IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal Nos.41500 & 41501 of 2015

(Arising out of Order-in-Appeal No. 73 & 74/2015 (STA-I) dated 30.3.2015 passed by the Commissioner of Service Tax (Appeals – I), Chennai)

M/s. Indian Additives Ltd. **Appellant**
Express Highway, Manali
Chennai – 600 068.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai Outer Commissionerate
12th Main Road
Anna Nagar, Chennai – 600 040.

APPEARANCE:

Ms. G. Varshitha, Advocate for the Appellant
Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos. 40783 & 40784/2024

Date of Hearing : 21.03.2024
Date of Decision: 02.07.2024

Per M. Ajit Kumar,

These appeals are filed against common Order in Appeal No. 73 & 74/2015 dated 30.3.2015 passed by the Commissioner of Service Tax (Appeals – I), Chennai.

2. Brief facts of the case are that the appellant are service providers under the category of Intellectual Property Right Service, Scientific and Technical Consultancy Service etc. and were discharging service tax. They entered into an agreement with M/s. Chevron Oronite Company LLC, USA and were paying royalty to the foreign company on the net sales of their products. During the scrutiny of details furnished by the appellant regarding the TDS portion of the royalty payment made for

the period April 2010 to September 2010 and October 2011 to March 2012, it revealed that while paying service tax on the royalty payments made to the foreign company, the appellant had not paid service tax on TDS portion of the royalty amount retained by them. As it appeared to the department that TDS portion retained by them was also taxable, Show Cause Notices dated 21.12.2010 and 2.7.2012 were issued for recovery of the dues. After due process of law, the original authority confirmed the demand proposed in the Show Cause Notices along with interest and also imposed penalties. Aggrieved against the said order, the appellant preferred appeals before the Commissioner (Appeals) who vide the order impugned herein has rejected the appeals. Hence the appellants are now before this Tribunal.

3. Ms. G. Varshitha, learned counsel appeared for the appellant and Shri N. Satyanarayanan, learned Assistant Commissioner (AR) appeared for the respondent.

4. The learned counsel for the appellant submitted that the Appellant has discharged service tax on the entire consideration paid to the foreign service provider. That TDS amount has been discharged separately by the Appellant. As per the agreement entered into with Chevron the running royalty shall be net of Indian Income Tax. The tax shall be borne by the Appellant. In other words, if the royalty payable is Rs.100/-, the Appellant paid entire Rs.100/- to the foreign company and the TDS of Rs.10/- is separately discharged to the Government of India. As per Section 67 service tax is payable on the amount which is charged by the service provider. As per Rule 7 of Service Tax (Determination of Value) Rules, 2006 value of taxable service received under Section 66A shall be the actual consideration charged for the

services provided or to be provided. The appellant further submits that the issue is no longer res integra as the said issue has already been decided by the Tribunal in favour of the appellant in the case of **Adani Bunkering Pvt. Ltd. Vs. CCE, Ahmedabad – II** reported in 2024 (1) TMI 984 – CESTAT Ahmedabad. Further in the appellant's own case, vide Final Order No. 40878/2018 dated 2.3.2018 and Final Order No. 42344/2021 dated 24.9.2021, it was held that service tax liability has to be discharged on amounts paid to the foreign service provider and there cannot be a demand on the TDS portion which has been separately discharged by the appellant. Accordingly, she prayed for setting aside the demand confirmed in the impugned order.

5. The learned AR Shri N. Satyanarayanan reiterated the findings in the impugned order.

6. Heard both sides and perused the appeal documents.

7. Prima facie there does not appear to be a bar on tax being a part of assessable value. The Hon'ble Apex Court (5 judges) in **Jain Bros. & Others vs The Union Of India & Others** [1970 AIR 778 / 1970 SCR (3) 253], a case pertaining to Income Tax, held:

> "It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted they cannot be so interpreted as to tax the subject twice over to the same tax (vide Channell J. in Stevens v. The Durban-75 Roddepoort Gold Mining Co. Ltd.('). The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of s. 23 (5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation. . . . .If any double taxation is involved the legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to invoke the general principles that the subject cannot be taxed twice over."
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> (emphasis added)

8. However, we find that the TDS paid/ deposited to the government exchequer by the appellant arises out of a statutory liability. In the normal course TDS cannot be held to be a 'consideration' for the service unless specifically mandated/ deemed by law, as stated above. We agree with the contention of the Appellant that the amount would not be part of the consideration for the taxable services received by them as per Section 67(1)(a) of the Finance Act, 1994 in the absence of the legislature itself sanctioning such a provision, mandating double taxation, in the Act. Accordingly, we observe that service tax is not payable on the TDS paid by the appellant on behalf of the foreign service provider.

9. The issue is no longer 'res integra' as it has already been decided by the Tribunal in the appellants own case and in the case of **Adani Bunkering Pvt. Ltd. Vs. CCE, Ahmedabad – II** reported in 2024 (1) TMI 984 – CESTAT Ahmedabad wherein the Tribunal has held that TDS deposited to the Income Tax Department in relation to the payment made to the foreign service provider over and above the invoice value of the services, is not liable to service tax. The relevant portion of the order is reproduced below:-

> *"9. In our considered view, the plain reading of Section 67 with Rule 7 of Service Tax Valuation Rules, in this case in hand, Service Tax liability needs to be discharged on amounts which have been billed by the service provider."*
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> *d) VSL India Private Limited (supra):-*
>
> *"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."

In view of the above judgments, it can be seen that in the identical facts it was held that the TDS deposited which is over and above the invoice value cannot be charged to service tax."

10. As per the discussions and the decisions cited above, we hold that the appellant is not liable to pay service tax on the TDS paid by them on behalf of the foreign service provider. Accordingly, we hold that the demand confirmed in the impugned order is not sustainable.

11. We accordingly set aside the impugned order and allow the appeals, with consequential relief, if any, as per law.

(Pronounced in open court on 02.07.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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