IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 42074 of 2013

(Arising out of Order-in-Original No. 41/2012 dated 31.12.2012 passed by the Commissioner of Central Excise, Chennai-I Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Lotte Engineering & Construction (India) (P) Ltd. : Appellant
Plot No. 2207, AF Block, 7th Street,
11th Main Road, Anna Nagar West,
Chennai – 600 040

VERSUS

Commissioner of Central Excise and Service Tax : Respondent
26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

APPEARANCE:

Shri R. Anish Kumar, Advocate for the Appellant

Shri N. Satyanarayanan, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 41066 / 2023

DATE OF HEARING: 01.09.2023

DATE OF DECISION: 30.11.2023

Order : [Per Hon'ble Mr. P. Dinesha]

[Period of dispute: 2008 to 2009]

This appeal is against the impugned Order-in-Original No. 41/2012 dated 31.12.2012 passed by the Commissioner of Central Excise, Chennai.

2.1 It is the case of the assessee that it is engaged in the business of civil construction, it was awarded a contract for construction of factory building by M/s. Lotte Foods India Pvt. Ltd. [hereinafter referred to as 'LFI'] for Rs.1,78,53,39,880/-. The said contract was signed during the year 2008–09. During the course of audit of the accounts of the assessee by the Internal Audit Group, the audit team appears to have noticed the said agreement and the fact that the customer of the assessee was to make an advance payment of 25% of the contract price. It is the further case of the Revenue that, from the financial statements like balance sheet and Profit & Loss account for the year 2008–09, at Schedule 8 of the Balance Sheet, an amount of Rs.37,55,76,899/- was shown as current liabilities and provisions – advances from customers.

2.2 Entertaining a doubt that as per the balance sheet for the year under challenge and the Profit & Loss account, the assessee was liable to pay Service Tax on the amount received on accrual basis at the time of debiting / crediting of transactions with the associated enterprise in the books of account, as per Explanation (c) to Section 67 of the Finance Act, 1994, read with explanation to Rule 61 of the Service Tax Rules, 1994, a Show Cause Notice dated 07.04.2010 came to be issued alleging as per the above and with a proposition to demand appropriate Service Tax, applicable interest under Section 75 and penalty under Sections 76 and 78 of the Finance Act, 1994. In the said Show Cause Notice, the Revenue has, by alleging suppression of the actual taxable income in their S.T.-3 returns with an intention to evade payment of Service Tax, invoked the extended period of limitation.

3.1 The assessee appears to have filed reply, contending that it had paid the Service Tax on receipt basis during the year, since the amount received from its customer was higher than the invoices raised; the tax was paid on receipt basis, which was as per the Accounting Standard – 7 (AS-7) issued by the ICAI. Further, it was also explained that from the audited financials, an amount of Rs.45,43,62,388/- was recognised as income from its projects as against the invoices raised for Rs.21,67,76,732/-, an amount of Rs.23,75,85,656/- was recognised as income in the books of the accounts in order to comply with the Accounting Standard – 7 (AS-7) issued by the ICAI; that Rs.23,75,85,656/- was debited separately to the account "Unbilled revenue" in the balance sheet as required under AS-7 and but for the Accounting Standard requirements the said amount would not have been recognised as revenue since, contractually, the invoice for the said amount could not have been raised on the customer for that year; this unilateral credit in the year under challenge could not therefore be considered to be an income from the assessee's contract with its customer.

3.2 Without prejudice to the above, it was contended that even if it is to be held that the assessee should have paid Service Tax on the invoices raised plus the unilateral credit made, there was no further tax liability on the assessee since the CENVAT Credit lying in their books of accounts for the year ending 31.03.2009 amounting to Rs.79,73,916/- was more than sufficient to take care of the fictitious liability proposed against the assessee. Moreover, it was also claimed that the tax liability worked out in the Show Cause Notice was not based on cum-tax.

4.1 In the adjudication, the Commissioner having considered the explanation of the assessee, however, vide Order-in-Original No. 41/2012 dated 31.12.2012 proceeded to confirm the proposals carried out in the Show Cause Notice. The lower authority has found that the assessee did not dispute the fact that M/s. LFI was its associate enterprise, but had simply claimed that there was no such relationship between the assessee and its customer. They also appear to have not produced any documents to deny such relationships between them and M/s. LFI and hence, the Commissioner proceeded on the basis that the assessee and its customer were related.

4.2 Referring to the provisions of Section 65(105) and Section 67 of the Finance Act vis-à-vis the balance sheet of the assessee, the authority refers to Section 67(3) - the gross amount charged to include any amount received towards the taxable service before, during or after provision of such service - and hence the advance received in the respect of the service to be provided by the service provider should be recognised as the value for the purpose of charging Service Tax. Hence in view of the above, he holds that not only the services provided, but services to be provided are also taxable; consideration includes amount received towards the service provided as well as to be provided and gross amount charged with reference to associate enterprise would include even book adjustments of transactions with the associate enterprise, by means of debiting/crediting of the book of accounts. In view of the above, an amount of Rs.37,55,76,899/- treated as advance in the books of accounts of the assessee was held to be liable to Service Tax for the year under dispute.

4.3 With regard to the Service Tax liability on the amount of Rs.45,43,62,388/- shown as income from the project in the Profit & Loss account, the Commissioner has observed that the discussions in the earlier paragraphs of his order apply here also, the provisions of Finance Act would not make any distinction between the amount received towards the service already rendered and the one to be rendered, regardless of the fact whether the bills were raised or not; the said provisions would clearly provide for recognising even an advance received before rendering service as "gross amount" and hence the said amount shown to have been received by the assessee was held to be liable to Service Tax during the year under dispute.

4.4 With regard to the claim of the assessee that they had paid Service Tax on receipt basis during the year, the Commissioner observes that a sum of Rs.23,75,85,656/- was recognised as income in the books of accounts just for the purposes of Accounting Standards-7 and hence the same cannot be treated as income liable for Service Tax as per Explanation (c) to Section 67(4); transaction with an associate enterprise has to be strictly construed as gross amount received for the purposes of levy of Service Tax and hence, the unbilled amount of

Rs.23,75,85,656/- was required to be added to the billed revenue of Rs.21,67,76,732/- for the purposes of computation of Service Tax; hence, apart from the 'Income from projects' of Rs.45,43,62,388/- shown in the books of accounts, the advance received of Rs.37,55,76,899/- is also required to be taken into account for the purposes of computing Service Tax.

4.5 With regard to the invoking of extended period of limitation under proviso to Section 73(1), the Commissioner observes that the assessee had failed to disclose the fact of rendering of the taxable construction service to their associate company and the receipt of consideration for rendering the services in their periodical S.T.-3 return filed, but however, at paragraph 9 of the impugned order, the Commissioner has concluded that there was suppression, but however, intent to evade tax by the alleged non-disclosure of the execution of construction service or non-reporting in its S.T.-3 return of income, in any manner, is conspicuously absent, but however, has only justified the invocation of larger period to levy penalty under Section 78 of the Finance Act.

5. It is against this order that the present appeal has been filed before this forum.

6. Heard Shri R. Anish Kumar, Ld. Advocate for the appellant and Shri N. Satyanarayanan, Ld. Assistant Commissioner for the Revenue.

7. After considering the rival contentions, we find that the following three issues emerge for our consideration: -

(1) Whether the advance of Rs.37,55,76,899/- is liable to Service Tax?

(2) Whether the unbilled revenue of Rs.23,75,85,656/- is liable to Service Tax? and

(3) Whether the appellant is entitled to make payment of tax in respect of the amounts referred to above out of the CENVAT Credit standing to its credit?

8.1 We find at the threshold that it is most relevant to refer to Rule 6 of the Service Tax Rules, 1994, as it stood during the period of dispute i.e., 2008-09. The same reads as under: -

> *"Rule 6. Payment of service tax.*
>
> *(1) The service tax shall be paid to the credit of the Central Government, -*
>
> > *(i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and*

> *(ii) by the 5th day of the month, in any other case,*
>
> *immediately following the calendar month in which the payments are received, towards the value of taxable services:*
>
> *…."*

8.2 The above Rule lays down the time at which an assessee becomes liable to pay Service Tax. Before its amendment vide the Service Tax (Amendment) Rules, 2011 with effect from 01.04.2011, as shown above, Service Tax was payable in relation to the calendar month in which "payments are received, towards the value of taxable services". Therefore, there is no doubt that Service Tax was payable upon receipt of the consideration. No other factor such as the time of accrual of the consideration was relevant. Hence, the advance of Rs.37,55,76,899/- having already been received, would become taxable in the month in which the same was received by the appellant. This is of course subject to the qualification that if the appellant is able to establish that any portion of the advance so received was either refunded to its customer or no services were rendered in respect of any portion of the advance, then such portion would not be taxable.

8.3 Therefore, we hold that the advances, to the extent they have been received in the tax period under consideration (i.e., 2008-09), would be taxable.

The adjudicating authority is directed, accordingly, to bring so much of the advance to tax as has been received in this tax period, provided that there is nothing on the record to show that the advances so received were subsequently refunded. The appellant has also contended that these amounts have already suffered tax in the subsequent / final tax period. If this is the case, then it would not be open to the Revenue to levy tax once again. Hence, the adjudicating authority is directed to examine whether the above contention of the appellant is correct so that there is no double taxation; and it would be open for the appellant to furnish all such evidences as is necessary in this regard, to substantiate this contention. Even if the appellant shows that tax has been paid on the above sums in a subsequent period, any shortfall in the tax so paid on account of changes in rates or any other reason may, however, be recovered along with interest, if any, in accordance with law.

9.1 The above reasoning would very well apply when we consider the next issue of unbilled revenue. Unbilled revenue represents amounts attributable to services already performed, which have accrued but which have not fallen due for payment or invoicing in terms of the agreement between the parties. It therefore represents revenue which has not yet become recoverable from the customer of the appellant. The fact that these amounts continued at the end of the relevant tax period to appear as unbilled revenue demonstrates that no receipts had been made in that respect. Therefore, there is no question that the unbilled revenue did not represent consideration though which has been received by the appellant for services rendered, they would be taxable only at the time of receipt in accordance with the provisions of Rule 6 *ibid.*

9.2 Therefore, we are of the clear view that the unbilled revenue of Rs.23,75,85,656/- cannot be brought to tax.

10. On the third issue to the extent to which taxes actually fall due as a result of our findings above, the appellant would no doubt be entitled to make good the taxes that are due by means of utilization of credit available to it.

11.1 Various contentions have been raised with respect to Explanation (c) to Section 67 of the Finance Act, 1994 in relation to the unbilled revenue. It is necessary for us to deal with these contentions as they were raised although, for the reasons we will presently set forth, they do not have a bearing on deciding the issues that arose for our consideration. It is the case of the Revenue that Section 67(3) stipulates that the gross amount charged for a service shall include amounts received before, during or after the service. The Revenue also contends that clause (c) in the Explanation to Section 67 defines "gross amount charged" to include, *inter alia*, "book adjustment and any amount credited or debited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise".

11.2 Much emphasis has been laid on the position that the appellant and its customer are related i.e., 'associated enterprises' within the meaning of the above Explanation. The reason this is of no relevance is that Section 67(3) read with the aforesaid Explanation operates to define what falls within consideration or "gross amount charged". In the facts of the case at hand, it is nobody's case that the unbilled revenue does not constitute consideration for services rendered or that it does not form a part of the "gross amount charged". The limited scope of the dispute is whether that sum, although forming a part of "gross amount charged", can be taxable in this tax period as contended by the Revenue, or in a subsequent period as contended by the appellant. This question we have already answered above and hence, Section 67 or the Explanation thereunder would not disturb our reasoning.

12. In the result, the appeal is partly allowed and partly remanded and the issues are answered as under: -

(i) The issue no. (1) is remanded to the file of the adjudicating authority with specific directions.

(ii) The issue no. (2) is allowed.

(iii) The issue no (3) is allowed.

13. The appeal is accordingly disposed of.

(Order pronounced in the open court on **30.11.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd