
(2021) 09 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 53101, 53125 Of 2015

M/s Hindustan Zinc Ltd.

APPELLANT

Vs

Commissioner Of Central Excise, Udaipur

RESPONDENT

Date of Decision : 17-09-2021

Acts Referred:

Finance Act, 1994 — Section Section 65(105), 65(105)(y), 66, 66A, 73(3)
Taxation of Services (Provided from Outside India and Received in India) Rules, 2006
— Rule 3(ii)

Citation : (2021) 09 CESTAT CK 0012

Hon'ble Judges : Delip Gupta, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : B.L. Narasimhan, Tarun Trehan, Dr. Radhe Tallo

Final Decision : Allowed

Judgement

1. M/s Hindustan Zinc Ltd, the Appellant has filed these two appeals to assail the order dated 26.05.2015 passed by the Commissioner, Central Excise, the Commissioner, by which the show cause notice dated 16.08.2013 issued to the Udaipur unit of the Appellant and the show cause notice dated 20.06.2013 issued to the Chittorgarh unit of the Appellant have been adjudicated upon by a common order confirming part of the demand proposed in the two show cause notices with interest and penalties.

2. The details of the period, the demand proposed, and the demand confirmed are as follows:-

Unit

Show Cause Notice

Period

Proposed demand (in Rs.)

Confirmed demand (in Rs.)

Udaipur
 16.08.13
 2009-10
 7,01,662/-
 5,44,846/-
 2010-11
 20,63,896/-
 Nil
 2011-12
 77,45,600/-
 Nil
 Total
 1,05,11,158/-
 5,44,846/-
 Chittorgarh
 20.06.13
 2009-10
 2,66,493/-
 2,60,623/-
 2010-11
 13,64,685/-
 7,90,065/-
 2011-12.
 77,45,600/-
 Nil
 Total
 93,76,778/-
 10,50,688/-

3. The two units of the Appellant are engaged in manufacture of lead, zinc and other concentrates. Two show cause notices were issued to the Appellant

proposing demand of service tax on foreign currency expenditure alleging that it was towards receipt of taxable services on which the Appellant was liable to pay service tax under the reverse charge mechanism.

4. The issues involved, the demand confirmed, the findings in the impugned order and the submissions of the Appellant in respect of the two Service Tax Appeals can briefly be summarized as follows:-

SERVICE TAX APPEAL NO. ST/53101/2015 - UDAIPUR UNIT

Sl. No.

Issues/ Dispute

Demand confirmed in Order

Finding in the Order

Submissions of the Appellant

2009-10

1

Demand of Service Tax in respect of foreign remittances, which has been duly discharged by the Appellant, but the same has not been accepted by the Adjudicating Authority.

Rs. 1,17,157/-

Difference in the amount of challan submitted i.e. Challan dated 05.03.2011 submitted towards payment of Service Tax of Rs. 1,76,328/- does not correlate with service tax liability of Rs.1,17,157/-

a) The Appellant has already paid service tax of Rs. 1,17,157/- towards the impugned services.

b) The difference in challan amount is due to exchange rate difference and TDS payments.

2

Rs. 1,57,748/-

Non-production of documentary evidence (i.e. relevant challan), indicating payment of service tax on services received in India.

The impugned proceedings are vague as the department has failed in discharging its burden of proving taxability. There is no allegation in show cause notice, or findings in Impugned Order, as to how charging provisions are attracted. The show cause notice/Impugned Order do not even specify the category of service, under which the alleged demand has been proposed/ confirmed against the Appellant

3

Demand of Service Tax in respect of 'Marketing Research and Exploration' services rendered by Mr. Johan Carlier to the Appellant

Rs. 1,83,733/-

Non-production of documentary evidence (i.e. Agreements & invoices), to support the fact that the impugned services of 'Marketing Research and Exploration' are not exigible to service tax, as being provided outside India in terms of Rule 3(ii) of Import Rules

Work of Marketing Research and Exploration was executed entirely outside India, thus, not subject to service tax in terms of Rule 3(ii) of Import Rules.

4

Certain entries could not be traced at the Appellant's end.

Rs. 86,208/-

Non-production of documentary evidence (challans etc.) indicating payment of service tax on impugned services.

The impugned proceedings are vague as the department has failed in discharging its burden of proving taxability. There is no allegation in show cause notice, or findings in Impugned Order, as to how charging provisions are attracted. The show cause notice/Impugned Order do not even specify the category of service, under which the alleged demand has been proposed/confirmed against the

Total

Rs. 544,841/-

SERVICE TAX APPEAL NO. ST/53125/2015- CHITTORGARH UNIT

Sl. No.

Issues/ Dispute

Demand confirmed in Order

Findings in the Impugned Order

Submissions in Brief

2009-10

5

Service Tax in respect of foreign remittances, which has been duly discharged by the Appellant, but the same has not been accepted by the Adjudicating Authority

Rs. 1,88,096/-

Difference in amount of challan/(s) submitted i.e. Challans submitted towards payment of service tax of Rs. 2,48,736/- does not correlate with service tax liability of Rs. 1,88,096/-

a) The Appellant has already paid service tax of Rs. 1,88,096/- towards the impugned services

b) The difference in challan amount is due to exchange rate differences and TDS payments

6

Certain entries could not be traced at the Appellant's end.

Rs. 72,527/-

Non-production of documentary evidence (challans etc.) indicating payment of service tax on impugned services.

The impugned proceedings are vague as the department has failed in discharging its burden of proving taxability. There is no allegation in show cause notice, or findings in Impugned Order, as to how charging provisions are attracted. The show cause notice/Impugned Order do not even specify the category of service, under which the alleged demand has been proposed/confirmed against the Appellant.

Total

Rs. 2,60,623/-

2010-2011

7

Service Tax in respect of foreign remittances, which has been duly discharged by the Appellant, but the same has not been accepted by the Adjudicating Authority

Rs. 7,57,166/-

Difference in amount of challan/(s) submitted i.e. Challans submitted towards payment of service tax of Rs. 8,93,484/- does not correlate with service tax liability of Rs. 7,57,166/-

a) The Appellant has already paid service tax of Rs. 7,57,166/- towards the impugned services.

b) The difference in challan amount is due to exchange rate difference and TDS payments.

8

Certain entries could not be traced at the Appellant's end.

Rs. 32,899/-

Non-production of documentary evidence (challans etc.) indicating payment of service tax on impugned services.

The impugned proceedings are vague as the department has failed in discharging its burden of proving taxability. There is no allegation in show cause notice, or findings in Impugned Order, as to how charging provisions are attracted. The show cause notice/Impugned Order do not even specify the category of service, under which the alleged demand has been proposed/confirmed against the Appellant.

TOTAL

Rs. 7,90,065/-

5. A perusal of the aforesaid chart would indicate that the issues at Serial Nos. 1, 5 and 7 are identical and they are in connection with the foreign remittance discharged by the Appellant which have not been accepted by the Commissioner. The chart would also reveal that the issues at Serial Nos. 4, 6 and 8 relate to entries which could not be traced at the end of the Appellant. Issue No. 3 relates to demand of service tax in respect of 'marketing, research and exploration' services rendered by the Appellant.

6. Shri B.L. Narasimhan, learned Counsel appearing for the Appellant, made the following submissions:-

i. The impugned proceedings are vague and in gross violation of the principles of natural justice. The department failed to discharge its burden of proving taxability. It was imperative for the department to first show that the alleged foreign currency expenditure pertains to services falling under one of the sub-clauses of section 65(105) of the Finance Act, 1994, the Finance Act and thereafter, prove how it would be taxable in terms of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, Import Rules;

ii. The impugned demand is based merely on the difference between the figures in balance sheet and in ST-3 returns, while it is a known fact that both are prepared on different basis. The vagueness of the impugned proceedings is also evident from the fact that for the period 2011-12, the same demand of Rs. 77,45,600/- on alleged difference between figures in the Balance Sheet and ST-3 returns was proposed against both the units;

iii. The confirmation of demand is also not sustainable in as much as there is no liability on the Appellant to pay service tax on such expenses under the reverse charge mechanism. In support of the submissions reliance has been placed on the following decisions;

a. Shubham Electricals v/s Commissioner of Central Excise & Service Tax, Rohtak, 2015 (40) STR 1034 (Tri.-Del.);

b. M/s Deltax Enterprises v/s Commissioner of Central Excise, Delhi-I, 2018-TIOL-636-CESTAT-DEL;

c. M/s Micromatic Grinding Technologies Ltd. v/s Commissioner of Central Excise & Service Tax, Ghaziabad, 2019 (8) TMI 320-CESTAT ALLAHABAD;

d. N R Management Consultants India Pvt. Ltd. v/s Commissioner of Service Tax, New Delhi, 2018-TIOL-813-CESTAT-DEL;

e. M/s Balaji Contractor v/s Commissioner of Central Excise, Jaipur II, 2017-TIOL-1071-CESTAT-DEL; and

f. Hetero Labs Ltd. v/s CCT Hyderabad GST, 2018-TIOL-2874-CESTAT-HYD;

iv. The extended period of limitation could not have been invoked as the Appellant had not suppressed any facts from the Department. In fact, the Appellant was under a bonafide belief about non-taxability of the transactions and thus did not pay service tax. This apart, the issue of taxability of such services received from abroad under reverse charge mechanism was under litigation at various forums and was ultimately settled later. It cannot, therefore, be said that the Appellant suppressed any facts with malafide intention; and

v. The Appellant had reasonable cause for not making payment of service tax and, therefore, penalties could not have been imposed upon the Appellant.

7. Dr. Radhe Tallo, learned Authorized Representative appearing for the Department supported the findings recorded by the Commissioner in the impugned order. Learned Authorized Representative also submitted there can possibly be no dispute about levy of service tax on services received from agencies established abroad and the only dispute is about correct payment of service tax on such services.

8. The submissions advanced by learned Counsel for the Appellant and the learned Authorized Representative appearing for the Department have been considered.

9. The first contention advanced by learned Counsel for the Appellant is that the proceedings that were initiated against the Appellant were vague and in gross violation of the principles of natural justice. Elaborating this submission, learned Counsel submitted that during the relevant period, the charge of service tax under section 66 of the Finance Act was on services falling under the various sub-clauses of section 65 (105). The provisions of section 66A of the Finance Act would also be applicable only when a service falls within any of the sub-clauses of section 65(105). It was, therefore, necessary for the Department to first establish that the alleged foreign currency expenditure pertained to services falling under one of the sub-clauses of section 65(105) of the Finance Act and then establish how it would be taxable in terms of the Import Rules. Learned Counsel submitted that a charging provision has to be construed strictly and a heavy burden is cast upon the Department to prove that the demand is sustainable under the charging provisions. In this connection, learned Counsel placed reliance upon the decision of the Supreme Court in Commissioner v/s Dilip Kumar Company, 2018 (361) ELT 575 (SC).

10. To appreciate the aforesaid contention, it would be necessary to examine the relevant provisions of section 66 and 66A of the Finance Act. Section 66 is the charging section and it provides that there shall be levied service tax at the rate of 12 per cent of the value of taxable services referred to in various clauses of section 65(105). Section 66A of the Finance Act relates to charge of service tax on services received from outside India.

11. Neither is there any allegation in the two show cause notices nor any finding has been recorded in the impugned order to demonstrate how the provisions of 66 read with 66A of the Finance Act and the Import Rules are attracted. In fact, neither the show cause notices nor the impugned order specify the category of service under which the demand has been confirmed against the Appellant. The demand has been proposed and confirmed merely because of difference between the figures in the balance sheet of the Appellant and the ST-3 Returns.

12. It is well settled that the show cause notice as also the order of the adjudicating authority should specify the taxable service. In this connection reference can be made to the following decisions.

13. In Shubham Chemicals, the Tribunal observed as follows:-

"11. Neither the show cause notice dated 21-10-2011 nor the impugned adjudication order dated 18-1-2013 record any assertion/conclusion whatsoever as to which particular or specific taxable service the appellant had provided. In the absence of an allegation of having provided a specific taxable service in the show cause notice and in view of the failure in the adjudication order as well, neither the show cause notice nor the consequent adjudication order could be sustained."

(emphasis supplied)

14. In Deltax Enterprises, the Tribunal observed as follows:-

"4. In the absence of specific allegation with reference to the nature of service or the service recipient it is not tenable to hold an income of the appellant even if it is admitted to be an actual income, as consideration for a taxable service."

15. In NR Management Consultants, the Tribunal observed as follows:-

"It is clear that there is no categorical finding as to how the expenditure incurred in foreign exchange can be considered as a payment towards specific category of taxable service and thereafter can be subjected to tax at the hands of the appellant on reverse charge basis. We find considerable force in appellant-assesse's plea with reference to presumptive nature of the demand for service tax attributable to expenditure in foreign currency. In fact, the nature of services received by the appellant-assesses with supporting evidence has not been analyzed at all. In such situation, the finding recorded by the impugned order suffers from serious legal infirmity."

(emphasis supplied)

16. The confirmation of demand on the basis of such a vague show cause notice cannot, therefore, be sustained.

17. Learned Counsel for the Appellant has also placed facts stated in the memo of appeal and has contended that the transactions are not taxable.

Issues at Serial Nos. 1, 5 and 7

18. These issues relate to demand of service tax on remittance towards services on which service tax was payable as per the Import Rules and has been paid by the Appellant, but it has not been accepted by the Department. This covers service tax demand on Rs. 2,74,905/-. The Appellant has provided entry-wise summary of the demand on remittances to various foreign service providers vis-a-vis the payment of service tax on the taxable value on which service tax has actually been paid by the Appellant. It is reproduced as under:-

S.No. of HZL letter dated 27.02.20 13 Party's name Demand as confirmed
Details of service tax payment by appellants Taxable value ST demand Actual
taxable value ST paid by the appellants *Challan particulars 64

Party's name

Demand as confirmed

Details of service tax payment by appellants

Taxable value

ST demand

Actual taxable value

ST paid by the appellants

*Challan particulars

64

Stephens on Harwood Office No. 2

1137450

117157

1711920

176328

Challan no. 50119 dated 05.03.2011

66

Emperor Design Consultants Ltd.

1531530

157748

The entry is similar to S. No. 139 for the year 2010-11 which has been dropped by the Adjudicating Authority. Service Tax on the same lines is paid on this transaction also; however, the Challan evidencing payment is not being readily available.

Total

2668980

274905

19. It would be seen from the aforesaid that for the demand of service tax of Rs. 1,17,157/- on foreign remittance of Rs.11,37,450/-, the Appellant paid service tax of Rs. 1,76,328/-towards the services received from the service provider mentioned at Serial. No. 64. The service tax paid by the Appellant is more than the service tax pointed out by the Department for the reason that actual remittance is more on account of exchange rate difference and substantial TDS. It has also been pointed out by the Appellant that there are no other remittances of the service provider - M/s Stephenson Harwood Office No. 2 and, therefore, the service tax payment pertains to this very transaction.

20. The explanation offered by the Appellant deserves to be accepted. The Appellant has paid the service tax, though on a higher value than proposed by the Department. The show cause notice for the demand, in view of the provisions of section 73(3) of the Finance Act, should not have been issued.

21. In regard to the demand of service tax of Rs. 1,57,748/- on foreign remittance of Rs. 15,31,530/- relating to M/s Emperor Design Consultants Ltd. mentioned at Serial No. 66, the entry is similar to the entry at Serial No. 139 for the year 2010-2011. It has been pointed out by the Appellant that since the records were quite old, the challans evidencing such payment were not available at the end of the Appellant, but as the demand of service tax of Rs. 82651 with respect to Serial No. 139 for the year 2010-2011 was dropped by the Adjudicating Authority the demand of Rs. 1,57,748/- for the year 2009-2010 was also liable to be dropped on similar grounds.

22. This submission of learned Counsel for the Appellant deserves to be accepted. It is the same service and the same service provider and, therefore, if the demand has been dropped for the year 2010-2011, there is no reason why it should not be dropped for the year 2009-2010. Thus, the demand of service tax of Rs. 2,74,905/- on foreign remittance of Rs. 26,68,980 cannot be sustained.

Issues at Serial Nos. 4, 6 and 8

23. These issues relate to demand of service tax on which service tax of Rs. 86,208/- could not be traced by the Appellant.

24. The contention of the Appellant is that the entries relating to the said

demand do not pertain to the Appellant. The confirmed demand has been summarized by the Appellant in the following manner:-

Serial No. in annexure to HZL letter dated 27.02.2013

Party's name

Taxable value on which demand is confirmed

Demand confirmed

12

Jhu Xuejun

2,05,876

21,205

22

Noranda Income Limited

4,98,270

51,322

Sub-total

7,04,146

72,527

51

Aspermount UK Ltd.

1,32,822

13,681

Grand total

8,36,968

86,208

25. It has been pointed out that the Appellant repeatedly requested the Department to provide details of the bank reference number and details of foreign currency against each of the entry, but the Department did not provide the information and it is for this reason that while submitting the reply to the show cause notice, the Appellant made a specific request for providing the date of debit of amount towards such remittances in the bank account of the appellant from which the transactions could be linked, because according to the Appellant non-availability of any material with the Appellant indicated that these foreign remittances did not relate to the Appellant.

26. The order passed by the Principal Commissioner has confirmed the demand of service tax by simply observing that in respect of entry numbers 12, 22 and 51 of the annexure to the show cause notice, the Appellant could not produce any document which may indicate that service tax had been paid in respect of these entries. It has further been noticed in the order that details were provided to the Appellant during the course of personal hearing on 17.02.2020.

27. The contention of the learned Counsel for the Appellant is that since the details were provided during the course of personal hearing on 17.02.2015, it did not have sufficient time to trace out the requisite documents and that too only a calculation sheet of taxable value for the period 2009-2010 and 2010-2011 was provided.

28. If the Department had proposed the demand, it was for the Department to substantiate from the records that the proposed demand was justified. In the present case the contention of the Appellant is that its records do not indicate that the foreign remittances amounting to Rs. 8,36,968/- on which service tax of Rs. 86,208/- was demanded could be related to the Appellant. There is nothing on the record which may conclusively establish that the aforesaid foreign remittances are in respect of the Appellant. This demand, therefore, cannot also be sustained.

Issues at Serial No. 3

29. This issue relates to service tax on 'market research and exploration' executed outside India for which service tax of Rs. 1,83,733/- has been confirmed.

30. The Appellant contends that the foreign remittances amounting to Rs. 17,83,810/- to Mr. Johan Carlier were towards the work of market research and exploration, which can be said to be covered under the taxable category of the 'market research services' falling under section 65(105)(y) of the Finance Act and they were executed entirely outside India, which fact is apparent from the contract dated 13.02.2008. The details are as follows:-.

S.No. of HZL letter dated 27.02.2013

Party's name

Details of demand as confirmed

Taxable value

Service Tax demand

13

Mr. Johan Carlier

232023

23898

14

.....do.....

239300

24648

17

.....do.....

332068

34203

18

.....do.....

348278

35873

20

.....do.....

487795

50243

54

.....do.....

144346

14868

Total

.....do.....

1783810

183733

31. The contention of the Appellant is that even though the activity of 'market research services' is not explicitly mentioned in the contract dated 13.02.2008 entered with the service provider but still the scope of the work, which is the crux of the contract, would clearly suggest that the contract is basically for the work of 'market research and exploration' which is taxable under the category of 'market research services' falling under section 65(105)(y) of the Finance Act.

32. Learned Counsel for the Appellant further contended that the other activities mentioned in the contract are only of supporting nature and since service tax is based on the actual nature of service and not because of what is described in the documents, the substance of the transaction would prevail over the form. The submission, therefore, is that the services are taxable under section 65(105)(y) of the Finance Act and but as they were provided outside India during the relevant period, service tax would not be payable as per rule 3(ii) of the Import Rules.

33. A perusal of the scope of work mentioned in the contract dated 13.02.2008 would indicate that the activities undertaken are as follows:-

(i) Securing 5000 mt per month annual contract with end users within next 3 months;

(ii) Benchmarking with best Marketing practices from some of the world class commodity companies and implement the same in business;

(iii) Regular, daily and weekly update on market information and competition watch;

(iv) Contract vetting and standardization in line with best practices in the world;

(v) Risk management- strategy to identifying and mitigating risk;

(vi) Coaching and training of Export marketing personnel to prepare them to create and sustain 200kt/year zinc export market including issues concerning commodity hedging; and

(vii) Any other relevant activities concerning metal export.

34. It would clearly be seen that though market research and exploration have not been specifically stated in the contract, but still the scope of the work clearly suggests that the contract is basically for the work of market research and exploration which would be taxable under section 65(105)(y) of the Finance Act but in view of the provisions of rule 3(ii) of the Import Rules, no service tax would be payable.

35. The last contention advanced by the learned Counsel for the Appellant is that the extended period of limitation cannot be invoked.

36. Though it may not be necessary to examine this issue as it has been found that the Appellant is not liable to pay service tax on reverse charge mechanism, yet this aspect can be examined as an additional factor.

37. The contention of learned counsel for the petitioner is that the issue of taxability of such services received from abroad under reverse charge mechanism was under litigation at various forums and was settled later and, therefore, it cannot be contended that there was suppression of facts with intention to evade payment of duty. In this connection learned Counsel for the Appellant has placed reliance upon the decisions of the Tribunal in M/s Skipper

Electricals India Ltd. v/s Commissioner of Central Excise, Jaipur -I, 2017-TIOL-2891-CESTAT-DEL and M/s Kriti Nutrients Ltd. v/s Commissioner of Central Excise and Service Tax, Indore (MP), 2017-TIOL-99-CESTAT-DEL.

38. In M/s Skipper Electricals India Ltd it was observed as under:-

"Admittedly, we find that the issue relating to service tax liability on the recipient of service was a subject matter of large number of litigations. The concept of reverse charge on import of service was new and was disputed. The legal position got clarified only with the decision of Hon'ble Bombay High Court in the case of Indian National Shipowners Association v/s Union of India, 2009 (13) STR 235 (Bom.), In such situation, we find that there is no justification for invoking allegation of willful mis-statement, suppression of fact with intend to evade service tax etc. Accordingly, we hold that the demand is barred by limitation, as having been issued well beyond the normal period from the relevant date. Accordingly, the impugned order is set aside on the ground of limitation and the appeal is allowed."

39. In Kriti Nutrients Ltd., the Tribunal observed:-

"Otherwise also we note that the fact that the service tax on reverse charge was recently introduced and its scope was not clear and entertained various doubts, requiring issuance of various clarifications by the Board. In the facts and circumstances of the case that the services were provided outside India and tax liability fell on the appellant on reverse charge basis, a bona fide belief entertained by the appellant was justified."

40. This submission advanced by learned Counsel for the Appellant deserves to be accepted in view of the aforesaid decisions of the Tribunal. When there was some ambiguity regarding levy of service tax on services received from abroad under the reserve charge mechanism and it was clarified later, it cannot be said that the appellant had suppressed any material fact from the department with intention to avoid payment of service tax.

41. Thus, for all the reasons stated above, the order dated 26.05.2015 passed by the Commissioner cannot be sustained and is set aside. The appeals are accordingly, allowed.

(Order pronounced in the open Court on 17.09.2021)