IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. IV

APPEAL NO. ST/87733/14

(Arising out of Order-in-Original No. 21-22-ST-RN-CMR-13-14 dated 28.02.2014 passed by the Commissioner of Central Excise, Mumbai-II.)

M/s Bharat Petroleum Corporation Ltd. Appellant

Vs.

CCE, Mumbai-II Respondent

Appearance:

Shri M.H. Patil, Advocate for Appellant
Shri M.P. Damle, Assistant Commissioner (AR) for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE SHRI C J MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 28.03.2018
Date of Decision: 19.04.2018

ORDER NO. ....

Per: Ramesh Nair:

The facts of the case are that the appellant have entered into agreements with various foreign entities for obtaining licence to use technical know-how and technical information and also various engineering services, in connection with setting up of their manufacturing plant/refineries. The Revenue was of the view that the appellants received taxable service under the category of "Consulting Engineering Service" in terms of Section 65(31) of the Finance Act, 1994 read with Section 66A of the Finance Act, 1994 and Rule

2(1)(d)(iv) of Service Tax Rule, 1994. Accordingly, the proceedings were initiated against the appellant by issuance of two show-cause notices dated 29.08.2008 for the period 01.04.2003 to 31.03.2007 and notice dated 26.09.2008 for the period 01.04.2007 to 30.09.2007. Learned Commissioner after due process of adjudication, dropped the demand proposed in the show-cause notice dated 29.08.2008 for the period 01.04.2003 to 18.04.2006 of ₹ 1,71,28,527/-, on the ground that demands were for agreements prior to insertion of Section 66A of the Finance Act, 1994 and partly confirmed demand for the period 19.04.2006 to 31.03.2007 for an amount of ₹ 1,10,92,372/- and ₹ 1,01,00,329/-. Being aggrieved by the said adjudication order the appellant filed the present appeal.

2. Shri M.H. Patil, learned Counsel appearing on behalf of the appellant made the following submissions:-

2.1 Agreement dated February 2001 is between appellant and Haldore Topose, the said agreement is towards supply of Know-how and process package for Hydrogen plant. Under the said agreement payment is made towards license fees, BDEP fees and other mandatory services such as test run, HAZOP study, training and manual.

2.2 Agreement dated 15.01.2001, is between appellant and Chevron Lummus Global LLC, for purchase of technology relating to Chevron ISOCRACKING process for Hydrocracker unit. The agreement includes payment towards licence fees, Basic Designs, training manual and HAZOP study. The technology has been transferred before

10.09.2004. This agreement also includes purchase of catalyst. Payment covered in 2005-06 is towards licence fees.

2.3 Agreement dated 17.11.2000, is between appellants and Shell Global Solutions, for purchase of Catalogue Management tool software and licence fees towards usage of software. This licence fees if for the year 2004 and paid on 28.03.2005. The delivery date of CMT Software was 15.10.2001.

2.4 From the perusal of the agreements, it is clear that the agreements are for grant of license to use technical know-how or technical information by the foreign companies and hence cannot be considered as 'Consulting Engineering Service'. From the agreements it is also clear that there is no consultation involved in terms of the agreement. A perusal of the various agreements will clearly show that the appellants were receiving process know-how and technical information which is owned by the foreign companies. The technology and production process of various products was developed by the foreign companies and the same is supplied to the appellant in connection with setting up of refinery in India. Essentially, the agreement is for such transfer of technical know-how. Thus, any engineering service, technical assistance and guarantees provided by the suppliers of such technical know-how cannot be brought under the tax category of consulting engineer service.

2.5 Thus, the foreign collaborators are thus not covered under the category of "Consulting Engineer". These foreign companies are manufacturers of various final products. They have developed certain technical know-how and process technology. The appellant is getting such technical know-how and the collaborators also provided engineering service in pursuance of transfer of such technical know-how. It is pertinent to note that Ld. Revenue has been able to establish with any evidence that the foreign companies are in fact falling under the category of Consulting Engineer as defined under Section 65(31). The dominant object of foreign collaborator is to transfer the technical know-how to the appellant in terms of the agreement. The agreement is not for any consultancy, advice or assistance;

2.6 The Appellants submit that the issue as to whether the supply of technical know-how, payment of royalty, license fees is not covered under 'Consulting Engineer Services', based on following judgments:

(i) *Bharat Oman Refineries Ltd. – 2017 (4) GSTL 221 (T)*

(ii) *Leibert Corporation – 2014 (33) STR 161 (T)*

(iii) *Kinetic Engineering – 2012 (25) STR 26 (T)*

(iv) *Upheld by Bombay High Court – 2013 (30) STR J-18 (Bom)*

(v) *Yamaha Motors (I) Ltd. – 2006 (3) STR 665 (T)*

(vi) *Larsen & Toubro – 2015 (37) STR 156 (T)*

(vii) *Suzuki Motor – 2012 (25) STR 266 (T)*

2.7 The appellant submit that the demand in dispute, for the period 19.04.2006 to 31.03.2007, raised vide Notice to Show Cause dated 29.08.2008, is barred by limitation for the following reasons:

(i) *For the earlier period for agreement with Chevron, Notice to Show Cause dated 22.04.2004 was issued, hence dept. was aware of the agreements entered;*

(ii) *Notice to Show Cause dated 26.09.2008 for the period 01.04.2007 to 30.09.2007 for Rs. 1,01,00,329/-, has been dropped on similar grounds/agreements, hence extended period as well as penal provisions are not invocable,*

(iii) *Without prejudice to, initially the Appellants were of the view that since, the provider of service is also situated outside India and hence, the same would not be taxable in India, the service was performed outside India and going by section 64 read with CBEC Circular No. 36/4/2001 dated 8.10.2001 service tax is payable only on services provided within the territorial waters of India, which made the Appellants to believe that service tax was not payable on the said activity. Further, the Appellants were of the view that Appellants being services would, be classified under 'Intellectual Property Service', which was not taxable during relevant point of time.*

(iv) *Prior to 18.4.2006, there was no charging section making the recipient of service liable to pay service tax for the services provided from outside India and only w.e.f. 18.4.2006 section 66A was brought on statute book which made person receiving servicesin India (which were provided by a person having fixed establishment or business in a country other than India) liable to pay service tax for the services provided from outside India.*

(v) *Various circulars as well as clarifications were issued by Govt. regarding the taxability under reverse charge mechanism which created confusion amongst the appellants regarding the taxability under reverse charge mechanism.*

(vi) *Due to conclusion and clarification thereon it is clear that there had been a bonafide belief of non-taxability of the service provided outside India by overseas parties till the Hon'ble Bombay High Court judgment dated 11.12.2008 in the case of Indian National Shipowner's Association [2009 (13) STR 235 (Bom)] as upheld by Hon'ble Supreme Court on 14.10.2009 [2010 (17) STR J-57] and thereafter CBEC Circular dated 29.09.2011 [2011 (24) STR C-77]. The period involved in the present case is 18.04.2006 to 30.09.2009 which is much prior to the judgment and the Circular.*

2.8 The Appellants submit that the entire situation is revenue neutral and hence on this ground also demand is not sustainable, based on following submissions:

(i) Entire service tax payable was available as cenvat credit to the appellants as the said services are availed for the conduct of business activity of manufacturing activity of the appellants and under the said circumstances, the appellants could not have intention to evade service tax and would lead to revenue neutral situation, hence, penalties are not imposable based on the following judgments:

(a) Jet Airways – 2016-TIOL-2072-CESTAT-MUM
(b) British Airways – 2014-TIOL-979-CESTAT-MUM
(c) Hindustan Petroleum Corporation – 2017-TIOL-1304-CESTAT-MUM

(ii) Infact. Hon'ble Tribunal in the case of Jet Airways – 2016-TIOL-2072-CESTAT-MUM, has held that revenue neutrality is good ground, more so when the tax liability is discharged under Reverse Charge Mechanism.

2.9 Without prejudice to the contention that penalties under sections 77 & 78 are not imposable, penalties under 78 (penalty imposable for non-payment of service tax due to extraneous stipulated factors like fraud, collusion etc with intent to evade tax – mensrea existing) simultaneously are not imposable based on the following:

a) Pannu Property – 2011 (24) STR 173 (P&H)
b) Motor World – 2012 (27) STR 225 (Kar)

2.10 In any case issue relates to interpretation of law, hence extended period as well as penal provisions are not invocable.

3. Shri M.P. Damle, learned Assistant Commissioner (A.R.) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submissions made by both sides and perused the records. we find that the Revenue sought to

classify the service under the category of "Consulting Engineering Service", however the service received by the appellant from various foreign based services provider is clearly in the nature of technical know-how and technical information and also various engineering services, in connection with setting up of their manufacturing plant/refineries. From the nature of service it is very clear that the said services cannot be covered under the "Consulting Engineering Service". This issue has been considered in detail by coordinate Bench of this Tribunal in the case of *Bharat Oman Refineries Ltd. Vs. CCE & SERVICE TAX, Bhopal – 2017 (4) GSTL 221 (Tri.-Del.)*, wherein the appeal of the assessee was allowed.

5. On going through the said judgment, we find that all the services involved in the present case were identical to the issue involved in the said judgment. Therefore the ratio of *Bharat Oman Refineries Ltd.* (supra) is squarely applicable in the present case, the relevant findings on the Tribunal's order is reproduced:-

> *"4. We have heard both the sides and perused the appeal records. It is necessary to examine the terms of agreements entered into by the appellant with various foreign collaborators. The agreement dated 06/11/1997 is with Kinetic's Technology International BV, Netherland. It stipulates that M/s Kinetic (Licensor) has developed technology for the production of Hydrogen, who is also owner and controls process technology relating to a process for the production of Hydrogen. The appellant intended to install and operate under license from the licensor a hydrogen production unit to be installed in its refinery located in Madhya Pradesh. In this connection, the appellant wishes to receive certain basic engineering services, technical assistance and guarantee with respect to the plant they are putting up. The licensor is willing and has the right to grant such right to utilize the process technology and to render basic engineering services and*

technical assistance and give such guarantee on the terms and conditions mentioned therein.

5. Agreement dated 01/09/2006 is between appellant and UOP LLC, U.S.A. It stipulates that UOP, LLC (licensor) warrants that it has the right to grant appellant a license under licensor's patent rights described therein. The licensor granted to the appellant (licensee) a non-exclusive, non-transferable license under licensor's patent rights to use the process in the unit, to use any apparatus or catalyst therefor etc. The licensor provides technical information in terms of the said agreement. The said 5 ST/58303 of 2013 agreement also mentions about separate engineering agreement for providing engineering designs specifications for the appellant. Payment is as royalties. The royalty payments is as per the schedule agreed upon.

6. Agreement dated 31/03/1997 is between appellant and Chevron Research and Technology Company, U.S.A. The said agreement states that Chevron (licensor) has developed technology for production of lube oil base stocks under the name, Chevron Isodewaxing process and Chevron Lube Hydrofinishing Process. The appellant (licensor) wishes to install and operate units in the refinery located in India to undertake the said licensed process. The licensor granted license on such processes, a non-exclusive, non-transferable patent rights. The U.S. company will also make available technical information for use in the operations of the licensed units. It also talks about use of proprietary information by the appellant. The payment is in the form of royalty. The terms of payments are stipulated in the agreement itself.

7. Agreement dated 31/07/2006 is between the appellant and M/s AB Lummus Global Inc., U.S.A. (licensor). The said agreement stipulates with the licensor has developed technical information and inventions relating to delayed coking process and has the right to grant a license to use such process for appellant's plant in Madhya Pradesh. The agreement also states 6 ST/58303 of 2013 that the appellant wishes to acquire the said license and also retains the licensor to perform engineering and technical service in connection with design of the plant in terms of the agreement. The scope of work is stipulated in Article 2 of the agreement. The payment is in the form of contract price and the same is as per the schedule mentioned in Article 5.

8. We have perused the details of agreements submitted by the appellant. These agreements are for supply of technical knowhow, process technology, proprietary technical information and various connected services to the appellant in connection with setting up of their plant in Madhya Pradesh. The Original Authority mainly focused on the engineering services, which are a follow up of the transfer of technical knowhow, to conclude that the appellants received engineering consultancy service only. We are not in agreement with such conclusion. The very fact that all these agreements talk about the foreign companies as "licensor" itself is revealing. In a typical agreement for consultancy service, there will be no licensor or licensee with transfer of licensed process technology or proprietary technical information. The essence of the agreement as could be seen from the narration above is for transfer of technology process. The Tribunal had occasioned to examine similar issues involving technical collaboration and transfer of intellectual property right from foreign companies to Indian recipient. It was held that when the agreement is for transfer of exclusive/non-exclusive technical 7 ST/58303 of 2013 knowhow the consideration received cannot be taxed under consultancy service. Reference can be made to the decisions in Yamaha Motors (I) Pvt. Ltd. vs. CCE, Delhi – IV (Faridabad) reported in 2006 (3) S.T.R. 665 (Tri. – Del.), CCE & CUS, Nashik vs. Larsen & Toubro Ltd. reported in 2015 (37) S.T.R. 156 (Tri. – Mumbai), CST, Mumbai vs. Leibert Corporation reported in 2014 (33) S.T.R. 161 (Tri. – Mumbai) and CST, Delhi vs. Suzuki Motor Corporation reported in 2012 (25) S.T.R. 266 (Tri. – Del.).

9. Based on the above discussion and analysis, we find that the impugned order is not legally sustainable. We also note that the appellant made out a strong case against demand for extended period. Admittedly, in case of payment of service tax on such import of service, the appellants are rightly eligible for Cenvat credit. Even the impugned order did not substantiate the ground for confirming the demand for extended period. It is recorded by the Original Authority that the assessee had spent foreign exchange for consultancy and, hence, they are aware of tax liability. He rejected the claim of bonafide belief and revenue neutrality and confirmed the demand for extended period. We note that the findings are not legally justifiable. In any case, we have recorded the findings on merits of the case against the demand.

10. In terms of the discussion, as above, we hold that the impugned order is liable to be set aside and the appeal to be allowed. Ordered accordingly."

In view of the aforesaid findings of the Tribunal's order, the demand in the present case does not sustain. Since we are passing this order on merit of the issue, do not incline to go into on various other issues raised by the learned Counsel. Accordingly, the impugned order to the extent it, confirmed the demand with interest and penalties is set aside. The appeal is allowed.

(Pronounced in Court on 19.04.2018)

(C J Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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