IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 325 of 2011

(Arising out of Order-in-Original No. 63/Commr/ST/Kol/2010-11 dated 28.03.2011 (issued on 21.04.2011) passed by the Commissioner of Service Tax, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Hooghly Met Coke & Power Co. Limited : Appellant
Tata Centre, 43, Jawaharlal Nehru Road,
Kolkata – 700 071

VERSUS

Commissioner of Service Tax : Respondent
Kendriya Utpad Shulk Bhawan,
3rd Floor, 180, Shantipally, Rajdanga Main Road,
Kolkata – 700 107

APPEARANCE:

Dr. Samir Chakraborty, Senior Advocate
Assisted by Shri Abhijit Biswas, Advocate
For the Appellant

Shri S. Mukhopadhyay, Authorized Representative
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76617 / 2024

DATE OF HEARING: 06.08.2024

DATE OF DECISION: 09.08.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The instant appeal has been filed against the Order-in-Original No. 63/Commr/ST/Kol/2010-11 dated 28.03.2011, passed by the Commissioner of Service Tax, Kolkata, wherein the Ld. Commissioner has confirmed the demand of service tax amounting to Rs.91,97,197/-, including cess, along with interest and penalty.

2. The facts of the case are that the appellant is a manufacturer of coke in their factory located at Haldia in the State of West Bengal. For the purpose of setting up the Heat Recovery Coke Oven Project in the said factory, the appellant entered into five Agreements, all dated October 27, 2005, with Beijing Sino-Steel Industries and Trade Group Corp (hereinafter referred to as "SSIT"), Beijing, China. The said plant simultaneously provides for production of power from the heat generated in the coke oven during conversion of coal to coke.

2.1. One of the five Agreements entered between the appellant and SSIT, being Contract No.HMCPCL/PROJ/003/002/FDR, was for supply of designs and drawings for manufacture of indigenous equipment and civil structure utilities and other services and for the purpose of erection, start-up commissioning and demonstration of performance test, etc. As per Clause 2.1 of this Agreement, the contract price for supply of the imported designs and drawing was USD 1 million.

2.2. In April, 2007 the jurisdictional Service Tax authorities visited the appellant's registered office at Kolkata and verified the records related to execution of Heat Recovery Coke Oven Project and found that the appellant was not paying service in respect of the imported designs and drawings supplied by SSIT, China, under reverse charge. The Department was of the view that supply of designs and drawings, by SSIT amounts to providing the taxable service of "Intellectual property services" (IPR Services) as defined in Section 65(55b) read with Section 65(5a), which was taxable in terms of Section 65(105)(zzr) of the Act. As the appellant has not paid service tax for

the IPR services received by them, they were asked to pay the service tax payable for the period from November 2005 onwards, along with interest. The appellant, paid service tax of Rs.48,78,395/- along with interest 'under protest' and informed the Department about the payment 'under protest' vide letter dated 28.02.2008. Subsequently, the appellant paid service tax for various other taxable services also. Thus, the appellant paid a total sum of Rs.91,90,101/- (including cess), along with interest thereon amounting to Rs.9,77,463/-, towards the services" received by them from SSIT.

2.3. Thereafter, on April 24, 2009, the Commissioner issued a show cause notice to the appellant demanding service tax of Rs.91,97,197/- (including cess). The Notice demanded service tax in respect of the taxable services, namely, 'intellectual property services' under Section 65(105)(zzr) and "consulting engineering service" under Section 65(105)(g) respectively of the Finance Act, received by them in the form of supply of designs and drawings from SSIT, China during the period 10th November, 2005 to 31st March 2008. The said Notice was adjudicated by the Commissioner vide the impugned order wherein the demands raised in the Notice are confirmed along with interest and penalty. Aggrieved against the confirmation of the demands, the appellant filed this appeal.

3. The appellant submits that transferring of technical know-how from SSIT is not a taxable service liable for service tax; supply of designs and drawings by SSIT would not qualify as a taxable service under the category of "intellectual property right service" as defined under Section 65 (55a) of the Finance Act,

1994 unless the said intellectual property right is registered or patented in India. The appellant also submits that they have paid an amount of Rs.91,90,101/-(including cess) along with interest, only at the insistence of the Department; they are of the firm view that the service received by them was not liable for service tax and hence they paid the entire service tax under protest vide letter dated 28.02.2008. They have also reiterated their payment 'under protest' during the course of personal hearing before the Ld. Commissioner.

3.1 In support of their contention that the services received from SSIT are not liable to service tax under the category of "intellectual property right service", the appellant placed their reliance on the following decisions:

(i) ***Munjal Showa Ltd.*** *Vs.* ***Commissioner of C.Ex & ST, 2017(5) GSTL 145(T)***

(ii) ***Hindustan Aeronautics Ltd.*** *Vs.* ***Commissioner of Central Excise, Customs & Service Tax 2024(4) TMI 726 – CESTAT KOLKATA***

(iii) ***Commissioner of Service Tax*** *Vs.* ***McLeod Russel (India) Ltd. 2023 (3) TMI 739-CESTAT KOLKATA***

(iv) ***Crest Speciality Resins Pvt. Ltd.*** *Vs.* ***CCE&C 2023(II) TMI 167- CESTAT AHMEDABAD***

(v) ***SICPA India Pvt. Ltd.*** *Vs.* ***Commissioner of Central Excise, Customs & Service Tax, 2017(9) TMI 1325-CESTAT KOLKATA***

3.2 Accordingly, the appellant prayed for setting aside the impugned order and allow their appeal.

4. The Ld. Authorized Representative appearing for the Revenue reiterated the findings in the impugned order.

5. Heard both sides and perused the appeal documents.

6. We observe that for the purpose of setting up the Heat Recovery Coke Oven Project in their factory, the appellant entered into five Agreements with Beijing Sino-Steel Industries and Trade Group Corp. One of the Agreements was meant for supply of designs and drawings for manufacture of indigenous equipment and civil structure utilities and other services for the purpose of erection, start-up commissioning and demonstration of performance test, etc. The Department has alleged that supply of designs and drawings, by SSIT amounts to providing the taxable service of "Intellectual property services" (IPR Services) as defined in Section 65(55b) read with Section 65(5a), which was taxable in terms of Section 65(105)(zzr) of the Act. At the insistence of the Department, the appellant started paying service tax 'under protest'.

6.1. Regarding liability of service tax, the appellant submitted that these designs and drawings were considered as goods under Customs Act, 1962 and customs duty has already paid on the same at the time of importation of the goods; hence, no service tax is payable on the designs and drawings under the category of taxable service of "Intellectual property services" (IPR Services). We find merit in the contention of the appellant. The designs and drawings have been considered as 'goods' at the time of importation and customs duty has already been paid on the same. Hence, we hold that the imported drawings and designs cannot be considered as taxable service under the category of "intellectual property services". Accordingly, we hold that the demand of

service tax on the drawings and designs supplied by SSIT under the category of "intellectual property services" in the impugned order is not sustainable.

6.2. Regarding the amount of service tax paid by the appellant for the IPR services received by them, we observe that the appellant has paid a total sum of Rs.91,90,101/- (including cess). The appellant claimed that the entire amount was paid as service tax under the category of "Intellectual property services", under protest. However, from the records submitted by the appellant we observe that the appellant had paid service tax of Rs.48,78,395/- only along with interest 'under protest' and informed the Department about the payment 'under protest' vide letter dated 28.02.2008. For the sake of ready reference, scanned copy of the letter is reproduced below: -

2224-8160-✓ (68) Annexure - 8

Hooghly Met Coke & Power Co Ltd

(A Joint Venture between **TATA** **STEEL** *&* WBIDC *)*

R
29/2/08.

HMC/F&A/0255
28th February, 2008

The Assistant Commissioner (SIV)
Service Tax
9 Old Post Office Street
4th Floor
Kolkata 700 001

Dear Sir,

Re: Payment of Service Tax

We refer to the various discussion and your letter dated 21/02/2008 on payment of service tax. Your letter dated 21/02/2008 states that an amount of Rs.75.72 lacs is payable. We had verified the payments at our end and had submitted the details of service tax paid by us vide our letter dated 20th February 2008.

From the reconciliation of payments made by us and the amount of service tax payable as per your letter we have found that a tax liability of Rs.48,78,395/- has been considered by you, as payable by us. This amount relates to payments made by us to Beijing Sino-Steel Industry and Trade Group Corp (SSIT) on account of purchase of designs and drawings for manufacture of equipment, etc. in India.

These designs and drawings were imported into India which have been considered as 'goods' under Customs Act, 1962 and classified under tariff sub-heading 4906 00 00. The bill of entry was prepared and assessed by the Customs authority. Since the import has been considered as goods, no service tax is payable on the value of import.

We would like to draw your attention to the following cases in this matter where designs and drawings are held to be goods and no service tax is payable on sale of goods:-

1. Supreme Court decision in ACC Ltd. vs. Commissioner of Customs which had held that design and drawings when put on a media, whether paper or disc, becomes chattel and therefore drawings and designs are goods and liable to customs duty. Intellectual property when put on a media is to be regarded as an article on the total transaction value of which customs duty is payable. There is no scope for splitting the engineering drawing or the encyclopedia into intellectual input on the one hand and the paper on which it is scribed on the other.

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2. In the case of ASL Motor Pvt Ltd vs. Commissioner of Customs, Excise and Service Tax, Patna the CESTAT, EZB held that free service done is not liable to service tax even though the value of free service is included in the margin for sale of car since sales tax is paid on the total value of sale of car (goods).

3. The same issue was clearly dealt by the CESTAT, Bangalore in Gerb Vibration Control System (P) Ltd vs. Commr of Service Tax, Bangalore where the appellant ordered for drawings as per specification and these drawings are sold for consideration by discharging sales tax. The Honourable Tribunal held that the activity cannot be brought under the ambit of services under Consulting Engineer's service.

In line with the above pronouncements and other decisions no service tax is payable on goods (designs and drawings) imported by us from SSIT.

However, as per your letter we are arranging to deposit service tax amount of Rs.48,78,395/- under protest without prejudicing our claim that service tax is not payable on the designs and drawings bought by us from SSIT and further without prejudice to our right to make more submission on the subject.

Thanking you,

Yours truly,
For Hooghly Met Coke & Power Co.Ltd.

Chief Financial Officer

6.3. From the letter dated 28.02.2008 reproduced above, we observe that the appellant has paid service tax of Rs.48,78,395/- along with interest, with respect to import of design and drawings. According to them there is no liability of service tax on these services. As these designs and drawings were considered as goods under Customs Act, 1962 and customs duty has already paid on the importation of the goods, we hold that the demand of service tax to the extent of Rs.48,78,395/-in the impugned order, under the category of Intellectual property services", paid by the appellant under protest, is not sustainable and accordingly we set aside the same.

6.4. Out of the total service tax of Rs.91,90,101/- paid by the appellant, Rs.48,78,395/- has been paid under the category of "intellectual property services".

Even though the appellant has claimed that the entire service tax of Rs.91,90,101/- has been paid under the category of "intellectual property service", we find that the claim of the appellant is not supported by any documentary evidence. On the contrary, the statement dated 06.07.2007, recorded from Shri. R. Balasubramian, reveals that the appellant has entered into contract with SSIT for various works such as :

(i) imported plant & machinery;

(ii) supervision charges;

(iii) Design and drawings for indigenous equipments;

(iv) Training of personnel.

6.5. From the statement dated 06.07.2007, we observe that the appellant has made payments towards receiving of various other services such as supervision charges and Training of personal etc. for which the appellant paid service tax, under reverse charge without any protest. We find that the appellant has rightly paid service tax on the taxable services such as supervision charges and Training of personal, without any protest. Thus, we uphold the payment of service tax by the appellant on other services received by them, under reverse charge.

7. Regarding the penalty imposed on the appellant under Section 78 of the Finance Act, 1994, we observe that there is no suppression of facts with intention to evade the payment of tax established in this case. The appellant has paid service tax under the category of "consulting engineering service" instead of "intellectual property service" as claimed by the Department. If service tax is paid under a different

category, it is only a procedural lapse, for which no penalty can be imposed. Accordingly, we hold that no penalty imposable on the appellant and thus, we set aside the penalty imposed under Section 78 of the Finance Act, 1994.

8. In view of the above discussions, we pass the following order: -

(i) The appellant is not liable to pay service tax on the importation of drawings and designs, under the category of "intellectual property services". Accordingly, service tax of Rs.48,78,395/- paid by the appellant along with interest, under protest, is set aside.

(ii) Out of the total service tax of Rs.91,90,101/- paid by the appellant along with interest, excluding the amount of service tax of Rs.48,78,395/- mentioned at (i) above, the remaining amount of service tax paid by the appellant, without any protest, is upheld.

(iii) The penalty imposed under Section 78 of the Finance Act, 1994 is set aside.

(iv) The appeal filed by the appellant is disposed on the above terms.

(Order pronounced in the open court on **09.08.2024**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd