CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI.

COURT NO. II

Service Tax Appeal No.55445 of 2014 (DB)

[Arising out of Order-in-Original No.97/ST/SRB/2014 dated 01.08.2014 passed by the Commissioner of Service Tax (Adjudication), New Delhi.]

M/s. PEC Ltd. **Appellant**
Hansalaya Building,
15, Barakhamba Road,
New Delhi.

VERSUS

Commissioner of Service Tax (Adjudication) **Respondent**
New Delhi.

APPEARANCE:

Shri S.C. Kamra, Advocate for the appellant.
Shri Harsh Vardhan, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. 50073/2022

DATE OF HEARING/DECISION:21.01.2022

ANIL CHOUDHARY:

The issue in this appeal is whether the appellant have short paid service tax, as has been held in the impugned order-in-original.

2. The appellant is a Central Government Public Sector Undertaking (PSU) under the administrative control of Ministry of Commerce. The appellant is engaged in the business of trading activities including import, export, domestic sales and trade financing, by way of supporting the MSME sector, who are not in a position to undertake foreign trade themselves.

3. The appellant are registered with the Service Tax Department under the category of "Business Auxiliary Services".

4. The accounts and other records maintained by the appellant were audited by the Audit officers from Service Tax Commissionerate, Delhi for the period 2006-07 to 2010-11. The Audit team observed that the appellant did not pay/short paid service tax of Rs.7,53,49,212/- under the following heads:-

Sr. No.	Nature of Service	Period	Service Tax (Rs.).
1.	Banking and other Financial Services, Business Auxiliary Services.	2007-08 to 2009-10	2,56,27,858/-
2.	Erection, Commissioning or installation services	2006-07	4,21,58,314/-
3.	Banking and other financial services imported –ST under Reverse Charge Mechanism.	2006-07 to 2010-11	52,21,830/-
4.	Business Auxiliary Service imported – ST under Reverse Charge Mechanism.	2006-07 to 2010-11	23,41,210/-
	Total		7,53,49,212/-

5. Ld. Counsel for the appellant submits that the ld. Commissioner without appreciating the defence replies, have confirmed the proposed demands along with equal amount of penalty under Section 78 and also penalty under Section 77 of the Finance Act.

6. Heard the parties at length, perused the records and the evidences produced.

7. So far the first issue of amount of Rs.2,56,27,858/-, for banking and other financial services and Business Auxiliary services is concerned, the appellant have received amount for financing charges in the nature of commission. According to the appellant, they have deposited the service tax on such commissions during the three financial years

2006-2007 and 2007-2008. According to the Department, the appellant have booked less in their return. However, it is explained that such differential amount is arising out of the trading activity being import of pulses, etc., as per the directions of the Government of India for stabilisation of the prices. After import, the appellant have sold pulses to the State Governments at reduced prices (than cost), as per the directions of the Government. Thus, they have incurred loss, which is reimbursable under the scheme by the Central Government. However, such amount received has been mistakenly booked under the 'Commission Income' head. From all the evidences and documents shown to us, it appears that, if the said amount is actually by way of subsidy, the same will not be exigible to service tax. However, for verification of this fact that the amount of subsidy has been wrongly booked under the "Commission Income". We are remanding this issue to the Original Adjudicating Authority with directions to verify this claim, and thereafter, to pass a reasoned order in accordance with law.

8. So far the next ground is concerned, the amount in dispute of Rs.4,21,58,314/-is towards the 'erection, commissioning and installation services'. We find that the said amount has been booked by Revenue, from the Director's report for the year 2006-2007, being annexed to the audited accounts for the year - March ending 2007, wherein the Board of Directors have stated that the appellant have received a contract/ project for laying of transmission line worth Rs.800 million (Rs.80 Crores).

8.1. Further, from the evidences led before us, we are satisfied that this appellant was only a 'consortium partner' for the sake of giving financial backing to M/s. Voltech Projects Pvt. Ltd., which is the 'leading party", and as per declarations in the MOU and the 'consortium

agreement', the role of the appellant was limited to give financial backing to the Project, and all the liability of the execution of the project and realisation of Profit & Loss arising thereunder, was on the lead partner (Voltech Projects Pvt. Ltd.).

8.2. Ld. Counsel also demonstrated that being part of the Consortium as a partner, they have received their share of profit being Rs.53,15,322/-, which has been received in the subsequent financial year and the same has been booked in books as share of profit in the project.

8.3. Thus, this demand is set aside and the ground is allowed in favour of the appellant/ assessee.

9. The next ground relates to the demand of Rs.52,21,830/- under the head "banking and other financial services" on which tax has been levied under Reverse Charge Mechanism.

9.1. Ld. Counsel explains that the transaction is that - the appellant opens 'letter of credit' for import of goods/merchandise through their bankers, in favour of the foreign party/shipper. In such transaction, the Indian banker informs the banker of the shipper (in foreign country) the fact of opening of the letter of credit in favour of the shipper. This communication by Indian Banker to the foreign banker is through the agency of SWIFT, which is an agency for transmission of foreign monetary transactions, maintaining confidentiality and integrity. SWIFT recovered charges from the sending banks (Indian Bank). After the foreign bank receives the intimation about opening of letter of credit from the Indian Bank, through SWIFT, the foreign bank informs their clients/shipper, as to the fact of opening of credit in their favour, mentioning the details therein. For such confirmation given by foreign bank to their clients, they collect

'confirmation charges' from the Indian bank, which in turn, is debited to the account of the appellant/assessee in India.

9.2. As regards the confirmation charges, we hold that the appellant, being initiator of letter of credit, is the receiver of the benefit on such opening of the letter of credit and accordingly, they are liable to pay the confirmation charges and accordingly, they have received the banking services from the foreign bank, through the bank in India. Accordingly, we find that the appellant is required to pay service tax on such confirmation charges under 'Reverse Charge Mechanism'.

9.3. So far the SWIFT charges are concerned, the privity of contract is between the Indian Bank and the SWIFT society. Thus, the receiver of the services is the Indian Bank, and not the appellant/assessee.

9.4. Under the facts and circumstances, the appellant/assessee only have reimbursed such SWIFT charges to the Indian bank. Accordingly, we hold that the appellant is not the receiver of SWIFT services, hence not liable to pay service tax on the same.

9.5. However, we remand this issue to the ld. Commissioner for re-calculation of the tax liability (on confirmation charges) in view of our findings.

10. Further, Rs.23,41,210/- is towards 'Business Auxiliary Services' received by the appellant under RCM. Such service, admittedly, has been rendered by the service provider located outside India and have been received by the appellant in India. The appellant have been involved in this business being from the year 2006-2007 to 2010-2011. The said taxability (under RCM) was highly debatable and was under litigation. The

issue was finally decided by the ruling of the Bombay High Court in the case of **Indian National Shipowners Association – 2009 (13) STR 235 (Bombay),** wherein by judgement dated 11.12.2008, it was held (in the writ petition) that an assessee is required to pay service tax under Reverse Charge Mechanism for the specified services, w.e.f. 18.04.2006 only, when Section 66 A was introduced in the Finance Act. This decision was further affirmed by the Hon'ble Supreme Court as reported in **2010 (17) STR J-57 (SC).** We further find that the appellant/assesse was entitled to cenvat credit on payment of such service tax under Reverse Charge Mechanism. Thus, there is no incentive for them to evade payment of tax. Accordingly, we uphold this service tax liability, but at the same time, we set aside the penalty.

11. Similarly, in the case of 'banking and financial charges', as the cenvat credit is available for the payment of service tax, under Reverse Charge Mechanism, the penalty imposed is set aside.

12. Having considered the rival contentions and under the facts and circumstances, our aforementioned findings, we allow this appeal in part and remand on the issue as stated hereinabove. All the penalties stand set aside. The appellant shall be entitled to consequential benefits in accordance with law.

13. Appeal is allowed for statistical purposes.

[order dictated & pronounced in open court].

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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