits that extended period of limitation cannot be invoked in the present case and the demand of service tax which pertains to be period 16.08.2002 to 31.12.2005 has been raised by invoking the extended period of limitation vide show cause notice dated 22.10.2007. She further submits that extended period of limitation in this case cannot be invoked as there was no willful suppression or misrepresentation of any fact in relation to payment of service tax. The appellant had registered itself under ' Banking and

other Financial Services' from 01.10.2004 after availing the benefit of Service Tax Amnesty Scheme, 2004 and paid service tax on agreements entered into after 16.08.2002. Further, the appellant was subjected to regular audits and the demand of service tax is raised on the basis of audit objections. She also submits that the department was very well aware about the appellant's activities and therefore the appellant is not liable to pay service tax on the agreements entered into prior to 2002. Further, the appellant was maintaining proper records of service tax paid and regularly filed returns. The instant case also involves the interpretation of complex legal issues. For this, she relied upon the decision of the Delhi High Court in the case of Bharat Hotels Ltd. Vs. Commissioner of Central Excise 2018 (12) GSTL 368 (Del.). She further submits that when the demand itself is not sustainable, the question of payment of interest and penalty does not arise.

17. On the other hand, Ld. DR reiterated the findings of the impugned order and submitted that the appellant was rendering banking and financial services for leasing and hire-purchase and is covered in the definition of BOFS as provided under Section 65(12)(a)(i) of chapter V of the Finance Act, 1994. He further submits that the appellant fall in the definition of any other body corporate as provided in section 65(12) of the Finance Act. He further submitted that extended period of limitation has rightly been invoked because the appellant suppressed the facts by non declaration of service till 04.11.2004 whereas the service tax is leviable on BOFS

w.e.f. 16.08.2002 in case of body corporate. Further, the appellant has not declared correct income under Amnesty Scheme.

18. We have considered the submissions made by both the parties and perused the material on record. Before we decide the issue involved in the present case we think it would be relevant to reproduce the definition of BOFS during the relevant time which is reproduced here in below:

[(12) "banking and other financial services" means-

(a) the following services Provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern, namely:-

(i) financial leasing services including equipment leasing and hire-purchase;

(ii) credit card services;

(iii) merchant banking services;

(iv) securities and foreign exchange (forex) broking:

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management;

(vi) advisory and other auxiliary financial services including invend ment and portfolio research and advice, advice mergers acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing, and

(viii) other financial services, namely, lending: issue of pay order, demand draft, cheque, letter of credit and bill of exchange; providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts; (b) foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (a);]

19. Further, the taxable service of banking and financial service has been defined under section 65(105)(zm) is as under:

[(zm) [to any person], by a banking company or a financial institution including a non-banking financial company, or any other body corporate or [commercial concern], in relation to banking and other financial services;]

20. The contention of the Ld. Counsel that the appellant during the relevant time did not fall in the definition of a body corporate as provided in the definition of banking and financial services provided under Section 65(12)(a) of the act. In this regard, we may refer to the circular dated 04.07.2006 which clarifies that the word 'any other person' in Section 65(105)(zm) has to read by applying the principle of ejusdem generis with the preceding words.

21. We also find that this issue has been considered by various Benches of the Tribunal and here we may refer to the observation of the Tribunal in the case of Kansal Nerolac Paints Ltd. Vs. Commissioner of Customs, Mumbai reported in 2017 (52) S.T.R. 334

(Tri.-Mumbai) as contained in para 6.2 which is reproduced here in below:

"6.2 Applying the above definition of "Banking and other Financial Services" and the definition of other taxable service. We find that the amount received by appellant in the case in hand would not be covered for taxing under "Banking and other Financial Services". The Circular dated 4-7-2006 of the CBEC indicates as under:-

"3. Banking and other financial services are defined under Section 65(12). Such services provided to a customer by a banking company or a financial Institution including a non-banking financial company or any other body corporate or any other person to a customer are liable to service tax under Section 65(105) (zm). The expression any other person' appearing in Section 65(105)(zm) is to be read ejusdem generis with the preceding words. The expression 'other financial services appearing under Section 65(12)(a)(ix) is a residuary entry and includes, those services which are normally rendered by banks or financial institutions.

4. Hence, banking and other financial services provided by a banking company or a financial institution or a non- banking financial company or any other service provider similar to a bank or a financial institution are liable to service tax under Section 65(105)(zm) of the Finance Act, 1994. Department of Posts is not similar to a bank or a financial institution and hence does not fall within the category of any other similar service provider."

22. Further, we find that in the present case service tax under banking and other financial service has been demanded from the appellant on the lease and finance income received in respect of contract entered into prior to 16.08.2002. It is pertinent to note that financial leasing services provided by the appellant i.e. body corporate are taxable only from 16.08.2002 whereas in the present case service tax is sought to be demanded on the basis of the agreement prior to 16.08.2002 hence we hold that impugned order confirming demand of service tax is liable to be set aside on this ground alone.

23. Further, we find that the whole premise on the basis of which the present demand has been confirmed is factually incorrect and it appears that Ld. Commissioner has not understood the nature of the transactions. In fact, the demand has been confirmed on the basis that the appellant has collected Rs. 9,37,76,673/- under the following heads which is clear from the annexure to the show cause notice:

- Interest Income- Rental (Rs. 6,69,75,182/-)
- Interest Income- Funding (Rs. 1,44,71,761/-)
- Finance Income- Facility Management (Rs. 1,23,29,729/-)

24. As regards interest income-rental, we find that the appellant received rent for renting equipment, further the perusal of sample copies of agreements will indicate that the appellant is only providing its equipment on rent basis to its customers and is not providing any

financial leasing services. These services is entirely different from the service of financial leasing for the purpose of levy of service tax.

25. Further, as regards interest income-funding, we find for this purpose the appellant entered into equipment finance agreement with the customers which is on record whereby the purchaser could either make one time down payment for purchasing the equipment or could make the payment in installments as agreed between them. The ownership in the machine is not transferred to the customer in the beginning and the customer was to make payment in specified installments. This arrangement of sale and purchase cannot be subjected to service tax under financial leasing as has been done in the impugned order.

26. Further, as per Section 67 of the act the interest income on loans is excluded from the value to calculate service tax on any service and the circular no. 80/10/2004-S.T. dated 17.09.2004 reiterates the same position. Further, as regards the finance income facility management, it is seen that this amount is received by the appellant for providing printing/copying equipment to the customers along with operator at the premises of customers and the customer paid to the appellant per impression charges based on the usage of the machine during a month. The appellant has also produced the copies of documents management service agreement entered into with the buyer in order to show the real nature of the transaction. Further, we also find that w.e.f. 01.05.2006 the appellant is paying service tax on facility management under business support service

which has been accepted by the department vide order no. 10/SIS/CST/(ADJ)/2010 dated 30.11.2010. The said order has attained finality as no appeal has been preferred by the department. Hence, we hold that for facility management, demanding service tax under financial leasing during the relevant period is not sustainable. Further, it appears to us that Ld. Commissioner has gone on presumption that this amount of Rs. 9,37,76,673/- has been received by the appellant for providing financial leasing service without taking into consideration the actual nature of the transaction. Hence, the demand is liable to be set aside and we accordingly do so.

27. We also take note of the circular no. F.No. 334/1/2007-TRU 28.02.2007 which clearly provides that all transaction particularly sale and lease should be examined to find out the true nature of the transactions which has not been done in the present case by the Ld. Commissioner. As regards invocation of extended period alleging suppression to confirm the demand, we find that the appellant has never suppressed or misrepresented any fact relating to service provided. In fact, the appellant is duly registered with the service tax authorities under banking and financial service and paid service tax of Rs. 2,38,161/- along with interest of Rs. 27,370/- under the Amnesty Scheme, 2004. It shows that all the facts were in the knowledge of the department w.e.f. 2004 i.e. the appellant got itself registered with the service tax authorities under the banking and financial services and paid service tax on agreements entered into after 16.08.2002. Before issuing the show cause notice dated 22.10.2007 a series of correspondence transpired between appellant and

department which shows the department was aware of the transactions but in spite of that the show cause notice was issued after delay of three years alleging suppression. Further, we find that the appellant is not liable to pay service tax on agreements entered into prior to 2002. Further, the appellant was maintaining proper records of service tax paid and regularly filed returns. Moreover, the issue involved in the present case relates to interpretation of complex legal issues. Further, the appellant was subjected to regular audits and the demand of service tax is raised on the basis of audit objections. Further, the Hon'ble Delhi High Court in the case of Bharat Hotels Ltd. cited (Supra) has held in para 27 as under :

"27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, l.e. "fraud, collusion, wilful misstatement. As explained in Uniworth (supra). "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of Information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid paying excise duty. The terms "mis-statement" and "suppression of facts" are preceded by the expression "wilful". The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere

omission or mere failure to pay duty or take out a license without the presence of such intention."

28. In view of the discussion above, we are of the considered view that the impugned order is not sustainable in law therefore we set aside the same by allowing the appeal of the appellant with consequential relief, if any as per law.

(Order pronounced in the open court on 23.02.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash