

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 530 of 2012

WITH

Service Tax Appeal No. 531 of 2012

AND

Service Tax Appeal No. 532 of 2012

(Arising out of common Order-in-Original Nos. 26 to 28/2012 dated 24.02.2012 passed by the Commissioner of Service Tax, M.H.U. Complex, Nandanam, Chennai – 600 035)

M/s. VSL India Private Limited

: Appellant

602 B, 6th Floor, Campus 4B,
RMZ Millenia Business Park,
143, Dr. MGR Road, Kandanchavady,
Perungudi, Chennai – 600 096

VERSUS

The Commissioner of Service Tax

: Respondent

692, M.H.U. Complex, Anna Salai, Nandanam,
Chennai – 600 035

APPEARANCE:

Shri S. Muthu Venkataraman, Learned Advocate for the Appellant

Smt. K. Komathi, Learned Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 40164-40166 / 2023

DATE OF HEARING: 21.02.2023

DATE OF DECISION: 16.03.2023

Order : [Per Hon'ble Mr. P. Dinesha]

These appeals are filed by the assessee against the Order-in-Original Nos. 26 to 28/2012 dated 24.02.2012 passed by the Commissioner of Service Tax, Chennai.

2. Facts, in brief, as could be gathered from the Show Cause Notices as well as the impugned Order-in-Original are that the appellant is primarily engaged in the field of civil construction, performing supply of post tensioning slabs / beams, installation, stressing, grouting, etc. The assessee had entered into an 'Offshore Services Agreement' with their holding company namely, M/s. VSL International Ltd., Switzerland ('M/s. VSLI' for short) dated 03.03.2006 whereby the holding company was to provide the appellant with requisite technical assistance in the fields of consultancy, advisory, operation and other services, as per the terms contained in the above agreement; it was also clear that the above services were to be provided by the VSL group as such, including M/s. VSLI and all other subsidiary and affiliate companies with whom separate service agreements could be entered into. Thus, an agreement was signed between the appellant and M/s. VSL, Hong Kong for providing assistance in managerial, financial, sales, marketing, controls and audit, taxes, personnel and training and technical services.

3. A Memorandum of Understanding (MOU) dated 01.01.2008 was drawn between the appellant and M/s. VSLI, which appears to be in furtherance to the earlier agreements between the two parties.

4. It appears that there was an audit of accounts of the appellant by the Internal Audit Group of the Service Tax Commissionerate wherein: (i) wrong availment of exemption under Notification No. 18/2002-S.T. dated 16.12.2002 by wrongly classifying the services imported from its group companies and (ii) non-inclusion of TDS in the taxable value of services received from outside India, were noticed, which prompted the issuance of Show Cause Notice dated 29.07.2010.

5. Subsequently, three Show Cause Notices were issued to the assessee, the details of which are as under:-

Sl. No.	Show Cause Notice No. & Date	Period Involved	Amount of demand proposed (in Rs.)
1.	SCN No. 414/2010 dated 29.07.2010	October 2008 to July 2009	1,23,91,512/-
2.	SCN No. 679/2010 dated 19.10.2010	August 2009 to March 2010	13,60,794/-
3.	SCN No. 461/2011 dated 13.10.2011	April 2010 to March 2011	9,80,837/-

6.1 The Show Cause Notice dated 29.07.2010 issued by the Commissioner captures, at paragraph 2.1.1, the salient features of the above MOU with M/s. VSLI, which reads as under: -

"it has been considered expedient and convenient that

- the services rendered by VSL Hong Kong shall henceforth be rendered by VSL International on the same terms and conditions

- The services being rendered by VSL International to The assessee will continue to be rendered by VSL International

- VSL International and the assessee shall enter into a single agreement incorporating the services to be rendered by VSL International and as per that agreement rendering of services by VSL International will be on the same terms and conditions as per the earlier agreement between (a) VSL India and VSL Hong Kong and (b) VSL India and VSL International"

6.2 Further, towards the end of paragraph 2.1.1, it is concluded as under: -

"The MOU also provides that the agreement dated 3.3.2006 entered into between the assessee and VSL, Hong Kong would automatically stand terminated subject to the terms and conditions in the MOU."

6.3.1 From the Show Cause Notice, it transpires that as per the terms of the agreement, the Revenue believed that the Associated Enterprises ('AE' for short) have provided various services to the assessee including deputation of personnel, etc. (as per paragraph 2.5.2) which primarily relate to the management of the organization and business of the assessee and hence, are appropriately classifiable under "Management or Business Consultant" services in terms of Section 65A of the Finance Act, 1994 and that supply of designs and drawings by the AE for the project in addition to the supply of equipment / tools were classifiable under Architect Services and Supply of Tangible Goods Services respectively. The above services appear to have been classified by the appellant as falling under the category of "Consulting Engineer" services. Thus, the Revenue entertained a doubt that, by claiming the above services as Consulting Engineer Services, which itself was wrong, the appellant had wrongly availed the exemption benefit of Notification No. 18/2002-S.T. *ibid.* and thus, it was proposed to re-classify the services involved under Management or Business Consultant Services / Architect Services / Supply of Tangible Goods Services and thereby demanding Service Tax of Rs.94,15,417/- (Service Tax + Education Cess + Secondary and Higher Education Cess), for the period from October 2008 to July 2009, as detailed at Annexure-I to the Show Cause Notice.

6.3.2 It is the further case of the Revenue that the appellant had credited the value mentioned in the invoices to the accounts of the AE in their books of account whereas the appellant had paid the Service Tax for the invoices received from the AE only for the amounts credited in the accounts of their AE, which, according to the Revenue, was contrary to the Explanation under Section 67 read with Explanation under Rule 6(1) of the Service Tax Rules, 1994. That is to say, the appellant had borne the TDS expenses of its AE over and above the amounts shown in the invoices of the AE, without including the TDS amount

in the value of taxable services. Thus, an amount of Rs.29,76,095/- (Service Tax + Education Cess + Secondary and Higher Education Cess), for the period from October 2008 to July 2009 was proposed to be demanded, as worked out at Annexure II to the Show Cause Notice.

6.4 For the subsequent periods, Show Cause Notices dated 19.10.2010 and 13.10.2011 were issued to the assessee *inter alia* proposing to demand the Service Tax of Rs.13,60,794/- for the period from August 2009 to March 2010 and Rs.9,80,837/- for the period from April 2010 to March 2011 respectively.

7. The appellant thereafter appears to have filed a detailed reply trying to justify the classification of the services received, under Consulting Engineer Services, as claimed by it. It also appears to have pleaded that the TDS component was rightly not included in the value of taxable services. The appellant also appears to have taken other legal grounds, namely, that the issue was, in any event, revenue neutral since any tax payable by it would in turn be available to it as CENVAT Credit and that extended period of limitation could not be invoked for the very same reason of revenue neutrality, for which reliance has been placed on a number of judicial precedents.

8.1 The Adjudicating Authority, having considered all the Show Cause Notices for common adjudication, has passed the impugned Order-in-Original Nos. 26 to 28/2012 dated 24.02.2012 whereby the demands proposed in the Show Cause Notices have been confirmed. In the impugned Order-in-Original, the Commissioner has referred to the C.B.E.C. Circular F. No. 177/2/2001-CX.4 [Section 37B Order No. 1/1/2001-ST] dated 27.06.2001 wherein the scope of management consultant service had been clarified by the Board, before confirming the proposed demand in the Show Cause Notices, insofar as the first issue is concerned.

8.2 The Commissioner has also referred to the payment of R&D Cess by the appellant to hold that mere payment of the same would not entitle the appellant to set off the same against Service Tax liability without any statutory provision envisaged under the Finance Act, 1994 extending such benefit. The reason for the above given in the impugned Order-in-Original, is that the exemption envisaged is service-specific and not a general exemption and hence, the services received by the appellant under Consulting Engineer Service was an afterthought, just to avail the benefit of the exemption Notification *ibid*. He thus concluded that the adjustment of R&D Cess sought by the appellant against the Service Tax liability was without any legal sanctity.

8.3 On the next issue of includability of TDS and the allegation of short payment of Service Tax on TDS component involved in the payment made to the appellant's AE, the Adjudicating Authority has referred to clauses 10(A), 10(C), 10(D) and 10(E) of the agreement dated 03.03.2006 to conclude that in terms of Section 67 of the Act read with Rule 7 of the Valuation Rules, the appellant was required to pay Service Tax on the gross consideration payable to its AE and not on the net amount paid as claimed by the appellant.

8.4 With regard to the invoking of extended period of limitation, the Commissioner has held that there was clear wilful mis-statement in ST-3 return inasmuch as the appellant had declared that it was not claiming any exemption, without further declaring anywhere in the ST-3 return that they had adjusted the R&D Cess from the total tax payable.

8.5 With regard to the other legal contention that the whole exercise was revenue neutral for the reason that the appellant was entitled to take CENVAT Credit, the Commissioner has held that a general claim, without substantiating the eligibility to take full credit, was not

sufficient. The Adjudicating Authority has relied on the decision of the Hon'ble Supreme Court in *M/s. Mahindra & Mahindra Ltd. [2005 (179) E.L.T. 21 (S.C.)]* in this regard.

9. It is against this order that the present appeals have been filed before this forum.

10. Heard Shri S. Muthu Venkataraman, Learned Advocate for the appellant and Smt. K. Komathi, Learned Additional Commissioner for the Revenue. After hearing both sides, we find that the following issues are required to be addressed to: -

- (i) Classification of the service involved;
- (ii) Whether the TDS amount remitted by the appellant partakes the character of consideration for 'service'?
- (iii) Whether the contention of the appellant that the situation is revenue neutral is correct?
- (iv) Whether the Show Cause Notice issued by invoking the extended period is justifiable?

11. Facts are not in dispute; the first agreement between the appellant and its AE was dated 06.12.2001 and the second agreement, which is dated 03.03.2006, was entered into to renew the above agreement dated 06.12.2001 with retrospective effect from 11.10.2005. There is also a Memorandum of Understanding (MOU) on record, which is dated 01.01.2008 and, as observed by the Commissioner at paragraph 2.1.1 of the Show Cause Notice dated 29.07.2010, the said MOU had provided that the agreement dated 03.03.2006 entered into between the assessee and M/s. VSL, Hong Kong would automatically stand terminated subject to the terms and conditions in the MOU, which fact has also been reproduced by us elsewhere in this Order.

12. The primary contentions of the appellant, through its Advocate, are as under: -

- (i) The definition of "consulting engineer" service has a wide amplitude to cover a gamut of services, including those which are involved / imported by the appellant in the case on hand.
- (ii) The terms of the agreement between the appellant and its overseas group companies reveal that the services received were in the nature of professional/technical expertise towards architectural/engineering projects undertaken by the appellant.
- (iii) The payment of R&D Cess was clearly with a reasonable belief that the nature of service was professional / technical only.
- (iv) Even if the services received were not classifiable under Consulting Engineer Service, still the exemption envisaged under Notification No. 18/2002-S.T. was available, irrespective of the nature of such taxable services.
- (v) Without prejudice, even if the services are classifiable under Management or Business Consultant Service / Architect Service, both the above services would fall under Rule 6 (5) of the CENVAT Credit Rules (CCR), 2004, as observed by the Adjudicating Authority and therefore, the authority himself has accepted that the issue is revenue neutral.
- (vi) He relied on the following case-law in this regard: -

- (a) *M/s. The Oberoi Rajvilas & ors. v. Commissioner of Central Excise, Jaipur* [2018 (5) TMI 1715 – CESTAT, New Delhi]
- (b) *M/s. Lemon Tree Hotels Pvt. Ltd. v. Commissioner of Service Tax, Chennai* [2018 (1) TMI 1215 – CESTAT, Chennai]

(c) *M/s. Beekay Engineering Corporation v. Commissioner of Central Excise, Raipur [2017 (11) TMI 1468 – CESTAT, New Delhi]*

(d) *Commissioner of C.Ex., Goa v. M/s. VM Salgaonkar & Bros. Pvt. Ltd. [2008 (2) TMI 90 – CESTAT, Mumbai]*

(vii) The appellant has borne the TDS as cost and paid the same by grossing up the consideration as per the Income Tax Act. The appellant having already discharged the Service Tax on the gross amount, there cannot be any allegation as to the non-payment of Service Tax on the TDS.

(viii) He relied on the following case-law in this regard: -

(a) *M/s. Magarpatta Township Development and Construction Co. Ltd. v. Commissioner of Central Excise, Pune-III [2016 (3) TMI 811 – CESTAT, Mumbai]*

(b) *M/s. Hindustan Oil Exploration Co. Ltd. v. Commissioner of G.S.T. & Central Excise [2019 (2) TMI 1248 – CESTAT, Chennai]*

(c) *M/s. Gayatri Hi-Tech Hotels Ltd. v. Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I [2022 (5) TMI 141 – CESTAT, Hyderabad]*

(d) *M/s. T.V.S. Motor Company Ltd. v. Commissioner of Central Excise & Service Tax, Chennai [2021 (9) TMI 81 – CESTAT, Chennai]*

(ix) The entire exercise was revenue neutral and therefore, the allegation as to suppression, etc., was not justifiable.

(x) He relied on the following case-law in this regard: -

(a) *Commissioner of C.Ex., Jamshedpur v. M/s. Jamshedpur Beverages [2007 (214) E.L.T. 321 (S.C.)]*

(b) Commissioner of C.Ex., Pune v. M/s. Coca-Cola India Pvt. Ltd. [2007 (213) E.L.T. 490 (S.C.)]

(c) M/s. Nirlon Ltd. v. Commissioner of C.Ex., Mumbai [2015 (320) E.L.T. 22 (S.C.)]

(d) Commissioner v. M/s. Hyundai Motor India Pvt. Ltd. [2020 (32) G.S.T.L. 1154 (S.C.)]

(e) Commissioner of C.Ex., Chennai-IV v. M/s. Tenneco RC India Pvt. Ltd. [2015 (323) E.L.T. 299 (Mad.)]

(f) M/s. Ponni Sugars Ltd. v. Commissioner of Central Excise & Service Tax, Salem [2018 (8) TMI 1587 – CESTAT, Chennai]

(g) M/s. Hwashin Automotive India (P) Ltd. v. The Commissioner of Central Excise [2018 (8) TMI 689 – CESTAT, Chennai]

13. *Per contra*, the Learned Additional Commissioner for the Revenue relied on the findings given in the impugned order. She would also rely on the following: -

(a) Commr. of C.Ex. & S.T., LTU, Chennai v. M/s. Sify Technologies Ltd. [2018 (17) G.S.T.L. 24 (Mad.)]

(b) M/s. Shervani Indus. Syndicate v. Commr. of C.Ex., Cus. & S.T., Allahabad [2009 (14) S.T.R. 486 (Tri. – Del.)]

(c) Commr. of C.Ex. & S.T., Raipur v. Shree Nakoda Ispat Ltd. [2019 (22) G.S.T.L. 276 (Tri. – Del.)]

14. We have considered the rival contentions and we have also gone through the various decisions / orders relied upon by the rival parties.

15.1 First we shall consider the definitions of “consulting engineer” and “management or business consultant” in the context of its taxability in terms of Section 65 (105) of the Finance Act, 1994. In addition, we also refer to the Trade Notice No. 53 CE (Service Tax)/97 – C.No. CE-20/41/ST/Trade Notice/97 dated 04.07.1997, Notification No. 18/2002-S.T. dated 16.12.2002, Section 3 of the Research and Development Cess Act, 1986 and C.B.E.C.

Circular F. No. 177/2/2001-CX.4 (*supra*), which are relevant in order to decide the first issue.

15.2.1 "Consulting Engineer" has been defined in Section 65 (31) of the Finance Act, 1994, as under: -

"(31) 'consulting engineer' means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering"

15.2.2 "Taxable Service" has been defined in Section 65 (105) to mean: -

"(105) 'taxable service' means any service provided or to be provided, -

.....

*.
.*

(g) to any person, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering.

Explanation. — For the purposes of this sub-clause, it is hereby declared that services provided by a consulting engineer in relation to advice, consultancy or technical assistance in the disciplines of both computer hardware engineering and computer software engineering shall also be classifiable under this sub-clause;..."

15.3.1 Section 65 (65) defines "management or business consultant" to mean: -

"(65) "management or business consultant" means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organisation or business in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management;"

15.3.2 C.B.E.C. Circular F. No. 177/2/2001-CX.4 [Section 37B Order No. 1/1/2001-ST] dated 27.06.2001 has clarified the scope of management consultant service. The relevant portion of the above Circular read as under: -

"7. In this regard, the Board had consulted the Indian Institute of Management, Ahmedabad for obtaining an expert opinion on the subject matter. They have opined that the term "Management" is generally understood to mean running the affair of an organisation in an organised and systematic manner. To be able to do this efficiently and effectively, management typically involves carrying out a host of activities, functions and tasks and at different levels. Thus management encompasses both strategic and operational level functioning and would include tasks such as planning, organising, staffing, directing, controlling and coordinating. Management also invariably involves designing organisational structure around functions such as marketing, manufacturing, research and development and finance and/or business area such as product groups or geographical markets. Thus management of any organisation involves carrying

out a wide variety of clearly defined activities across a number of organisational sub-units in a coherent and coordinated manner. Since the expression "Management" is an inclusive term, 'management consultant' would also be equally encompassing expression and would include any adviser who renders services on any aspect of management. They have further opined that financial advisory services rendered in merger and acquisition transactions are clearly in the nature of services in connection with the management of an organisation as merger and acquisition themselves are important dimension of modern management."

15.4 Trade Notice No. 53 CE (Service Tax)/97 – C.No. CE-20/41/ST/Trade Notice/97 dated 04.07.1997 has clarified the scope of the term "consulting engineer" as having wide amplitude, to include any one or more of the following categories: -

"(i) Feasibility study.

(ii) Pre-design services/project.

(iii) Basic design engineering.

(iv) Detailed design engineering.

(v) Procurement.

(vi) Construction supervision & project management.

(vii) Supervision of commissioning and initial operation.

(viii) Manpower planning and training.

(ix) Post-operation and management.

(x) Trouble shooting and technical services, including establishing systems and procedures for an existing plant.

Though the above list is not exhaustive, it illustrates the wide scope and nature of the services rendered by a consulting engineer."

By the above Trade Notice, it has to be understood that the list depicted above is not exhaustive.

15.5 Notification No. 18/2002-S.T. dated 16.12.2002 grants exemption to taxable services provided by a consulting engineer to any person on transfer of technology from so much of the Service Tax leviable thereon under Section 66 of the said Act, as is equivalent to the amount of cess payable on the said transfer of technology under the provisions of Section 3 of the Research and Development Cess Act, 1986 (hereinafter referred to as the 'R&DC Act') subject to the conditions laid down thereunder. Section 3 of the R&DC Act reads as under: -

"3. Levy and collection of cess on payments made towards import of technology.—

(1) There shall be levied and collected, for the purposes of this Act, a cess at such rate not exceeding five per cent. on all payments made towards the import of technology, as the Central Government may, from time to time, specify, by notification, in the Official Gazette.

(2) The cess shall be payable to the Central Government by an industrial concern which imports technology on or before making any payments towards such import and shall be paid by the industrial concern to any specified agency."

15.6.1 Notification No. 18/2002-S.T. dated 16.12.2002 is reproduced as ready reference: -

"Notification No. 18/2002-S.T., dated 16-12-2002

In exercise of the powers conferred by Sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided by a consulting engineer to a client on transfer of technology from so much of the service tax leviable thereon under Section 66 of the said Act, as is equivalent to the amount of cess paid on the said transfer of technology under the provisions of Section 3 of the Research and Development Cess Act, 1986 (32 of 1986)."

15.6.2 The same was reiterated by the Board vide Notification No. 14/2012–Service Tax dated 17.03.2012 and further, it came to be rescinded vide Notification No. 34/2012-Service Tax dated 20.06.2012.

16.1 C.B.E.C. Circular F. No. 177/2/2001-CX.4 (*supra*) refers to the consultation of the Board with the Indian Institute of Management, Ahmedabad before issuing the Circular, through which the Board has clarified the scope of management consultant service and this has been specifically considered at paragraph 6.3 of the impugned order. A perusal of the scope of management consultant service, as clarified by the board, leads to the irresistible conclusion that "Management" is generally understood to mean as activities or services related to running the affairs of an organization/business; which typically involves carrying out a host of activities, functions and tasks and at different levels; including tasks such as planning, organising, staffing, directing, controlling and coordinating; management also involves designing organisational structure around functions like marketing, manufacturing, research and development and finance and/or business area such as product groups or geographical markets; management consultant would thus

include any adviser who renders services on any aspect of management.

16.2 Trade Notice No. 53 CE(ST)/97 (*supra*) has clarified the scope of “consulting engineer” as having wide amplitude to include one or more of the following categories: -

- (i) Feasibility study.
- (ii) Pre-design services/project.
- (iii) Basic design engineering.
- (iv) Detailed design engineering.
- (v) Procurement
- (vi) Construction supervision & project management.
- (vii) Supervision of commissioning and initial operation.
- (viii) Manpower planning and training.
- (ix) Post-operation and management.
- (x) Trouble shooting and technical services, including establishing systems and procedures for an existing plant.

16.3 Thus, when clarifications as regards both the services are considered, some of the activities appear to overlap and hence, it becomes necessary for us to interpret in such a manner that the activities are put in the appropriate basket and to justify our decision to do so. Further, in the light of the possible overlapping, we have to consider the scope and meaning as clarified in the above Circular and Trade Notice.

17.1 Section 65(105)(g) requires that a consulting engineer’s service be a service rendered by a consulting engineer. In turn, the definition of the term ‘consulting engineer’ under section 65(31) contemplates two kinds of

persons: a professionally qualified engineer on the one hand, or, on the other, a body corporate or a firm. The reason for this is that the law seeks to include services rendered by juridical persons who are not natural persons even though such juridical persons are not capable of holding the qualification of an engineer. It is reasonable, therefore, to construe this definition as meaning that whoever renders these services, they must be linked in one way or another to the field of engineering. This is reinforced by the use of the expression "technical assistance" rather than the more general "assistance" or the different "professional assistance." It is also reinforced by the closing words of the definition, which state that the service must be "in one or more disciplines of engineering."

17.2 Therefore, a service provider cannot be treated as a consulting engineer, and a service cannot be classified as a consulting engineer's service, unless it is inextricably linked to or, by itself actually is, engineering of whatever discipline.

18. From the evidence on the record, particularly clauses from the agreement dated 03.03.2006 which are extracted in the Show Cause Notice, it is clear that the services rendered extend far beyond engineering to areas like procurement management, purchase negotiations, supplier selection, management information systems, trading and problem source identification, finance, advertising and communication, legal services, insurance, etc. As Krishna Iyer J. put it in *CIT v. T. N. Aravinda Reddy* [1980] 120 ITR 46 (SC), "The purpose is plain; the symmetry is simple; the language is plain. Why mutilate the meaning by lexical legalism?" To treat legal, advertising, finance and insurance services as being linked to engineering would be to play this game of lexical legalism or, as Krishna Iyer J. put it in the same case, "linguistic distortion."

19. Having so concluded that the services in question do not constitute the services of a consulting engineer, the question remains as to whether these services constitute the services of a "management or business consultant." We have considered the interpretation placed upon the definition of the term "management or business consultant" employed in section 65(65) by the Board. From that interpretation, and from the words of the statute, what emerges is that the task of management extends to all those tasks that do not constitute the core business of the enterprise, and which do not fall under other specialisations. It appears to us that while no definition of the term "management" can be satisfactory, the best way to approach its construction would be negatively, i.e., by elimination. Section 65(65) too is worded widely enough to provide for this and covers financial management, human resources management, marketing management, management of information technology resources and, the crucial residuary limb "other similar areas of management." In our opinion, all the services under the agreement we have referred to above will fall under one or the other of these limbs. There is some congruence, for example between "financial management" in the statutory definition and the financial services being rendered by the foreign entity. Similarly, marketing management brings advertising within its scope. Other services such as insurance and legal services will fall within the residuary limb, especially because these are not purported to be provided directly or with any professional expertise. It is not as if the foreign enterprise is itself an insurer or a lawyer. It appears that it will only make those services available to the Appellant.

20. In view of our above discussions, we have to agree with the conclusions drawn by the Ld. Commissioner in classifying the services received by the appellant under 'management or business consultant' service.

21.1 Learned Advocate also argued that the above service which falls under Rule 6(5) of the CCR and hence the issue was revenue neutral as the appellant would be eligible to avail the full input credit of the tax payable. This was not found favour by the Commissioner *inter alia* for the reason that 81% of the appellant's turnover was exempted and therefore was hit by explanation to Rule 3 *ibid*. Before us, a number of decisions/orders of various judicial for a have been filed. Interestingly, the issue of revenue neutrality was considered by the Hon'ble Apex Court in *M/s. Star Industries v. Commissioner of Customs, (Imports), Raigad* - 2015-TIOL-234-SC-CUS. Hon'ble court after considering rival contentions, held as under:

"...

35.It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit.

36. We, thus, do not find any merit in this appeal and dismiss the same with cost."

21.2 We must also refer to the CESTAT larger Bench order in the case of *M/s. Jay Yuhshin Ltd. v. Commissioner of Central Excise, New Delhi* [2000 (119) E.L.T. 718 (Tribunal – LB)], wherein it has been categorically held by the Learned 5-Member Bench that the issue of Revenue neutrality being a question of fact, the is to be established in the facts of each case and not merely by showing the availability of an alternate scheme.

22. In view of our above discussion, we are of the view that as laid down by the Hon'ble Apex court in *M/s. Star Industries (supra)*, it is always open for the appellant to make such claim for credit, as per the Rules and Regulations prescribed under the statute.

23. We now consider the contention as to issue involving interpretation, etc., for invoking the larger period and this appears to be genuine. This is because of the reason that there was a host of services received but there is also no doubt in our minds that a few of the activities could possibly be brought under consultant engineer services. The very fact that even the Board itself was not clear, for which reason an opinion was sought from the expert, namely, IIM Ahmedabad, fortifies the stand of the appellant that interpretation was involved. Thus, we hold that the appellant has made out a case for interference insofar as the invoking the larger period of limitation is concerned. Thus, we partly allow this ground of appeals insofar as they relate to the period of limitation. To ascertain, however, the tax liability for the normal period, this issue, to this extent, is remitted to the file of adjudicating authority.

24.1 Now, we shall consider the issue of includability of TDS amount in the value of taxable services. Section 195 of the Income tax Act, 1961 deals with Tax to be deducted at source when payment is made to non-residents or foreign companies. This is basically to plug revenue loss that may occur if by any chance the non-resident doesn't file income tax return in India. Further, under said section, such sum alone is taxable which has the character of 'income'. Thus, the TDS is a tax obligation which can never partake the character of value or consideration for the transaction or of the goods or of services. It is not uncommon that any business contract/agreement inter-se parties primarily focuses on the value/consideration and then spells out as to who would bear the TDS obligation. This cannot be construed as to mean that TDS is also a part of such value/consideration. This is also because, any value/consideration agreed upon is strictly the choice of the parties but the TDS depends on the rate in force at the relevant point of time.

24.2 Thus, when it is contended that the assessee 'grossed up' the TDS, it is understood to mean that the assessee has indeed received only the amount as agreed towards value/consideration and the expenditure towards TDS are met by the assessee. So, when such TDS is not received from the non-resident since it is not towards value/consideration, there is no merit in requiring such assessee to include even the TDS it paid in the value of services, as in the case on hand. There is an argument advanced for the Revenue that as per the terms of agreement, it is for the appellants to bear the TDS and thus it is to be treated as part of the consideration. We are unable to yield to the said contentions since in such agreements where one is a non-resident and such non-resident doesn't have any PE, then it becomes the responsibility of the other party who is an Indian resident, to meet with the TDS obligation arising on account of the agreement in question. Even if such clause is not there in the agreement, still the resident cannot escape the tax liability and hence it becomes incumbent upon it to deduct tax at appropriate rate, at source, before making the payment. We find that the decisions relied upon by the appellant support our above view.

25. In view of the above discussions, we hold as under:-

- (i) With regard to the classification of service, the service involved has been correctly classified under 'management or business consultant' service.
- (ii) With regard to includability of TDS, we hold that the appellant was correct in not including the TDS amount in the value of taxable services.
- (iii) Insofar as revenue neutrality is concerned, we remit the matter back to the file of the Adjudicating Authority to examine if the appellant is entitled to avail CENVAT Credit and in this regard, we are guided by the *ratio decidendi* in *M/s. Jay Yuhshin Ltd. (supra)* and *M/s. Star Industries Ltd. (supra)*.

(iv) With regard to the invocation of extended period, we hold that the Revenue has not justified, with adequate reasons, for invoking the extended period of limitation and hence, this grounds-of-appeal are partly allowed and we hold that the tax has been correctly levied for the normal period.

26. The appeals are disposed of on the above terms.

(Order pronounced in the open court on **16.03.2023**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sdd