CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 2639 OF 2012

[Arising out of Order in Original No. 120-ST/PKJ/CCE/ADJ/2012 dated 17.05.2012 passed by Commissioner, Central Excise, New Delhi]

M/s. Nokia India Pvt. Ltd. **...Appellant**
1st & 2nd Floor, Tower-A, SP
Infocity, Plot No.243,
Udyog Vihar, Phase-I,
Gurgaon – 122 016.

Versus

Commissioner of Service Tax, **....Respondent**
IAEA House, 17 B,
MG Road, IP Estate
New Delhi.

APPEARANCE:
Mr. Kamal Sawhney & Ms.Aakansha Wadhwa, Advocates for the appellant
Mr.S.K. Meena, Authorized Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 02/08/2024
DATE OF DECISION: 29/11/2024

FINAL ORDER NO.59753/2024

DR. RACHNA GUPTA

M/s Nokia, India, private Limited, the appellants are registered with the service tax department being engaged in providing "Installation and Commissioning Implementation Services", "maintenance or Repair Services" and "Business Auxiliary Services". During the audit of the appellant's record for the period 2003–04 to 2006–07 (till September 06), the audit team observed as follows;

1. For the period October 2003 to September 2006 the appellants had paid service tax of Rs.23,23,95,921/- besides education,

cess of Rs.40,89,963/-. However, on the basis of service tax rates applicable for the relevant period of ST-3 returns, the appellants failed to pay service tax amounting to Rs.25,96,76,067/- and education cess of Rs. 46,27,495/- **resulting into short payment of service tax to the tune of Rs.2,78,17,678/-**

2. For the period April 2006 to June 2006 the appellants had provided fixed managed services to M/s Bharti Cellular against receiving services fee of Rs. 15,55,40,866/- inclusive of service tax charged @ 10.20% on which service tax of Rs. 1,58,65,168/-was paid. Whereas rates of service tax were revised with effect from 18.04.2006. @ 12.24%. Hence service tax of Rs.1,84,38,851/-was to be paid by the appellants. **This resulted into short payment of service tax of Rs.25,73,638/-**

3. For the period October 2006 to March 2007 the appellants had paid service tax, aggregating, to Rs.6,85,31,213/-and the education cess of Rs.13,70,624/-instead of Rs.6,89,64,652/- and Rs. 13,79,273/- respectively for all the taxable services rendered by the appellants during the month of November, 2006. They had also failed to properly assess their service tax and education cess liability for the month of November 2006 resulting into short payment of Rs.13,13,697/- and short payment of education cess of Rs.26,274/- **Thus their occurred short payment of service tax accounting to Rs.17,82,059/-**

4. For the financial year 2006-07, the appellant had shown income of Rs.12,58,23,92,000/- under the head "income from projects" out of which the appellants earned Rs.4,12,91,28,867/-from the Services as per the SALE invoices for the said financial year. The remaining amount of Rs.8,45,32,63,133/-pertain to sale of material. The appellants were observed to have availed the abatement of 67% without including the value of machinery sold on the aforementioned value of services. The audit team observed that the appellants either had to pay service tax on the total income of Rs.12,58,23,92,000/-after availing abatement @ 67% or had to pay service tax on invoice value of Rs.4,12,91,28,867/-. **This failure resulted into short payment of service tax of Rs.1,86,78,934/-**

5. For the period April 2006 to September 2006, since the invoices (17 in number) do not contain the registration number of the person issuing the invoices hence the same were not valid documents for availing CENVAT credit as per rule 9(2) of CENVAT Credit Rules, 2004 (hereinafter referred as CCR, 2004). **Thus the appellants had irregularly availed CENVAT credit of Rs.26,20,533/-**

6. During the period 2006-07, the appellants received an income of Rs.2,42,90,50,000/-on which service tax payable@12. 24.% comes to Rs.29,73,15,720/-as per the annual account. But the services of this amount were not disclosed in the service tax returns as exempted/ export services nor were included in the amount of taxable services for the period 2006-07.

In the light of the above observations service tax accounting to Rs.35,07,88,074/- (including education Cess) for the period October 2003 to September 2006 was proposed to be recovered from the appellants vide Show Cause Notice No.07/ 3804 dated 31.03.2009 along with proportionate interest and the appropriate penalties. Wrongly availed CENVAT credit of Rs.26,20,000/- was also proposed to be reversed along with the interest.

2. The said proposal has been decided by the original adjudicating authority in the following manner:-

1) The appellants are held liable to pay the short-paid service tax of Rs.2,78,17,678/- and of Rs.25,73,683/- for the bills raised on M/s. Bharati Cellular Ltd. and M/s. Bharati Televenture Ltd. at the reduced rate of 10.2% instead of the correct rate of 12.24% applicable from 18.04.2006.

2) With respect to short paid service tax amounting to Rs.17,82,059/-, the same has also been confirmed on the same ground that the appellant are liable to pay service tax applicable on the date of receiving payment. However, the amount of Rs.6,88,041/- as was already paid by the appellant, has been ordered to be set off.

The appellant is held liable to pay service tax at the revised rate of 12.24%. Hence, the demand of Rs.4,12,91,28,867/- has been confirmed. However, the proposal for demand of

Rs.29,73,15,720/- with respect to warranty support services has been set aside.

3) The demand of service tax on software development during 2006-2007 is also set aside.

4) The Business Auxilliary Services (market support/ sales promotion) provided by Nokia India are denied to be export of services on the ground that services do not fulfil the requirement of "used outside India". Accordingly, a demand of Rs.7,74,14,882/- has been confirmed.

5) The reversal of the Cenvat Credit amounting to Rs.26,20,000/- has however been set aside holding that the same is not recoverable from the appellant for the period April 2006 to September, 2006 as no Cenvat Credit was found availed against those 17 invoices which were alleged as improper documents.

3. Resultantly, the original adjudicating authority has confirmed the service tax demand of Rs.12,47,56,621/- instead of proposed demand of Rs.35,07,88,074/- alongwith interest and the penalties. Still being aggrieved, the appellant is before this Tribunal.

4. We have heard Mr.Kamal Sawhney and Ms. Aakansha Wadhwa, ld. Counsels for the appellant and Mr. S.K. Meena, Authorised Representative for the Department.

5. Ld. Counsel for the appellant has mentioned that the adjudicating authority has grossly erred while holding that the receipt of payment is the event for calculating service tax liability. Ld. Counsel has relied upon the decision of Hon'ble High Court of Delhi in

the case of **Vistar Construction Pvt. Ltd. vs. Union of India reported as 2013 (31) STR 129 (Delhi).** The findings qua this issue are prayed to be set aside in the light of the said decision.

6. It is further submitted that appellant is entitled for abatement of 67% from the value of turn-key projects in terms of Notification No.1/2006 dated 01.03.2006. It is impressed upon that the contract is awarded for GSM-NW-Expansion equipment Supply & Services. It is clear that the contract is both for supply of goods and for provision of services as such the abatement benefit under the said Notification has wrongly been denied. Otherwise also with effect from 01.06.2007 the contract of providing services as well as supply of goods falls under the category of 'Works Contract'. It has already been held by Hon'ble Supreme Court in the case of **Larsen and Toubro reported as 2015 (39) STR 913** that no service tax can be collected on works contract before 01.06.2007. The period in dispute in the present case is prior the said date.

7. With respect to the issue of marketing, support services provided to Nokia Corporation, Finland, it is mentioned that the activity amounts to export of service. It has wrongly been held that the service has been provided in the territory of India and as such has been "used in India" except that Nokia Finland is the beneficiary of the service. It is impressed upon that these finding are apparently wrong in terms of Rule 3 of Export of Service Rules, 2005. According to which, following conditions have to be met for a service to be called as export of service.

a) Recipient shall be outside India

b) Service is delivered outside India

c) Service is used outside India

d) Foreign exchange is received.

8. The term "used" outside India has not been defined or clarified in the rules. However, Department's own Circular dated 24.02.2009 explains that "location of the recipient and not the place of performance of the service" is relevant to decide the export of service. Since the recipient of marketing support service situates outside India, the service is wrongly held to be used in India. Ld. Counsel has relied upon the decision of this Tribunal in the case of **Arcelor Mittal Stainless vs. Commissioner of Service Tax in Service Tax Appeal No.88483 of 2014 decided on 09.06.2023**.

9. Finally, it is submitted that the entire demand is barred by time. The extended period has wrongly been invoked. There is no allegation of any fraud, collusion or suppression to have been committed by the appellant. It is impressed upon that non-filing of information cannot be a ground to invoke extended period if there was reasonable belief that the activities undertaken are not taxable. Ld. Counsel has relied upon the decision of this Tribunal in the case of **Subhash Khandelwal & Sons vs. Commissioner of Central Excise, Jaipur reported as 2011 (24) STR 461 (Tri-Del.).** The non-disclosure in the service tax returns also cannot always have the element of suppression as was held by this Tribunal in the case of **Tiger Logistics (India) Ltd. vs. CST, Delhi reported as 2022 (63) GSTL 337**. In the light of all the above discussion, ld. Counsel

has prayed for the order under challenge to be set aside and the appeal to be allowed.

10. While rebutting these submissions, ld. D.R. has reiterated the discussion and findings of the order in Original, at the outset with respect to the rate applicable for payment of service tax. It is submitted that Circular No.56/5/2003 dated 25.04.2003 has clarified that the rate applicable at the time of raising the bills or invoice shall be relevant for making payment of service tax. This issue was further examined and clarified by TRU vide their letter No.544/6/2007-TRU dated 28.04.2008. Since the appellant has made the payment of service tax at the rate which was prevailing prior the issuance of bills/payment of invoices, the short payment has rightly been confirmed. The business support service is also rightly denied to be the export of service, as the services though were provided to Nokia, Finland but for the promotion of their business in India i.e. the services are meant to be used in India. The tax demand is, therefore, rightly confirmed.

11. Finally, while justifying the invocation of extended period of limitation, ld. DR has mentioned that the appellant never disclosed the facts of short payment of service tax to the department, which came to their notice only at the time of audit. The appellant was working under self-assessment system hence they were bound by service tax law to correctly assess their service tax liability and there after only to file the proper service tax returns. However, the appellant had wrongly assessed their liability. They had also failed to show the actual amount in the relevant ST-3 Returns. This amounts

to an act of willful suppression of facts from the department. Since it resulted in short-payment of service tax, the act amounts to evasion of the payment of service tax. Hence the extended period has rightly been invoked. With these submissions and impressing upon no infirmity in the order under challenge, the present appeal is prayed to be dismissed.

12. Having heard the rival contentions of both the parties, perusing the entire record of present appeal and the case law relied upon, we observe and hold as follows:-

To adjudicate upon the present appeal, following 3 issues need to be adjudicated:-

a) Whether marketing support provided to Nokia Corporation Finland is export of service?
b) Whether Service Tax is payable at the rate prevailing at the time of rendering service or at the time of raising bills?
c) Whether benefit of notification No. 1/2006-ST accrues to the Appellant?
d) Whether the extended period is wrongly invoked while issuing Show Cause Notice?

The issue-wise findings are as follows:-

Issue (a)

13. Admittedly the appellant has provided Business Auxilliary Services to Nokia Corporation, Finland i.e. the recipient is outside the territory of India, the taxable territory. Rule 3 (3) of Export of Service Rules, 2005 is relevant for the purpose. The rule reads as follows:-

Rule 3 of the 2005 Export Rules as was substituted w.e.f. 19.04.2006, the relevant portion is reproduced below:

3 (1) Export of taxable service shall, in relation to taxable services, -

(i)

(ii)

(iii) specified in clause (105) of section 65 of the Act,

******

When provided in relation to business or commerce, be provision of such services to a recipient located outside India***

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable service provided shall be treated as export of service only when order for provision of such service is made from any of his commercial or industrial establishment or any office located outside India

(2) The provision of any taxable service shall be treated as export of service when the following conditions are satisfied:

(a) such service is delivered outside India and used outside India; and

(b) payment for such service provided outside India is received by the service provider in convertible foreign exchange"

Rule 3(2) was thereafter amended by Notification dated 01.03.2007 and the relevant portion of the Notification is reproduced below:

> *2. In the Export of services Rules, 2005, in rule 3, for sub-rule (2), the following sub-rule shall be substituted, namely:-*
>
> *(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-*
>
> *(a) such service is provided from India and used outside India; and*
>
> *(b) payment for such service provided outside India is received by the service provider in convertible foreign exchange.*

14. During the period April 19, 2006 to February 28, 2007 in order to qualify as export of service following conditions are required to be satisfied:

> *(i) The service recipient is located outside India if the service were relation to business or commerce.*
>
> *(ii) Service was delivered outside India and used outside India; and*
>
> *(iii) Payment of such service was received in convertible foreign exchange.*

15. In the present case the Appellant has entered into an agreement with Nokia Corporation, Finland for marketing support. The agreement is effective from 1.1.2005. Article II of the agreement provides as follows:

"NIPL shall provide consultancy and advisory services to NOKIA as set forth hereunder. NIPL shall also provide warranty services as a sub- contractor to NOKIA as regards telecommunication Infrastructure products of NOKIA.

The Information to be provided by NIPL shall be in such formats as may be prescribed by NOKIA. The information so supplied by NIPL shall be promptly delivered to NOKIA either by uploading on the internal web based tool (as mentioned below) or by telephone, mail, e-mail or facsimile, as instructed by NOKIA."

16. Hence it is clear that the above stated conditions are satisfied by the Appellant in the instant case in the following manner:

(i) Services are provided by Appellant to Nokia Corporation, Finland located outside India who did not have any office in India. Further the services are used by Nokia Corporation, Finland for deciding the strategy to be adopted for India market and for deciding on the products to be sold in India. Thus the first condition of service recipient being located outside India was satisfied.

(ii) The marketing support services provided by the Appellant are delivered outside India and used outside India by Nokia Corporation, Finland. Therefore the second condition is also satisfied.

17. Ld. Commissioner has denied the benefit of EOS Rules on the ground that the services provided by Appellant are not delivered outside India and not used outside India.

18. In view of above discussion, it is held that services rendered by the Appellants i.e. 'Business Auxiliary services' qualify as export of services as even though the services were rendered in India as the benefits of such services accrued outside India, being utilized by Nokia Corporation, Finland situated in Finland.

19. This situation is clarified by the Circular dated 24.02.2009 Issued by CBEC deals with applicability of the provisions of the 2005 Export Rules in certain situations, including that provided under rule 3(1)(iii) and rule 3(2). The relevant portion of the said Circular is reproduced below:

> "In terms of rule 3(2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if 'such service is provided from India and used outside India'. Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under rule 5 of the Cenvat Credit Rules 2004 (Notification No 5/2006-CE (N.T.) dated 14-3-2006 on the ground that these activities do no satisfy the condition 'used outside India',-

(iii) Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;

20. The Circular dated 24.02.2009 issued by CBEC extensively deals with the issues relating to rule 3(1)(iii) and rule 3(2)(a) of the 2005

Export Rules. It notices that in cases where Indian agents undertake marketing in India of goods of a foreign seller, the Indian agent undertakes all the activities within India and receives commission for his services from the foreign seller in convertible foreign exchange. The officers of the department, however, were taking a view that since the activities pertaining to the provision of service were undertaken in India, the use of service would not be outside India. The CBEC Circular clarifies that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver and not the place of performance and the phrase 'used outside India' should be interpreted to mean that the benefit of the service should accrue outside India. Thus, in this category 'export of service' may take place even when all the relevant activities take place in India so long as the benefit of these services accrues outside India.

21. Ld. Counsel for the appellant has mentioned that this issue is no more *res-integra* as stands already decided by this Tribunal in the case of **Arcelor Mittal Stainless (supra).** There is no denial on part of the department to this fact nor any other decision has been bought to our notice which amounts to superseding the said decision. We have perused the decision of that case.

22. The contradiction of views taken by different Benches of this Tribunal has been answered by the Larger Bench of this Tribunal in M**/s. Arcelor Mittal Stainless** (supra) case wherein it has been held:

"45. The 2005 Export Rules were introduced to achieve the destination based consumption tax concept and so exemption is provided from payment of service tax to services exported out of India. The 2005 Export Rules set out various conditions for a service to qualify as export of service. Basically, the service recipient should be outside India; service should be provided from India and delivered outside India; and payment should be received in foreign currency.

48. A service recipient is a person who makes a request for a service, in exchange of a consideration. In fact, he is the person who is liable to pay for the services received. Service recipient is not a person who is affected by the performance of the service. The Finance Act does not define the term 'service recipient'. However the same has been clarified in the CBEC Education Guide as follows:

"5.3.3 Who is the service receiver?

Normally, the person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf."

Arcelor France and Arcelor India act as main agent and sub-agent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India. Therefore, even though the goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France. Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India."

23. The Hon'ble Supreme Court also in the case of **Association of Leasing and Financial Service Companies vs. Union of India reported as 2010 (20) STR 417** has held that the taxable event is

the rendition of service and not the date of payment. This decision has been followed by the present Tribunal in the case of **Commissioner of Service Tax vs. Consulting Engineering Services Pvt. Ltd. announced in Service Tax Appeal No.76/2012 decided on 14.01.2013**.

24. In the light of entire above discussion, we hereby hold that the services provided to Nokia Corporation, Finland are wrongly denied to be export of service. The issue stands decided in favour of the appellants and against the Department.

Issue No.(b)

25. While alleging the short payment of service tax the Department has formed an opinion that the service tax is to be paid at the rate prevailing at the time of making the payment. This has been done in view of the revision in rates of service tax w.e.f. 18.04.2006. Apparently and admittedly the appellant had provided services to Nokia Corporation, Finland prior the said date of revision. However, the service tax was paid post revision.

26. We observe that the original adjudicating authority has accepted the said proposal relying upon the TRU Circular/Instruction dated 28.04.2008. However, the said instruction is already held contrary to the law and thus, being invalid by Hon'ble Supreme Court.

27. Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Bolpur vs. Rattan Melting & Wire Industries reported as 2008 (12) STR 416** has held as follows:-

> ***"6.*** *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."*

28. In view of the entire above discussion, we hold that the rate of payment of service tax was enhanced to 12.24% after the services were rendered but prior the date of payment. Since rendition of service is the point of taxation, except for TRU clarification dated 28.04.2008 which has been set aside, we hold that the service tax at the rate of 10.12% has rightly been paid. The short-paid Service tax demand confirmed is therefore, held liable to be set aside. The issue stands decided in favour of the appellant and against the department.

Issue (c)

29. The Department has alleged that the appellant since has not included the value of goods to the gross-value of construction services, no abatement can be allowed to the appellant in terms of Notification No.1/2006. The said Notification talks about the effective rate of service tax for specified services – percentage of abatements and thereby exempts the service of erection, commissioning or installation under a contract for supplying a plant, machinery or

equipment and erection commissioning/installation of such plant, machinery or equipment from paying 67% of the service tax provided that the gross amount charged from the customer shall include the value of plant, machinery equipments etc. sold by the service provider. In such case, only 30% of such gross value has to be paid by the appellant. In the present case as apparent from Clause – 1 of the contract between the appellant and its customer Idea Cellular that the appellant has entered into a turn-key project for supplying the equipment and the installation/commissioning thereof. Clause 11 of the said agreement discusses the payment terms. It clarifies that the contract is both for supply of goods and provision of services. We have also perused the sample invoices on record. It is clear that the appellant has charged for the equipments required for respective civil and electrical work for turn-key project. The perusal of these documents is sufficient to falsify the allegation that the value of goods has not been included by the appellant, to the gross value of the turn-key projects, though there are few invoices, wherein only installation and commissioning services have been charged. But it is clear that on such invoices no abatement has been availed by the appellant. The abatement has been availed only on the contracts of Civil Construction Services and not on the Services of Management Maintenance and Repair. Otherwise also there is no denial of the Department that the services provided by the appellants were in the nature of works contract being turn-key projects. The Hon'ble Apex Court in the case of **Larsen and Toubro (supra**) has been held as follows:-

"28. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

29. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of."

30. In the light of said decision, we hold that the abatement has wrongly been denied to the appellants. This issue also decides in favour of the appellant.

Issue (d)

31. Vide the present Show Cause Notice dated 31.03.2009, the allegedly short-paid service tax for the period October, 2003 to September, 2006 is proposed to be recovered. Clearly the department has invoked the extended period of limitation while issuing the said Show Cause Notice, alleging that the appellant has not assessed/disclosed the correct service tax which came to the notice of the department only through the audit. We observe that during the audit the documents of appellant only have been considered while raising the impugned demand. In such circumstances, the mere ipse dixit that the noticee willfully

suppressed the material facts with intent to evade payment of service tax is not sufficient. To our understanding, the notice must contain particulars of facts and circumstances in support of such allegation, even if, such particulars are not included in the notice the department should be in a position to justify and /or substantiate its allegations of suppression of material facts on the part of the noticee. But in the present case, as is apparent from the discussion on 3 of the above issues, it is clear that department has raised demand based on presumptions and without appreciating the contract entered into by the appellant with its service recipient and the invoices raised for rendering the impugned services. The appellant had diligently provided all the documents. We hold that the department has failed to substantiate the allegations of suppression. We draw our support from the decision in the case of **Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut, reported in (2005) 7 SCC 749 - 2005 (188) E.LT. 149 (S.C.)**, the Supreme Court held as follows:-

> "...we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."

32. In the light of discussion on four of the above issues, we hereby set aside the demand in question. Consequent thereto the order under challenge is hereby set aside and Appeal is allowed.

[Pronounced in the open Court on 29/11/2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Anita