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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 76328 of 2014

(Arising out of Order-in-Original No. COMMR/B-I/ST-02/2014 dated 27.06.2014 passed by the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. Hindustan Aeronautics Limited : Appellant
Engine Division – Koraput,
P.O. Sunabeda – 763 002, District: Koraput (Odisha)

VERSUS

Commissioner of Central Excise, Customs and Service Tax : Respondent
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

Shri Rajen Mishra, Advocate for the Appellant

Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO. 75700 / 2024

DATE OF HEARING: 04.04.2024

DATE OF DECISION: 17.04.2024

Order : [PER SHRI RAJEEV TANDON]

The appellant are a public sector company engaged in the manufacture, repair and overhaul of aircraft engines and registered with the Service Tax Authorities viz. the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I Commissionerate, under the head "Management, Maintenance or Repair service". They have filed the present appeal assailing the Order-in-Original No. COMMR/B-I/ST-02/2014 dated 27.06.2014.

2. The appellant was issued a Show Cause Notice dated 19.04.2013 seeking recovery of Service Tax for an amount of Rs.26,47,16,000/- for the Financial Year 2007-08 to 2011-12 under Section 73(1) of the Finance Act, 1994[1] along with interest, as leviable under Section 75 and imposition of penalty under Sections 76, 77 and 78 of the Act.

3. The two-fold questions involved in the present appeal are the following: -

(i) Whether the Appellant is liable to pay service tax on the license fees and other incidental expenses paid to the Russian Company i.e. M/s. Rosboronexport, Moscow, Russia towards transfer of technical knowhow and technical assistance for manufacture of aircraft & engines under the category of "Intellectual Property Services"?

(Service Tax demand amounting to Rs. 23,72,60,000/-)

(ii) Whether the Appellant is liable to pay service tax on amount received from the Malaysian company i.e. M/s. Setia Technologi SDN, BHD, Malaysia against repair/rectification of MIG Engines?

(Service Tax demand amounting to Rs. 2,75,56,000/-)

3.1 During the course of audit undertaken by the Department, it was pointed out that the appellant were liable to pay Service Tax under reverse charge mechanism (RCM), towards expenses incurred by them in foreign currency on account of Licence Fee,

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1 - The Act

Documentation charges and Foreign Technician Fees. The appellant was also required to pay Service Tax on amounts received from the foreign company claimed by them as Export of Service.

4. The Ld. Advocate Shri Rajen Mishra appearing for the appellant submits that pursuant to an inter-governmental agreement between the Republic of India and the Russian Federation, the Russian Corporation viz. M/s. Rosoboronexport, Moscow, Russia signed a Technology Transfer Agreement with the appellant for transfer of technical knowhow, personal instructions, training, rendering assistance for licensed production and setting up of overhaul facility with the appellant. The technology so received was made use of by the appellant and the Licence Fee thereto along with other incidental expenses were paid to the overseas enterprise.

5. The Department, invoking extended period of limitation, issued the above Show Cause Notice *inter alia* pointing out that appropriate tax was not paid on the transfer of technology, which is nothing but "Intellectual Property Service" rendered by the overseas party and that by virtue of Section 66A of the Act, the appellant was required to discharge due Service Tax on the same under RCM.

6. The appellant has submitted that the demand for claim of intellectual property right (IPR) on the aforesaid is clearly inappropriate and does not flow in law. "Intellectual Property Right" in terms of Section 65(55a) and "Intellectual Property Service" in terms of Section 65(55b), are defined as under: -

"SECTION [65. Definitions. — In this Chapter, unless the context otherwise requires, -

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(55a) "intellectual property right" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright;"

(55b) "intellectual property service" means, —

(a) transferring, [temporarily]; or

(b) permitting the use or enjoyment of,

any intellectual property right;]"

6.1 The Ld. Advocate Shri Rajan Mishra points out that the technology shared by M/s. Rosboronexport is confidential in nature and qualified as undisclosed information which is specifically excluded from the meaning and definition of IPR and that the technology transferred by M/s. Rosboronexport is not registered under any law for the time being in force. To this extent, they also place reliance on C.B.E.C.'s Circular No. 80/2010/2004-S.T. dated 17.09.2004[2]. Paragraph 9 of the said Circular for intellectual property reads as under: -

"Circular No. 80/10/2004-S.T., dated 17-9-2004

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

1. The Finance (No. 2) Bill, 2004 has been enacted on 10-9-2004. With the enactment of the Finance Bill,

2 - The said Circular.

2. The scope of these changes is explained in the following paragraphs.

3. Education Cess on taxable services :

…

4. Business exhibition services :

…

5. Airport services :

…

6. Transport of goods by air :

…

7. Survey and exploration of minerals :

…

8. Opinion poll services :

…

9.Intellectual property services (other than copyrights) :

9.1 Intellectual property emerges from application of intellect, which may be in the form of an invention, design, product, process, technology, book, goodwill etc. In India, legislations are made in respect of certain Intellectual Property Rights (i.e. IPRs) such as patents, copyrights, trademarks and designs. The definition of taxable service includes only such IPRs (except copyright) that are prescribed under law for the time being in force. As the phrase 'law for the time being in force' implies such laws as are applicable in India, IPRs covered under Indian law in force at present alone are chargeable to service tax and IPRs like integrated circuits or undisclosed information (not covered by Indian law) would not be covered under taxable services.

9.2 A permanent transfer of intellectual property right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a 'holder of intellectual property right' so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs.

9.3 In case a transfer or use of an IPR attracts cess under Section 3 of the Research and Development Cess Act, 1986, the cess amount so paid would be deductible from the total service tax payable (refer Notification No. 17/2004-S.T., dated 10-9-2004)."

6.2 It is therefore their submission that the findings of the Ld. Commissioner vide the impugned order under challenge are clearly beyond the scope of the said Circular.

6.3 On the second question, pertaining to Export of Service, they plead that it may have been a failure to properly comprehend the exact nature of activity and understanding the same as Export of Service. However, the Ld. Advocate vehemently contests the demand on the grounds of limitation and points out that at best, it was a case of a misunderstanding but certainly not an intention to evade payment of tax. He thus submits that imputing them with suppression of facts and thereby invoking larger period of limitation was completely uncalled for and cannot be made out. He submits that all requisite details towards this nature of work undertaken were incorporated in their statutory returns filed and hence, the charge of suppression of facts does not lie.

7. Shri J. Chattopadhyay, the Ld. Authorized Representative for the Department, however, reiterates the findings of the adjudicator and contends that the appellant is liable to make good the shortfall and also subject to penalty.

8. We have heard the two sides and perused the case records.

9. We find that the Ld. Commissioner has dismissed the impugned C.B.E.C.'s Circular holding that the impugned Circular has since been withdrawn vide Master Circular No. 96/7/2007-S.T. dated 23.08.2007. It may be appropriate to state that the revised Master Circular in effect states nothing contrary to what had been stated in the 2004 Circular and that the C.B.E.C.'s clarifications issued post introduction of the levy have to be read in the context of and as explained in terms of the communications sent to the field formations by the TRU *inter alia*

explaining the provisions of the Finance Bill / Finance Act.

9.1 We also note that the Ld. Commissioner has relied upon the stay order in the case of *SICPA India Pvt. Ltd. v. Commissioner of Cus., C.Ex. & S.T., Siliguri*[3] in support of his stance. However, we are of the view that it would be inappropriate to rely on the said order as it is merely an interim order and cannot be taken as laying down any enunciation in law and is bereft of any precedent value.

9.2 It may further be pointed out that this Tribunal in the case of *SICPA India Pvt. Ltd. v. Commissioner of Cus., C.Ex. & S.T., Siliguri*[4] held that technical knowhow provided by a foreign company to an Indian company under a licence for manufacture of goods for consideration of Royalty equal to a percentage of net sale price of the goods, was nowhere registered / patented in India as an IPR service and therefore, the recipient of such service was not liable to pay Service Tax under RCM as IPR service.

9.3 We thus feel that the transfer of technology by M/s. Rosboronexport would not qualify as "intellectual property right" within the meaning of Section 65(55a) of the Act for the various aspects as listed in paragraph 3.1 of this Order and therefore, would not be covered under the definition of "intellectual property service" within the scope of Section 65(55b).

10. We further note that this Tribunal in the assessee's own case, on more than one occasion, has held that the service charge received against foreign technician fees for repair and overhaul of the aircraft,

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3 - 2013 (30) S.T.R.630 (Tri. – Kol.)
4 - 2018 (15) G.S.T.L. 375 (Tri. – Kol.)

as undertaken with the assistance of foreign technicians, was not includible in the value of the taxable services [ref.: 2019 (21) G.S.T.L. 46 (Tri. – All.), 2015 (40) S.T.R. 289 (Tri. – Mum.), 2020 (38) G.S.T.L. 75 (Tri. – Bang.)].

10.1 It was further held by this Tribunal in the case of *Munjal Showa Ltd. v. Commissioner of C.Ex. & S.T., Delhi* (Gurgaon)[5] that to tax a service under IPR, such rights ought to be registered with the trademark / patent authorities; there was nothing on record to show that the same were registered in India. In view of the law as propounded in the said case, we are of the view that the Department has not been able to make out any sustainable case, seeking recovery of tax with reference to the issue as made out in paragraph 3(i) of this Order.

10.2 The Ld. Advocate has also placed reliance to the law as laid down in the cases of *Lurgi India International Services Pvt. Ltd. v. Commr. of C.Ex., Cus. & S.T., Hyderabad*[6] *and Technova Imaging Systems Pvt. Ltd. v. Commissioner of C.Ex., Mumbai*[7], both specific case laws in respect of IPR service and the issue herein.

11. Insofar as the second issue is concerned, we find that the appellant had received an amount of Rs.2639.17 lakh towards repair and overhaul of MIG engines owned by M/s. Setia Technologi SDN, BHD, Malaysia. Necessary repairs and rectifications were carried out on the MIG 29 Aircrafts of Royal Malaysian Airforce. The appellant has characterized this service of repairs / rectifications provided by them as Export

5 - 2017 (5) G.S.T.L. 145 (Tri. – Chan.)
6 - 2020 (34) G.S.T.L. 507 (Tri. – Hyd.)
7 - 2019 (31) G.S.T.L. 472 (Tri. – Mum.)

of Service *inter alia* pleading that the same was not liable to tax.

11.1 It is undisputed that the aforesaid activity of repairs and maintenance was carried out within the jurisdiction of India and therefore was liable for tax under Section 65(105)(zzg) as "management, maintenance or repair" service and was liable for payment of duty in terms of Rule 3(1)(ii) of the Export of Services Rules, 2005. The Ld. Commissioner vide the impugned order has categorically held that the provision of service having took place in India, there is a breach of Rule 6A of the Service Tax Rules, 1994 and Rule 3(1)(ii) of the Export of Services Rules, 2005. To this extent, we are fairly in agreement with the findings of the Ld. Commissioner on the aspect.

11.2 We however note that the impugned Show Cause Notice for the period indicated supra was issued to the appellant on 19.04.2013, invoking the extended period of limitation, alleging suppression of facts unearthed during audit of the company's record. In view of the fact that the appellant is a public sector company completely under the control of the Ministry of Defence and owned by the Government of India, we find it rather unacceptable and quite improper to assume intent to evade payment of duty on the part of the organization. We therefore are not in agreement with the findings of the Ld. Commissioner that the appellant had deliberately suppressed material information, wrongly classifying as 'Export of Service' with intent to evade duty. The appellant on the contrary has pointed out that it was rather inappropriately shown as Export of Service, however, nothing was concealed in the statutory records and returns filed. Thus, at best, it could be a case of

misinformation, wrong classification and not suppression. We do not find merit to impute the charge of suppression to a government organization owned by the Ministry of Defence, for the non-payment of duty / tax with intent to evade the same by suppressing the material information, more so when it is depicted inappropriately and construed accordingly.

11.3 Moreover, we find that the charge of suppression to be sustained, is required to be ascertained as wilful. Under the circumstances, there is nothing on record to remotely state such omission of tax as wilful or deliberate with intent to evade payment of duty by the appellant, even though it may have been discovered in the course of audit. It would be appropriate to point out that the Hon'ble Apex Court in the case of *Continental Foundation Joint Venture Holding* v. *Commissioner of Central Excise, Chandigarh-I*[8] has held as under: -

> *"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly.* ***Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty****. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."*

(Emphasis supplied)

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8 - (2007) 10 SCC 337 = 2007 (216) E.L.T. 177 (S.C.)

11.4 Thus, the demand for the extended period cannot be sustained as there is nothing on record to establish *mala-fides* on the part of the appellant. We thus hold that the extended period of limitation is not invokable in the circumstances. Our understanding on the subject is further buttressed by the following cases: -

i. *Commissioner of Central Excise, Indore v. NEPA Ltd.*[9]

ii. *Hindustan Insecticides Ltd. v. Commissioner of C.Ex., Delhi-I*[10]

iii. *Indian Oil Corporation Ltd. v. Commissioner of C.Ex., Ahmedabad*[11]

12. In view of our observations, we set aside the impugned order and allow the appeal of the assessee.

(Order pronounced in the open court on **17.04.2024**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(RAJEEV TANDON)
MEMBER (TECHNICAL)

Sdd

9 - 2013 (398) E.L.T. 225 (Tri. – Del.)
10 - 2017 (6) G.S.T.L. 218 (Tri. – Del.)
11 - 2013 (291) E.L.T. 449 (Tri. – Ahmd.)