CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 20315 of 2016

[Arising out of Order-in-Original No. COC-EXCUS-000-COM-034-15-16 dated 27.11.2015 passed by the Commissioner of Central Tax, Cochin]

FCI OEN Connectors Ltd **……Appellant**
Thykoodam Vytila
Cochin Kerala 682019

VERSUS

Commissioner of Central Tax, Cochin **……Respondent**
C R Building, I S Press Road,
Ernakulam Cochin
Kerala 682018

APPEARANCE:

Present for the Appellant: Ms. Neethu James, Advocate

Present for the Respondent: Sh. K. Vishwanath, Authorized Representative

CORAM:
HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mr. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21161/2023

DATE OF HEARING: 27.06.2023
DATE OF DECISION: 26.10.2023

PER D. M. MISRA

This is an appeal filed against the Order-in-Original No. COC-EXCUS-000-COM-034-15-16 dated 27.11.2015 passed by the Commissioner of Central Tax, Cochin.

2. Briefly stated facts of the case are that the appellant is

engaged in the manufacture and sale of electronic connectors. The services viz. 'IPR services' and 'Management Consultancy' services imported from related parties located outside India, are chargeable to service tax under reverse charge mechanism basis under Section 66A of the Finance Act, 1994. On the basis of intelligence that the appellant had wrongly availed benefit of exemption Notification No. 17/2004-ST dt. 10.09.2004 to the extent of research and development cess paid on the imports of technology under IPR service and also imported 'management consultancy service' from their group companies abroad, but had not discharged service tax on the TDS amount paid from April 2011 onwards, investigation was initiated and on completion, a show cause notice was issued on 29.09.2014 to the appellant for recovery of an amount of Rs.1,92,48,984/- under the category of Intellectual Property other than copyright service and an amount of Rs.51,71,248/- was also proposed to be recovered on the TDS amount with interest and proposal for penalty; also Rs.1,75,23,250/- proposed to be appropriated against the demanded amount on IPR service. On adjudication, the demand of Rs.1,75,23,250 was confirmed being the service tax not paid on IPR services imported by them for the period 2009-10 to 30.6.2012 and the amount already paid is appropriated; demand of Rs.51,71,248/- was also confirmed being short paid by them on the value of Management Consultancy Services imported during the period 2011 to 2013; interest under Section 75

confirmed; penalty amounting to Rs.2,26,94,498/- imposed under section 78 ; penalty of Rs.10,000 imposed under section 77 of the Finance act, 1994. Aggrieved by the said order, the present appeal is filed.

3.1 The ld. Advocate for the appellant has submitted that the appellant has received the right to use the licensed patent from FCI, France, in accordance with license agreement. In consideration, the appellant pays royalty to FCI, France on the gross revenue earned by the appellant. At the time of import, the appellant paid R&D cess at the rate of 5% on the cost of the imported patent. The appellant had discharged service tax on the patent cost paid to FCI as a recipient of service under Section 66A of the Finance act, 1994. The ld. Advocate submits that for the purpose of payment of service tax, the appellant is entitled for the benefit under Notification No. 17/2004–ST dt. 10.09.2004, which exempts service tax as is equivalent to the amount of R&D cess paid. In accordance with the said notification, the appellant deducted the amount equivalent to the R&D cess paid from the said service tax payable and thereafter, paid the balance amount of service tax. The ld. Advocate has further submitted that the Notification No. 17/2004–ST dt. 10.09.2004 provides for exemption from the taxable services if provided by the holder of the IPR to any person. It is the case of the Department that the benefit of the notification is available in

respect of the R&D cess paid by a holder of IPR engaged in providing IPR services and paying service tax under section 66 and since the appellant was not the holder of IPR, but the receiver of the service, and paying service tax under Section 66A, therefore, the benefit of the notification cannot be availed by the appellant. It is her contention that the benefit of the notification is given on the service provided by the holder of the IPR and not to the service provider. It is her contention that Section 66 of the Finance Act, 1994 is the charging section for the purpose of levy of service tax at the prescribed rate on taxable services defined under various clauses of Section 65(105) when provided to any person by the persons responsible for collecting the service tax; Section 66A of the Finance act, 1994 has been introduced with effect from 18.04.2006 for the purpose of taxing services received from outside India. It provides that such taxable services received by a person in India from persons outside India shall be taxable service, and such taxable service shall be treated as if the recipient had himself provided such service in India, and accordingly all the provisions of the Finance Act, 1994 shall apply.

3.2 She has further contended that, contrary to Section 66, Section 66A does not provide for the levy of service tax. It merely deems the recipient of service as the service provider, so all the provisions of the Finance act, 1994 are applicable to the

service recipient as if he is the service provider. Thus, the provision creates a deeming fiction for the service recipient to be treated at par with the service provider. It means that Section 66 is the charging section under the Finance Act, 1994 for the purpose of levy under Section 66A as well. In support of their contention, the ld. Advocate referred to the Circular issued by the CBEC bearing F.No. 354/148/2009-TRU dated 16.07.2009, wherein it has been clarified that Section 66A in itself is not charging section, it only creates a legal fiction to deem import of services as provision of services within India so that the provisions of the Finance Act, 1994 can be applied to it. The charging section remains Section 66 even for the services imported. Thus, the tax collected from the recipient in terms of section 66A is also chargeable under Section 66 of the Finance Act, 1994. Further, she has referred to various case-laws listed as below:-

(i) Rochem Separation Systems (India) P Ltd vs. CST – 2015 (39) STR 112 (Tri. Mum.)

(ii) CCE & ST vs. Cummins Technologies India Ltd – 2017 (7) GSTL 69 (Tri. Del.)

(iii) United News of India vs. CST – 2017 (51) STR 23 (Tri. Del.)

3.3 On the issue of inclusion of TDS amount in the value of Management of Consultancy Service, the ld. Advocate has

submitted that the appellant has entered into a management service agreement with its group companies for receipt of general management services. As per the terms of the said agreement, the price of the services provided by the group entities to the appellant are understood as excluding taxes. All taxes which may be applied are also to be exclusively borne by the appellant as well. In terms of the agreement, the appellant has paid service tax as recipient of service, and the entire value as indicated in the invoice under the category of Management Consultancy Services, suffered tax. The appellant has also remitted the TDS amount in terms of the Income Tax Act on the gross amount. The TDS amount is paid by the appellant from its own funds and were not deducted from the client's accounts, hence not part of the consideration of service paid. In the impugned order following Rule 7 of the Service Tax (Determination of Valuation) Rules, 2006, it is held that prior to 01.07.2012, the service tax is payable on the actual consideration charged, which shall include TDS amount paid by the appellant and post 01.07.2012, the service tax is payable on the gross amount charged as per Section 67 of Finance Act, 1994, which has also been interpreted to include TDS amount. The appellant submits that the service tax has been correctly paid on the invoice value and the TDS is not legally and contractually required to form part of the assessable value. Further, she has submitted that the TDS amount has been

wrongly paid to Income Tax Department and refund application has been filed with department accordingly. The appellant submits that they have correctly discharged service tax on the actual consideration charged for the service by the service provider. In support, she has referred the following judgements :-

(i) TVS Motor Company Ltd vs. CCE & ST – 2021 (55) GSTL 459 (Tri. Chennai)

(ii) Magarpatta Township De. & Construction Co. Ltd vs. CCE – 2016 (43) STR 132 (Tri. Mum.)

(iii) Garware Polyester Ltd vs. CCE – 2017 (5) GSTL 274 (Tri. Mum.)

(iv) Indian Additives Ltd vs. CCE – 2018 (6) TMI 523 – CESTAT CHENNAI

(v) Centre for High Technology vs. CST – 2018 (8) TMI 243 – CESTAT NEW DELHI

(vi) Hindustan Oil Exploration Co. Ltd. vs. CGST – 2019 (2) TMI 1248 – CESTAT CHENNAI

(vii) Gayatri Hi-Tech Hotels Ltd vs. CCE & ST – 2022 (5) TMI 141 – CESTAT HYDERABAD

(viii) VSL India Pvt Ltd vs. CST – 2023 (3) TMI 802 – CESTAT CHENNAI

3.4 The contention of the ld. Advocate for the appellant is that since service tax has already been discharged on the value

of the services provided, therefore, there is no justification to demand service tax on the income tax component of the consideration as well. They have submitted that the demand cannot be sustained as the issue is of revenue neutral; in support, she has relied upon the judgement of the Hon'ble Supreme Court in the case of *Nirlon Ltd. Vs. Commissioner of Central Excise - 2015 (320) ELT 22 (SC).*

3.5 The ld. Advocate has further submitted that invoking of extended period of limitation in confirming the demand is bad in law and hence the demand confirmed up to September 2012, is grossly barred by limitation. She has further submitted that the appellant have not suppressed any facts with intention to evade payment of duty in as much as they have been paying service tax on imports of services under both the categories. The appellant has regularly filed the ST-3 returns and clearly reflected in the said Returns that the exemption under Notification No. 17/2004-ST dt. 10.09.2004 has been available to them. Thus, there is no question of suppression of facts with respect to availing of the benefit of said notification; also, the TDS amount being paid to the government, no fact is suppressed. It is her contention that the department had complete knowledge of the transactions and the department's inaction at the time of discharge of service tax cannot be the ground for alleging suppression of fact etc. Further, it is

submitted that the issues involved are interpretational in nature as is evident from the circular issued by board with respect to the credit availed under section 66A and the various case laws on the subject. Further, with respect to the demand on TDS, the Tribunal in *TVS Motor Company Ltd*'s case has clearly held that the issue is of interpretational in nature, in such circumstances, extended period cannot be invoked. It is submitted that the interest and penalty cannot be sustained.

4. The ld. A.R. for the Revenue reiterates the findings of the ld. Commissioner. He submits that since the appellant are not the holder of IPR, on strict interpretation of the Notification No. 17/2004-ST dt. 10.09.2004, the said exemption cannot be extended to the appellant. On the issue of inclusion of the TDS paid by the appellant, he submits that the ld. Commissioner in the impugned order has rightly followed the case of *TVS Motors Company Ltd vs. CCE – 2012 (37) STT 232*. Further, he has submitted that since the appellant have failed to discharge service tax on the TDS amount by including it in the gross taxable value, also wrongly availed the benefit of Notification No. 17/2004-ST dt. 10.09.2004 with intent to evade payment of service tax invoking extended period by the Commissioner is justified and also imposition of penalty under Section 78 of the Finance Act, 1994 is sustainable.

5. Heard both sides and perused the records.

6. Issues involved in the present appeal for determination are whether : (i) the appellant are entitled to the benefit of Notification No. 17/2004-ST dt. 10.09.2004 when they discharged service tax under Section 66A of the Finance Act, 1994; and (ii) TDS amount be included in the gross taxable value on which service tax was paid.

7. The undisputed facts are that the appellant received intellectual property rights other than copy rights from their group companies located outside of India and discharged service tax under reverse charge mechanism as per Section 66A of the Finance Act, 1994 and availed the benefit of Notification No. 17/2004-ST dt. 10.09.2004. Revenue's objection is that since the appellant are not holder of intellectual property rights but discharged service tax as receiver of service by virtue of Section 66A of the Finance Act, 1994, therefore, the benefit of exemption Notification No. 17/2004-ST dt. 10.09.2004 cannot be extended to them. Revenue's argument is that only person, discharging service tax under Section 66, the charging section, could be eligible to the benefit of said notification.

8. We find that a similar controversy came before the Mumbai Bench of this Tribunal in *Rochem Separation Systems (India) Pvt Ltd'*s case (supra). This Tribunal analyzing Notification No. 17/2004-ST and charging Section 66 and Section 66A of the Finance Act, 1994 observed as follows:

> ***"10.*** *The Commissioner has rejected the benefit of Notification No. 17/2004 for the reason that the notification applies only to Section 66 and not to Section 66A in which the appellant is required to pay service tax on the import of services or reverse charge basis. The Commissioner's further reasoning is that the appellant is only a deemed provider of service under Section 66A(1)(b) and cannot be treated as one who provided the service. This reasoning is flawed Section 66A was introduced by Finance Act, 2006 w.e.f. 18-4-2006 whereas the Notification No 17/2004 was issued on 10-9-2004. It appears that the law makers slipped on bringing an amendment to the notification because the intention of the notification is very clear, that is, not to levy service tax on cess paid towards the import of technology. Careful reading of the notification indicates that what is exempted is "taxable service provided by the holder of the Intellectual Property Right to any person……" Service Tax Rule 2(r) defines "Provider of Taxable Service" to include a person liable for paying service tax. Therefore, this rule read with Notification No. 17/2004 can be interpreted only to mean that the appellant being the person liable to pay service tax under Section 66A will also be eligible for exemption. It must not be forgotten that the charge of service tax on Intellectual Property Right under Section 65(105)(zzr) is actually made under Section 66. What Section 66A does is only to fasten the liability to the receiver of services in India while receiving services from abroad. In the present case the charge of service tax is under Section 66 but the appellant being the receiver is liable to pay under Section 66A. The Commissioner's reasoning is not correct and is rejected. The appellants are eligible to benefit from Notification No. 17/2004."*

Thia view was echoed by the Principal Bench at Delhi in the case of *CCE & ST vs*. *Cummins Technologies India Ltd* (supra). No contrary view has been placed by the Revenue.

9. Following the above principles consistently held by the Tribunal, we do not see merit in the impugned order that the benefit of Notification No. 17/2004-ST dt. 10.09.2004 would not be admissible to the appellant only on the ground that service tax was discharged by them under Sec. 66A of the Finance Act,

1994 on reverse charge mechanism basis.

10. On the issue of inclusion of the TDS amount paid by the appellant, the ld. Commissioner is of the view that it should form part of the gross taxable value for the period post 01.07.2012 under Section 67 of Finance Act, 1994 and under Rule 7 of the Service Tax (Determination of Valuation) Rules, 2006 prior to 01.07.2012. The relevant portion of Management service Agreement dated 01.01.2012 between the appellant and its related companies at Article 9 on payment of taxes stipulated as follows:

> *"9.1 Payment shall be made in Euro within ten (10) days following invoicing or as otherwise agreed upon, through netting or any other mean agreed upon. To the extent not otherwise prohibited under applicable law, any amounts owned by one Party to another pursuant to this Agreement may be offset or netted against other indebtedness among such parties.*
>
> *9.2 In the event one invoiced party fails to pay in due time any invoiced amount, then the sums due and payable to the invoicing party shall bear late interest based on the interest rate applied by the European Central Bank to its most recent main refinancing operation plus ten (10) percentage points. Such amount shall be paid upon the invoicing party's request.*
>
> *9.3 Any and all taxes which may be applied by any authorities or administrations on any invoices made pursuant this Agreement shall be exclusively borne by the invoiced entity.*

9.4 In the event a country imposes a withholding tax against FCI USA LLC's invoices, Recipient shall pay to FCI USA LLC the necessary amounts that are necessary to ensure, receipt by FCI USA LLC of the full amount that FCI USA LLC would have received without the implementation of such withholding tax."

In similar facts and circumstances the aforesaid issue has been recently considered by the Chennai Bench of this Tribunal in the case of *VSL India Pvt Ltd vs. CST – 2023 (3) TMI 802 – CESTAT CHENNAI* whereunder this Tribunal after analysing the precedent and the relevant provisions held as follows:

***"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 nonresident 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."

11. Following the aforesaid judgments of this Tribunal, we are of the view that the TDS amount paid to the Income Tax department by the appellant from his own account cannot form part of the consideration of the service charges paid to the overseas service provider, accordingly, service tax is not payable on the TDS amount paid by the appellant. Also, it is brought on record that subsequent to the payment of the TDS, realizing that being wrongly paid, refund application filed .

12. In the result, the impugned order is set aside and the appeal is allowed with consequential relief, in any, as per law.

(Order pronounced in the court on 26 /10 /2023)

(D. M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

RA_Saifi