IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. ST/469/2010

(Arising out of Order-in-Appeal No.74/2010 (M-ST) dated 31.3.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Hindustan Oil Exploration Co. Ltd. Appellant

Vs.

Commissioner of GST & Central Excise
Chennai Respondent

Appearance

Shri L. Shibi, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :24.01.2019
Date of Pronouncement :19.02.2019

Final Order No. **40322 / 2019**

Per Bench

The appellant is a private company engaged in exploration of oil and gas onshore and offshore in India and elsewhere and to tap oil and gas reserves and other similar or allied substances. During the course of audit conducted by the officers of internal audit during the month of December 2007, it was revealed that the company is originally based at Baroda and has a separate registration there. After successful exploration at the cauvery basin, they have moved to Chennai during 2005 and got registered with the Service Tax Department for providing various services. For performing the petroleum operations, the appellants entered into contract for provision of manpower, hire of equipment contracts, consultancy contracts, material contracts and other service contracts with various companies who are experts in the field some located in India and mostly located abroad and appellants are receiving various input services from the persons / companies based abroad who have no office in India. Being a recipient of such service, appellants are liable to pay service tax in terms of Rule 2(1)(d)(iv) of Service Tax Rules, 1994 as the foreign service provider do not have office or fixed establishment in India. It was noticed that the appellants have not paid the service tax on the gross amount but on the net TDS amount. Since the value of taxable service under section 67 is the gross amount charged, the appellants are liable to pay service tax on the TDS amount also. Service tax payable on TDS amount works out to Rs.5,89,251/-.

1.2 Secondly, it was noticed that while paying service tax, the appellant had not taken into account the expenses incurred by them on behalf of the foreign service provider towards air fare, accommodation and other incidental expenses. As per section 67, the value of taxable services would be the gross amount charged by the service provider and therefore the department was of the view that these amounts are to be included in the gross value. The expenses incurred by the appellant for the period 18.4.2006 to 30.11.2007 was Rs.66,66,976/- and the liability of service tax on such amount works out to Rs.8,24,038/-.

1.3 Thirdly, the appellant receives services of Goods Transport Agencies namely M/s. Chandra CFS and Terminal Operators Pvt. Ltd. Chennai. As per Rule 2(1)(d)(v) of Service Tax Rules, in respect of service rendered by GTA, where the consignor or consignee of goods are a company under Companies Act, the recipient of service is liable to pay freight and has to discharge the service tax on such freights. The appellants are therefore liable to pay service tax on GTA service with effect from 1.1.2005 which works out to Rs.61,500/-.

1.4 Show cause notice was issued proposing to demand a sum of Rs.14,74,789/- under various heads as stated above along with interest and also proposing to impose penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalty under section 78 of Finance Act, 1994. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, ld. counsel Shri L. Shibi appeared and argued the matter.

2.1 The first issue is with regard to non-inclusion of TDS amount while discharging service tax under reverse charge mechanism for the services received from foreign service provider. He explained that contracts wherein all the indirect taxes is to be borne by the appellant, the appellant does not deduct TDS from the amount paid but pays the deductions to the Government from their own pocket and treats them as expenses. Since the said TDS is borne by the appellant, the demand of service tax on such amount cannot sustain. During the financial year 2006-07 and 2007-08, the company has deposited service tax amounting to Rs.12,395,886/- and Rs.11,100,981/- respectively. The company avails of services of various companies / persons, not having any office in India and hence deposits service tax thereon as a recipient of service. The nature of these contracts are (i) where all Indian direct tax are to be borne by the service provider and (ii) where all Indian direct tax are to be borne by the service recipient i.e. the appellant. In the first category, the service provider raises and invoice for the total amount say Rs.100/-. The company deducts income tax TDS thereon say @4%. The company pays the contractor Rs.96/- (Rs.100 less Rs.4 TDS), the income tax department Rs.4/0 as TDS and Rs.12.36 to the Service Tax Department as service tax. There is no dispute as to the liability of service tax on any such contract. In the second category of contracts, the service provider raises and invoice for the total amount of his services says Rs.100/-. It would be apt to mention here that the service provider charges the company for a gross amount of Rs.100/- only in such case. He is not at all concerned with the liability for Indian direct taxes and does not charge for the same. The company grosses up the amount and deducts income tax TDS thereon say Rs.5/. The company pays the contractor Rs.100/-, the income tax department Rs.5/- as TDS and Rs.12.36 (12.36% of Rs.100/-) to the Service Tax Department as service tax. The service tax department has been demanding service tax on the gross amount charged by the contractor as well as the TDS paid by the company in relation to the contract value but not charged by the service provider. It is clarified that TDS in such cases is not something which is charged by the service provider. It is a cost incurred by the company by operation of law and is not liable to service tax, as per the current provisions. He relied upon the decision of the Tribunal in the case of M/s. Magarpatta Township Development & Construction Co. Ltd. Vs. Commissioner of Central Excise, Pune – 2016 (43) STR 132 (Tri. Mum.).

2.2 The second issue is with regard to non-inclusion of the expenses of air fare, accommodation service and other incidental expenses incurred for the foreign service provider. The ld. counsel submitted that these were not reimbursed by the foreign service provider and being expenses incurred by them for availing the services, these cannot be included in the gross value for discharging service tax.

2.3 With regard to the demand of Rs.61,500/- under GTA service, he argued that M/s. Chandra CFS and Terminal Operators Pvt. Ltd. is a CFS agent and they have undertaken clearing and forwarding services. Though the transportation was also provided by them, it cannot be said that the appellant has to discharge service tax on GTA separately.

2.4 Ld. counsel for the appellant alternatively prayed that the penalties imposed may be waived as the non-payment was only due to confusions and interpretation in arriving at total taxable value.

3. The ld. AR Shri A. Cletus appeared on behalf of the department. He supported the findings in the impugned order.

4. Heard both sides.

5.1 The first issue is with regard to non-inclusion of TDS part which is paid under reverse charge mechanism for the services provided by foreign company. The ld. counsel for appellant has explained that there were two types of contracts and in the second category, the tax has to be borne by the service recipient which is the appellant herein. There is no dispute with regard to the service tax that is payable under the first category as a services provider. The demand is only with regard to the second type of contracts. The appellant has furnished documents to show that though TDS amount is deposited the same is borne by the appellant and has not been made part of the consideration. On perusal of documents, we are convinced that TDS has been borne by the appellant. For example, the letter dated 10.5.2006 shows that the appellant has to pay USD 319710 to the foreign company, namely, Thai Nippon Steel Engineering & Construction Corporation Ltd. The said amount has been fully paid as per the foreign certificate remittances. They have not deducted TDS but in fact have discharged the TDS liability. The appellant has borne the same as expenses of their company. On such score, we find that the demand of service tax alleging that TDS has not been included in the gross value is incorrect on facts and cannot sustain. We find that the issue is covered by the decision relied upon by the ld. counsel in the case of Magarpatta Township Development & Construction Co. Ltd. (supra), wherein the facts are as under:-

> "3. The learned Counsel took us through the facts of the case and submits that the agreement entered by the appellant with the foreign architect is very clear as the said agreement states that amount to be paid by the foreign architect not to be taxed i.e. by the appellant. He would take us through the agreement and bring to the notice specific clauses; appellant has discharged the Service Tax liability on the actual amount paid by them to such consultant. He would then take us through the provision of Section 67 of the Finance Act, 1994 and submit that the said Section contemplates discharge of Service Tax liability on the gross amount charged by the service provider. He would submit that the architect has charged the gross amount that indicated in the agreement. Subsequently, learned Counsel would take us through the provision of Service Tax (Determination of Value) Rules, 2006, as per Rule 7 during the relevant period, the provisions were very clear as to actual consultant charges need to be taxed. For this purpose, he relied upon the judgment of the Tribunal in the case of *Commissioner of Central Excise, Raigad* v. *Jawaharlal Nehru Port Trust P. Ltd.* - 2015 (40) S.T.R. 533 (Tri.-Mumbai)."

The Tribunal in the above decision had set aside the demand. Following the same, the demand under this category requires to be set aside, which we hereby do.

5.2 The second issue is with regard to the non-inclusion of expenses like airfare, accommodation expenses and incidental expenses borne in regard to the service provided by the foreign companies. The plea of the appellant is that these are expenses for the services of foreign personnel and therefore need not be included. Service tax is payable on the gross amount charged as consideration which will include the expenses for rendering service also. The appellant has not been able to establish that these expenses are reimbursable expenses. When the expenses are incurred for providing the services, these are definitely includable in the value for discharging the service tax liability. We find that the plea of the appellant on this category cannot sustain and therefore the demand is upheld.

5.3 The third issue is with regard to the demand on GTA service to the tune of Rs.61,500/-. The appellant has contended that the services were provided as part of clearing and forwarding service. On perusal of the invoices, it is seen that the CFS agent has charged the appellant separately as freight charges for GTA service. When the appellant has paid the freight charges for transportation of the goods, they are liable to discharge the service tax under this category as service recipient. The demand under this category also requires no interference.

5.4 The ld. counsel has prayed to set aside the penalties imposed. With regard to issues No. 2 and 3, we find that the appellant has not discharged the service tax liability as they entertained bonafide belief that they are not liable to include the amounts while discharging service tax. It is seen that they have been paying service tax as well as filing the returns regularly. The non-payment of service tax under these two categories was with regard to bonafide belief as to the interpretation that the appellant entertained. The penalties on 2nd and 3rd issues therefore require to be set aside, which we hereby do.

6. In the result, the appeal is partly allowed in the above terms, with consequential relief, if any, as per law.

(Pronounced in court on **40322 / 2019)**

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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