IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

<u>Service Tax Appeal No.184 of 2012</u>

(Arising out of Order-in-Original No.67/Commr./ST/Kol/11-12 dated 31.01.2012 passed by Commissioner of Service Tax, Kolkata)

M/s CESC Limited
CESC House, Chowringhee Square, Kolkata-700001

Appellant

VERSUS

Commissioner of Service Tax, Kolkata
180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

<u>APPERANCE :</u>

Dr.Samir Chakraborty, Sr.Advocate and Shri Arnab Chakraborty,Advocate for the Appellant
Shri A.Roy, Authorized Representative for the Respondent

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

FINAL ORDER NO...75524/2023

<u>DATE OF HEARING : 30 .05.2023</u>
<u>DATE OF DECISION : 30 .05.2023</u>

<u>Per Ashok Jindal :</u>

The appellant is in appeal against the impugned order, wherein the ld.Adjudicating Authority has ordered as under :

" (i) I confirm the demand of Service Tax of Rs.1,03,59,202/- (including Education Cess) under first proviso to sub-section (1) of Section 73 of the Finance Act, 1994 as amended ;

(ii) I order to pay interest at an appropriate rate under Section 75 of Chapter V of the Finance Act, 1994 (as amended) on the amount of demand confirmed as above ;

(iii) I waive imposition of penalty in terms of Section 80 of Finance Act, 1994 as amended.

(iv) I appropriate the amount of Rs.99,27,762/- having been paid by the notice and credited to the account of the Government against Service Tax (including Education Cess) and interest."

2. The facts of the case are that the appellant is engaged in generation of electricity at various plants located at West Bengal. In order to finance, its capital expenditure with respect to expansion and modernization, the appellant raised capital through external commercial borrowing (ECB) for US$ 20 Million, US$ 15 Million and US$ 50 Million respectively with M/s ICICI Bank Limited. M/s ICICI Bank Limited arranged the ECB through its overseas Branch located at Singapore.

2.1 In April, 2007, DGCEI, Kolkata, initiated an investigation wherein it was contended that the various charges remitted by CESE to ICICI Bank, Singapore for obtaining the ECB loans were taxable under "Banking and Other Financial Services in terms of Section 65(105)(zm) read with Section 65(12) of the Act and since ICICI Bank Ltd., Singapore Branch has its place of business at Singapore. The appellant as a service recipient, is liable to pay service tax under reverse charge mechanism.

2.2 The appellant replied the same and submitted that USD 40 Million were ECB pertains to the period prior to 18.04.2006 and for ECB for amount of USD 80 Million, the appellant has paid service tax along with interest and for USD 50 Million, the appellant has not paid for facility fees to the foreign service provider. But the show-cause notice was issued to the appellant to demand service tax along with interest and to impose penalty on the appellant.

2.3 The matter was adjudicated. Demand of service tax along with interest was confirmed and the amount already paid was appropriated, but penalty was dropped. The appellant is in appeal against the impugned order.

3. The ld.Sr.Counsel appearing on behalf of the appellant, submits that in terms of Section 73 (3) of the Finance Act, 1994, if a person is chargeable to service tax paid the amount of service tax on the basis of his own ascertainment before issuance of show-cause notice, the proceedings come to an end, but despite that the show-cause notice was issued to the appellant, which is not sustainable. He further submits that for the payment received prior to 18.04.2006, when there was no mechanism for payment of service tax, the service tax is not payable in terms of the decision of the Hon'ble Bombay High Court in the case of Indian National Shipowners Association Vs. Union of India reported in 2009 (13) STR 235 (Bom.), which is affirmed by the Hon'ble Apex Court as reported in 2010 (17) STR J57 (S.C.). He, therefore, submits that the proceedings against the appellant are not sustainable.

4. On the other hand, the ld.A.R. for the Revenue reiterated the impugned order.

5. Heard the parties and considered the submissions.

6. As per the show-cause notice, the demand of service tax is bifurcated as follows :

Sl. No		**Dt.of payment**	**Nature of Fee**	**FC Amount**	**Amount (INR)**	**Service Tax**	**Edu. Cess**	**Total**
1.	USD 20 Million	29.12.05	Arrangement Fee	USD 200000	9026000	902600	18052	9,20,652
2.	USD 20 Million	29.12.05	Facility Agent Fee	USD 10000	451300	45130	903	46033
3.	USD 15 Million	13.03.07	Processing Fee	USD 225000	9951750	1194210	23884	1218094
4.	USD 15 Million	20.03.07	Facility Fee	USD 10000	439500	52740	1055	53795
5.	USD 50 Million	13.03.07	Arrangement Fee	USD 1500000	66345000	7961400	159228	8120628
6.	USD 50 Million	13.03.07	Facility Fee	USD 10000	442300	53076	1062	54138
			Total		86655850	10209156	204184	10413340

7. We find that Sl.Nos.1 & 2 above, pertain to the period prior to 18.04.2006 and as per CBEC Circular F.No.276/8/2009-CX8A dated 26th September, 2011, it has been clarified as under :

> *" 2. I view of the aforementioned judgements of the Hon'ble Supreme Court, the service tax liability on any taxable service provided by a non-resident or a person located outside India, to a recipient in India, would arise w.e.f. 18.04.2006, i.e. the date of enactment of Section 66A of the Finance Act, 1994. The Board has accepted this position. Accordingly, the instruction F.No.275/7/2010-CX8A dated 30.06.2010 stands rescinded."*

8. In view of the above said Circular, we hold that the appellant is not liable to pay service tax for the demand as per Sl.Nos.1 & 2 hereinabove.

9. Further, we find that for Sl.No.3,4, & 5 as mentioned above, the appellant has already been paid service tax along with interest. Therefore, the demand against the appellant is not sustainable and for Sl.No.6, the demand has already been dropped by the Adjudicating Authority, accordingly, the same is not in dispute before us.

10. As the appellant has already been paid service tax along with interest, we hold that the show-cause notice was not required to be issued to the appellant.

11. In that circumstances, we hold that the show-cause notice issued to the appellant is bad in law. Accordingly, the impugned proceedings against the appellant are not sustainable, hence, the same are set aside.

12. In the result, the appeal is allowed with consequential relief to the appellant, if any.

(Dictated and pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K.Anpazhakan)
Member (Technical)

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