IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.568 of 2012

(Arising out of Order in Original No. 48/2012 dated 29.2.2012 passed by the Commissioner of Service Tax, Chennai)

M/s. Mando India Ltd. **Appellant**
No. F-64, SIPCOT Industrial Park
Irungattukottai
Sriperumbudur – 602 105.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai Outer Commissionerate
II Avenue, Newry Towers
12th Main Road, Anna Nagar
Chennai – 600 040.

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40440/2023

Date of Hearing: 02.06.2023
Date of Decision: 15.06.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Mando India Ltd. Sriperumbur. During investigation initiated by the Survey Intelligence and Research Wing of Service Tax Commissionerate, Chennai, it was noticed that the appellant had not paid service tax on the amount debited towards services received from their associated enterprise in the books of accounts on 10.5.2008. The various charges which are under dispute and the payment of service tax under reverse charge mechanism has been demanded are as under:-

(a) Salaries paid to foreign service engineers

(b) Fees for technical know-how

(c) Fee for product testing / product validation

(d) Reimbursement of air travel expenses

(e) Service charges for loan guarantee

As per the reply given by the appellant, the Commissioner of Service Tax vide Order in Original No. 48/2012 dated 29.2.2012 has confirmed the demand of Rs.2,63,60,667/- along with interest and penalties. Aggrieved by the impugned order, the appellant is before us.

2. No cross-objections have been filed by the respondent.

3. The demand confirmed by the Commissioner of Service Tax in the Order in Original and its reasons those were conducted by the appellant in the synopsis submitted by them during the hearing are reproduced below for easy reference:

S. No.	Issue	Demand confirmed	Reasons
1.	Salary paid to Foreign Service Engineers	67,14,271/-	That FSEs are part of the technical service provided by Mando Korea to the Appellant. Hence, the expenses incurred towards FSE is classifiable under Consulting Engineering Service.
2.	Fees for technical-know how service	52,46,278/-	The Appellant is liable to remit Service Tax on difference amount arrived at by deducting the closing balance for Financial Year 2008-09 from the amount available in the Trial Balance as on 30.09.2009
3.	Fees for product testing/product validation	24,42,705/-	The inspection and testing activities are carried out at the assessee's premises in India also. Hence, the assessee is liable to pay Service Tax under Consulting Engineering Service.
4.	Reimbursement of air travel expenses	3,46,410/-	That visit of Board of Directors is integral part of IPR service and accordingly, the Appellant is liable to remit Service Tax under IPR service.
5.	Service charges for Loan Guarantee	89,008/-	Mando Korea is providing guarantee service to the Appellant. Hence, the service is classifiable under Banking and other Financial Service.

6.	CENVAT credit wrongly utilised	11,46.058/-	Service imported from outside India shall not be treated as output service for the purpose of availment of CENVAT credit under Cenvat credit rules, 2004.
7.	Exchange rate fluctuation	2,492/-	-

4. We have heard Shri Raghavan Ramabhadran, learned counsel for the appellant and Smt. K. Komathi, ADC (AR) for the Department.

5. The appellant has stated that the department has failed to mention and classify the service it seeks to propose and demand service tax in the Show Cause Notice. Hence the Order in Original is beyond the scope of the Show Cause Notice and on this ground itself, the entire demand needs to be set aside. Further, since the issue involved is of pure interpretation of legal provisions and levy of service tax under reverse charge mechanism, as to whether payments made to foreign service engineers and Mando, Korea is liable for service tax. The extended period of limitation cannot be invoked. It is settled position in law that extended period of time or limitation cannot be invoked when the entire exercise is revenue neutral as the appellant could not have achieved any purpose to evade payment of service tax. Further, since the issue involves interpretation of law, penalty is not imposable.

6. The learned AR Smt. K. Komathi stated that service tax is leviable on the import of services after the insertion of Section 66A in the Finance Act, 1994 with effect from 18.4.2006. She stated that since 'reverse charge' is applicable on all services when provided by a supplier who is based abroad, the non-mention of specific heading of the services is not very detrimental to the case. The assessees liability to pay service tax under appropriate provisions i.e. sec. 66A, 67and

68(2) of the Finance Act, 1994 and Rule 2(1)(d)(iv) and Rule 6(1) of the Service Tax Rules, 1994 have also been clearly mentioned in the Show Cause Notice. Hence mere non-quoting of the category does not vitiate the proceedings in the matter. She relied on the decision of the Tribunal in the case of Geeedeelon Texo Twist Pvt. Ltd. reported in 2009 (238) ELT 455 (Tri. Ahmd.)

7. We have heard both sides.

8. The issue pertains to short-payment of service tax under reverse charge mechanism on payments made by the appellant to their foreign service engineers conducted by their associated enterprise and other remittances by the appellant. We have examined the primary objection raised by the appellant that the show cause notice does not disclose the classification of the service it seeks to demand service tax on. We find that this plea of the appellant is not disputed. However, its Revenue's submission that mere non-quoting of the category does not vitiate the proceedings in the matter. She relied on the decision of the Tribunal in the case of **Geeedeelon Texo Twist Pvt. Ltd. reported in 2009 (238) ELT 455 (Tri. Ahmd.).** The case relates to imported Polyester Filament Yarns found in excess in the factory compared to the last stock balance recorded in the statutory records, where the appellant unit admitted that they had purchased the said goods on cash payment, without having duty paying documents. The present case depends upon the interpretation of law. The exigibility to tax will depend on determining the correct classification of the services. Hence the judgment is distinguished.

8.1 One of the disputes between the department and appellant in this case relates to the classification of the taxable service related to the deputation of Foreign Service Engineers (FSE) by Mando Korea to their factory premises. Further the appellant states that neither the SCN nor the OIO has specified the category/classification under which tax on technical know-how fees are to be levied. We find that section 66A relates to charge of service tax on services, specified in clause (105) of section 65 and received from outside India. Similarly, the charging section 66 of FA 1994 levies a tax on the value of taxable services referred to in sub-clauses of clause (105) of section 65. Natural justice requires that the noticee knows the specific charge against him and the reason for it, on the basis of which a decision is proposed to be taken by the proper authority. In this case with certain descriptive headings being equally applicable to one or more services, a noticee will not be able to put up an effective defense on the exigibility of the service rendered to tax, without knowing the exact classification heading of the service on which tax is sought to be levied. As held by a coordinate bench of this Tribunal in ***CCE, Pondicherry vs R Sundaramurthy & Co [2019 (5) TMI 228-CESTAT Chennai]***, a SCN which does not specify the category of service under which it seeks to impose Service Tax is illegal and the Service Tax demand cannot be sustained. Further the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise Vs Brindavan Beverages Ltd [2007 (13) ELT 487 (SC)]*** has held that the SCN is the foundation on which the department has to build its case and if allegations in the notice are not specific, lack detail etc it would be sufficient to hold that

the notice was not given proper opportunity to meet the allegations. We concur with the view and hold that the demand for service tax under RCM must fail on the grounds of natural justice, since the appellant has not been put to notice on the service classification headings under which tax is demanded.

8.2 The second issue relates to the eligibility of the appellant to utilise CENVAT credit for payment of Service Tax under RCM. They have relied upon the Bombay High Court judgment in ***Commissioner of CGST and Central Excise vs USV Limited [2019 (7) TMI 567-*** Bombay High Court] wherein it was held that for period prior to 20/06/2012 (presumably referring to the date of the notification No 28/2012 CE (NT) inserting the 'explanation'), there was no restriction to utilise CENVAT credit for payment of tax under RCM. The relevant portion of the judgment is extracted below;

> "6. The view taken by the Tribunal in respect of Rule 3(4)(e) of the Cenvat Credit Rules, 2004 now stands concluded against the revenue by the decision of the Gujrat High Court in the case of Commissioner of C.Ex. & Customs vs. Panchmahal Steel Ltd., 2015 (37) S.T.R. 965 (Guj.), Delhi High Court in the case of Commissioner of Service Tax vs. Hero Honda Motors Ltd. 2013 Vishal Parekar 4/6 9-cexa-78-2019.doc (29) S.T.R. 358 (Del.) and Punjab and Haryana High Court in Commr. Of C.Ex. Chandigarh vs. Nahar Industrial Enterprises Ltd.,2012 (25) S.T.R. 129 (P & H). The aforesaid decisions have been followed by this Court in The Commissioner of CGST & Central Excise v/s.Godrej & Boyce Mfg Co. Ltd. (Central Excise Appeal No. 23 of 2019) decided on 24 th June, 2019 to allow utilisation of CENVAT credit for payment of service tax on reverse charge basis GTA (Goods Transport Agency). The above decision of Gujrat, Delhi and Punjab High Courts were also followed by us in Commissioner of CGST and General Excise, Belapur Commissionerate vs. M/s. GTL Infrastructure Limited in (Central Excise Appeal No. 94 of 2019) decided on 25th June, 2019 in respect of discharge of service tax obligation on reverse charge basis on import of services under Section 66A of the Finance Act, 1994 by utilization of cenvat credit. Thus there is no reason not to follow our Court's decision in GTL Infrastructure Limited (supra).
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> 7. On the above being pointed out, the distinction which is sought to be made out by the Revenue before us for not following Vishal

> Parekar the earlier decisions, is, the prohibition found in Rule 5 of the Taxation of Services (provided from Outside India and Received in India) Rules, 2006. We note that the restriction provided in Rule 5 of the above rules is that the taxable service received from outside India shall not be treated as output services for availment of tax paid on any input services. However, there is no bar to utilizing of cenvat credit already availed to discharge service tax obligation on the import of services on reverse charge basis. *This view is further supported by the fact that on 20 th June, 2012 the Cenvat Credit Rules, 2004 were amended so as to introduce an explanation which bars utilization of cenvat credit to meet oblilgation of tax on output service on reverse charge basis."*
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> (emphasis added)

We find that the explanation to Rule 3(4)(e) of CENVAT Credit Rules, 2004, clarifying that CENVAT credit cannot be used for payment of tax when the person liable to pay tax is the recipient, was inserted by Notification No 28/2012 CE (NT) dated 20/06/2012, effective from 01/07/2012. The 'Explanation' reads;

> Explanation. - CENVAT credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient.

Further the Hon'ble Constitution Bench of the Supreme Court in **A.V Fernandez v. State of Kerala [AIR 1957 SC 657]**, elucidated the principle of strict interpretation in construing a taxing statue as under:

> "29. In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case of not covered within the four corners of the provisions of the taxing statue, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter."

The Apex Court had held that the provisions of a taxing statute must be construed as they stand, adopting the plain and grammatical meaning of the words used. In the present case there was no express provision under the CENVAT Credit Rules, 2004 restricting the usage of

CENVAT credit for payment of service tax liability under the reverse charge mechanism until 01/07/2012. Consequently, the appellant was eligible to pay service tax using CENVAT credit till 30/06/2012. However, we find that although the issue has been discussed at para 13 of the impugned order and an amount of Rs. 11,46,058/- is found 'liable for recovery' it has not been 'confirmed' and 'demanded' in the 'Order". Thus, the issue fails on merits and also because it has not been confirmed and demanded in the impugned order.

9. As regards invoking the extended period of time / limitation and the imposition of penalties etc, since the demand is found to be unsustainable, the question of time limit or penalties does not arise.

10. In light of the discussions above, we set aside the impugned order and allow the appeals with consequential relief, if any, as per law. The appeal is disposed off accordingly.

(Pronounced in open court on 15.06.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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