TaxGuru® Complete tax solution

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 684 of 2012

(Arising out of Order-in-Original No. 29/2012 dated 06.09.2012 passed by the Commissioner of Central Excise, Chennai-III Commissionerate, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Godrej Consumer Products Limited **: Appellant**
(Formerly known as 'M/s. Godrej Sara Lee Limited')
E-5 Industrial Estate, Maraimalai Nagar,
Tamil Nadu – 603 209

VERSUS

Commissioner of Central Excise **: Respondent**
Chennai-III Commissionerate,
No. 26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

APPEARANCE:

Shri M. Karthikeyan, Advocate for the Appellant

Smt. K. Komathi, Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40495 / 2023

DATE OF HEARING: 04.05.2023

DATE OF DECISION: 28.06.2023

Order : [Per Bench]

The appellant is engaged in the manufacture of shoe care, body care and personal care products such as hair cream, shoe polishes and floor cleaners, etc. By a scheme of amalgamation, as approved by the Hon'ble Bombay High Court, with effect from 01.04.2008, M/s. Sara Lee Household and Body Care Limited (SLH&BC) merged with M/s. Godrej Sara Lee Limited (GSLL) and the noticee had thereafter obtained Central Excise registration.

2.1 The Show Cause Notice dated 14.10.2003 is addressed to M/s. SLH&BC, and the allegations are as under: -

- Appellant had entered into an agreement with M/s. Buttress B.V., Netherlands, for obtaining the licence to use the know-how, formula and trademarks for the manufacture, packing, sale and distribution of personal care products in India, for which the appellant had obtained firm permission from the Reserve Bank of India for payment of Royalty for the licence of know-how, formulae and trademarks, as above, under the Foreign Exchange Regulations Act, 1973.

- The effect of the above agreement appears to be that the foreign company would be getting a Royalty fee equal to five per cent (5%) of the Net Sales Value of all marked products sold by the appellant, which, according to the Revenue, would fall under the category of "consulting engineers" as defined under the statute, for which reason the appellant was liable to pay Service Tax.

- It also appeared to the Revenue that in terms of the above licence agreement, the Royalty payments would have to be borne by the Indian company, i.e., the appellant.

- Revenue also entertained a doubt that with effect from 16.08.2002, Rule 2 of the Service Tax Rules, 1994 was amended by Notification No. 12/2002-S.T. dated 01.08.2002 whereby, a new clause was inserted under sub-rule (1) to the said Rule and therefore, the appellant was responsible for the payment of service tax on the taxable services received from their foreign collaborator.

2.2 In the said Show Cause Notice, a proposal was accordingly made proposing to demand Service Tax on the Royalty fees paid by the appellant for the period from 1997–98 to December 2001 at 5% of the payment made to the foreign company under the heading "consulting engineers" services in terms of Section 73 of the Finance Act, 1994. The Show Cause Notice also contained various other proposals like demanding appropriate interest and penalties under various sections of the Finance Act, 1994.

2.3 The appellant appears to have filed a very detailed reply to the above Show Cause Notice denying any liability to the Service Tax as proposed to be demanded. During adjudication, after considering the reply filed by the appellant, it appears that the adjudicating authority had passed the Order-in-Original dated 31.05.2004, which thereafter came to be set aside by the Commissioner of Central Excise (Appeals), Chennai vide Order-in-Appeal No. 109/2004 (M-III) (ST) dated 08.09.2004. It is evident from the pleadings of both parties that no appeal was filed against the said Order-in-Appeal.

3.1 Show Cause Notice dated 21.04.2011 came to be issued demanding Service Tax against various categories of services received from abroad during the period from 1st April 2004 to 31st March 2008 when SLH&BC was clearly in existence, but however, the said Show Cause Notice was issued to Mrs. Godrej Sara Lee Limited by invoking the extended period of limitation. This is despite the fact that the issuing authority having recognized the merger of the two entities with effect from 1st April 2008, as ordered by the Hon'ble Bombay High Court.

3.2 The appellant filed a detail reply in response to the above Show Cause Notice denying the Service Tax liability, as proposed. However, the Order-in-Original No. 29/2012 dated 06.09.2012 came to be passed by the adjudicating authority wherein he has confirmed the demand of Service

Tax, along with interest under Section 75 of the Finance Act, 1994 and penalty under Section 78 *ibid.*

4. Aggrieved by the above Order-in-Original, the assessee has preferred the present appeal before this forum.

5.1 In view of the above, it is the case of the appellant that any demands prior to 18.04.2006 is not sustainable since the charging Section 66A of the Finance Act, 1994, for the levy of Service Tax on the services provided by a foreign service provider, was enacted only from 18.04.2006. The appellant has relied on the decision in the case of *M/s. Indian National Shipowners Association v. Union of India [2009 (13) S.T.R. 235 (Bom.)]* which came to be approved by the Hon'ble Supreme Court *[2010 (17) S.T.R. J57 (S.C.)]*

5.2 Learned Advocate invited our attention to paragraph 17 of the impugned order and submitted that Rule 6(1) of the Service Tax Rules, 1994, provided for the Service Tax only on the receipt of the value of taxable service, which came to be amended as per Notification No. 07/2005-S.T. dated 01.03.2005, referred to the second proviso to sub-rule (1), to contend that notwithstanding the time of receipt of payment towards value of service, no Service Tax is payable for the part or whole of the value of services which is attributable to the services provided during the period when such services were not taxable.

5.3 He would conclude his argument, urging that the impugned demand, for the reason that the taxable event was not the provision of service, but the date on which the value for taxable service was collected or paid, is not as per the spirits of law and the consequential demand is, therefore, unsustainable. He placed reliance on an order of the co-ordinate Mumbai bench of the Tribunal in the case of *M/s. Reliance Industries Ltd. v. Commissioner of C.Ex. & S.T., LTU, Mumbai [2016 (44) S.T.R. 82 (Tri. – Mumbai)]*, wherein it has been held that the service itself

having been rendered prior to the introduction of levy, mere fact that payments for the same were made on staggered basis over a period of time could not be a ground for levying of tax by referring to the date on which the payments were made.

5.4 Without prejudice to the above, learned Advocate submitted that the demands raised and confirmed in the impugned order are not sustainable as being time-barred. He would submit that the earlier Show Cause Notice dated 14.10.2003 for the period from 1997 to 2001 had culminated in the Order-in-Original dated 31.05.2004 whereby the demands proposed came to confirmed, the appeal against which, filed by the appellant, was allowed vide Order-in-Appeal No. 109/2004 (M-III) dated 08.09.2004, to buttress that the Department was very much aware of the payment of Royalties to the foreign company under consulting engineers service. The demand proposed thus in the Show Cause Notice having been set aside, as submitted hereinabove, the appellant believed in good faith that there was no liability to Service Tax on its part on the very same issue and therefore, there was no scope whatsoever to allege suppression of any facts, much less, with an intention to evade tax.

5.5 Without prejudice to the above, he would also submit that the entire issue was revenue neutral inasmuch as the services availed from the foreign service providers were being treated as input services and are used in the manufacture of dutiable final products which would entitle the appellant to avail input service credit; that on this ground also, the extended period of limitation was not invokable. In this regard, he has placed reliance on the following judgements: -

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

(b) Reliance Industries Ltd. v. Commissioner of C.Ex. & S.T., LTU, Mumbai [2016 (44) S.T.R. 82 (Tri. – Mum.)]

(c) *Commissioner of Central Excise, Salem v. JSW Steels Ltd. [2017 (6) G.S.T.L. 397 (Mad.)]*

(d) *Icon Household Products v. C.C, CE [2018 (7) TMI 308 – CESTAT, Chennai]*

(e) *LG Balakrishnan & Bros. v. Commissioner of Central Excise [2018 (10) TMI 1470 – CESTAT, Chennai]*

(f) *Scope E Knowledge Center Pvt. Ltd. v. Commissioner of Service Tax, Chennai [2023 (3) TMI 695 – CESTAT, Chennai]*

(g) *Vedanta Ltd. v. Commissioner of C.Ex., Tirunelveli [2019 (28) G.S.T.L. 258 (Tri. – Chennai)]*

6. *Per contra,* learned Additional Commissioner has relied on the findings of the lower adjudicating authority. She would specifically invite our attention to paragraph 20 of the Order-in-Original wherein the lower authority has held that in the earlier year i.e., 2007-08, there was no actual payment of Royalty, but only book adjustments were made and the liability arose only for the services provided after 10.05.2008. There is also a recording of admission as to the payment of Service Tax by the appellant, which was referred to by the learned Additional Commissioner, to highlight that the appellant had voluntarily made the payment after understanding its liability to Service Tax.

7. We have heard the rival contentions, we have perused the documents placed on record and we have also gone through the decisions of various judicial fora referred to during the course of arguments before us.

8. After hearing both sides, we find that the only issue to be decided by us is: whether the Revenue is correct in demanding Service Tax for the alleged consulting engineers services on the Royalty payments made to the foreign company by the appellant?

9. We agree with the appellant's submission that the demand of Service Tax prior to 18.04.2006 is not sustainable as the charging Section 66A of the Finance Act, 1994 for levy of Service Tax on the services provided to the foreign service provider on reverse charge basis was enacted only with effect from 18.04.2006. In view of the ratio laid down in the case of *M/s. Indian National Shipowners Association v. Union of India [2009 (13) S.T.R. 235 (Bom.)],* which has been upheld by the Hon'ble Supreme Court as reported in *2010 (17) S.T.R. J57 (S.C.)*, the appellant cannot be fastened with Service Tax liability for the Royalty payments made under consulting engineer service prior to 18.04.2006. The relevant finding of the Hon'ble Court is extracted below: -

> *"20. ……*
>
> *……. It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006 w.e.f. 18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the Petitioners-association."*

10.1 Further, we find that Rule 6(1) of the Service Tax Rules, 1994, which provides that the Service Tax is payable only on receipt of the value of taxable service, was amended vide Notification No. 07/2005-S.T. dated 01.03.2005 and the amendment reads as follows: -

> *"5. In the said rules, in rule 6, for sub-rule (1), the following sub-rule shall be substituted, namely : -*
>
> *"(1) The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable services :*
>
> *Provided that where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the quarter in which the payments are received, towards the value of taxable services :*
>
> ***Provided further that notwithstanding the time of receipt of payment towards the value of services, no service tax shall be payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable :***
>
> *Provided also that the service tax on the value of taxable services received during the month of March, or the quarter ending in March, as the case may be, shall be paid to the credit of the Central Government by the 31st day of March of the calendar year.."*

(Emphasis supplied)

10.2 The second proviso to sub-rule (1) to the above Rule 6 clearly provides that notwithstanding the time of receipt of payment towards value of service, no Service Tax shall be payable for the part or whole of the value of services which is attributable to services provided during the period when such services were not taxable. As such, the impugned order holding that the taxable event is not the provision of the service but the date on which the value of taxable service is paid, is not legally maintainable. Hence, the demand of tax confirmed in this regard is not sustainable.

10.3 In the case of *M/s. Reliance Industries Ltd. v. Commissioner of C.Ex. & S.T., LTU, Mumbai [2016 (44) S.T.R. 82 (Tri. – Mumbai)],* it has been held that the service itself having been rendered prior to the introduction of levy and payments were made on a staggered basis over a period of time cannot be a ground for levying Service Tax with reference to the date on which the payments were made.

11.1 We find that the appellant was issued with a Show Cause Notice C.No.IV/16/172/2003-STC dated 14.10.2003 for the period from 1997 to 2001 demanding appropriate Service Tax on Royalty paid which was dropped vide Order-in-Appeal No. 109/2004 dated 08.09.2004, indicating that the Department was well aware of the activities of the appellant such as payment of Royalties to foreign collaborators under consulting engineer service.

11.2 The contentions of the appellant that: -

(i) the demand was raised based on the transactions recorded in their books of accounts and nothing was hidden from the Department and as such, no wilful suppression or mis-statement of facts with an intent to evade tax is attributable;

(ii) the services were provided by foreign service providers and their liability to pay Service Tax on reverse charge basis had always been a matter of dispute and litigation; and

(iii) since the services availed from foreign service providers are input services used in the manufacture of final products, they are entitled to avail input tax credit, thereby leading to a revenue neutral situation

are acceptable and so, the invocation of extended period is not justified in this case.

11.3 We rely on the decision rendered in the case of *M/s. Reliance Industries Ltd. (supra)* wherein it was been observed as under: -

> *"12. We also note that the entire dispute being revenue neutral, there could have been no intention to evade payment of duty and consequently the extended period of limitation was per se not invokable. It is settled law laid down in the following amongst other judgments a series of judgment including that of the Apex Court that in a case where credit is available to an assessee itself it cannot be said that there is any intention to evade payment of duty, which is a pre-requisite for invoking the extending period of limitation. In the instant case also if any tax was payable it could have been available immediately to the Appellant, thereby rendering the entire dispute being revenue neutral. This being the case the invocation of extended period of limitation is clearly not justified :-*
>
> *(a) Reliance Industries Ltd. v. CCE - 2009 (244) E.L.T. 254 (Tri.)*
>
> *(b) CCE v. Indeos ABS Ltd. - 2010 (254) E.L.T. 628 (Guj.)*
>
> *(c) Mafatlal Industries Ltd. v. CCE - 2009 (241) E.L.T. 153 (T); affirmed by the Apex Court by dismissing the Civil Appeal reported in 2010 (255) E.L.T. A77 (S.C.)*
>
> *(d) Nirlon Ltd. v. CCE - 2015 (320) E.L.T. 22 (S.C.)"*

12. However, we confirm the demand of Service Tax on the appellant for the normal period. Consequently, the penalties imposed are also set aside. We order to modify the impugned order to this extent.

13. The appeal is partly allowed, as indicated above.

(Order pronounced in the open court on **28.06.2023**)

Sd/- **(VASA SESHAGIRI RAO)** MEMBER (TECHNICAL)	Sd/- **(P. DINESHA)** MEMBER (JUDICIAL)

Sdd