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

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.76128 of 2019

(Arising out of Order-in-Appeal No.03/ST/BBSR-GST/2019 dated 27.02.2019 passed by Commissioner (Appeals), CGST, CX & Customs, Bhubaneswar.)

M/s. Paradeep Phosphates Limited
(PPL Township, Paradip-754145.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bhubaneswar Commissionerate
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha.)

WITH

Service Tax Appeal No.77423 of 2019

(Arising out of Order-in-Appeal No.120/ST/BBSR-GST/2018 dated 26.09.2018 passed by Commissioner (Appeals), CGST, CX & Customs, Bhubaneswar.)

M/s. Paradeep Phosphates Limited
(PPL Township, Paradip-754145.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bhubaneswar Commissionerate
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha.

APPEARANCE

Shri Jynesh Mohanty, Advocate for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75118-75119/2023

DATE OF HEARING : 2 March 2023
DATE OF DECISION : 2 March 2023

ASHOK JINDAL :

The Appellant is in Appeal against the impugned orders wherein demand of Service Tax has been confirmed on account of under-valuation.

2. The facts of the case are that the Appellant is engaged in the business of manufacture of fertilizer, falling under Chapter 31 of the CETA, 1985. During the period under dispute, they received "Scientific & Technical Consultancy Services" from various service providers, who were not having their offices in India.

3. As per Section 68 (2) of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, if the service provider does not have an office in India, then the service receiver who has his business establishment in India, is liable to pay Service Tax, on behalf of the service provider. The Appellant thus paid Service Tax on the value of service charges under reverse charge mechanism.

4. The Appellant paid an amount of Income Tax as TDS. As per the terms of agreement which is extracted below –

> 4. Statutory:
>
> Service tax and other taxes & duties if any shall be to our (PPL) account Under double taxation avoidance agreement, in case M/s. Ardaman get refund in their country against the tax deduction certificate the same shall be refunded to PPL upon receipt.

The consideration payable was agreed as net of all duties and taxes applicable and payable. In other words, the consideration agreed will be paid by the appellant to the service provider and any amount of tax payable in India, shall be borne by the Appellant.

5. As per Section 195 of the Income Tax Act, 1961, the Appellant is liable to deduct Income Tax thereon (TDS) at the stipulated rate on the

aforesaid payment. Since, as per the agreements, the Appellant had to bear all taxes including TDS, the amount of consideration agreed was grossed up and the TDS which is to be borne by the Appellant was worked out, in terms of Section 195A of the Income Tax Act.

6. The Revenue is of the view that the Income Tax deducted at source is part of the value of service provided by foreign service provider therefore Appellant is required to pay Service Tax on the amount of Income Tax deducted at source. In these terms, two show cause notices were issued to the Appellant and demand of differential Service Tax has been confirmed along with interest and penalties were also imposed. Aggrieved by the said order, the Appellant is before us.

7. The Ld.Counsel, appearing on behalf of the Appellant submits that during the relevant period, as per Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, the Appellant was liable to pay Service Tax on the aforesaid payments on RCM. In terms of Section 67 of the Finance Act, 1994, *value for the purpose of service tax is the actual amount charged by the service provider.* Accordingly, during the period under dispute, *the appellant discharged service tax on the actual amount of consideration agreed upon and paid to the service provider*. The amount of consideration is grossed up by the Appellant only for the purpose of payment of TDS and the TDS liability is fully borne by the Appellant.

8. He also submits that the issue is no longer *res integra* as has been settled by this Tribunal in the following decisions:-

a) M/s. Magarpatta Township Development & Construction Co.Ltd. Vs. CCE
[2016 (43) STR -132 (Tri.Mum)]
b) M/s. Garware Polyster Ltd. Vs. Commissioner, Central Tax & Customs
[2017 (5) GSTL 274 (Tri.-Mum)]
c) M/s. Hindustan Oil Exploration Co.Ltd. Vs. Commissioner of GST & C.E.
[2019 (25) GSTL 252 (Tri.-Chennai)]
d) M/s. Indian Additives Ltd. Vs. Commissioner
[2018 (6) TMI 523 (CESTAT, Chennai)]
e) M/s. TVS Motor Company Ltd. Vs. Commr. Of C. Ex & ST, Chennai
[2021 (5) GSTL 459 (Tri.-Chennai)]

Therefore, he prayed that the impugned orders are to be set aside and Appeals be allowed.

9. On the other hand, the Ld.Authorized Representative for the Department opposed the contention of the Ld.Counsel and submits that as per the terms of agreement, if the foreign service provider gets the refund of Income Tax paid by the Appellant, therefore on that amount the Appellant is required to pay Service Tax under reverse charge mechanism.

10. Heard the parties and considered the submissions.

11. On careful consideration of the submissions made by the both the sides, we have gone through the records and found that as per the invoice, the Appellant is paying Service Tax on the value of services provided by foreign service provider and as per the statutory provisions, the Appellant was required to deduct Income Tax at source. In that circumstances, the Income Tax component which is to be deducted at source, if refunded to the service provider, the same shall be refunded to the Appellant itself. In that circumstances, the value of service provided by the foreign service provider remains the same as what the tax deducted by the Appellant at source the same is borne to the Appellant.

12. The said issue has been examined by this Tribunal in the case of TVS Motor Company Ltd. (supra) and this Tribunal has observed as under:-

> ***"14.1.4****The TDS is paid/deposited to Government by the appellant out of a statutory liability. Such activity of deducting the tax at source is a legal obligation and the amount so deducted cannot be taken as consideration for services rendered. The amount on which the parties have reached a consensus ad idem can only be the consideration for the services. Further, the amount of tax deducted varies and depends upon the rate in force. There is no agreement by the parties with regard to the amount of TDS that has to be deducted. It wholly depends upon the law prevailing in the direct tax regime.*
>
> ***14.2.1****Section 2(d) of the Indian Contract Act, 1872, defines "consideration". Compliance with statutory provisions cannot be*

considered as rendering of service. Again, "consideration" is not doing something which a person is bound by law to do. When the amount is paid at the will of a person not party to the agreement, such amount does not bear the character of consideration. It has to be noted that in the present case, there is no consent from the foreign counterpart to reduce his consideration by deducting the income tax liability from the agreed consideration. While doing business with the foreign counterpart and making payment, they are bound to deduct the tax and deposit with the Government. The appellants have thus grossed up the TDS and complied with the statutory obligation. The situation would be different if the TDS is deducted from the actual consideration and is not borne by the Indian counterpart. When the foreign counterpart does not agree to forego the TDS portion from the consideration agreed, then it becomes legally incumbent upon the appellant to gross up the value as under Section 195A.

14.2.2*For the purposes of discharging their obligation of deducting tax at source, the appellants have grossed up the TDS to the actual consideration. After deposit of TDS, the service provider has received only the amount that has been agreed between the parties. There is no dispute about the fact that TDS amount has been borne by appellant. It is mentioned in paragraph 3 of the Show Cause Notice dated 19-11-2007 itself, which reads as under :*

> *"As per Section 67 of the Finance Act, 1994, '...where service tax is chargeable on any taxable service with reference to its value, then such value shall - (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him.' In view of the above, it appears that the TDS charges, which was borne by the assessee, has to be included in the value of taxable services received by the assessee from the Service Providers and hence it appears that the assessee has short paid Service Tax to the extent of TDS deducted from the value of service charges."*

(Emphasis applied)

XXXXXXXXXXXX

14.4.1*The said issue has been considered by the Tribunal in various decisions. In the case of M/s. Hindustan Oil Exploration Co. Ltd. (supra), the Tribunal had held as under :*

"5.1 The first issue is with regard to non-inclusion of TDS part which is paid under reverse charge mechanism for the services provided by foreign company. The Ld. Counsel for appellant has explained that there were two types of contracts and in the second category, the tax has to be borne by the service recipient which is the appellant herein. There is no dispute with regard to the service tax that is payable under the first category as a services provider. The demand is only with regard to the second type of contracts. The appellant has furnished documents to show that though TDS amount is deposited the same is borne by the appellant and has not been made part of the consideration. On perusal of documents, we are convinced that TDS has been borne by the appellant. For example, the letter dated 10-5-2006 shows that the appellant has to pay USD 319710 to the foreign company, namely, Thai Nippon Steel Engineering & Construction Corporation Ltd. The said amount has been fully paid as per the foreign certificate remittances. They have not deducted TDS but in fact have discharged the TDS liability. The appellant has borne the same as expenses of their company. On such score, we find that the demand of service tax alleging that TDS has not been included in the gross value is incorrect on facts and cannot sustain. We find that the issue is covered by the decision relied upon by the Ld. Counsel in the case of Magarpatta Township Development & Construction Co. Ltd. (supra), wherein the facts are as under :-

3. The Learned Counsel took us through the facts of the case and submits that the agreement entered by the appellant with the foreign architect is very clear as the said agreement states that amount to be paid by the foreign architect not to be taxed i.e. by the appellant. He would take us through the *agreement and bring to the notice specific clauses; appellant has discharged the Service Tax liability on the actual amount paid by them to such consultant. He would then take us through the provision of Section 67 of the Finance Act, 1994 and submit that the said Section contemplates discharge of Service Tax liability on the gross amount charged by the service provider. He would submit that the architect has charged the gross amount that indicated in the agreement. Subsequently, Learned Counsel would take us through the provision of Service Tax (Determination of Value) Rules, 2006, as per Rule 7 during the relevant period, the provisions were very clear as to actual consultant charges need to be taxed. For this purpose, he relied upon the judgment of the Tribunal in the case of Commissioner of Central Excise, Raigad v. Jawaharlal Nehru Port Trust P. Ltd. - 2015 (40) S.T.R. 533 (Tri. - Mumbai).*

The Tribunal in the above decision had set aside the demand. Following the same, the demand under this category requires to be set aside, which we hereby do."

14.4.2*In M/s. Indian Additives Ltd. (supra), the issue has been discussed as under :*

"5. The issue to be decided is whether the appellant is liable to pay service tax on the alleged deducted portion of TDS from the royalty paid to the foreign company. The allegation of the department is that the appellant has deducted TDS and therefore being the part of royalty the appellant is liable to pay service tax. The Ld. Counsel has produced a copy of the agreement and demonstrated that the appellant has paid TDS to the Government over and above the royalty paid to the foreign company. On the royalty the appellant has discharged the service tax. The Commissioner (Appeals) has set aside the demand prior to 18-4-2006. The Mumbai Bench of the Tribunal in Magarpatta Township Dev. & Construction Co. Ltd. (supra) has held that the demand of service tax on TDS portion cannot sustain. Relevant portion of the said decision is reproduced as under :-

8. Service Tax Valuation Rules, 2006 before amendment by Notification No. 24/2012-S.T., specifically Rule 7 needs to be read to arrive at the correct value of taxable service provided from outside India relevant Rule is reproduced :-

> *"7. Actual consideration to be the value of taxable service provided from outside India*
>
> *(1) The value of taxable service received under the provisions of Section 66A, shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.*
>
> *(2) Notwithstanding anything contained in sub-rule (1), the value of taxable services specified in clause (ii) of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as are partly performed in India, shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India."*

It can be seen from the above reproduced Rule that for the purpose of discharge of Service Tax for the service provided from outside India, the value is equal to the actual consideration charged for the services provided or to be provided. In the case in hand, we specifically asked for the invoice/bill raised by the service provider and on perusal of the same, we find that appellant had discharged the consideration as raised in the said invoice/bill. There is nothing on record that indicates that the appellant had recovered that amount of Income Tax paid by them on such amount paid to the service provider from the outside India and any other material to hold that this amount is paid as consideration for services received from service provider.

9. In our considered view, the plain reading of Section 67 with Rule 7 of Service Tax Valuation in this case in hand, Service Tax liability needs to be discharged on amounts which have been billed by the service provider."

14.4.3*In the case of M/s. Centre for High Technology (supra), the Tribunal discussed the issue and held in favour of the assessee, which reads as under :*

> *"10. After the considering the arguments made by both sides and perusal of record, we note that dispute is with reference to the amount paid as Withholding Tax which was on top of the amounts paid to M/s. Shell for the consultancy. It is not in dispute that the entire consideration for consultancy, as per the agreement, has been offered for payment of Service Tax by the appellant. The Revenue's view is that the withholding tax also needs to be included for payment of Service Tax is not justified as has been held by the Tribunal in the cited decision. We reproduce below the relevant part of the decision.*
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> *"8. Service Tax Valuation Rules, 2006 before amendment by Notification No. 24/2012-S.T., specifically Rule 7 needs to be read to arrive at the correct value of taxable service provided from outside India relevant Rule is reproduced :-*
>
> > *Actual consideration to be the value of taxable service provided from outside India.*
> >
> > *The value of taxable service received under 1. the provisions of Section 66A, shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.*
> >
> > *Notwithstanding anything contained in sub-rule 2. (1), the value of taxable services specified in clause (ii) of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as are partly performed in India, shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India.*
> >
> > *It can be seen from the above reproduced Rule that for the purpose of discharge of Service Tax for the service*

provided from outside India, the value is equal to the actual consideration charged for the services provided or to be provided. In the case in hand, we specifically asked for the invoice/bill raised by the service provider and on perusal of the same, we find that appellant had discharged the consideration as raised in the said invoice/bill. There is nothing on record that indicates that the appellant had recovered that amount of Income Tax paid by them on such amount paid to the service provider from the outside India and any other material to hold that this amount is paid is consideration for services received from service provider.

9. In our considered view, the plain reading of Section 67 with Rule 7 of Service Tax Valuation Rules, in the case in hand, Service Tax liability needs to be discharged on amounts which have been billed by the service provider.

10. In view of the foregoing, in the facts and circumstances of this case it is to be held that the impugned order is unsustainable and liable to be set aside and we do so."

11. By following the decision (supra) we set aside the impugned order and allow the appeal."

We find that when TDS has been borne by the Appellant and only the consideration for services as agreed upon by the parties has been paid to service provider, therefore, the amount of TDS cannot be included in the taxable value to determine the Service Tax liability. Therefore, we hold that as TDS liability has been borne by the Appellant and the value of service provided has already been paid to the service provider, the Appellant has correctly arrived at the taxable value of service received by them and paid the Service Tax thereon correctly under reverse charge mechanism.

13. In view of this, we do not find merits in the impugned orders, the same are set aside.

In the result, the Appeals filed by the Appellant are allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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