

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85645 of 2015

(Arising out of Order-in-Original No.12-13/ST-VII/RS/2014 dated 26.12.2014 passed by the Commissioner of Service Tax- VII, Mumbai.)

M/s BG Exploration & Production India Ltd. Appellant
BG House, Hiranandani Business Park,
Lake Boulevard Road, Powai, Mumbai - 400076.

Versus

Commissioner of Service Tax-VIIRespondent
Mumbai
115, New Central Excise Building,
MK Road, Churchgate, Mumbai - 400020.

Appearance:

Shri Rohan Shah, Sr. Advocate with Mihir Deshmukh, C. Sabri Rajan and Mohammad Anajwalla, Advocates for the Appellant

Shri S. K. Mathur, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86135/2023

Date of Hearing: 16.03.2023

Date of Decision: 17.07.2023

Per: M.M. PARTHIBAN:

This appeal has been filed under Sub-section (1) of Section 86 of the Finance Act, 1994 (for short, 'the said Act'), by M/s. BG Exploration and Production India Limited (herein referred to as 'appellants') having been aggrieved by the Order-in-Original No. 12-13/ST-VII/RS/2014 dated

26.12.2014 passed under Section 73 of the said Act by the Commissioner, Service Tax-VII, Mumbai as adjudicating authority.

2. The brief facts of the case are that the appellants are registered with the Service Tax Registration No.AAACE4569KST003 for providing taxable services, *inter alia*, under the category of 'management consultancy services, consultancy engineer services, cargo handling services, goods transport by road services, commissioning and installation services, mining services, business support services, supply of tangible goods services and telecom services' covered under the taxable services defined under section 65 (105) of the Finance Act, 1994. The appellants are engaged in the business of mining of mineral oil and natural gas and for this purpose have executed 'Production Sharing Contract (PSC)' for extraction of mineral oil and natural gas at the Panna & Mukta oilfields and the Tapti oilfield. In undertaking such activities under the PSC, the appellant along with M/s Oil and Natural Gas Corporation Limited (ONGC) and Reliance Industries Ltd. (RIL) have been entered into a Joint Operating Agreement (JOA) for performing field operations on above stated oilfields.

3. It appears from the materials on record that an enquiry was initiated by the department on the basis of information received that the appellant is earning income under the head 'parent company overheads', from unincorporated joint venture with ONGC and RIL, but were not discharging service tax liability; and further the appellants were receiving various services from foreign-based service providers, including the appellant's parent company, for which consideration has been paid in convertible foreign exchange without properly discharging service tax liability. Accordingly the Department had initiated show cause proceedings for demand of service tax which is short paid along with proposal for recovery of interest and imposition of penalty. The proposals in two SCNs dated 22.10.2011 and 14.12.2012 in brief are as follows:

I. Service Tax demand in SCN dated 22.10.2011

Sl. No.	Description	Amounts in Rs.		
		Total value of services/income	Service Tax, payable and paid	Service Tax demand in SCN
1	Parent company overhead income @1% of total amount for the period 2006-2007 to 2010-2011	46,22,25,797	5,33,87,455	5,33,87,455

2	Services received from parent company outside India, under Reverse charge mechanism basis, during 10.05.2008 to 31.03.2010	6,26,36,75,335	ST Payable 72,88,83,449 Less ST Paid 47,14,86,535	25,73,96,914
3	Interest on service tax paid on receipt of payment basis instead of service tax payable on receipt of invoice basis during 10.5.2008 to 31.03.2010	Interest on Service Tax of 41,37,63,027	-	Interest at applicable rate under Section 75
4	Penalty			Under Section 76,77,& 78

II. Service Tax demand in SCN/Statement of Demand dated 14.12.2012

Description	Value of services (in Rs.)			Total (in Rs.)
	Mining Services	Expat salaries	Receivables	
Gross value of services	226,48,88,302	33,11,12,844	101,23,78,267	360,83,79,413
Service Tax payable				37,16,63,080
Service tax paid				32,54,71,922
Short payment of Service Tax demanded				4,61,91,158
Interest	applicable rate under Section 75			
Penalty	Under Section 76,77,& 78			

4. The show cause notices referred above were adjudicated by the Commissioner, Service Tax-VII, Mumbai vide common Order-in-Original No.12-13/ST-VII/RS/2014 dated 26.12.2014, confirming the adjudged demand of service tax proposed in the SCNs under Section 73(2) of the said Act and imposing mandatory penalties under Section 78 and Section 77 ibid besides imposition of interest on confirmed demands as above.

5. The assessee, being aggrieved with the order passed by the Commissioner preferred this appeal before the Tribunal.

6.1. Learned Advocate appearing for the appellants stated that appellant is engaged in the business of mining mineral oil and natural gas. The Government of India has executed 'Production Sharing Contract' (PSC) for extraction of mineral oil and natural gas at the Panna & Mukta Oil Field and the Tapti Oil Field. To undertake the activities under the PSC, the Appellant along with ONGC and RIL had entered into a Joint Operating Agreement (JOA). The true nature of the transactions under the said Production Sharing Contract is that of a "Joint Venture" between the Government of India, the Appellant, RIL and ONGC, and that it involves no rendition of service. The

learned Advocate submitted that the demand of service tax raised by the Department is arising on account of following four issues namely,

- (i) Service tax demand on the difference in value indicated between the ST-3 returns and the Balance Sheet for Rs.25,73,96,914/-
- (ii) Service tax demand on '1% indirect cost allocation from the Joint Venture' for Rs.5,33,87,455/-
- (iii) demand of interest under Section 75 on alleged delay in payment of Service Tax under reverse charge mechanism
- (iv) Service tax demand of Rs.4,61,91,158/- on the amount disclosed as 'receivables' in the Balance Sheet.

He stated that the first three issues as stated at (i) to (iii) above are covered under the SCN dated 22.10.2011, and the issue at (iv) has been covered under the Statement of Demand/SCN dated 31.12.2012.

6.2. On the first issue, the learned Advocate briefly submitted that during the relevant period, i.e., from 01.04.2006 to 31.03.2010, the appellant had received services under the categories 'Management and Consultancy Services' and 'Mining Services' from its parent company M/s B.G. International Limited ("BGIL"), in relation to which services the Appellant has paid the service tax on reverse charge basis. However, the difference between the ST-3 returns and the balance sheets have occurred on account of the following reasons:

- (i) The balance sheets included 'Management Service Unit charges' (MSU charges) which were costs allocated by BGIL to the appellants in relation to 'Mining Services' for the period prior to 01.06.2007 which is not taxable for service tax.
- (ii) The balance sheets included certain 'provision entries', which are not towards any rendition of services, and hence are not taxable for service tax.
- (iii) The balance sheets included expenses towards taxes paid by the Appellant, which are not taxable for service tax.

6.3. Learned Advocate also claimed that it is settled law that levy of service tax on the sole basis of balance sheet/ income tax returns, etc. is unsustainable in law. In this regard, he placed reliance on the judgment of the Tribunal in the case of *Synergy Audio Visual Workshop P. Ltd. v. Commissioner of S.T., Bangalore 2008 (1) TMI 88 – CESTAT Bangalore* and *Mahindra Holiday and Resorts India Ltd. vs. The Commissioner of LTU, Chennai (26.09.2018 - CESTAT - Chennai): MANU/CC/0236/2018*. Further,

he stated that in the instant case, that the difference in the amounts/value between the balance sheet and the ST-3 returns are not attributable to any rendition of 'Management & Business Consultancy' service by BGIL. The difference is however due to inclusion of certain amounts as expenses in the balance sheet which were not leviable for service tax. Further, he stated that on the basis of reconciliation made between these figures, the appellants had accepted a differential amount of service tax short paid for an amount of Rs.8,48,65,143/- and have voluntarily paid the same along with interest of Rs.4,76,07,998/-. He also submitted that the appellant had rendered services 'Management & Business Consultancy' and 'Mining Services' to the Appellant. While the management & business consultancy service was leviable for service tax throughout the relevant period and the Appellant has duly discharged tax on the same, he stated that 'mining services' became taxable by an introduction of a new entry [Section 65(105)(zzzy)] vide the Finance Act, 2007 with effect only from 01.06.2007. The appellant's balance sheets included the expenses towards 'mining services' also for the period prior to 01.06.2007, which were not leviable for service tax. By way of the impugned order, the Department has demanded service tax on such expenses which are related to 'mining services' even for the period prior to 01.06.2007, by classifying them as 'management & business consultancy services', which is illegal, wholly without jurisdiction and directly contrary to the law settled by the Hon'ble Supreme Court and various High Courts. He placed reliance on the judgements in the case of *Greenwich Meridian Logistics (I) Pvt. Ltd. v Commissioner Of Service Tax 2016 (43) S.T.R. 215 (Tri. - Mumbai)*; *Tuticorin Alkali Chemicals & fertilizers Ltd. vs. Commissioner of Income Tax 1997 6 SCC (117)*. For these reasons, he pleaded that the demand raised by the Department for service tax, interest and penalty towards in the issue no.1, is incorrect.

6.4. As regards the issue at (ii), the learned Advocate stated that the demand is raised under the category Management or Business Consultants service on 1% of the total gross expenditure allocated to the appellants from the Unincorporated Joint Venture. In this regard, Clause 2.6.2 of the Production Sharing Contract entered into by the Appellant with the other Joint Venture partners. The said clause extracted provides "an annual overhead charge" for services rendered by the parent company to support and manage the petroleum operations under the contract and for staff advice and assistance including financial, legal, accounting and employee relations services calculated on the basis of one percent of the expenditures. It is

pertinent that clause 2.6.2 is a sub-clause under General and Administrative Costs (clause 2.6). Thus, these are all executory costs and will not fall under Management and Business Consultant services. Further, such allocations are in the nature of reimbursement of expenditures i.e., an indirect expense incurred by the Appellant while carrying out its obligations under the Joint Venture. Thus, the allocation of 1% was only sharing of expenses and not a consideration for service. The Appellant is a member of the Joint Venture and there can be no service to itself as per the doctrine of mutuality. On the proposition that allocation of expenses cannot be regarded as 'service', the Appellant also places reliance on the judgment of the Tribunal in the case of *Morugao Port Trust v Commissioner of Cus, C.Ex& ST, Goa 2017 (48) STR 69 (Tri. Mum.)*

6.5. As regards the issue at (iii), he stated the SAP posting date i.e. the date on which the amount for above services was credited / debited in the books of accounts of the Appellant is correctly considered for payment of Service Tax and there is no delay in payment of Service Tax. Thus, interest cannot be demanded and the Impugned Order to above extent should be set aside.

6.6. On the last issue at (iv), he claimed that the amount which is disclosed as 'receivable' by the Appellant is towards consideration for providing 'manpower supply services' from India to customers located outside India and fall under the taxable category 'Manpower Supply Services'. The value of services indicated in the debit notes issued by the Appellant to the Parent Company for above services is in foreign currency. During the period 2011-12, the Export Rules classified all taxable services (for the purpose of determination of export) into three categories i.e., based on location of property, based on place of performance of service and based on location of recipient of services, and accordingly prescribed different criteria for the determination of whether a service qualifies as export of services. In the instant case, the services rendered by the Appellant is an export of service, which is classifiable under the third category in the Export Rules i.e., location of the recipient of service, and hence he claimed that the same is not leviable for service tax.

6.7. In view of the aforesaid submissions, the learned Advocate prayed that their Appeal be allowed, and the impugned Order be set aside.

7. Learned Special Counsel appearing for Revenue reiterated the findings recorded by the Commissioner in the impugned Order. He further stated that in the absence of documentary evidence explaining the reasons for difference in values in ST-3 Returns and the Balance Sheet, no evidences produced to indicate that the services have been rendered outside India, and other evidences, the claim made by the appellant are not supported. Accordingly he stated that the order in original passed by the Commissioner is just, legal and proper. Hence he requested that the appeal filed by the appellants may be disallowed.

8. Heard both sides and perused the records of the case.

9. The issues to be examined in this appeal lies in the narrow compass of deciding whether service tax is leviable on specific items such as amount of 1% indirect cost allocation from the joint venture shown as receipts in the hands of appellants, amounts shown as Management Service Unit (MSU) charges, amounts disclosed as 'receivables' in the balance sheet of appellants under the taxable category of services and further deciding whether interest is payable on the alleged delay in payment of service tax under reverse charge mechanism.

10.1. We note that Government of India, Ministry of Petroleum & Natural Gas (MoP&G) had enacted Oilfields (Regulation and Development) Act, 1948 in order to provide for the regulation of oilfields and for the development of mineral oil resources and amended the said Act periodically. In terms of Section 3(b) *ibid*, "mines" means any excavation for the purpose of searching for or obtaining mineral oils and includes an oil well. Further under Section 3(c) "mineral oils" include natural gas and petroleum; and under Section 3(d) "mining lease" means a lease granted for the purpose of searching for, winning, working, getting, making merchantable, carrying away or disposing of mineral oils or for purposes connected therewith, and includes an exploring or a prospecting license. Section 3(e) defines that "Oilfield" means any area where any operation for the purpose of obtaining natural gas and petroleum, crude oil, refined oil, partially refined oil and any of the products of petroleum in a liquid or solid state, is to be or is being carried on. In terms of the legal provisions under Section 4(2) of the Oilfields (Regulation and Development) Act, 1948, no mining lease shall be granted after commencement of this Act otherwise than in accordance with the rules made under this Act and Government of India, MoP&G grants such license.

10.2. We further note from the policy documents of the MoP&G, that New Exploration Licensing Policy (NELP) was formulated by the Government of India, during 1997-98 to provide a level playing field to both Public and Private sector companies in exploration and production of hydrocarbons with Directorate General of Hydrocarbons (DGH) as a nodal agency for its implementation. Government of India's commitment to the liberalization process is reflected in NELP, which has been conceptualized keeping in mind the immediate need for increasing domestic production. To attract more investment in oil exploration and production, NELP has steered steadily towards a healthy spirit of competition between National Oil Companies and private companies. Till the adoption of Liberalisation policy in 1991-1992, petroleum exploration and production (E&P) activities were carried out in India only by public sector oil companies viz., ONGC and Oil India Limited (OIL).

10.3. Under this policy, Petroleum Exploration Licence (PEL) and Petroleum Mining Lease (PML) are granted. PEL is granted for a period of 7 years in inland and shallow water areas and for 8 years in deepwater and frontier areas for exploration activities as per PSC provisions. Subject to the provisions of this Act and in accordance with the terms and conditions to which such licence is subject to the holder of an PEL shall have the exclusive right to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the licensed area. Further, PML for offshore exploration & production operations is granted by the Union Government. In case of inland blocks, PML is granted by the concerned State Government on the basis of recommendation made by the Union Government for the awarded blocks. PML is awarded for 20 years for producing Hydrocarbons as per the Oilfields Regulation & Development Act, 1948 and P&NG Rules, 1959. The statistics given by the MoP&G state that Government of India has signed 28 contracts for 29 discovered fields (1 PSC for Panna Mukta), 28 exploration blocks under Pre-NELP Exploration regime and 254 blocks under NELP regime with National Oil Companies and private (Both Indian and foreign)/ Joint Venture companies.

10.4. The above details of the Petroleum Exploration Policy and Licensing provisions make it clear that license granted by the Government for exploration of oil field under PEL is distinct and different from license granted for mining as PML. The various activities involved under PEL include seismic

acquisition like 2D seismic, 3D seismic, Gravity Magnetic, seismic processing and interpretation along with drilling of exploratory wells and appraisal. Subsequently, separate license is being obtained for Development and Production of petroleum including activities of development drilling, development-petroleum exploitation facility, production/operations and decommissioning after completion of commercial production.

10.5. We also find that Panna-Mukta-Tapti joint venture (PMT JV), consisting of ONGC, RIL and BGIL as joint operators, carries out petroleum operations in the Panna & Mukta and Mid & South Tapti Contract Areas situated in western India offshore, pursuant to production sharing contracts executed with the Government of India.

11.1. In the SCN dated 22.10.2011, the department had raised demand of Rs.25,73,96,914/- as differential service tax to be paid on account of difference in the figures between the values indicated in Balance Sheets for Rs.72,88,83,449/- towards payment made by the appellants to their parent company and the amount of Rs.47,14,86,535/- indicated in the ST-3 Returns towards services provided by their parent company on RCM basis. The learned Commissioner in the impugned order discussed the issue at length in paragraphs 21 to 22.1 and concluded that *"the services are received for use in the management of business and exploration activities. It cannot, therefore, be said that services received are only classifiable under 'Mining services' and not under 'Management or Business Consultant' services. In fact, taxability is a settled issue and is not the subject matter of the present SCN. The SCN only seeks to demand service tax on the differential value i.e., value declared in Balance Sheet and the value declared in the ST-3 Returns and also on the amount received from the joint venture and booked as 'other income' which is not included in the taxable income."*

11.2. In this regard, we find that the taxable category of services under Section 65(105) of the Finance Act, 1994, *inter alia*, specify the following in respect of mining and management consultant.

*"Section 65 (105) "taxable service" means any service provided or to be provided,-
(zzzy) to any person, by any other person in relation to mining of mineral, oil or gas;
(r) to any person by a management or business consultant in connection with the management of any organization or business, in any manner;"*

Further, the term management or business consultant have also been defined in the said Act, as follows

"Section 65 (65) "management or business consultant" means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organisation or business in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management;"

11.3. We also find from the Union budget documents dealing with indirect taxation proposals, that the Ministry of Finance, Tax Research Unit in its instructions in D.O. F.No. 334/1/2007-TRU dated 28.02.2007 while explaining the scope of changes brought through the Budget, 2007 had stated that in continuation of the policy of widening of the service tax base, the Finance Bill, 2007 proposes to, levy service tax on more services, expand or clarify the scope of existing services, and carve out separate services from the existing services and specify them as separate taxable services. The detailed explanatory notes relevant to the above changes are extracted below:

"6.2 MINING SERVICE [section 65(105)(zzzy)]:

Presently, geological, geophysical or other prospecting, surface or sub-surface surveying or map-making services relating to location or exploration of deposits of mineral, oil or gas are leviable to service tax under "survey and exploration of mineral service" [section 65(105)(zzv)].

Services such as-

- site formation and clearance, and excavation and earth moving, drilling wells for production / exploitation of hydrocarbons (development drilling)*
- well testing and analysis services*
- sub-contracted services such as deploying workers and machinery for extraction / breaking of rocks into stones, sieving, grading, etc.*
- outsourced services,*

provided for mining are individually classified under the appropriate taxable service. Services provided in relation to mining of mineral, oil and gas are comprehensively covered under this proposed service. With this, services provided in relation to both exploration and exploitation of mineral, oil or gas will be comprehensively brought under the service tax net.

6.2.1 The trend is to outsource part or whole of the mining activities. Since exploration and mining of mineral, oil or gas are comprehensively brought under the service tax, field formations may undertake necessary action.

7.7 MANAGEMENT CONSULTANT'S SERVICE:

- (i) *Renamed as management or business consultant's service [Section 65(105)(r)], and*
- (ii) *to explicitly include business consultancy in the definition itself [Section 65(65)]."*

The above details indicate clearly that there is change in the scope of services covered under the service tax net. The mining services have been comprehensively covered so as to include sub-contracted, out sourced services and certain more specific services connected with mining. Similarly, business consultancy has been specifically included under the scope management and business consultant services for the purpose of levy of service tax. Hence, the activities undertaken by the appellants needed to be listed out in detail to determine whether they were already covered under the scope of service tax levy or whether they were subsequently covered under the new proposed levy in 2007 Budget, which by expanding the coverage in a comprehensive manner brought these activities under the service tax. However, since the learned Commissioner as original adjudicating authority had already decided this by concluding that the issue of taxability is a settled issue and for his confirmation of demand mainly relied on the basis of difference between the amounts indicated in the Balance sheet and ST-3 return, we consider it is sufficient to examine the issue in the narrow compass of whether service tax is leviable on such difference in values between two different documents i.e., Balance sheet and ST-3 Returns.

11.4. We find that this issue has already been decided by the Co-ordinate Bench of this Tribunal in the case of *M/S. Synergy Audio Visual vs. The Commissioner Of Service Tax 2008(1) TMI 88*, holding that levy of service tax on the sole basis of balance sheet/income tax returns, etc. is unsustainable in law. The relevant paragraph of the said judgement is extracted below:

"5.1 The other ground is for confirming demands is that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeed on this ground also. The impugned order is set aside and the appeal is allowed."

We also find that the Co-ordinate Bench of this Tribunal in the case of *Mahindra Holidays and Resorts India Ltd. vs Commissioner of LTU, Chennai - MANU/CC/0236/2018* had held that balance sheet entries *per se* cannot be considered as income or expenditure for the purpose of considering it as gross value for levy of service tax. The relevant portion of the judgement is extracted below:

"8.1 With regard to the securitization income, we are not able to subscribe to the findings of the lower authority or the arguments advanced by the Ld. DR. Accounting Standard makes it mandatory for an assessee to maintain its accounts in a particular manner. It is essentially to act as a balancing factor. It is only an entry made in the balance sheet and it is a settled position that a balance sheet entry could never become an income or an expenditure, as the case may be. Hence, viewed from this angle, an amount showed in the balance sheet could neither be an income nor a consideration nor a payment or the gross amount charged in terms of Section 67(a) and (c) and hence, it is nothing but a financial adjustment in the nature of book entry."

In view of the above findings given by the co-ordinate Benches of the Tribunal, we find that the adjudged demand of Service Tax merely on the basis of difference between the figures indicated in the Balance Sheet and ST-3 Returns do not legally sustain. However, we find that the short payment of service tax during the period 1.6.2007 to 31.3.2008, for an amount of Rs.8,68,65,143/- along with interest thereon for Rs.4,76,07,998/- which were paid by the appellants on 19.12.2011, and which was also appropriated by the original authority in the impugned order, is sustainable in view of the detailed discussions on the levy of service tax in the preceding paragraph at 11.3, concluding that w. e. f. 01.07.2007, Service Tax levy on "mining services" have been comprehensively covered including various outsourced and sub-contracted services.

12. In the impugned order, the learned Commissioner had confirmed Rs. 5,33,87,455/- demanded in the SCN dated 22.10.2011 as income at 1% of the total amount received from unincorporated joint venture towards parent company income or affiliate of the operator outside India to support and manage petroleum operations on the category of 'Management or Business Consultant's service'. We find that this issue is no more *res integra* in view of the decision of this Tribunal in the case of appellant themselves in *BG Exploration & Production India Ltd Vs. Commissioner of Service Tax (Audit-I) 2020 (10)TMI 579 – CESTAT MUMBAI*, holding that

the performance of obligations by a party to the joint venture is intended to serve itself and, thereby, the joint-venture and the fulfillment of obligations to contribute to the capital of the joint venture is beyond the scope of taxation under Finance Act, 1994, as it does not amount to consideration. The relevant paragraphs of the above judgment is extracted below:

"11. We have no doubt that agreement among entities for rendering of service to another entity is the essence of 'joint venture'; however, it is doubtful if 'joint operation agreement', mandated by the terms of the 'production sharing contract', can be deemed to be one such in the absence of an external beneficiary. In the impugned contract, the several participating interests are, collegially, designated as 'contractor' in the singular and in furtherance of the policy of the Government of India to involve corporate participation for efficient harnessing of natural resources as codified in the 'production sharing contract' agreed upon. This, then, would be the primary association as joint venture comprising of four entities, including Government of India, for viability in extraction of natural resource as the common goal. The manner in which the contract provides for distribution of 'profit petroleum' and 'cost petroleum' is a business model for ensconcing within itself the alienation of risk by the Government of India which necessarily mandates a working arrangement for the disaggregation of 'cost petroleum' as compensation for the mutually exclusive risks undertaken by the contractor. The participating interests in the 'joint operations' have not come together of their own accord for the common purpose of bearing the risk but from one stipulation in the contract setting forth the common purpose including the participation in the proceeds of 'profit petroleum' that is extracted. The 'joint operations' does not render service, within the meaning of section 65B(44) of Finance Act, 1994, as there is no beneficiary entity outside the 'production sharing contract (PSC)', to which 'joint operations' is subordinated, for determination as joint venture to which the Explanation could be applied. This looming presence of 'production sharing contract' to the exclusion of any other independent or subordinate agreement and the indispensability of the Government of India to such contracts has been ordained by the Hon'ble Supreme Court in Reliance Natural Resources Ltd v. Reliance Industries Ltd [(2010) 7 SCC 1]).

12. In its truest sense, service is the satisfaction of one's need by another person with the existence of a 'provider' as sine qua non in any service transaction and with accumulated capital affording the luxury of such satisfaction. Owing to increasing pressure on manufacturers to scale up size and to specialize in competencies for achieving cost optimality, that is

no longer a luxury borne on affordability. With the maturing of this sector, the State inserted itself as a stakeholder and, as always, tax was, so to speak, the foot in the door. Taxpayer fatigue, engendered by prohibitively high rates, frenetic enforcement overreach and incessant adversarial litigation, was not conducive to direct implementation of the 'negative list'; more so, as definitional certitude was necessary to guide assesses and assessors through unfamiliar territory of intangibles. The addition of services to the enumeration, though slow in the early years, underwent a five-fold increase between 2000-01 and 2006-07 signposting the imminence of transition to 'negative list' regime. The adroit easing of the upgraded scheme into the sphere of tax administration was the outcome of carefully calibrated strategy to reach this goal. In the classificatory regime, adopted in the beginning, the definition of 'service', as enumerated series, did not reflect its essence, viz., substitution of self-performance with the descriptive limit further encapsulated in provider-recipient equation to which 'consideration', as measure of its value, was subordinated.

13. Under the 'negative list' regime, in which demarcation between services was superfluous, the obliteration of boundaries permitted the definition of 'service', as

'(44) ...any activity carried out by a person for another for consideration, and includes a declared service, but shall not include - ..'

in section 65B of Finance Act, 1994, to encompass all 'activities' save those exogenic to, and excepted in, it and aligned it with the essence of service by the expression 'for another', replacing 'to any person', to eliminate the recipient as a necessity. In the new scheme of tax, 'consideration', being the obligated recompense to the provider devolving on the person who opted for hiving off the undertaking of an activity, was no longer mere measure of value but translatable as the span of service rendered. Thus, 'service' was the extent of activity entrusted to a provider for such consideration as rendered it economically gainful to be outsourced. We now subject the expenditure booked by the appellant to test of conformity with this definition.

14. In Cricket Club of India Ltd v. Commissioner of Service Tax, Mumbai [2015 (40) STR 973 (Tri-Mumbai), on examination of the several types of payments made to clubs by members, the Tribunal dealt with entrance fees, held to be akin to capital contribution, thus

'11....Consideration is, undoubtedly, an essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow.... The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow

cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient.'

before concluding that

'14....Each category of fee or charge, therefore, needs to be examined severally to determine whether the payments are indeed recompense for a service before ascertaining whether that identified service is taxable.

xxx

16....Wages of employees and costs of running the establishment,...., are necessary expenses for such sustenance..... Contribution to expenses cannot, by any stretch, be deemed to be consideration for any identified service rendered.'

The principle thus espoused, and emphatically reiterated by the Tribunal in Mormugoa Port Trust v. Commissioner of Central Excise [2017 (48) STR 69 (Tri-Mum)] as

'16... the two had come together with the common objective of earning revenue by jointly rendering port services at Jetty Nos. 5A and 6A...We are therefore of the view that the agreement between the Assessee and SWPL is joint-venture between the two, where the two co-venture are jointly controlling a common activity and sharing the revenue therefrom.

17.....whatever the partner does for the furtherance of the business of the partnership, he does so only for advancing his own interest as he has a stake in the success of the venture.....All the resources and contribution of a partner enter a common pool of resources required for running the joint enterprise and the such an enterprise is successful the partners become entitled to profits as a reward for the risks taken by them for investing their resources the venture....'

found approval of the Hon'ble Supreme Court with dismissal of appeal of Revenue.

15. It is incumbent upon participants in collaborative undertaking to contribute capital for attainment of the common purpose. It is the nature of the undertaking, in terms of permanence and of purpose, that determines the mode of contribution. In the impugned 'production sharing contract', Government of India brings in its rights over the resources, M/s Oil & Natural Gas Corporation handles contracts and documentation, M/s Reliance Industries Ltd manages financial and commercial requirements and the appellant vested with responsibility for technical operations. The deployment of personnel is in pursuance of that obligation. No business venture can function without capital and the by-passing of transubstantiation of accumulated capital, in the form of cash and bank balances, into these rights and competencies does not derogate from that. Hence, the activity undertaken by the appellant with its cost equivalence recorded in the books is nothing but capital contribution. The adjudicating authority has erred in concluding that the mechanism of 'cash call' prescribed in the 'joint operations agreement' is consideration for services; it is intended as the vehicle for contribution by the participating interests to the capital requirements of the venture. As such

capital contributions are obligated for the establishment and operation of a business venture, it is not 'consideration' for rendering of any taxable service.

16. From our discussion supra, we find that it is parties to the 'production sharing contract' who constitute a joint venture and that the Explanation below section 65B (44), intended to cover supply of services to a constituent of 'unincorporated associations' or 'body of persons' by the latter is not relevant to the present dispute. Further, the fulfillment of obligation to contribute to the capital of the joint venture is beyond the scope of taxation under Finance Act, 1994 as it does not amount to consideration. The performance of such obligations is intended to serve itself and, thereby, the joint-venture. As the demand confirmed in impugned order is not on the consideration for rendering of a service, we are not required to decide on the other issues."

In view of the detailed justification for decisions arrived at by this Tribunal, in the above cases for the same appellant, we are unable to agree with the decision of the learned Commissioner in confirmation of the above demand of service tax.

13. The learned Commissioner has also confirmed the demand proposed in the SCN dated 14.12.2012 for the subsequent period of 2011-2012 under Section 73(1) for various categories such as service tax on mining services, value of expat salaries and receivables shown in balance sheet for a total amount of Rs.4,61,91,158/-. From the records of the case, we find that the details of reconciliation of the amounts provided by the appellants explain the issue. The brief details of the gross amounts for which the short payment of service tax was indicated in the SCN and the reconciliation statement given by the appellant is as follows:

S. No.	Category of services	Gross value of services as per SCN	Amount as per appellant's reconciliation statement
		(Amount in Rs.)	
1	Mining Services	226,48,88,302	226,48,88,302
2	Expat salaries	33,11,12,844	38,55,32,507
3	Receivables shown in Balance Sheet	101,23,78,267	34,95,30,831
4	Total value of services	360,83,79,413	294,55,31,977
5	Service Tax payable/paid	37,16,63,079	32,54,71,922
6	Service Tax demanded in SCN	37,16,63,079 – 32,54,71,922 =4,61,91,157	

From the details, we find that the difference in value leading to demand of service tax has arisen solely on account of the amount shown as receivables in the Balance Sheet, as the amount indicated on account of 'mining services' as Sr. No. 1 of the table above are the same and in respect of 'expat salaries' at Sr. No. 2 indicated by the appellants is higher, and on which service tax due has been paid. Hence, the dispute in the above issue is limited to the difference in the figures indicated in respect of 'receivables' as per the Balance sheet. On this issue, we have already dealt it in great detail at paragraph 11.4 on the basis of the decisions taken by the co-ordinate bench of this Tribunal. Hence, we do not find it necessary to again re-examine the same here.

14. We find that the service tax paid by the appellants on various category included reimbursement of salary cost of the Appellants Parent Company employees working for the Joint Venture-expat salaries for which service tax was paid under 'Management Consultancy services', third party charges, management service unit charges and other costs incurred by the Parent Company on behalf of the Appellants for which service tax was paid under 'Mining services' as explained above paragraph. The learned Commissioner had demanded interest on these service tax payments taking invoice as relevant date for payment of service tax. In this regard, we find that inasmuch as the appellant had paid the short payment of service tax along with interest as explained in para 11.4, which have also been appropriated by the learned Commissioner and for the rest of the demands under SCN adjudged by the Commissioner is not sustainable, we do not find any need to delve in to this issue.

15. We also find that contractual arrangements between various parties to joint venture agreement under production sharing contract in the Panna-Mukta-Tapti joint venture (PMT JV), were examined in great detail in the case of appellants by the co-ordinate Bench of the Tribunal in *B.G. Exploration & Production India Ltd., Vs. Commissioner of CGST & C. Ex. Navi Mumbai - 2022 (63) G.S.T.L. 351 (Tri.-Mumbai)*, holding that the performance of a party in the joint venture agreement does not amount to a contractor-contractee or principal-agent relationship between the co-venturer and the joint-venture, which is a pre-requisite for a service to be liable to tax under the Finance Act. The relevant paragraph of the above judgement is extracted below:

"32. *The contention of the appellant is that from a conjoint reading of the various clauses of the Production Sharing Contract, the true commercial nature of the transaction between the Government of India, the appellant, RIL and ONGC is a Joint Venture and involves no rendition of service.*

33. *This precise issue was examined at length by the Division Bench of the Tribunal in the decision rendered by the Tribunal on 6-10-2021, in the case of the appellant itself, which decision is reported in **2021 (10) TMI 306-CESTAT (Mum)**. The Tribunal, after referring to the earlier decision of the Tribunal rendered on 11-6-2020 in the case of the appellant, which decision is reported in **2020 (10) TMI 579-CESTAT (Mum)**, the decision of the Tribunal in **Mormugao Port Trust** and the decision of the Supreme Court in **Faqir Chand Gulati** and after noticing that an appeal had been filed by the Department in the Bombay High Court against the decision of the Tribunal rendered on 11-6-2020, observed that the Government of India with the appellant, RIL and ONGC had entered into a joint venture agreement, whereunder each co-venturer had its own set of obligations and the responsibility discharged by each of the co-venturers towards the venture was not by way of any service rendered to the joint venture, but in their own interest in furtherance of the common objective of the joint venture. Service tax liability, therefore, could not have been fastened upon the appellant. The paragraphs of the decision relevant for the purpose this order are as follows:*

"21. The question as to whether the appellant was rendering any services to the PMT-JV, of which it was a constituent member, has been dealt with earlier by Tribunal in the decision rendered on 11-6-2020 in the case of the Appellant. xxxxxxxx

22. *It is an admitted fact that though an appeal has been filed before the Bombay High Court against the order dated 11-6-2020 of the Tribunal, but the said order has neither been stayed or set aside. It is also evident from the contentions urged by the Department that there is no dispute on the proposition that the Contract is an example of public private partnership in which the Government and private enterprises are in a joint venture for the purpose of achieving a common objective and sharing the profits arising from such operations. Under the Contract in question, the Central Government was to bring in its rights over the resources, while ONGC was to handle contracts and documentation, RIL was to manage financial and commercial requirements and the appellant was vested with the responsibility of undertaking the technical operations. The man power deployed by the appellant was in furtherance of its own interest as also that of the joint venture and not by way of any service to unincorporated joint venture. Also, the cost incurred by the appellant for this purpose was its capital contribution to the joint venture and it cannot be said that consideration was received by the appellant for arranging man power.*

23. *It is natural that in such public private partnerships, the public enterprise generally brings in the resource over which it has exclusive rights, such as the waterfront or the right to exploit the minerals, while the private party brings in the required capital, either in monetary terms or in kind or by way of equity. The equity brought in by the co-venturer, in this case by making available man power, cannot be considered as a service rendered to the unincorporated joint venture. It is this capital contribution along with the capital contribution made by others which forms the hotchpotch of the unincorporated joint venture.*

24. *The Tribunal in **Mormugao Port Trust**, explained that public private partnerships between the Government/Public Enterprises and Private parties are in the nature of joint venture, where two or more parties come together to carry out a specific economic venture, and share the profits arising from such venture. Such public private partnerships are at times described as collaboration, joint venture, consortium or joint undertaking. Regardless of the name or the legal form in which the same are conducted, they are essentially in the nature of partnership with each co-venturer contributing some of the resources for the furtherance of the joint business activity. The Tribunal held that such public private partnerships meet the test laid down by the Supreme Court in **Faqir***

Chand Gulati v. Uppal Agencies Pvt. Ltd., for ascertaining whether or not the arrangement is one of joint venture.

25. The Civil Appeal filed by the Department (**Commissioner v. Mormugao Port Trust**) against the aforesaid decision of the Tribunal was dismissed by the Supreme Court both on the ground of delay as well as on merits and the judgment is reported in **2018 (19) G.S.T.L. J118 (S.C.)**.

26. **There is no dispute that the joint venture in the present case has been constituted in terms of the Contract, which is a contractual arrangement between the Government of India, the appellant, ONGC and RIL.** The said joint venture was entered into for maximizing the extraction of crude petroleum/natural gas from the identified blocks and to share the profits from the venture. The management committee comprising of representatives of the Government of India, the appellant, ONGC and RIL undertook all the strategic, financial and other operative decisions with respect to the venture. Thus, all the pre-requisites of being a joint venture are clearly met. **In this backdrop, it is clearly impermissible to hold that the contribution made by a co-venturer (partner) in the course or furtherance of the joint-venture is a service rendered to the joint venture for a consideration. It is not in dispute that in a partnership or a joint venture, whatever a partner does for the furtherance of the business, he does so also for advancing his own interest, as he has a stake in the venture.** All the resources contributed by the partners enter into a common pool required for running of the enterprise. There is no contractor-contractee or principal-agent relationship between the co-venturer and the joint-venture, which is a pre-requisite for a service to be liable to tax under the Finance Act.

27. **As is evident from the submissions made by the Department, the decision of the Tribunal rendered on 11-6-2020 in the appellants case has been assailed on the grounds that :**

(a) The same had relied upon another decision of the Tribunal in the case of **Cricket Club of India**, which has since been affirmed by the Supreme Court in **Calcutta Club**. However, while doing so the Supreme Court has held that the principle of mutuality would not apply to a unincorporated club or association. The PMT-JV being an unincorporated association of persons, the principle of mutuality was inapplicable for services between the JV and the co-venturer; and

(b) The same had relied upon the decision in the case of **Mormugao Port Trust**, which had been distinguished by the Tribunal in the case of **Badve Helmets Pvt. Ltd. v. CCE [2018 (10) G.S.T.L. 435]**.

28. **This contention of the Department is entirely misplaced inasmuch as the order dated 11-6-2020 of the Tribunal is not premised on the principle of mutuality. Further, the Department has assumed that merely because the unincorporated association and its members are deemed to be distinct persons, this by itself is enough to establish that a service has been provided by the appellant to the unincorporated joint venture. This presumption is not tenable as the burden to prove that there was a rendition of service for a consideration is a sine qua non for any liability to service tax being attracted.** No evidence has been led by the Department to establish this fact. On the contrary, the Tribunal in the decision rendered on 11-6-2020, arrived at a finding of fact to the effect that the Government of India along with the appellant, RIL and ONGC had entered into a joint venture agreement, whereunder each co-venturer had its own set of obligations and the responsibility discharged by each of the co-venturers towards the venture was not by way of a service being rendered to the joint venture, but in their own interest, in the course or furtherance of the common objective of the joint venture.

29. It is also pertinent to note that the decision of the Tribunal in **Cricket Club of India** had been relied upon by the Tribunal not in support of the proposition that there cannot be a levy to service tax by applying the principle of mutuality, but on the point that a mere flow of money by itself is not enough to fasten a service tax liability. It is obligatory on the part of the Department to show that the said flow of money is a consideration for rendition of a service, in which case alone there can be a liability to service tax. The said burden has not been discharged in the facts of the present case. The relevant findings of the Tribunal in **Cricket Club**

of India, which were relied upon by the Tribunal in the case of the appellant, are reproduced herein below :

"11..... Consideration is, undoubtedly, and essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow. Without an identified recipient who compensates the identified provider with appropriate consideration, a service cannot be held to have been provided. In a taxation scheme that specifies the particular targets of taxation, tax liability will arise when a provider conforming to the relevant description in the charging section performs an activity that conforms to the relevant description in the charging section on the request, and for the benefit, of a recipient conforming to the relevant description in the charging section. Service, its taxability and the provision of the taxable service to a recipient, in that order, are necessary pre-requisites to ascertaining the quantum of consideration on which ad valorem tax will be levied. This fundamental will not alter in the scheme of the negative list too; a service that is clearly identifiable has to be provided or agreed to be provided before it can be taxed. The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient."

30. The arrangement in question can also be viewed from another perspective i.e. the appellant had entered into employment contracts on behalf of the unincorporated joint venture as the latter was incapable of entering into contracts in its own name. All activities of the unincorporated joint venture are conducted in the name of its constituent members. Unless such an activity is undertaken by a constituent member as an independent service provider for the joint venture for a consideration, there is neither a rendition of service nor can there be any liability to service tax. This position also evolves from paragraph 4.2 of the Circular dated 24-9-2014, wherein it has been clarified that a member of a joint venture may provide support services to the joint venture for a consideration either in cash or in kind, which alone would be leviable to service tax.

31. Insofar as the decision of the Tribunal in **Badve Helmets** is concerned, the same is based on entirely different facts. In that case M/s. Vemmar SRL Italy, who was a equity holder had transferred know-how for a consideration of US \$ 1,00,000/-. The said transfer of know-how was not in the course or furtherance of the venture nor was it by way of a capital contribution. Undisputedly, M/s. Vemmar SRL was acting as a independent service provider to the joint venture and was rendering services for a consideration. The facts in the case of **Badve Helmets**, being completely different with that of **Mormagao Port Trust**, as also those in the present case, the said decision cannot be relied upon nor does the same in any manner dilute the ratio laid down in **Mormagao**. In fact the Tribunal had in **Mormagao** specifically recorded that there can be situations where a co-venturer or a partner can render taxable service to the joint venture/firm under an independent contract between the co-venturer/partner and the joint venture/ partnership and that such a contract should have been entered into in individual capacity, independent as a co-venturer, for a specific consideration.

32. Unlike in the case of **Badve Helmets**, where one of the co-ventures had entered into a separate and independent agreement with the joint venture for a specific consideration, in the facts of the present case there is no such agreement outside the scope of the joint venture that had been entered into between the appellant and the PMT-JV. The making available of man-power was the appellant's obligation as a co-venturer to the venture, by way of capital contribution and was not an independent service for a consideration being rendered by the appellant to the PMT-JV.

33. **It can safely be concluded that the Government of India with the appellant, RIL and ONGC had entered into a joint venture agreement, whereunder each co-venturer had its own set of obligations and the responsibility discharged by each of the co-venturers towards the venture was not by way of any service**

rendered to the joint venture, but in their own interest in furtherance of the common objective of the joint venture. Service tax liability, therefore, could not have been fastened upon the appellant."

(Emphasis supplied)

34. *The issues raised in this appeal are covered by the aforesaid earlier decision of the Tribunal rendered on 6-10-2021."*

The above decision taken by this Tribunal after detailed analysis of the contractual arrangement under joint-venture, clearly conclude that as a party to the joint-venture, obligations and responsibilities discharged by co-venturer cannot be brought under service tax levy.

16. Further, as the entire demand raised in the impugned order is based on the records as per ST-3 Returns filed by the appellant and the amounts indicated in the appellant's balance sheet, this could only lead to an irresistible conclusion that no suppression or intention to evade payment of tax could be levelled against the appellant. This being so, we find that there was reasonable cause for the failure to discharge tax liabilities which have been rectified by the appellant duly paying the service tax along with interest thereon as noted in paragraph 11.4 and hence the imposition of penalties is unjustified and we set aside the same.

17. In view of the above detailed discussions and analysis, the impugned order is modified to the extent of allowing the appeals filed by the appellants and upholding the confirmation of demand arising out of short payment of service tax for an amount of Rs.8,68,65,143/- along with interest thereon for Rs.4,76,07,998/-, which have also been appropriated to the Government exchequer in the impugned order.

18. The appeal filed by the appellant is disposed of in the above terms.

(Order pronounced in open court on 17.07.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)