IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal Nos.ST/153/2009 & ST/206/2009

(Arising out of Order-in-Original No.60/Commr/ST/Kol/2008-2009 dated 26.03.2009 passed by the Commissioner of Service Tax, Kolkata)

M/s Haldia Petrochemical Ltd.

Commissioner of Service Tax, Kolkata …APPELLANT(S)

VERSUS

Commissioner of Service Tax, Kolkata
M/s Haldia Petrochemical Ltd.

…RESPONDENT (S)

APPEARANCE

Shri Ravi Raghavan, Advocate, Shri Harsh Shukla & Ms. N.Agarwal, CAs for the Appellant
Shri K.Choudhary, Suptd.(AR) for the respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing/Decision : 30.10.2018

ORDER NO.FO/76879-76880/2018

Per Bench :

These are cross appeals filed against the Order-in-Original No.60/Commr/ST/Kol/2008-2009 dated 26.03.2009. The period of dispute is from 2003-2003 and 2005-2007.

2. Brief facts of the case are that during the course of audit it was noticed that the assessee had entered into agreement with different foreign companies having no office in India. These pertain to various contracts for setting up of the Petrochemical Refinery at Haldia, West Bengal. In terms of the these agreements, the assessee received services in connection with Project Management, Procurement, Supervision, Review, Approval,

Consulting Engineering and Assistance including in Basic Engineering Design, Technical and Maintenance Service, Practical Training to the Licensee's Personnel and other related matters. The department was of the opinion that such services are classifiable under the category of 'Consulting Engineering Services' falling under Section 65(105)(g) of the Finance Act, 1994. In addition, the appellant also received certain services in the nature of Banking and Financial Services from foreign financial institutions for external commercial borrowings raised by the assessee. In respect of all these services since the providers of the services did not have any offices in India, the assessee was liable to pay service tax as recipient of service in terms of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 read with Section 68(2) of the said Act. On the above lines the show cause notice dated 16.10.2007 was issued proposing demand for service tax amounting to Rs.52.88 crores along with interest and penalties. There was also a demand for reversal of cenvat credit amounting to Rs.3,18,977/-. Upon completion of the adjudication, the impugned order was passed to the following effect:

i) Demand for service tax was restricted to Rs.5,88,28,465/-. The balance demand of service tax was dropped.

ii) The adjudicating authority observed that a significant part of the demand pertains to Transfer of Technology and this cannot be classified, as proposed in the show cause notice, under the category of 'Consulting Engineering Services'. He observed that these activities fall under the 'Intellectual Property Service' under Section 65(105)(zzr) ibid which was introduced only during the relevant period. Accordingly, service tax demand amounting to Rs.15.56 crores.

iii) Further, the adjudicating authority dropped the demand for service tax amounting to Rs.5.36 crores; raised in the show cause notice on the basis of unamortized amount of licence fee carried forward in the balance sheet. The adjudicating authority observed that such amount does not reflect any payment towards licence fee and hence dropped the demand.

iv) The demand for Rs.27.90 lakh was also dropped since this pertains to services received prior to 16.08.2002 i.e. before insertion of Rule 2(1)(d)(iv) ibid.

3. The assessee is in appeal against the amount of service tax confirmed by the adjudicating authority mainly on the following grounds:

a) The liability of payment of service tax on Reverse Charge Basis can be confirmed only w.e.f. 18.04.2006, the date of enactment of Section 66A of the Finance Act, 1994. The Hon'ble Bombay High Court in the case of Indian National Shipowners Association vs. UOI [2009(13) STR 235 (Bom.)] held that service tax under Reverse Charge Mechanism will not be liable to be paid prior to this date. The above decision has also been maintained by the Hon'ble Supreme Court in 2010(17)STR J57(S.C.).

b) A significant part of the service tax held as payable by the adjudicating authority relates to services received prior to 18.04.2006. In view of the above decision of the Hon'ble Supreme Court service tax will not be payable.

c) Ld. Advocate further submitted that w.e.f. 18.04.2006, the assessee has started paying service tax under Reverse Charge Mechanism. They undertook to pay the service tax in respect of any amount not paid for the period w.e.f. 18.04.2006.

d) Cenvat or amounting to Rs.3.18 lakh availed on sales commission will be admissible to them.

4. Ld. DR fairly conceded that in view of the Apex Court's decision in the case of Indian National Shipowners Association vs. UOI (supra), the demand for service tax under Reverse Charge Mechanism can commence only w.e.f. 18.04.2006. But he submitted that the matter may be remanded to the adjudicating authority for verification. He also submitted that some of the amounts paid by the assessee were paid after the due dates and hence liable to pay interest under Section 75 of the Finance Act, 1994.

5. Heard both sides and perused the appeal records.

6. In the proceedings before the lower adjudicating authority, the demand for service tax has been raised for the period 2002-2003 to 2006-2007 in respect of certain services received by the assessee from service providers situated abroad. Demand for service tax was raised and confirmed against the assessee under Reverse Charge Mechanism by taking recourse to the Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. Subsequently, Finance Act, 1994 was amended and Section 66A was inserted w.e.f. 18.04.2006 making specific provision in the Act itself for payment of service tax on Reverse Charge Mechanism. The Hon'ble Bombay High Court and subsequently Hon'ble Supreme Court in the case of Indian National Shipowners Association vs. UOI (supra) have categorically held that service tax is liable to be paid on services received from abroad only after the date of enactment of Section 66A. These views have also been circulated by CBEC vide their Circular dated 26.09.2011. By following the above decisions, we conclude that the liability for payment of service tax on services received from abroad

will arise only from 18.04.2006. Consequently, we set aside the demand for the period prior to the said date, confirmed by the adjudicating authority.

7. Out of the total demand of about Rs.56.00 crores raised in the show cause notice, the adjudicating authority has confirmed only a part of it. The rest has been dropped for various reasons. A part of the demand dropped by the adjudicating authority has been challenged in the appeal filed by the revenue. But these grounds raised by the revenue in their appeal are also liable to be rejected for the period prior to 18.04.2006.

8. The assessee has claimed that they have started payment of service tax w.e.f. 18.04.2006. It is their submission that some portion of the service tax even for the period prior to 18.04.2006 has already been paid by them. The ld.DR has suggested that particulars of payment of service tax on or after 18.04.2006 may be got verified by the adjudicating authority.

9. The demand for reversal of Cenvat Credit amounting to Rs.3,18,977/- has been upheld by the adjudicating authority; the same has been challenged by the assessee in the present appeal. Such payment of service tax has been ordered on cenvat credit availed on sales commission paid to the agents in Nepal. But we find that such cenvat credit is admissible in view of the Explanation inserted in the Cenvat Credit Rules vide Notification No.2/2016-CE (NT) dated 03.02.2016. The Hon'ble Tribunal in the case of Essar Steel India Ltd. vs. CCE [2016(42) STR 869 (Tri.-Ahmd.)] has held that the Explanation inserted is clarificatory in nature and hence effective retrospectively. In view of the above Notification and the decision of the Tribunal (supra), we are of the view that the assessee will be entitled to avail the cenvat credit of Rs. 3,18,977/- as above.

10. In view of the above discussions we set aside the demand for service tax for the period prior to 18.04.2006 made on Reverse Charge basis as well as for reversal of cenvat credit. For the service tax liability from this date, the adjudicating authority is required to requantify the demand, if any, after taking into account the service tax already paid by the assessee. In case of delayed payment of service tax, interest will be payable under Section 75 of the Finance Act, 1994.

11. There is no justification for imposition of any penalty under the Finance Act, 1994 in the facts and circumstances of the present case.

12. In the result, both the appeals filed by the assessee and the revenue are disposed of in the above terms.

(Dictated and pronounced in the open court on)

S/d.

(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

S/d.

(V.Padmanabhan)
MEMBER (TECHNICAL)

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