CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87483 of 2016

[Arising out of Order-in-Original No: 31/STC-V/SKD/16-17 dated 9th August 2016 passed by the Commissioner of Service Tax - V, Mumbai.]

Gammon India Ltd
Gammon House, PB No. 9129, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400025 ….***Appellant***

versus

Commissioner of Service Tax - V
4th Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector – E,
Bandra-Kurla Complex, Bandra (E), Mumbai – 400051 ***…Respondent***

APPEARANCE:

Shri Prakash Shah with Shri Mohit Rawal, Advocates for the appellant

Shri Bidhan Chandra, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLEDR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85800 / 2020

DATE OF HEARING: 28/08/2019
DATE OF DECISION: 23/07/2020

PER: C J MATHEW

This appeal of M/s Gammon India Ltd, against order-in-original no. 31/STC-V/SKD/16-17 dated 9th August 2016 of Commissioner of

Service Tax-V, Mumbai, challenges the confirmation of liability of ₹ 24,46,94,906 demanded under section 73 of Finance Act, 1994, with applicable interest under section 75 of Finance Act, 1994, and the imposition of penalty of like amount under section 78 of Finance Act, 1994 and of ₹ 10,000 under section 77 of Finance Act, 1994. The dispute concerns the stage – on receipt or on issue of the bill - at which 'mobilization advance' paid to the appellant is leviable to tax.

2. The demand is founded on the factual matrix of 'mobilization advance' having been received by the appellant in pursuance of contracts entered into with recipients of services rendered by them applied to the legal framework established by amendments to section 67 of Finance Act, 1994 in 2005, 2006 and 2008, the clarification issued in circular no. BI/6/2005-TRU dated 27th July 2005 of Central Board of Excise & Customs (CBEC) and taxability of 'works contract service' so rendered with effect from 1st June 2007, by the newly incorporated section 65(105) (zzza) of Finance Act, 1994, which, according to the adjudicating authority, overcomes the strenuous defence put forth by the noticee.

3. It is contended by Learned Counsel for the appellant that the entire contractual value of the impugned transactions had, as on 16th July 2015, been subjected to levy under Finance Act, 1994 and that mobilization advance, totaling ₹ 587,62,76,512 from 2008-09 to

2011-12, was not additional consideration liable to be taxed above and beyond that already discharged but, contracted for adjustment against the final payment due on the contracts, was not taxable at the time of receipt. Narrating the nature of 'mobilization advance' in construction contracts, it is argued that the payment is received well before the commencement of the contracted work and, being for procurement of essential equipment and labour as prelude to performance of contract, the responsibility solely of the appellant, is a surrogate financial accommodation. It is further submitted that the advance, on which interest is payable by the appellant, is granted upon execution of a bank guarantee implying its disconnect from the consideration payable, at various stages, during the performance of the contract. The discarding, without proper reasoning, of their contention before the adjudicating authority that tax has been discharged on the entire contractual liability is assailed in no uncertain terms by Learned Counsel who reiterates the reliance placed on the decision of *Thermax Instrumentation Ltd v. Commissioner of Central Excise, Ludhiana [2016 (42) STR 19]* and in *Commissioner of Central Excise, Ludhiana v. JR Industries [2009 (16) STR 51]*.

4. Learned Authorized Representative places particular emphasis on section 67(3) of Finance Act, 1994, the *proviso* to rule 6 of Service Tax Rules, 1994 and the circular of Central Board of Excise & Customs (CBEC). According to him, the decision of the Tribunal in

Central Power Research Institute v. Commissioner of Central Excise, Bhopal [2017-TIOL-2504-CESTAT-DEL] has placed the decision in *re Thermax Instrumentation P Ltd* to 'mobilization advance' in the proper perspective and further urges us that the decision in *Sunil Hi-Tech Engineers Ltd v. Commissioner of Central Excise, Nagpur [final order no. A/88355-88356/17 dated 13th July 2017 disposing of appeal no. ST/85373 & 85379/13]* makes it abundantly clear that it was considered normal for all providers of 'works contract services' to concede taxability of 'advance' at the stage of receipt.

5. Other than expansion of the taxpayers by incorporating more services within section 65(105) of Finance Act, 1994, the tax mechanism has been guided by two guiderails: convenience of enforcement exemplified by deeming 'gross amount' received by the service provider from the recipient, to be the taxable value and unjust retention which is premised on the inclusion of tax component in every payment. The construction placed upon statutory provisions, in the light of these, and the construing of every monetary transaction between recipient and the provider as consideration for taxable service are manifested in the several disputes between the tax authorities and assessees. It is of interest to note that, since the issue of the impugned order, several changes - by statutory enactment and by judicial determination - have intervened to restrain the administration within the constitutional mandate of Article 265 of Constitution of India.

6. Much emphasis has been placed by the adjudicating authority, as well as by Learned Authorized Representative, on the unarguable implications of amendment to section 65 and 67 of Finance Act, 1994. The first of such was the incorporating of 'or to be provided' in section 67 to enlarge the reach of the taxable services and the insertion of *Explanation* 3 below by Finance Act, 2005 The second, effected in 2004, is the incorporation of *Explanation* below the *proviso* in rule 6(1) of Service Tax Rules, 1994. The combined consequence, in the finding of the adjudicating authority, is that 'advance' is payment of consideration for taxable services to be provided and, hence, liable to tax upon receipt. The explanation offered by the appellant of discharge of tax liability on the entire contractual value did not find favour with the adjudicating authority in the absence of details pertaining to the payment. On the other hand, we also do not find any evidence, that is on record in the impugned order, of any tax liability remaining unpaid on the contracted value and the only finding that emanates from the impugned order is that the liability was not discharged on receipt. The consequence of such delayed discharge could only have been liability to interest. To that extent, the impugned order is flawed and tangential.

7. With the notification of Point of Taxation Rules, 2011, effective from 1 April 2011, there can be no doubt about the intention to collect tax on payment, received in advance of performance of service for

which that, in part or wholly, is consideration, being made manifest. In the context of this dispute, in which the appellant claims to be compliant with the said Rules, the liability to tax on advance payment is the first issue for consideration. Undoubtedly, the definition of 'taxable service' and the value to be adopted for assessment, in accordance with section 67 of Finance Act, 1994, incorporate 'to be provided' and is not restricted to 'provided' or 'rendered'. Therefore, it can be construed that Point of Taxation Rules, 2011, though envisaging tax liability on consideration received an advance, cannot be perceived as the original expression of legislative intent as any comprehensive statutory instrument is bound to encompass the existing provisions; this is particularly so, as, till the notification of the said Rules, tax was levied on 'receipt' basis and not on 'accrual' basis. The recognition of this principle did not derogate from the inclusion of 'advance' payments in the grouping of 'receipts' that were always liable to tax. We are not convinced by the arguments, put forth on behalf of Revenue, that the amendment to rule 6(1) of Service Tax Rules, 1994 or the incorporation effected in section 67 of Finance Act, 1994 were intended to tax all payments at the time of receipt. From a plain reading of the newly inserted *Explanation* in the Service Tax Rules, 1994, it would appear that intent was to ensure the distribution of the said advances to the month, quarter or such other period to which the rendering of service could be attributed. The

Explanation in section 67 of Finance Act, 1994, doubtlessly, qualified the inclusions in 'gross amount' which, owing to subsequent judicial pronouncements can only be assigned a very restricted frame and to which we shall turn our attention presently. The decision in *re Sunil Hi-Tech Engineers Ltd* was not called upon to determine this issue but to decide if the proceedings could continue in the light of prompt payment of computed liability; mere acceptance of a proposition of Revenue by one or more assessees is no measure of the sanctity of interpretation by the tax administration. In *re Central Power Research Institute*, the taxability of the service for which payment was received in advance was not in dispute; therein, the security deposit sought from clients before undertaking the service to be rendered, presented as a business model, and the claim of the appellant of the issue being limited to delayed payment of tax to be ascertained by the tax authority was.

8. The Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)*], has held that the latitude available in the commodity tax statutes pertaining to manufacture of goods or import of goods for construing the valuation provision on its own is not extended to Finance Act, 1994 in which the charging provision controls section 67 of Finance Act, 1994; consequently 'gross amount' therein is not the entirety of receipts but only as is relatable to the service rendered.

Impliedly, a monetary transaction between two persons does not purport to be for 'taxable services' alone and, to the extent of attribution to a service that is not taxable, is not liable for inclusion in the computation of tax liability. Hence, the consideration that is not attributable to 'taxable service' cannot be presumed to be inclusive of tax element and, thereby, to be subject to tax, whether received an advance or subsequently.

9. The several contracts provide for the payment to be made at different, pre-determined stages of performance and are, generally, subject to evaluation of the work undertaken. It is also seen that such appraisal, as a prelude to making payments, is not undertaken until after the execution of the work in relation to the taxable service has commenced and that all the contracts, while linking such measurable stages, provide for payment of only 90% of contracted amount for the entirety of the work. The 'mobilization advance' is adjusted against the final payment due and is not linked to the work but as a pledge of the contract between the appellant and principal. It is also subject to furnishing of prescribed 'bank guarantee'; there is no connection with the performance of the contract. It is not in dispute that the 'mobilization advance', carrying interest, is granted to enable the contractor to prepare for undertaking the contracted work. The subsequent adjustment with the final payment due does not suffice to construe this as an advance payment for the work to be done merely

because the recipient and payee happened to be the provider of service. The payment of 'mobilization advance' is but a separate financial transaction within the contract for providing of service and, within the limits laid down by the Hon'ble Supreme Court in re Intercontinental Consultants and Technocrats Ltd, is not permitted to be included in the 'gross amount' envisaged in section 67 of Finance Act, 1994. We may also like to emphasize here that the issue of 'mobilization advance', especially in the examination of its nature, has not been considered in the decisions cited by Learned Authorized Representative.

10. For the above reason, and in view of absence of allegation that any part of the contracted value has not been levied to tax, we hold that the demand is not consistent with law and deserves to be set-aside.

11. Appeal is allowed.

(Order pronounced in the open court on 23/07/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*