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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75001 of 2018
(On behalf of Appellant)

(Arising out of Order-in-Appeal No.44/ST/BBSR-GST/2017 dated 22.11.2017 passed by Commissioner (Appeals) of CGST & Excise, Bhubaneswar)

M/s National Aluminium Company Limited
NALCO Bhawan, P/1, Nayapalli, Bhubaneswar-751013

Appellant

VERSUS

Commissioner of CGST & Excise, Bhubaneswar I
C.R.Building, Rajaswa Vihar, Bhubaneswar-751007

Respondent

APPERANCE :

Shri Jnanesh Mohanty & Ms.Shreya Mundhra, both Advocates for the Appellant
Shri J.Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER NO.76068/2024

DATE OF HEARING : 07 .06.2024
DATE OF DECISION : 07.06.2024

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein it has been held that the appellant is liable to pay service tax on TDS deposited in the Income Tax Department in relation to the payment made to the service providers.

2. The facts of the case are that the Appellant is engaged in the manufacture of aluminum. In the course of its business, the Appellant received scientific and technical consultancy services from overseas parties. On such services, the Appellant paid Service tax on gross amount of invoices under reverse charge mechanism under Section

68(2) of the Finance Act, 1994 for the period April 2008 to August 2010.

2.1 The Appellant deducted Tax at source and paid the same to the Income tax department in accordance with the terms of the agreement with the parties.

2.2 In view of the aforesaid, it is evident that the consideration payable was agreed as net of all duties and taxes applicable and payable.

2.3 As per Section 195A of the Income tax Act, 1961, the Appellant is liable to deduct Income tax thereon at the stipulated rate on the aforesaid payment. Since the Appellant had to bear the taxes, including TDS, the amount of consideration agreed was grossed up and TDS borne by the Appellant was worked out in terms of Section 195A of the Income tax Act, 1961.

2.4 An audit was conducted for the period 2008-09 and observed that the Appellant did not include the TDS amount in the value of taxable services provided by foreign customers, which resulted in short payment of Service tax.

2.5 In pursuance of such audit, a show-cause notice dated 26.04.2013 was issued to the appellant to demand service tax on the amount of TDS deducted by the Appellant.

2.6 The matter was adjudicated. The demand of service tax was confirmed along with interest and penalties.

2.7 Aggrieved from the said order, the Appellant is before us.

3. The ld.Advocate for the Appellant submits that the present issue has already been decided decided by this Tribunal in their own case for

the earlier period vide Final Order No.75118-75119/2023 dated 02.03.2023. Therefore, the issue is no more *res integra.* In these terms, the impugned order is to be set aside.

4. The ld.A.R. for the Revenue has justified the impugned order.

5. Heard both the parties and considered the submissions.

6. We find that an identical issue came up before this Tribunal for the earlier period, therein this Tribunal has observed as under :

> *"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.*
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> *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:-*
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> ***"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.*
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> ***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 :-*
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> *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*
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> *(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.*
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> *(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.

"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."

7. As in the appellant's own case, the issue has already been decided that as per the agreement, the taxes are to be borne by the appellant, therefore, TDS deducted by the appellant, which is as per the terms of agreement, the appellant has to bear.

8. In that circumstances, the value of income tax deducted at source is not includible of the value tax service received by the

appellant, on which the appellant had to pay the service tax under reverse charge mechanism.

9. We, therefore, find no merits in the impugned order, accordingly, the same is set aside.

10. In the result, the appeal is allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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