IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 14/03/2017.
DATE OF DECISION : 21/03/2017.

Service Tax Appeal No. 58303 of 2013

[Arising out of the Order-in-Original No. 18/COMMR/ST/SGR-II/2013 dated 29/03/2013 passed by The Commissioner of Customs, Central Excise & Service Tax, Bhopal.]

M/s Bharat Oman Refineries Ltd. Appellant

Versus

CCE & ST, Bhopal Respondent

Appearance

Shri B.L. Narsimhan, Advocate – for the appellant.

Shri Ranjan Khanna, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 52458/2017 Dated : 21/03/2017

Per. B. Ravichandran :-

The appeal is against order dated 29/03/2013 of Commissioner of Central Excise & Service Tax, Bhopal. The appellants have entered into agreements with various foreign entities for obtaining license to use technical knowhow and technical information and also various engineering services, in connection with setting up of their manufacturing plant. The Revenue entertained a view that the appellants received taxable service under the category of consulting engineering service in terms of Section 65 (31) of the Finance Act, 1994. Accordingly, proceedings were initiated against the appellant which resulted in the impugned order. The Original Authority confirmed service tax liability of Rs. 4,66,84,940/-. He also imposed penalty of equivalent amount under Section 78 of the Act.

2. The learned Counsel appearing for the appellant mainly submitted on the following grounds :-

(i) the grant of license to use technical knowhow or technical information by the foreign companies cannot be considered as consulting engineering service. There is no consultation involved in terms of the agreement. A perusal of the various agreements will clearly show that the appellants were receiving process knowhow and technical information which is owned by the foreign companies. The technology and production process of various products was developed by the foreign companies and the same is supplied to the appellant in connection with putting up the refinery in India. Essentially, the agreement is for such transfer of technical knowhow. Any engineering service, technical assistance and guarantees provided by the suppliers of such technical knowhow cannot be brought under the tax category of consulting engineer service. A reference was made to the terms of contract entered into with various foreign companies ;

(ii) the foreign collaborators are not coming under the category of "consulting engineer". These foreign companies are manufacturers of various final products. They have developed certain technical knowhow and process technology. The appellant is getting such technical knowhow and the collaborators also provided engineering service in pursuance of transfer of such technical knowhow. The Revenue has not established with any evidence that the foreign companies are in fact falling under the category of consulting engineer as defined under Section 65 (31). The dominant object of foreign collaborator is to transfer the technical knowhow to the appellant in terms of the agreement. The agreement is not for any consultancy, advise or assistance ;

(iii) the demand is also contested on the question of time bar. It is submitted that the appellants are fully eligible for credit of whatever service tax payable on such services as demanded by the Revenue. In such situation, there could be no sustainable allegation of suppression of fact, malafide intend etc. The whole payment is available as a credit and for the appellant as well as for Government it is a revenue neutral situation. As such, a demand for extended period as well as penalties on the appellant will not survive.

3. The learned AR reiterated the findings in the original order. He further submitted that each one of the contract has provision for providing technical assistance by the foreign companies deputing technical personnel to the appellant’s unit for advisory role, preparation of basic engineering design, construction, project management, training, trouble shooting etc. Since, the appellant received engineering design advise the services are liable to taxed under engineering consultancy service.

4. We have heard both the sides and perused the appeal records. It is necessary to examine the terms of agreements entered into by the appellant with various foreign collaborators. The agreement dated 06/11/1997 is with Kinetic's Technology International BV, Netherland. It stipulates that M/s Kinetic (Licensor) has developed technology for the production of Hydrogen, who is also owner and controls process technology relating to a process for the production of Hydrogen. The appellant intended to install and operate under license from the licensor a hydrogen production unit to be installed in its refinery located in Madhya Pradesh. In this connection, the appellant wishes to receive certain basic engineering services, technical assistance and guarantee with respect to the plant they are putting up. The licensor is willing and has the right to grant such right to utilize the process technology and to render basic engineering services and technical assistance and give such guarantee on the terms and conditions mentioned therein.

5. Agreement dated 01/09/2006 is between appellant and UOP LLC, U.S.A. It stipulates that UOP, LLC (licensor) warrants that it has the right to grant appellant a license under licensor's patent rights described therein. The licensor granted to the appellant (licensee) a non-exclusive, non-transferable license under licensor's patent rights to use the process in the unit, to use any apparatus or catalyst therefor etc. The licensor provides technical information in terms of the said agreement. The said

agreement also mentions about separate engineering agreement for providing engineering designs specifications for the appellant. Payment is as royalties. The royalty payments is as per the schedule agreed upon.

6. Agreement dated 31/03/1997 is between appellant and Chevron Research and Technology Company, U.S.A. The said agreement states that Chevron (licensor) has developed technology for production of lube oil base stocks under the name, Chevron Isodewaxing process and Chevron Lube Hydrofinishing Process. The appellant (licensor) wishes to install and operate units in the refinery located in India to undertake the said licensed process. The licensor granted license on such processes, a non-exclusive, non-transferable patent rights. The U.S. company will also make available technical information for use in the operations of the licensed units. It also talks about use of proprietary information by the appellant. The payment is in the form of royalty. The terms of payments are stipulated in the agreement itself.

7. Agreement dated 31/07/2006 is between the appellant and M/s AB Lummus Global Inc., U.S.A. (licensor). The said agreement stipulates with the licensor has developed technical information and inventions relating to delayed coking process and has the right to grant a license to use such process for appellant's plant in Madhya Pradesh. The agreement also states

that the appellant wishes to acquire the said license and also retains the licensor to perform engineering and technical service in connection with design of the plant in terms of the agreement. The scope of work is stipulated in Article 2 of the agreement. The payment is in the form of contract price and the same is as per the schedule mentioned in Article 5.

8. We have perused the details of agreements submitted by the appellant. These agreements are for supply of technical knowhow, process technology, proprietary technical information and various connected services to the appellant in connection with setting up of their plant in Madhya Pradesh. The Original Authority mainly focused on the engineering services, which are a follow up of the transfer of technical knowhow, to conclude that the appellants received engineering consultancy service only. We are not in agreement with such conclusion. The very fact that all these agreements talk about the foreign companies as "licensor" itself is revealing. In a typical agreement for consultancy service, there will be no licensor or licensee with transfer of licensed process technology or proprietary technical information. The essence of the agreement as could be seen from the narration above is for transfer of technology process. The Tribunal had occasioned to examine similar issues involving technical collaboration and transfer of intellectual property right from foreign companies to Indian recipient. It was held that when the agreement is for transfer of exclusive/non-exclusive technical

knowhow the consideration received cannot be taxed under consultancy service. Reference can be made to the decisions in **Yamaha Motors (I) Pvt. Ltd. vs. CCE, Delhi – IV (Faridabad)** reported in **2006 (3) S.T.R. 665 (Tri. – Del.), CCE & CUS, Nashik vs. Larsen & Toubro Ltd.** reported in **2015 (37) S.T.R. 156 (Tri. – Mumbai), CST, Mumbai vs. Leibert Corporation** reported in **2014 (33) S.T.R. 161 (Tri. – Mumbai)** and **CST, Delhi vs. Suzuki Motor Corporation** reported in **2012 (25) S.T.R. 266 (Tri. – Del.)**.

9. Based on the above discussion and analysis, we find that the impugned order is not legally sustainable. We also note that the appellant made out a strong case against demand for extended period. Admittedly, in case of payment of service tax on such import of service, the appellants are rightly eligible for Cenvat credit. Even the impugned order did not substantiate the ground for confirming the demand for extended period. It is recorded by the Original Authority that the assessee had spent foreign exchange for consultancy and, hence, they are aware of tax liability. He rejected the claim of bonafide belief and revenue neutrality and confirmed the demand for extended period. We note that the findings are not legally justifiable. In any case, we have recorded the findings on merits of the case against the demand.

10. In terms of the discussion, as above, we hold that the impugned order is liable to be set aside and the appeal to be allowed. Ordered accordingly.

(Order pronounced in open court on 21/03/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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