IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/156/2009

(Arising out of Order-in-Original No. 63/Commr/ST/Kol/2008-09 dated 31.03.2009 passed by the Commissioner of Service Tax, Kolkata.)

M/s. (Flakt) India Ltd.

Appellant (s)

Vs.

Commissioner of Service Tax, Kolkata

Appeal No. ST/177/2009

Commissioner of Service Tax, Kolkata Appellant (s)

Vs.

M/s. (Flakt) India Ltd.

Respondent (S)

Appearance:
Shri Rajeev Agarwal, CA for the Appellant (s)
Shri S. S. Chattopadhyay, Suptd. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -17.07.2018
Date of Pronouncement:-09/01/2019
Order No. FO/77230-77231/2018

PER SHRI P. K. CHOUDHARY

Both the appeals are taken up together for disposal since it involves a common issue arising out of the Order dated 31.03.2009 passed by Ld. Commissioner of Service Tax, Kolkata.

2. Briefly stated the facts of the case are that the appellant is engaged in the manufacture of industrial fans and allied products. The appellant made foreign remittances outside India for availing certain services for use in their manufacturing business. Show Cause Notice dated 04.07.2007 was issued proposing demand of service tax under reverse charge for foreign remittances under various categories viz., Intellectual Property Services, Management Consultancy Services, etc.

as per the figures appearing in the audited Financial Statements for the period 01.01.2004 to 31.12.2004 and under Goods Transport Agency Services for the period 01.01.2005 to 31.12.2006 alongwith interest and penalty.

3. In the course of adjudication, the appellant submitted that the demand was raised on the basis of figures appearing in financial statements which were on accrual basis and that service tax liability had to be arrived on the payment basis as was the law applicable during the material period. They submitted a Chartered Accountant certificate showing period wise breakup of the remittance amount. Based upon the said CA certificate, the Ld. Commissioner in his adjudication order dated 31.03.2009 dropped a portion of the proposed demand considering the actual foreign remittances / payment basis during the period in dispute. Penalty equal to the tax amount stands confirmed by the Ld. Commissioner. The Revenue has filed appeal for the portion of demand dropped by the Ld. Commissioner whereas, the assessee has preferred the instant appeal against the service tax demand confirmed.

4. Heard both sides and perused the appeal records.

5. We find that the demand of service tax has been made on two counts – (A) service tax liability under reverse charge for import of services from outside India and (B) service tax liability under reverse charge for receiving Goods Transport Agency services.

6. Regarding the service tax demand on import of services received from outside India, it is the contention of the assessee that the SCN was issued based on the figures available in the audited Financial Statements which are prepared on accrual basis of accounting. The Ld. Commissioner in the adjudication order has dropped the demand considering the actual payments based on CA certificate, since the liability to pay service tax under reverse charge arises only when the payment is made to the service provider as was the law applicable during the relevant period. It has been further submitted on behalf of the assessee that the Ld. Commissioner has confirmed the demand for

the period from 2003 to 2006 ignoring the settled law that no service tax is payable for the period prior to 18.04.2006 as held by the Hon'ble Supreme Court in **UOI vs. Indian National Ship Owners Association** reported in 2010 (17) STR J57 (SC). It was also submitted that no remittance has been made in 2006 for services availed in the above taxable period, except Rs. 12,43,109 towards Networking Charges on which service tax of Rs. 1,23,731/- has already been paid which is on record. It has been stated that the entire demand of Rs. 84,57,353 = Rs. (85,81,084 – 1,23,731) is liable to be dropped. The assessee stated that the tax amount of Rs. 1,23,731/- already paid, towards receipt of eligible input service, has been availed as CENVAT credit. The Ld. CA for the assessee also contested penalty imposed by Ld. Commissioner by stating that there could not be reason for fraud or suppression as the situation is revenue neutral since the services are eligible input service and relied on the decision of Hon'ble Supreme Court in **Nirlon Ltd vs. CCE, Mumbai** 2015 (320) ELT 22 (SC). He also contested the demand on the ground of limitation.

7. We find that in the impugned order, though the Ld. Commissioner has in-principle agreed that service tax liability will arise on payment basis and not on accrual basis, he has considered the tax liability for the period from 2003 to 2006. It is now well settled legal position as held by the Hon'ble Supreme Court in Indian National Ship Owners Association (Supra), that the service tax liability will arise for foreign remittances made for import of services for the period 18.4.2006 onwards. In the instant case, since the period in dispute is 01.01.2003 to 31.12.2006, the demand would be restricted to import of taxable service for the period from 18.04.2006 to 31.12.2006 only. As stated above, the Ld. CA submitted that the tax payable for the said period is Rs. 1,23,731/- only on cash basis, which has already been paid by them during adjudication. The adjudicating authority would accordingly re-compute the final service tax liability for the aforesaid period.

8. In so far as the appeal filed by Revenue is concerned regarding the portion of demand dropped by Ld. Commissioner, the only ground taken by the Revenue is that Explanation 3 to Section 67 of the Finance Act, 1994 regarding valuation of taxable service is that the gross amount charged for taxable service shall include any amount received towards the taxable services before, during or after provision of such service. He therefore submits that even if the remittance is made after the period in dispute (2003 to 2006), the tax is payable. He did not dispute the fact that remittance on which demand is dropped by Ld. Commissioner was not made in the material period, as evidenced by the Chartered Accountant certificate relied by the Ld. Commissioner. In this regard, we agree with the submission made by Ld. CA appearing for the assessee that service tax is payable only when the payment of consideration /foreign remittance is made (cash basis) as per Rule 6 of the Service Tax Rules, 1994. If the contention of the Revenue is accepted, the same would lead to premature demand which is legally not sustainable in view of the aforesaid provisions of Rule 6. The demand which has been dropped by Ld. Commissioner is on account of point of taxation and not the value of taxable services. Therefore, we don't find any merit in the argument furthered by the Revenue.

8. With regard to the other issue pertaining to service tax demand on Goods Transport agency service for the period January 2005 to December 2006, Ld. CA for the assessee submitted that they have already paid the service tax of Rs. 4,49,128/- in adjudication proceedings, after claiming the prescribed abatement of 75%. The Ld. Commissioner has upheld the entitlement of abatement benefits. The Revenue has filed appeal against the abatement benefits extended by Ld. Commissioner only on the ground that he has not verified the genuineness of the certificates submitted by concerned transporters based on which abatement benefit has been extended. However, we find that no evidence has been provided by the Revenue to doubt the correctness of the said certificates provided by the transporters.

9. In so far as the plea of limitation is concerned, service tax payable under reverse charge on import of services from outside India as well on Goods Transport services would be available as credit and hence, revenue neutral. By respectfully following the Hon'ble Supreme Court decision on Nirlon Ltd. (Supra), we hold that there could not be suppression and hence the extended period of limitation is not available to the Department. Further, the very levy on import of service was under dispute which was finally settled by Hon'ble Supreme Court in Indian National Ship Owner's Association (Supra). Moreover, a major portion of the demand in this case stands dropped as discussed above. Since there is no suppression, penalty is not sustainable.

10. In view of the above discussion, the appeal filed by assessee is allowed by way remand to the Ld. Commissioner to the extent of computation of service tax liability for the period 18.04.2006 to 31.12.2006 in the manner stated above. The appeal filed by the Revenue is rejected. Both the appeals are disposed of in the aforesaid terms.

(Order pronounced in the open court on………………..)

Sd/-	Sd/-
(BIJAY KUMAR)	**(P. K. CHOUDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Pooja