CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 596 of 2011

[Arising out of OIO-STC/32/COMMR/AHD dated 13/07/2011 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

Hazira Lng Pvt Ltd **.....Appellant**
101-103, Abhijeet-Ii,
Mithakali Circle, Ellisbridge,
Ahmedabad,
Gujarat

VERSUS

C.S.T.-Service Tax - Ahmedabad **.....Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad,
Gujarat-380015

APPEARANCE:
Shri Jigar Shah, Advocate for the Appellant
Shri. Vinod Lukose, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 11349 /2022

DATE OF HEARING:11.08.2022
DATE OF DECISION: 02.11.2022

RAJU

This appeal has been filed by M/s. Hazira Lng Pvt Ltd against confirmation of demand of Service Tax, Interest and Penalty.

2 Learned Counsel submitted that the Appellants are the company registered under the provisions of erstwhile Companies Act, 1956. The Appellants were registered with Service Tax Authorities, Ahmedabad having registration number AAACH9143CST001.

2.1 Learned Counsel submitted that the Appellants have another group company associated enterprise namely M/s. Hazira Port Pvt. Ltd. (for sake of brevity, hereinafter referred to as "HPPL"). The Appellants shared certain

expenditure like common office building, security services, insurance services, manpower costs etc. with HPPL. The Appellants used to raise cost sharing invoices on HPPL. The Appellants also charged applicable service tax under the taxable category of Business Support Services from the invoices raised on or after 01.04.2006 for the costsharing invoices. Thus, during the period 01.04.2005 to 31.03.2008, the Appellants charged the cost sharing expenses of Rs.29,20,64,558/- along with service tax of Rs.2,64,57,777/-.

2.2 However, due to poor financial conditions of HPPL, the Appellants waived off the sum of Rs.29,20,64,558/- along with service tax of Rs.2,64,57,777/- on 31.03.2008. The said waiver was duly approved by the Board of Directors of the Appellants vide resolution dated 18.03.2008. The certified copy of the Board Resolution dated 18.03.2008 is available in appeal paper book on Page No. 35.

2.3 During the course of audit of the Appellants by the Service Tax Authorities, Ahmedabad, it was observed that the Appellants have waived Rs.29,20,64,558/- along with service tax of Rs.2,64,57,777/- on 31.03.2008, however, the Appellants have not paid the service tax.

2.4 The said audit observation culminated in to issuance of show cause notice having number F. No. STC/4-51/O&A/10-11 dated 18.10.2010. The show cause notice dated 18.10.2010 alleged that the waive off of the balance pertained to M/s. HPPL is nothing but consideration received and therefore, Appellants are liable for payment of service tax of Rs.2,64,57,777/-. The show cause notice dated 18.10.2010 alleged that an explanation under Section 67 of the Finance Act, 1994 as it existed on 31.03.2008 (the date on which the Appellants have waived off Rs.29,20,64,558/-along with service tax of Rs.2,64,57,777/-) defines "gross amount charged" which includes payment by book adjustment. The show cause notice dated 18.10.2010 alleged that since the Appellants and HPPL

are associated enterprises, hence, any amount waived off by book adjustment are nothing but realization of amount charged towards the service tax and consequently, the Appellants are liable to pay service tax of Rs.2,64,57,777/. The show cause notice dated 18.10.2010 alleged suppression, wilful misstatement on the part of the Appellants and therefore, invoked extended period of limitation and also demanded interest and penalties from the Appellants.

2.5 Learned Counsel submitted that the Appellants vide their letter dated 03.01.2011 filed a detailed reply to the show cause notice dated 18.10.2010 and submitted that the service tax is not payable. However, the Commissioner of Service Tax Ahmedabad vide his Order in Original No. STC/32/COMMR/AHD/2011 dated 13.07.2011 confirmed the demand of service tax along with interest and penalty as it was proposed in the show cause notice.

2.6 Learned Counsel for the Appellants argued that the sharing of costs between two associated enterprises is not rendition of service and therefore, demand of service tax is not sustainable.

2.7 He argued that the demand of service tax of Rs.2,64,57,777/- is raised on the Appellants on the costs shared with their associated enterprise namely HPPL. The Appellants submit that cost sharing is not rendition of service and therefore demand of service tax itself is not sustainable.

2.8 Learned Counsel for the Appellants further relied on following decisions:

- *Gujarat State Fertilizers Corporation Ltd. reported in 2016 (45) STR 489 (SC).*
- Reliance ADA Group Pvt. Ltd. reported in 2016 (43) STR 372 (Tri.-Mumbai)

- Historic Resorts Hotels Pvt. Ltd. reported in 2018 (9) GSTL 422 (Tri.-Del).
- Asian Hotels Ltd. reported in 2019 (9) TMI 670 - CESTAT New Delhi.
- Arvind Mills Ltd. 2014 (35) STR 496 (Guj)
- Gujarat Sidhee Cement Ltd. Final Order No. A/10701-10704/2019

In view of the above, the Learned Counsel argued that they have not rendered any services to HPPL and therefore, the demand of service tax itself is not sustainable.

2.9 Learned Counsel argued that the revenue authorities have failed to make out any case against the Appellants for demanding the service tax under the taxable category of business support services. The show cause notice did not allege that the said services are business support services. However, Ld. Commissioner still confirmed the service tax under business support services. The entire proceedings are in violation of principles of natural justice.

2.10 Learned Counsel for the Appellants submit that the show cause notice dated 18.10.2010 never alleged that the Appellants have rendered the services in the nature of business support services to M/s. HPPL and it does not refer to the statutory definition of business support services. For classification of services, the show cause notice dated 18.10.2010 merely relied on the statement of the employee of the Appellants wherein the employee of the Appellants has never agreed for the classification of services as business support services, Ld. Commissioner has also not made any observation or discussed anything that how the activities carried out by the Appellants would fall within the ambit of definition of business support services. Learned Counsel for the Appellants submit that in absence of any allegation in the show cause notice dated 18.10.2010 that the Appellants have rendered the services in the nature of business support services the demand of service tax cannot be confirmed under the taxable category of

business support services. The Learned Counsel relied on the decision of Hon'ble Gujarat High Court in case of *UCB India Pvt. Ltd. reported in 2016 (45) STR 39 (Guj),* and the decision of CESTAT Allahabad in case of *Micromatic Grinding Technologies Ltd. reported in 2019 (8) TMI 320 - CESTAT Allahabad.*

2.11 Learned Counsel for the Appellants would further submit that the activity would not fall within the definition of business support services as defined in Section 65(104c) of the Finance Act, 1994. Learned Counsel for the Appellants submit that by no stretch of imagination, the cost sharing between the parties would be equated with rendition of business support services of the nature specified above.

2.12 Learned Counsel argued that the entire controversy in the present case is surrounding the waiver of outstanding amount of M/s. HPPL by the Appellants. As Appellants realized that HPPL is not in sound financial position to pay the dues to the Appellants, the said amount was waived off by the Appellants on 31.03.2008. Learned Counsel argued that Appellants and HPPL were associated enterprise. He pointed out that with effect from 10.05.2008, the Section 67 of the Finance Act, 1994 was amended to have effect that "payment" would include debit/credit in the books accounts by book adjustment in case of associated enterprises.

2.13 Learned Counsel submit that the amendments carried out in Section 67 of the Finance Act, 1994 are prospective in nature and therefore would apply only with effect from 10.05.2008 and not for the period prior to that date. In thepresent case, the Appellants have waived off the outstanding of HPPL on 31.03.2008 and therefore, the Appellants are not liable to pay service tax.

2.14 Learned Counsel for the Appellants further submit that the same proposition has been laid down in following cases:

- McDonalds India Pvt. Ltd. 2018 (8) GSTL 25 (Delhi)
- Nortel Networks (I) Pvt. Ltd. 2017 (52) STR 489 (Tri.-Del)
- Sify Technologies Ltd. 2015 (39) STR 261
- GECAS Services India Pvt. Ltd. 2014 (36) STR 556 (Tri.-Del)

On the basis of the above, the Appellants submit that the reasoning given by Ld. Commissioner to hold that the Appellants were liable to pay service tax for the period prior to 10.05.2008 is erroneous and on this ground itself the appeal filed by the Appellants be allowed by setting aside the impugned order in original.

2.15 Learned Counsel argued that during the period in dispute, Rule 6 of the Service Tax Rules, 1994 dealing with payment of service tax prescribed that the payment of Service tax has to be made when the consideration for the said services is received.

2.16 In the present case it is undisputed fact that the Appellants have never receivedany consideration for alleged services during the period in dispute. Therefore, the Appellants are not liable for payment of service tax at all in the present case.

2.17 Learned Counsel for the Appellants further argued that they have acted as merely pure agent for HPPL to procure the services. The Appellants have independently not rendered any taxable services. Learned Counsel rely on the decision of Hon'ble Supreme Court in case of*Intercontinental Consultants & Technocrats reported in 2018 (10) GSTL 401(SC).*

2.18 Learned Counsel argued that the show cause notice placed reliance on explanation (c) under sub-section (4) of Section 67 of the Finance Act, 1994, which reads as under:

> *"gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debits notes and book adjustment."*

2.19 He argued that the analysis of the above explanation would reveal that if the payment is made through cheque, credit card, deduction from payment ore issue of credit notes or book adjustment then it would form part of the gross amount charged. Thus, the explanation is only for considering different modes of payment. It may be noted here that in the present case the amount is waived off and no payment is made to the Appellants. As submitted above, the liability to pay service tax was only on receipt of consideration and not at any other point in time. Therefore, reliance cannot be placed on explanation to Section 67(4) of the Finance Act, 1994. Learned Counsel further submit that the said explanation was amended with effect from 10.05.2008 which reads as under:

> *"gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debits notes and book adjustment, and any amount credited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise"*

2.20 Learned Counsel for the appellant submit that the above explanation was amended with effect from 10.05.2008 to treat even the debit/credit entries as payment in case of associated enterprise. However, this would take effect only with effect from 10.05.2008 and not prior to that.

2.21 Learned Counsel for the Appellants further submit that the term "payment by book adjustment" means instead of multiple flow of payments by each parties, settlement in the books of account is done and net payable amount is arrived at and that is paid. The Appellants rely on the case of *CIT Vs. Nainital Bank Ltd. 1966 (62) ITR 638 (SC)* and decision in case of *J B Boda& Co. Vs. CBDT 1996 (89) Taxmann 311 (SC).*

2.22 Learned Counsel for the Appellants further argued that the entire demand of service tax is time barred in the present case. The show cause

notice dated 18.10.2010 has been issued to the Appellants to demand the service tax for the period 01.04.2005 to 31.03.2008.The demand under Section 73 would have been limited to one year from the relevant date i.e. from the date of the show cause notice i.e. 18.10.2010.However, it is alleged that the Appellants have suppressed the material information from the revenue department and therefore, the show cause notice has invoked the extended period of limitation of 5 years.

2.23 Learned Counsel submit that the extended period of limitation is not sustainable in the present case for the reason that the Appellants have not suppressed anything from the revenue department. The transaction of waiving off of the balance pertaining to HPPL was recorded in the books of account and disclosed in other financial statements of the Appellants.

2.24 Learned Counsel further submits that since the demand of service tax is not sustainable demand of interest and penalty also would not survive.

2.25 Learned Counsel further submits that since the issue involved in the present case is one of interpretation, the extended period of limitation also cannot be invoked. On this count also the demand fails and the Appellants are entitled to consequential relief.

3. Learned AR relied on the impugned order, he also relied on the decision of Hon'ble Apex Court to admit an appeal against the decision of Tribunal in case of Sempertrans Nirlon (P) Ltd. vs. CCE 2019 (20) GSTL 560 (T). He also relied on the decision of Tribunal in case of Alumeco India Extrusion Ltd.- 2018 (363) ELT 486 (Tri.-Hyd).

4. We have gone through the rival submissions. We find that the appellant had entered into arrangement with their associates company namely M/s. Hazira Port Pvt. Ltd, by which they have claimed, they were sharing certain cost. Shri Sujal Shah Manager Taxation of Hazira Port Pvt Ltd

in his statement dated 04.10.2010 stated that the object of the cost sharing agreement was to identify the requirement for a joint or a common function that may be required by any of the associated enterprises namely Hazira Lng Pvt Ltd, Hazira Ports Pvt Ltd and Hazira Gas Pvt Ltd., respectively and to jointly procure and use the said services. The said agreement also required the associated enterprises to contribute towards their allocated share in cost of common function. The appellants had raised debit notes on associated enterprises and in the said debit notes they have treated the said cost sharing as supply of business support services. In the ST-3 returns for the period October, 2007 to March, 2008, the appellant had made the following remark in their ST-3 returns:

> *"The amount shown as taxable service charged represents the value to be contributed by our associated enterprise which in our view is not subject to Service Tax".*
>
> *Though the said transaction did not result into rendition of any taxable service, taking a conservative view to avoid litigation, they treated it as business support service."*

4.1 It was claimed by Shri Sujal Shah that the Company neither received the payment till 31.03.2008, nor there was any possibility of receive it in future. Consequently they wrote off the said amount in their books of accounts on 31.03.2008.

4.2 Prior to 10.05.2008, the explanation C to Section 67 read as under:

> *"gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debits notes and book adjustment."*

With effect from 10.05.2008, the said explanation C was substituted with the following explanation:

> *"gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debits notes and book adjustment, and any amount credited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay*

service tax, where the transaction of taxable service is with any associated enterprise".

4.3 The appellants have contended that they have not provided any services to their associated company. The arrangement between them and the associated company was in the nature of cost sharing they relied on the decision of Hon'ble Apex Court in case of Gujarat State Fertilizers & Chemicals Ltd Vs CCE 2016 (45) STR 489 (SC), wherein para 15, 16 & 17 following has been observed:

"15. We have considered the aforesaid submissions in the light of the material placed on record. We shall advert to the second aspect namely, as to whether the arrangement between GSFC and GACL amounts to providing any services by GSFC to GACL and 50% incineration expenses incurred would constitute charges for providing such services. There is no dispute about the manner in which HCN is received through pipeline from M/s. Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60: 40 respectively. GSFC and GACL are public sector undertakings, as already mentioned above. Since HCN is to be received through pipeline, it is abundantly clear that in order to save the expenditure, both the parties agreed that there should be a common pipeline. Once HCN is received through the said common pipeline it comes first to GSFC's premises and from there it is diverted in the ratio of 60 40, meaning thereby that GSFC receives 60% of the HCN whereas GACL receives 40% of the supply in accordance with their respective requirement To enable GACL to receive this HCN through common pipeline, arrangement/agreement was entered into between these two parties. For this purpose, handling facilities were installed in the premises of GSFC However, fact remains, for which there is no dispute, that for installation of these facilities both the parties had contributed towards the investment Since the said handling facilities are in the premises of GSFC, incineration also takes place at the said premises. Handling facilities expenditure thereof is shared equally by both the parties. That is clearly provided in the agreement/arrangement that was agreed to between the parties and is reflected in the Minutes dated 6-7-1980 Once these facts are accepted, we find that handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share the expenditure. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC By no stretch of imagination, it can be treated as common service provided by GSFC to GACL for which it is charging GACL.

16. We are, thus, of the opinion that the second ingredient has not been established in the present case and the question

of service tax does not arise. In view thereof, it is not necessary to go into the question as to whether receiving of HCN through the said common pipeline in the tank which is setup by the GFSC and GACL amounts to 'storage' or not and we leave the said question open.

17. For the aforesaid reasons, the demand of 'service tax made by the respondent is unwarranted and is hereby set aside. We, thus, allow these appeals thereby quashing the Adjudicating Authority's order as well as the order of the CESTAT."

In the light of the above observation of Hon'ble Apex Court, it is seen that the arrangement of the appellant with it is associate companies is in the nature of cost sharing and it would not be correct to say that the appellants are providing any services to their associate companies. In this regard the observations of Tribunal in the case of Reliance Ada Group Pvt Ltd Vs CST-2016 (43) STR 372 (T) also became relevant:

"5.5 It is therefore clear that common services are not 'provided' by the appellant but, only these are only 'procured' by the appellant from the Service Providers. Costs thereof are shared by the recipient Participating Group Companies by making reimbursements to the Appellant. The Appellant merely carries out the agency function of procurement of services for the Participating Group Companies which share the costs and expenses thereon.

5.6 We find that the reimbursements of the cost/expenses incurred by the Appellant cannot be regarded as consideration flowing to the Appellant towards the taxable service provided by the Appellant rather the receipts are towards the reimbursements of the cost/expenses incurred by the Appellant in terms of the cost sharing agreement with the Participating Group Companies.

5.7 Section 64(3) of the Act which states the "Extent, commencement and application" of Chapter V of the Act, reads as under:

> *"(3) It shall apply to taxable services provided on or after the commencement of this Chapter."*

Service tax is a levy on rendition of taxable service. We find that in the peculiar facts of the instant case, the Appellant is merely acting as a manager/trustee to incur expenses on behalf of the Participating Group Companies. The object of entering into such cost sharing arrangement is to reduce the cost of operation of the Participating Group Companies. The activities carried out by the Appellant enables the Participating Group Companies to share the common services, the best available talent and resources required for carrying out their business activities. No

taxable service is provided by the Appellant and therefore in absence of rendition of such service by the Appellant to the Participating Group Companies, the demand of Service tax cannot sustain.

5.8 It is seen that in the impugned Order contrary to the above findings recorded in Para 4.3 regarding procuring of services which are reproduced hereinabove, the adjudicating authority in Para 4.5 onwards of the impugned Order erroneously proceeds on the basis that those services were provided by the appellant. This self-contradictory finding is not supported by any documentary evidence. On the basis of such erroneous self-contradictory findings, the adjudicating authority holds that the activities do fall under the definition of 'Business Support Services under Section 65(104c) read With Section 65(105)(zzzq). We find that these observations and findings of the adjudicating authority emanate from the confusion that the Appellant provides the services in question, whereas the Appellant at best acts as an agency to procure services and allocate cost to various Participating Group Companies for which it can claim an amount of Rs One Crore jointly from all participating group companies as its fees in addition to the reimbursement of the total costs incurred Towards such common services.

5.9 No direct statutory provision or any binding precedent could be shown to us by the Revenue, which for the relevant time, covers the activity of incurring costs and seeking reimbursements as Pure Agent under the purview of the "Business Support Services" under Clause (105) of Section 65 of the Finance Act, 1994 as amended by Finance Act, 2006 There is no dispute on the fact that no additional fees or profits or consideration for Pure Agent services is received by the appellant, who has merely recovered actual costs incurred from the Participating Group Companies.

5.10 We find that the definition of 'Business Support Services' covers only specific activities in its inclusive part of the definition. Only if such specific activities are carried out, it would be classifiable as Business Support Services The Appellant per se in its own capacity has not provided any of the specified services to the Participating Group Companies The attempt of the adjudicating authority to link all the activities of the Appellant with the marketing policies, customer evaluation procurement policies, distribution policies, customer relation policies, taxation policies, etc, and also considering the appellant as a Service Provider, appears to be for anyhow bringing the same in the definition of 'taxable serves', which exercise is only on assumptions, without any documentary evidence, and contrary to the findings recorded in earlier part of the same impugned Order (in Para 4.3 thereof).”

4.4 We find that revenue has not been able to identify any specific service, which the appellant has provided to its associate companies. In these

circumstances, we do not find that the activities in the nature of sharing cost between associate companies amount to provision of any service by one company in the agreement with to any other companies in the said cost sharing agreement.

4.5 However, since the activities under taken under the cost sharing agreement do not amount to provision of Service in terms of the decision of Hon'ble Apex Court in case of Gujarat State Fertilizers & Chemicals Ltd.(supra), the demand of Service Tax on the activities under taken under the cost sharing agreement cannot be sustained.

5. The demand is therefore set aside, appeal is consequently allowed.

(Pronounced in the open Court on 02.11.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Palak