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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. ST/2061/2010

(Arising out of Order-in-Original No. 14/2009 (RS) dated 20.11.2009 passed by Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam-I)

M/s Hindustan Shipyard Ltd., ...Appellant(s)

Vs.

Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam-I .....Respondent(s)

Appearance
Shri S. Thirumalai, Advocate for the Appellant.
Shri AVLN Chary, Superintendent (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 03/10/2018
Date of Decision: 13/11/2018

FINAL ORDER No. A/31412/2018

[Order per: P. Venkata Subba Rao]

This appeal is filed against Order-in-Original No. 14/2009 (RS) dated 20.11.2009.

2. The appellant herein is a Government of India owned public sector undertaking, engaged in building of ships and maintenance. They have received a contract from Indian Navy for submarine retrofitting. In terms of the contract they have received

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some amounts on which they are paying the service tax under Management, Maintenance or repair services. In addition, they received other amounts on which the Revenue sought to collect service tax which is the point of dispute. These amounts are:

i) An amount received from Indian Navy for the purpose of upgrading their infrastructure at the shipyard so as to facilitate they undertaking future refits for Indian Navy. This amount is not linked to the present contract for refitting the submarine but an amount given to the appellant to enhance their facilitates. This amount will be adjusted against the payments to be made in future contracts.

ii) An amount paid by the appellant as income tax deducted from the payments to be made to the Russian overseas suppliers but which were instead reimbursed by the Indian Navy. There was also an amount which the appellant paid as VAT for goods procured procured domestically which was also reimbursed by Indian Navy.

iii) An amount paid by the appellant to the Russian company for procuring Repair Technical Documents (RTDs) on behalf of the Indian Navy.

3. It is the case of the Revenue that the amount received by the appellant from Indian Navy for building facilities at their shipyard are in the nature of advance payments for taxable services to be provided and the service tax has to be paid on the same. It is the case of the appellant that this amount is in the nature of a grant at present and it is not linked to any service provided to any person at present. In future when contracts are signed this amount will be

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amortized against such future payments. Thus, it is the in the form of mobilization advance received for the sake of strengthening their own infrastructure and is not linked to any service provided or to be provided. They rely on the order of the Tribunal in the case of *SMS Infrastructure Ltd., Vs. CCE & Cus, Nagpur* [2017 (47) STR 17 (Tribunal-Mum)] (in which one of us, Shri M.V. Ravindran was a member) in which it was held "as far as mobilization advance concerned, it is contended that the adjudicating authority failed to appreciate the submissions made by the assessee to the effect that these are payments received towards obtaining necessary equipments and creating basic facilities before commencement of rendering of services. Reliance was placed on the order of the Tribunal in the case of Thermax Instrumentation Ltd., Vs. CCE, Pune-I [2016 (42) STR 19 (Tri.-Mumbai)] which has enumerated the various judicial decisions that advances made cannot be as to be taxed if such advances are adjusted against dues for rendering of services as that amount to double taxation. We respectfully follow these decisions". This order was appealed against in the Supreme Court but it has not been stayed or set aside so far. As far as the reimbursement of the income tax paid by the appellant as TDS for the overseas suppliers and reimbursement of VAT paid are concerned, the Learned Commissioner held in the impugned order "as a natural corollary, the amounts of income tax and VAT amounts associated with the service which were reimbursed to HSL by Indian Navy are to be treated as part of the consideration for rendering the said service on which the amount of service tax will have to be computed". The Learned Counsel for the appellant argued that in the case of Intercontinental Consultants &

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Technocrats Pvt. Ltd., [2018 (10) GSTL 401 (S.C.)] the Hon'ble Supreme Court held that, any amount which is calculated not for providing taxable service cannot form part of value, and service tax is to be paid only on services actually provided by service provider and also held that Rule 5 of Service Tax (Determination of Value) Rules 2006 is ultra vires the Act. Hence reimbursable expenses are taxable only post amendment to Section 67 by the Finance Act, 2015 and not before. It is his contention that the VAT and income tax which were reimbursed to them by the Indian Navy cannot be included in the value of taxable services and cannot be taxed in light of the law laid down by the Supreme Court.

4. As far as demand on consideration received from Indian Navy towards sale of imported RTDs is concerned, it is the contention of the Revenue that these are in the form of Consulting Engineering Services which have been obtained from abroad by the appellant on behalf of the Indian Navy and hence service tax is liable to be paid towards such services. It is the contention of the Learned Counsel that the repair technical documents (RTDs) are not in the nature of services but are goods which they have imported from outside India, by filing a bill of entry. Further, as these have been imported, they were excluded from the Andhra Pradesh VAT and were exempted from payment of CST. It is his contention that no service tax is paid can be charged in the RTDs as these are in the nature of the goods and are not services. As far as the income tax (TDS) on behalf of the Russian Company on sale of RTDs paid by them which were reimbursed by the Indian Navy are concerned, it is the submission of the Learned Counsel

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that these are reimbursable expenses cannot be included in the value of taxable service in view of the judgment of the Hon'ble Apex Court in the case of *Intercontinental Consultants & Technocrats Pvt. Ltd.,* (supra). As an alternative submission of the Learned Counsel also argued that the entire facts were available to the Revenue and they have been paying service tax and filing periodical service tax returns and therefore they cannot be held to have suppressed facts, or committed fraud, collusion, wilful mis-statement or contravened of provisions of Act with an intent to evade payment of service tax. It is also his contention that as a public sector undertaking they have no intention to evade tax defrauding the Government. He therefore argued that impugned order is liable to be set aside on grounds of limitation also.

5. Learned Departmental Representative reiterates the arguments made in the Order-in-Original and argues that the appeal may be rejected.

6. We have considered the arguments on both sides and perused the records and we proceed to decide the issues on merit. As far as the amounts received by the appellant from the Indian Navy for the purpose of upgrading their facilities at the shipyard are concerned, they are not linked to the present contract and hence can only be termed mobilization advances not linked to any signed contract for rendering services. Of course, in future Indian Navy may award the appellant contracts and the amounts now paid will be adjusted against such contracts. At this stage it is not clear as to what contracts will be

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signed and whether they will be liable to service tax during that period. Therefore, we do not find any ground to charge service tax on the mobilization advance received by the appellant. Respectfully, we follow the decision of the Tribunal in the case of *SMS Infrastructure Ltd.,* (supra) and hold that no service tax is payable on the amount received towards mobilization advance of the contract from the Indian Navy. As far as the amounts received towards reimbursement of income tax and VAT paid including the TDS paid by the appellant and reimbursed by the Indian Navy are concerned, these are in the nature of reimbursable expenses and hence cannot be included in the value of taxable services as has been held by the Hon'ble Supreme Court in the case of *Intercontinental Consultants & Technocrats Pvt. Ltd.,* (supra). As far as the amounts received towards RTDs are concerned, these are clearly goods received by the appellant on behalf of Indian Navy and were imported by filing a bill of entry and no service tax can be levied on the goods. In conclusion, we find that the impugned order is liable to be set aside and we do so.

7. The impugned order is set aside and the appeal is allowed.

(Order pronounced on 13/11/2018 in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi....