CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 90116 of 2014

(Arising out of Order-in-Original No. 53/STC-I/SKS/14-15 dated 23.09.2014 passed by the Commissioner of Central Excise, Mumbai II)

M/s. Bharat Petroleum Corporation Ltd. …..Appellant
Bharat Bhavan-II, Ballard Estate,
Currimbhoy Road,
Mumbai

Vs.

Commissioner of Service Tax, Mumbai I …..Respondent
Office of Commissioner of Service Tax,
4th Floor, Central Excise Bldg.
MK Road, Churchgate
Mumbai

APPEARANCE:
Shri T.C. Nair, Advocate for the appellant
Shri M. Suresh, Dy. Comm(Authorised Representative) for the Respondent

CORAM:
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER No: A/85645/2020

DATE OF HEARING : 22.08.2019
DATE OF DECISION : 23.07.2020

PER: C J MATHEW

M/s Bharat Petroleum Corporation Ltd is an appeal before us against the confirmation of demand of ₹2,30,37,688/- under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, and penalty of like amount imposed under section 78 of Finance Act, 1994 *vide* order-in-original no. 53/STC-

I/SKS/14-15 dated 23rd September 2014 of Commissioner of Service Tax, Mumbai-I. Proceedings had been initiated on five counts for recovery of ₹79,28,91,610/-, of which demand of ₹74,43,16,110/- pertaining to erroneous reporting of foreign currency payment in the notes to accounts for financial year 2008-09 was dropped in entirety and the demand of ₹4,16,47,020/-, pertaining to payment in foreign currency to agents outside the country towards port charges, was dropped to the extent of ₹2,53,76,310/-. Thus the dispute is limited to confirmation of ₹5,44,531/-, being the reimbursement to out chartering agents, ₹1,62,70,710/-, being payment to agents for handling port charges outside India, ₹16,273/- towards the reimbursement of deputation expenditure, ₹11,84,500/- as sales promotion expenditure, ₹4,30,648/- as expenditure on maintenance and repair and ₹7,20,126/- towards expenditure on consulting engineers and training. The charge was fastened on the appellant in terms of section 66A of Finance Act, 1994.

2. Pointing out to errors in computation, Learned Counsel for the appellant contends that the dispute continues only on the confirmation, arising from the finding of having remitted foreign exchange to agents outside the country for discharge of port charges there and the reimbursement of sales promotion charges incurred by their contracted partners in Sri Lanka. In their appeal, tax liability arising from expenditure on maintenance and repair, as well as consulting engineers and training services incurred outside the country to the extent of ₹50,21,774/-, along with interest of ₹21,68,235/- had

been discharged by them immediately on those being brought to their notice.

3. Learned Counsel draws our attention to the decision of the Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 40 (SC)]* which has held that 'gross amount' in section 67 of Finance Act, 1994, qualified by the deployment of the expression 'such', limits the taxability to the consideration for that service alone and that 'reimbursable expenses', received as 'pure agent' for onward transmission, is beyond the scope of inclusion in 'gross amount'. He also made the further plea that the liability having been fastened on the recipient, under section 66A of Finance Act, 1994, the imposition of penalty is not warranted as, in view of eligibility to CENVAT credit on such taxes, the ingredients prescribed for invoking of section 78 of Finance Act, 1994 cannot be said to exist.

4. Countering the pleas made on behalf of the appellant, Learned Authorised Representative submitted that the decision of the Tribunal in *Chennai Port Trust v. Commissioner of Service Tax, Chennai [2017 (5) GSTL 394 (Tri-Chennai)]* and in *Bharat Petroleum Corporation Ltd v. Commissioner of Central Excise, Nashik [2009 (242) ELT 358 (Tri-Mumbai)]* are binding precedents for uploading the impugned order.

5. The appellant is in the business of refining of crude oil. In addition, as oil marketing company, they trade on their own account as well as

that of other refiners, in the public sector. For the handling of liquid hydrocarbons, vessels are chartered and, in accordance with the practice in the shipping industry, agents are appointed at respective ports for the handling of the vessels; in addition to payment being made to these agents for services rendered to the appellant outside the country, the charges levied by the host ports are also routed through these agents. It is the claim of the appellant that, on the direction of the adjudicating authority, they had segregated the agency fees and port charges remitted during the disputed period as □1,21,99,369/- and □13,36,71,072/- respectively which was not taken into consideration in the impugned order. On the issue of inclusion of reimbursable expenses, transmitted to their agents outside the country for discharge of charges levied by port authorities there, there is no evidence of any portion of such amount having been retained by the agents. The decision of the Hon'ble Supreme Court in *re Intercontinental Consultants and Technocrats Pvt Ltd* was not available to the adjudicating authority, and the ruling therein, that

> *'24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount is calculated not for providing such taxable service cannot be part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from,*

> *May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 in the valuation of taxable service, the value of taxable service shall be gross amount charged by the service provider 'for such service' and valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*
>
> *25. This position did not change even in the amended Section 67 which was inserted on May 1, 2006...'*

being applicable squarely to the remittances towards port charges for the handling of vessels, that portion of the demand stands erased. As the dispute on that portion of the demand relates to valuation, the invoking of section 66A of Finance Act, 1994 is not relevant to the findings.

As for as the dispute pertaining to the commission paid to vessel agents abroad, the agencies involved in chartering out of vessels outside India and the amount remitted to M/s TVS Lanka, the propriety of fastening the tax liability on the recipient of the service under section 66A of Finance Act, 1994 requires evaluation. The former two pertain to the alleged rendering of service, chargeable to tax under section 65 (105) (zzb) of Finance Act, 1994, by the overseas agents and it would appear that the umbrella provision therein, as 'commission agent', persuaded the adjudicating authority to conclude that 'business auxiliary service' had been received in India. There is a

long history to the tax on services sourced from abroad and received in India and it was afforded legal validity only by transferring the liability to the entity in India through legal fiction of deeming the recipient to be the provider.

6. The business of chartering out of vessels and that of handling of vessels at foreign ports were transacted by the appellant outside India. There is no dispute in this score. The question that begs an answer is whether rendering of such service outside India, even if it is for the benefit of the entity in India, amounts to provision of the service in India. The adjudicating authority appears to have crystallised the tax liability on the sole fact of remittance of foreign currency to an agent outside the country and, inferring that such transmission is consideration, has presumed existence of a taxable service without subjecting the impugned activity to the test of conformity with section 65 (105) of Finance Act, 1994, the scheme of tax prevailing during the period of dispute. It would also appear that there has been a presumption that the concatenation of 'commission' in accounting entries and description of the correspondent outside the country as 'agent' suffices to label the activity as that of 'commission agency' without considering the commercial understanding of such. The peculiar characteristic of invisibility, and intangibility of the taxable event compounded by the near impossibility of segregating the taxable element in a bundled transaction, mandates rigorous rules of engagement to comply with constitutional requirement of limiting the levy within the authority of law. Hard enough as that is, the taxation

of services rendered from outside India by the legal fiction of deeming the recipient as provider cannot be founded on money transaction. The scheme of taxation of services in Finance Act, 1994 does not envisage transfer of money to be a service as evidence of such rendering. The taxation of services procured from abroad, if such was the legislative intent, would have been a simple enactment without the need of either the deeming fiction or the elaborate Rules for determination of the destination of service.

7. It was in acknowledgement of the complexity of taxation of services procured from outside India that the Tribunal examined disputed aspects in several decisions to portray the word picture of the statute in the several cases decided over the years. For the settlement of the present dispute, we refer to the decisions in *Milind Kulkarni & Ors v. Commissioner of Central Excise, Pune I [2016-TIOL-709-CESTAT-MUM]* and in *Genome Biotech Pvt Ltd v. Commissioner of Central Excise & Service Tax, Nashik [2016-TIOL-529-CESTAT-MUM]*. It is essential that the tax authorities determine the existence of the recipient and the provider as well as the fitment of the activity within the descriptions enumerated in section 65 (105) of Finance Act, 1994. It was further held that, in keeping with the rigid application of the ascertainment of receipt the service in India, implied by the incorporation of section 93 of Finance Act, 1994 in the said Rules, for exempting all other transaction, the charge can be laid on the door of the recipient subject to conformity with Taxation of Services (Provided from outside India and received in India) Rules, 2006 in

which, not surprisingly, the activities relating to immovable property in India and performance, perceptibly received in India are taxable in India with the default grouping, based on the location of the recipient, restricted to deployment of such service for business of commerce in India.

8. It is trite to assert that the compelling reason for taxation of services rendered from abroad in the hands of the recipient was two-fold: that businesses in India should not be permitted to indulge in arbitrage owing to escapement from tax on services in which the provider is beyond jurisdiction and that the chain of value-added is not broken. Hence, the receipt of services in India for furtherance of business and commerce are co-terminus parameters for taxation. The convenience of classification as 'business auxiliary service', to bring the activities within the residual grouping of rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, merely from 'commission' having been paid, does not pass muster in view of competing and more specific descriptions in section 65(105) of Finance Act, 1994.

9. In the field of maritime commerce, the activity of vessel handling in ports is entrusted to 'steamer agents' and of goods to 'customs brokers'; undoubtedly, these are agents but if legislative intent was to tax them as providers of 'business auxiliary service', there would be no need to have these separate descriptions in the enumeration of 'taxable service' and it cannot be the case of the tax authorities that

these varieties of agencies are peculiar to India. Logically, when such services are provided by agencies outside India these cannot be provided within India and it is for such reason that taxable services described in section 65 (105) (h) and section 65 (105) (i) of Finance Act, 1994 are within the ambit of section 66A of Finance Act, 1994 only to the extent of having been performed in India. Therefore, the commission or agency fee remitted to entities for handling of vessels outside India are exempt from taxation.

10. The chartering out of vessels, in the possession of the appellant but lying idle, is a separate business activity. It is in the nature of a service rendered outside India by the appellant and the agency commission, disbursed in India and remitted outside India, is a business expenditure in furtherance of rendering that service. Even of such activity were to conform to a description of the taxable services in section 65 (105) of Finance Act, 1994, its lack of linkage with business and commerce in India would take it out of the purview of the said Rules and, thereby, section 66 A of Finance Act, 1994.

Consequently, the taxability of commission paid to agents for handling of vessels outside India as well as for out charter of vessels fails and, with it, the other detriments fastened on the appellant in relation to these demands. The appellant has discharged the tax liability on ‘maintenance and repair’ and ‘consulting engineer and training’ services. Learned Counsel submits that no evidence of the existence of any of the ingredients warranting the invoking of section 78 of Finance Act, 1994 is on record. It is also brought to our notice

that the Tribunal has, in *Jet Airways (I) Ltd v. Commissioner of Service Tax, Mumbai [2016 (8) TMI 989-CESTAT Mumbai]*, held that the revenue neutrality of CENVAT credit in procurement of services from outside the country blunted the scope for alleging the existence of ingredients that permit the invoking of the extended period of limitation as well as penalty under section 78 of Finance Act, 1994. Indeed, but for the proceedings initiated in relation to the demands that we have, *supra*, set aside, the absence of these very ingredients, coupled the promptitude with which the liability had been discharged, the option of initiation of proceedings, would therefore close the option of initiating proceedings nearly for imposition of penalty. Therefore, we have no hesitation in setting aside the penalties under section 78 of Finance Act, 1994 attended upon the two services that remain in dispute.

11. The appeal is accordingly disposed off.

(Order pronounced in open court on 23.07.2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

//SR