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

Service Tax Appeal No.41287 to 41290 of 2013

(Arising out of Order in Original No. 117 to 120/2012 dated 28.11.2012 passed by the Commissioner of Service Tax, Chennai)

Aban Offshore Ltd. **Appellant**
(formerly Aban Loyd Chiles Offshore Ltd.)
Janpriya Crest, No. 11, Pantheon Road
Egmore, Chennai- 600 008.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the Appellant
Shri Harendra Singh Pal, AC (AR) for the Respondent

CORAM

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

Final Order No. 40078 to 40081/2024

Date of Hearing : 20.09.2023
Date of Decision: 24.01.2024

Per M. Ajit Kumar,

These appeals are filed by the appellants against Order in Original No. 117 to 120/2012 dated 28.11.2012 passed by the Commissioner of Service Tax, Chennai. (impugned order)

2. Brief facts of the case are that the appellant is engaged in providing offshore drilling services to oil majors. They are also registered with the Service Tax Department for providing other taxable services. While providing the offshore drilling service, the appellant engaged the services of various service providers located outside India, to provide engineering consultancy, management consultancy, testing

& inspection and banking service. On receiving intelligence that the appellant has neither obtained service tax registration for receiving the subject services nor paid service tax on reverse charge basis in terms of Rule 2(1)(d)(iv) of Service Tax Rules, 1994, the Directorate General of Central Excise Intelligence (DGCEI), Chennai Zonal Unit's investigated the matter culminating in issuance of Show Cause Notice's for the period from 2003 – 04 to September 2011 as detailed in the annexure to the impugned order, under the relevant provisions of the Finance Act, 1994 (FA, 1994). After due process of law, the adjudicating authority revised and confirmed the demand for service tax of Rs.7,31,87,545/- with equal penalty under section 78 of FA 1994 for the extended period and Rs 55,40,497/- along with penalty under section 76 of FA 1994 for the normal period. A penalty was also imposed for non-filing of ST3 Returns. Aggrieved by the said order, the appellant is now before the Tribunal assailing the findings and the demand confirmed.

3. No cross-objection has been filed by Revenue.

4. We have heard learned Counsel Smt. Radhika Chandrasekar for the appellant and Shri Harendra Singh Pal, learned AC (AR) for Revenue.

4.1 The learned Counsel for the appellant made a preliminary technical objection that Show Cause Notice No.23/2009 has been issued by the Additional Director General (ADG), DGCEI and is hence not maintainable. With respect to demand of duty for Management Consultancy Services she stated that M/s. India Offshore Inc., (IOI) is required to provide technical documentation and know-how for efficient operation of the rigs and service. The Appellant had correctly

registered the service under the category of Intellectual Property Services and had discharged service tax. With respect to Consulting Engineering Services, the Appellant has entered into agreement for supply of manpower. Having accepted registration under the category of Manpower Recruitment or Supply Agency Service (MRSAS), the department cannot tax the same under a different head. In terms of Section 65A of Finance Act, 1994 specific description prevails over general description. With respect to Banking and Financial Services she said that the Appellant had entered into an agreement with Barclays Bank PLC to advise and assist the Appellant in acquiring funds through issue of Foreign Currency Convertible Bond (FCCB). The proceeds have been received outside India after deduction of amount due to the foreign consultant. Hence the charge is not tenable. With respect to Technical Inspection and certification services she said that the appellant had rendered service with respect to rigs situated in the non-designated area and therefore there is no liability to pay service tax. With respect to Legal Consultancy Services she stated that the impugned order accepts that the legal fees were paid in connection with legal issues outside India. Having accepted that the entire activity has taken place outside India the confirmation of demand under legal consultancy services is not tenable. Further since the Show Cause Notice No.23/2009 is barred by limitation, extended period is not invocable as there is no suppression, fraud etc. as required under proviso to Section 73. She prayed that the impugned order be set aside

4.2 The learned AC (AR) stated that the Appellant has all along been reluctant to share details of their activities as pointed out in the impugned order, which has discussed all the issues elaborately. The

non-submission and late submission of the information was deliberate and hence the extended period of time has been invoked correctly. He reiterated the points given in the impugned order on behalf of Revenue and prayed that the appeal may be rejected.

4.3 Having gone through the appeal papers and having heard the rival parties, we proceed to examine the dispute relating to the classification of various services. The issues examined in this order are given in the table below:

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5. Jurisdiction of ADG DGCEI to issue Show Cause Notice

5.1 The appellant is of the opinion that the show cause notice issued by the ADG, DGCEI, is untenable in terms of the Hon'ble Supreme Court judgment in the case of **M/s Canon India Pvt Ltd. Vs. Commissioner Of Customs** [Civil Appeal No.1827 of 2018], wherein it was held that by virtue of sections 2(34) and 28 of the Customs Act, 1962, the ADG, Department of Revenue Intelligence (DRI) is not a proper officer to issue SCN demanding the customs duty in respect of goods which have already been assessed and cleared by the Deputy Commissioner of Customs.

5.2 We find that in **Hari Khemu Gawali Vs Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], a **Constitution Bench** of the Apex Court stated:

> "It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

It would hence not be proper to examine the issue of jurisdiction of DGCEI officers under the Service Tax law based on the Canon India Judgment (supra).

5.3 The various other sub-issues raised by the Appellant regarding the disability caused by DGCEI issuing the SCN are listed below.

A) Where the statute confers the same power to perform an act on different set of officers, as in this case, the said officers i.e. ADG, DGCEI and Commissioner of Service Tax, Chennai, cannot exercise their powers in the same case, especially when they belong to different departments. In the Appellant's view, this would result in an anarchical

and unruly operation of a statute which is not contemplated by any canon of construction of statute.

B) When the Legislature employed the definitive article 'the' under Section 73 of Finance Act, 1994, the same is with the intention to designate the power to such proper officer. In the case of ***Shri Ishar Alloy Steels Ltd Vs Jayaswals Neco Ltd (2001) 3 SCC 609*** it was held that 'the' is the word used before nouns with a specifying or particularizing effect as opposed to the indefinite or generalizing force of 'a' or 'an'. Therefore, in the absence of specific power vested on the DGCEI through Section 73, the Show Cause Notice issued by him is not legally maintainable and liable to be quashed.

C) The words 'Assistant Commissioner of Central Excise' or 'Deputy Commissioner of Central Excise' was substituted with the word 'Central Excise Officer' only with effect from 13.05.2005 vide Finance Act, 2005, hence a DGCEI officer who has vested with the powers that are exercisable by the Central Excise Officer from that day only and could not have issued the SCN earlier. When the laws specifically provides that SCN has to be issued only by the Commissioner of Central Excise the notice issued by the Assistant Commissioner is not valid.

D) It is submitted that even post 13.05.2005 the officers appointed by the Board cannot be considered as Central Excise Officer for the purpose of Section 73 in the absence of specific power vested on the DGCEI through Section 73 and therefore the Show Cause Notice issued is not legally maintainable.

5.4 We find that these issues have been addressed comprehensively by the Original Authority in the impugned order. Para's 6.0 to 6.2. of which is reproduced below, with approval.

"6.0 The assessee contended that the issuance of SCN by the ADG, DGCEI is without jurisdiction and hence not maintainable in law. They further argued that the Commissioner of Service Tax is not empowered to adjudicate the notice issued by ADG, DGCEI. I have examined the contentions made by the assessee. I find that the same has been raised without noticing and appreciating the changes made in this regard. The Central Government vide Notification No. 3/2004-ST dated 11.3.2004 have appointed ADG (DGCEI) as a Central Excise Officer for whole of India and have vested in him all the powers that are exercisable by the Central Excise officers. Further, by virtue of the provisions of section 12E of Central Excise Act, 1944, which is made applicable to service tax matter, a Central Excise Officer is empowered to exercise the powers and duties of any other central excise officer, who is subordinate to him. Therefore, when an Assistant / Deputy Commissioner in competent to issue Show Cause Notice for demand of service tax under section 73, then the ADG (DGCEI) having all India jurisdiction by virtue of Notification No. 3/2004-ST dated 11.3.2004 is fully competent to issue the present Show Cause Notice under consideration.

6.1 Further, it is well settled proposition of law that the provisions prevailing as on the date of issue of Show Cause Notice are alone applicable for determining the level of officers to issue Show Cause Notice. Accordingly, the provisions of section 73 as amended vide Finance Act, 2005 are applicable for issue of Show Cause Notice on or after 13.5.2005 irrespective of the period of demand. I also refer to the order passed by the Hon'ble Tribunal in the case of **ETA Travel Agency** 2007 (7) STR 454 (TRI), wherein the Tribunal rejected identical objections raised by the appellant of the case regarding the competency of ADG (DGCEI) in issue Show Cause Notice. Hence I find no force in the argument that ADG, DGCEI is not empowered to issue subject SCN and I reject the same. I hold that SCN has been issued properly and legally by the ADG (DGCEI) and the same is valid in the eyes of law.

6.2 It is also pertinent to see Board's Circular No. 80/1/2005-ST dated 10.8.2005 instructing that all pending Show Cause Notices shall be disposed of in terms of revised power of adjudication which makes it clear that the Commissioner is empowered to adjudicate the Show Cause Notice issued within his monetary powers. Hence, I reject the contentions of the assessee as not sustainable and hold that the ADG, DGCEI is competent to issue Show Cause Notice and the Commissioner of Service Tax is empowered to adjudicate the same."

Further the Board vide **Circular No. 80/1/2005–ST, dated 10.08.2005** has clarified that with the objective of enabling expeditious adjudication of service tax cases, section 73 of the said Act was amended vide Finance Act, 2005, whereby the words — 'Assistant/ Deputy Commissioner of Central Excise' were substituted by the words — 'Central Excise Officer'. Section 83A was also inserted in the said Act for the purpose of conferring powers on the Central Excise Officer for adjudging a penalty under the provisions of the said Act or the rules made thereunder. The above provisions came into force with the enactment of Finance Bill, 2005 on 13/05/2005. Since the earliest SCN in this case was issued on 26/03/2009 we do not find any infirmity in this regard.

5.5 It may further be added that over the years State activities have become multifarious and the role of the State's Administrative machinery has grown to at times co-exist with the powers of one another. Considering the wide ramifications of sovereign functions, it would not be wrong to say that we live in an age of overlapping and concurring regulatory jurisdiction. This is reflected in the very definition of 'Central Excise Officer' as per **section 2 of the Central Excise Act 1944**, which is reproduced here under;

> SECTION 2. Definitions
>
> In this Act, unless there is anything repugnant in the subject or context, -
>
> (a) . . . . .
>
> (aa) . . . . .
>
> (aaa) . . . .
>
> [(b) "Central Excise Officer" means the [Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise], Commissioner of Central Excise, Commissioner of Central

> Excise (Appeals), Additional Commissioner of Central Excise, [Joint Commissioner of Central Excise] [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of Central Excise Officer under this Act.]

The section empowers the Board to invest any person (including an officer of the State Government) with any of the powers of Central Excise Officer under this Act.

5.6 Once a person is empowered under the Act there is no statutory bar on his exercising the powers given there under even if administrative instructions proscribe his activities. His actions will remain legally valid as there is no jurisdictional error even if there may have been the transgression of an administrative circular. The Hon'ble Supreme Court in **Pahwa Chemicals Private Limited Vs Commissioner of Central Excise, Delhi,** [2005 (181) E.L.T. 339 (S.C).] examined a similar matter and held that the Board can only issue such direction as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration of levy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officers, as

a matter of propriety, must follow the directions and only deal with the work which has been allotted to them by virtue of these Circulars. But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.

Complexities of Administration and Shared Jurisdiction

5.7 Hence statutes that parcel out authority or jurisdiction to multiple agencies are perhaps the norm, rather than an exception. Hon'ble Justice Krishna Iyer of the Supreme Court in the case of **Avinder Singh Etc vs State Of Punjab & Anr. Etc,** [1979 AIR 321 / 1979 SCR (1) 845 / 1979 SCC (1) 137] had stated that, 'this is a trite proposition but the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility . .' There are many variants of shared jurisdiction regimes, and all need not be treated identically by the law. The **University of Chicago Public Law & Legal Theory Working Paper No. 161, 2007**, has examined the matter academically and stated that:

> "Combining the dimensions of exclusivity and completeness yields four potential statutory schemes.
>
> 1. Congress could delegate complete and exclusive jurisdiction. Agency A is given the authority to regulate X1, where X1 is a subset of X (X1⊂ X). Agency B is given authority to regulate X2, where X2 is a subset of X (X2⊂ X). In the complete and exclusive regime, there is no policy authority held simultaneously by both agencies; that is, X1 ∩ X2 = ∅ . And the combination of the policy space regulated by both agencies is the entire policy space, X1U X2 = X. If the space X is represented with a circle, a single line dissecting the circle marks the jurisdictional divisions, with A getting all authority on one side of the line and B all authority on the other.
>
> 2. Congress could delegate incomplete and exclusive jurisdiction. If the policy space X continues to represented by a circle, this statutory scheme excepts a subset of the policy space from the jurisdiction of either agency A or B. The remainder of the space

> is exclusively within either the jurisdiction of agency A or B. That is, the sets of authority delegated to agencies A and B remain disjoint, X1 ∩ X2 = ∅. However, the union of A and B does not occupy all of the policy space; X1U X2 ⊂ X. The important difference between regimes (1) and (2) is that some potential authority in the policy field that could have been given to an agency is not given to either agency. This is jurisdictional underlap.
>
> 3. Congress could delegate complete authority to agencies A and B, but with nonexclusive jurisdictional assignments. In this regime, all of the potential authority within space X is delegated, but some authority is given to both agencies. The authority might be perfectly overlapping, such that X1=X2=X. Or more likely, each agency is given some exclusive jurisdiction, but some subset of authority is also jointly held by both agencies such that X1∩X2=X3⊂ X. That is, jurisdiction is partially overlapping.
>
> 4. Lastly, Congress might generate a non-exclusive shared jurisdiction scheme in which the grant of authority is incomplete (or non-exhaustive). At least some portion of each agency's authority is also shared with the other agency. What differentiates regime (4) from regime (3) is that there is also some subset of the policy space not clearly given to either agency, such that X1 U X2 ⊂ X. Regime (4) carves out a portion of potential authority that is not given to either government entity, although of course the scope and existence of this pocket will usually be ambiguous. Jurisdiction in this scheme is both overlapping and underlapping. [Jacob Gersen, "Overlapping and Underlapping Jurisdiction in Administrative Law" (University of Chicago Public Law & Legal Theory Working Paper No. 161, 2007)]." (emphasis added)

This illustration using set theory showing the many potential schemes for allocation of jurisdiction available to a foreign democratic government is not the last word on the subject and is only to show the complex area of shared jurisdiction that Government across the world grapple with. Hence grant of jurisdiction to administrative functionaries is a matter of individual State policy. The Appellants view, that this would result in an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute, is not an universally accepted view.

5.8 The appellant has stressed on the article 'the' before the words 'Assistant Commissioner or Deputy Commissioner of Central Excise'. In English usage "the" is termed as the "definite article" while indefinite

articles are "a" and "an." Therefore, it is the Appellants view that in the absence of specific power vested on the DGCEI officers through Section 73, the Show Cause Notice issued by him is not legally maintainable and liable to be quashed. As noted earlier, Section 73 of the FA, 1994 was amended with effect from 13.5.2005 much before the issue of the first SCN, to enable expeditious adjudication of Service Tax cases. Furter definite article only specifies that the noun referred to is one which is an already known one. What it is, must be identified by the context of the matter under consideration. In this case it refers to the authority competent to adjudicate the matter as empowered by law and not by 'any' Assistant Commissioner. Further the appointment and jurisdiction of Central Excise Officers are as per **Rule 3 of the Central Excise Rules, 2002**. Rule 3 as it stood on 01/03/2002 states:

> **RULE 3.** Appointment and jurisdiction of Central Excise Officers-
>
> (1) The Board may, by notification, appoint such person as it thinks fit to be Central Excise Officer to exercise all or any of the powers conferred by or under the Act and these rules.
>
> (2) The Board may, by notification, specify the jurisdiction of a Chief Commissioner of Central Excise or Commissioner of Central Excise or Commissioner of Central Excise (Appeals) for the purposes of the Act and the rules made thereunder.
>
> (3) Any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or these rules on any other Central Excise Officer who is subordinate to him.

Certain changes in the designation of officers were made in Rule 3(2) on 30/06/2017 only to accommodate newly designated officers. In the light of Rule 3(3) any officer superior to the officer who is empowered to issue demand notice and adjudicate notice under Section 73 of Finance Act, 1994 can do the same if the officer designated is

subordinate to him. Hence so long as the officer has the jurisdiction to issue a notice there is no infirmity in his action. Having issued a notice, as discussed above, it cannot be insisted that the same officer should also adjudicate the matter. There is no such legal necessity as seen from the Pahwa Chemicals judgment (supra). There can be a segregation between the preventive and assessment functions among officers who share concurrent jurisdiction on a tax collection matter. Adjudication can be done by the other officer who enjoys concurrent jurisdiction in the matter, more so if he happens to be the jurisdictional officer looking after assessment work relating to the Appellant in the normal course.

5.9 Whether DGCEI officers are "Central Excise Officers" or not was examined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited vs Principal Additional Director, Directorate General of Goods and Services Tax, Chennai** [2022 (62) GSTL 406 (Mad)] dated 17/06/2022. It was held that without doubt, the officers from the Directorate are "Central Excise Officers" as they have been vested with the powers Central Excise officers.

5.10 As per the discussions, the averments of the Appellant fails to convince us of any jurisdictional error in the maintainability of the SCN. Having found no merit in the preliminary technical objection, we now examine the other issues raised by the Appellant.

6. Contracts / Agreements and the Best Evidence Rule

6.1 The dispute between the contesting parties is based on the Agreement entered into by the Appellant with various service providers located outside India. Every agreement that is enforceable in law is a contract in the realm of private law. Section 91 of the Indian Evidence

Act, 1972 gives immense importance to documentary evidence over oral ones. Hence when written agreements and documents are available they are the best evidence to demonstrate a fact or to understand it. Further, as per section 106 of the Evidence Act, the fact within the knowledge of a person must be proved as the burden is cast upon him. The Apex Court in **Mohan Lal Sharma Vs. UOI and Another** [1981 AIR 1346] observed that the cardinal rule in the law of evidence is that only the best available evidence should be brought before the court of law to prove a fact or the point in issue. The Apex Court again in its judgment in **Smt. J. Yashoda Vs Smt. K. Shobha Rani** [AIR 2007 SC 1721], went on to define the best evidence rule stating that 'so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it'. It has been held by courts that the nomenclature of any contract, of document, is not decisive of its nature otherwise clever drafting can camaflouge the real intention of the parties. In its judgment in **Great Eastern Shipping Company Ltd. Vs State Of Karnataka [2020 (32) G.S.T.L. 3 (S.C.)]** the Apex Court stated at para 13 as under:

> 13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

The above principles shall be a guide for the discussions below.

7. Consulting Engineering Services Vs. Manpower Recruitment Service

7.1 As regards the first classification dispute, traditionally under manpower supply, employees whose services are supplied on a temporary basis or otherwise are hired under a contract of service, and the hirer, i.e., the employer, has complete control over the work and manner in which it is done (apart from other tests of an employer-employee relationship which will be discussed later). Consultants on the other hand are hired under a contract for service to advice on specific tasks with minimal supervision.

7.2 It is the Appellants contention that they have entered into an agreement with M/s. International Offshore Management Inc., USA (IOMI) Noble Denton Agency, OCS Services Ltd. and Transworld International, for temporary supply of manpower falling under MRSAS. The Appellant has registered under the category and has reportedly discharged service tax which is taxable with effect from 16.06.2005. It's the Departments case that as per the agreement IOMI has to provide the Appellant, Drilling Services Consultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units and the activity come under the taxable service of "consulting engineer". The Agreement with IOMI has been examined in the impugned order.

7.3 It would be essential at this stage to examine the definition of 'consulting engineer service' and MRSAS.

> Section 65(13): "consulting engineer" means any professionally qualified engineer or an engineering firm who, either directly or indirectly, renders any advice, consultancy

> or technical assistance in any manner to a client in one or more disciplines of engineering." (emphasis added)
>
> Section 65(48): "taxable service" means any service provided- (g) to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering."

7.4 The definition of "Manpower Recruitment or Supply Agency's Services" (MRSAS) under section 65(68) of the Finance Act, 1994 provides that "Manpower Recruitment or Supply Agency Service'' means 'any person engaged in providing any service directly or indirectly in any manner for recruitment or supply of manpower, temporarily or otherwise in any manner to any other person". (emphasis added).

7.5 The 'Agreement' between the Appellant and IOMI as placed in the Appeal booklet is given as under. The abbreviation IOM in the Agreement refers to IOMI as used in this order:

SERVICE AGREEMENT

> This agreement made and entered into this 15th of December 20001 by and between **Aban Loyd Chiles Offshore Ltd. (*)** a company incorporated under the Companies Act of 1956 and having its registered office at No. 113, Janpriya Crest, Pantheon Road, Egmore, Chennai – 600 008 (herein referred to as 'ABAN') and International Offshore Management Inc. a company incorporated under the Laws of Texas, USA and having its registered office at 8303, Southwest Freeway, Suite 335, Houston, Texas 77074, USA (herein referred to as 'IOM') on the part.
>
> ABAN and IOM is hereby agree as follows:-
>
> 1. IOM shall provide ABAN Drilling Services Consultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units ABAN – II or ABAN – III and HITDRILL – 1.
>
> 2. The services shall include Consultants for Drilling Technology, Electrical and Mechanical maintenance and Rig move operations.

3. As compensation ABAN shall pay IOM USD 1750 per Rig per day and the amount shall be remitted to IOM's Bank Account within 30 days of presentation of monthly invoices. In the event of any change in the number of consultants deployed, the amount payable by ABAN shall be adjusted upwards for additions and downwards for reductions as mutually agreed from time to time.

[Per day for each position USD]

Drilling Consultant	400.00	On 28 days on
Mechanical, Electrical, Barge, maintenance Consultants	400.00	28 days off basis

4. In order to render Drilling Services as required under Clause – I IOM shall provide sufficient experienced technical manpower teams as per mutual requirements from time to time.

5. ABAN shall give IOM 28 days written notice of intent to change the team complement or any individual consultant team members.

6. IOM shall be responsible for all payments to the consultants except otherwise expressly provided in the agreement.

7. ABAN shall pay all transportation costs and air fare as provided below, food and lodging costs while in India (including catering while on the Rigs of European / US Standards), safety equipment and all other costs in India, such as local reception, stopover, meals, additional travel etc. IOM shall bear the cost of insurance of their team of Technical Consultants provided by them.

8. IOM will ensure that the Technical Consultant provided vide Clause – I above are professionally competent, experienced and qualified in their respective areas and shall agree to conform to all reasonable rules and regulations promulgated by ABAN or ONGC for drilling operations on the Rigs. Should ABAN feel for just cause that the conduct of any of the Technical Consultant is detrimental of ABAN's interests. ABAN shall notify IOM in writing for removal giving the proper reasons. IOM shall remove and replace such member / members of Technical Consultant at IOM's expense within seven days. ABAN shall effect a reduction in the amount payable to IOM at the rates mentioned in paragraph 3 above. The person / persons so removed shall not be again included as a Technical Consultant without the prior written consent of ABAN.

9. The rates provided for in paragraph (3) above are valid through March 31, 2003.

10. This agreement is effective 1st January 2002 and may be terminated only by giving IOM a written notice by either party of 90 days to the other.

11. The agreement is subject to applicable Indian laws.

12. ABAN shall withhold corporate tax from payments to IOM on the basis of deemed profit of 10% as provided under section 44BB of the Indian Income Tax Act.

ABAN shall furnish to IOM quarterly the copies of challans evidencing payment of such taxes.

In the event that corporate tax liability in India of IOM is determined in excess of the rate pursuant to section 44BB of Indian Income Tax Act 1961 such excess would be fully compensated by ABAN to IOM by immediately upward revision of individual day rate.

All taxes in the country of incorporation of IOM including corporate income tax, if any, assessable on IOM under the laws of that country shall be borne by IOM.

Any dispute between ABAN and IOM shall be resolved through mutual discussions and if the resources has not obtain through negotiation the matter shall be referred to arbitration under the Laws of International Chamber of Commerce, London.
(emphasis added)

(*) - Now known as Aban Offshore Ltd. i.e. the Appellant

7.5 The Agreement may now be examined in terms of FA 1994. With rapid changes in the work environment and the highly specialized and sophisticated nature of work it is doubtful whether the search for a formula in the nature of a single test to identify a Consultant is possible. However, in the impugned context it may be profitable to look at some of the definitions of the term 'consultant'. In **CIT v. Bharti Cellular Ltd.** [2009] 319 ITR 139 / [2008] 175 Taxman 573 (Delhi), the Hon'ble High Court of Delhi has observed that the word "consultant" is a derivative of the word "consult" which entails

deliberations, consideration, conferring with someone, conferring about or upon a matter. The Appellant has also drawn attention to the judgment of the Tribunal in the case of **Basti Sugar Mills Co. Ltd. vs. CCE Allahabad** [2007 (7) STR 431 (Tri-Del)] wherein it was held that the activity of a mediator Service cannot fall in to the category of business consultant service. That what is envisaged from a consultant is primarily an advisory service and not the actual performance of the management function. This case was upheld by Supreme Court [2012 (25) STR 3154 (SC)].

7.6 In the context of the discussions above two points emerge. Firstly, a contract is to be interpreted according to its purpose [see Great Eastern Shipping Company (supra)]. Secondly "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. However highly skilled operations may require the hired consultant to be present at site, temporarily or otherwise depending on the needs of the industry or hirer, to facilitate an immediate consultation.

7.7 It is the contention of Revenue that clause 1 of the Agreement begins by stating that IOMI shall provide the Appellant Drilling Services Consultancy with experienced Consultants for the safe and sound operation of its Offshore Drilling Units. We find that the term ‘consultant’ permeates the entire agreement, ruling out a linguistic mistake. The compensation that the Appellant has to pay IOMI is in USD per Rig per day (clause 3). The agreement states that IOMI shall be responsible for all payments to the consultants. Hence the payments received by the person hired does not reflect as being between the

appellant as an employer to an employee. The fact that the hired personnel are available at site on a continuous 28-day basis before taking a break (clause 4), could be due to administrative exigencies and convenience, necessitating such an arrangement. The Consultants are hired for the safe and sound operation of its Offshore Drilling Units which would by and large involve them advising the Appellant at the spot and not for operating the rigs, as would be expected of hired labour. Thus, the matrix of fact regarding the engagement of 'consultants' and the intention of parties can prima facie be discerned by the term consultant being repeatedly used to denote the relationship of the hired team and its members with the appellant in the agreement. Moreover, the words "in any manner" emphasized in the definition extracted above i.e. 'consultancy or technical assistance in any manner to a client', is of the widest import and is equivalent to "every manner". The term 'in any manner' also appears in MRSAS, which pertains to a more general taxable service. A more generalised service must yield to the more specific one for classification.

The Test Of Employer and Employee or Master and Servant

7.8 Looked at from another angle the department in the SCN has submitted evidence in the form of the Agreement which was interpreted to allege that the Appellant was in receipt of the services of consultants at its rigs, and thus discharged its primary onus which was sufficient to raise a presumption in its favour with regard to the existence of facts sought to be proved. [See; **Collector of Customs, Madras & Ors. v. D. Bhoormul** [1974] 3 S.C.R. 833]. Once an allegation, which is based on a written Agreement, has been raised by Revenue regarding the nature of services received by the appellant,

adverse inference could be drawn against the Appellant if they are not able to provide a satisfactory reply. The initial burden of rebuttal is on the Appellant, because the basic facts are within their special knowledge. The appellant has thus not been able to explain their contention that the engagement of the persons was only in the nature of supply of manpower. The Appellant could have rebutted the Departments allegation by showing that:

> i) the Appellants level of control over the persons engaged was very high and the persons could be directed about not only what work to do, but also how to do it. (Control and Supervision Test)
> [See **Shivnandan Sharma v. Punjab National Bank Ltd**.[955 AIR 404 / 1955 SCR (1)1427]
>
> ii) the persons were integrated within the employer's business during the course of their engagement. This test (organisation test) looks at the degree of integration in work committed in the Appellants primary business with the understanding that the higher the level of integration, the more likely the worker is to be an employee. (Organisation Integration Test)
> [See **Silver Jubilee Tailoring House vs Chief Inspector of Shops & Establishments** (1974) 3 SCC 498]
>
> iii) the Appellant had the power to select, appoint and dismiss the persons without restriction. The persons, like any typical employee enjoyed benefits such as leave/paid time off, holidays, bonus, perquisites, social security, insurance coverage etc (Mutual Obligation Test)
> [See **Ram Singh vs U.T. of Chandigarh** (2004) 1 SCC 126 (Supreme Court)]
>
> iv) they are provided with and use company equipment during their engagement. (Provision of Equipment Test)
> [See **Silver Jubilee Tailoring House vs Chief Inspector of Shops & Establishments** (1974) 3 SCC 498]
>
> v) they were bound to provide their services being on the rigs or any place as directed by the appellant, and do not have the flexibility to provide the services from any remote location not approved by the Appellant. They are required to adhere to the same specified times of work and rules that apply to the Appellants permanent employees. (Control and Supervision Test)
> [See **Shivnandan Sharma vs Punjab National Bank Ltd**. 955 AIR 404 / 1955 SCR (1)1427]

There is not a straightjacket formula nor are the above 'tests' exhaustive, but are pointers to discern the relationship between the parties considering the facts of this case. In facts courts in different cases, have used 'multiple sets of factors' test while deciding these relationships. **Boards Circular F No B1/6/2005-TRU dated 27/07/2005** relied upon by the Appellant, does not obviate the necessity of establishing an employer–employee relationship for temporary supply of manpower. Hence in the present matter the Appellant has failed to rebut the allegations in the SCN and findings in the impugned order satisfactorily and hence their pleading fails to disturb the findings in the impugned order.

8. Management Consultancy Services Vs. Intellectual Property Service

8.1 The Appellant and M/s India Offshore Inc (IOI) have entered into a collaboration agreement. The name of the Company was "ABAN LOYD CHILES OFFSHORE LTD", (ALCOL) a limited company incorporated under the Indian, Companies Act of 1956. The object of the Collaboration was to locate customers who need oil exploration, production and transportation services; participate in bids and secure orders; execute them by using the technical capability of IOI and infrastructure facilities of ALCO (and its promoters) and deliver them to the customers. The impugned order has examined the host of services provided to the Appellant by the service provider as being pre-dominantly one of consultation service. Para 11.1 and 11.2 of the impugned order is reproduced below:

> "11.1 It is evident from the various clauses of the agreement including the clauses reproduced above that

India offshore has undertaken to provide a host of services to the assessee. The services provided by India Offshore are not only limited to merely providing 'know-how' but they assist the assessee to locate customers who are in need of oil exploration, production, transportation services, participate in the bids and secure orders and execute them by using technical capability of India offshore, provide pre bid services viz. locating suitable rigs and other equpments against enquiries floated by operators and supply of all technical and commercial documentation comprising of equipment specifications, copies of necessary certificates, data on the number, categories and cost of expatriate manpower required and any other data required for submission of bids. It is seen that India offshore is further required to provide supplementary information and specialists necessary during discussions with the operators of clients and once contract is awarded, they shall negotiate with equipment suppliers, obtain documentation and certificates required by statutory authorities for import clearances and coordinate between supplier and other departmental agencies of the exporting country. India offshore is also responsible to select and employ the expatriate manpower and provide material procurement services, recommend organization structure and procedures for sound system of planning, administration, financial control and project management, provide training, maintenance, repair, tests and service of rigs, advise and assistant in emergent situations.

11.2 In view of the above facts, the nature and scope of services provided by India offshore to the assessee are predominantly consultation service in the overall effective and efficient management of the operations, right from locating customers, procuring orders, employment of necessary manpower, procurement of materials to equipments and spares. It is pertinent to state that apart from providing the aforesaid services, India offshore is required to recommend the organization structure and procedures and sound system of planning, administration and financial control and project management. Further, India Offshore shall also provide advise and arrange maintenance, repair, tests and certification of rigs and equipment besides advise and assistance in emergency situations of operations of the rigs."

8.2 The Appellant has questioned the classification of the services as Management Consultancy Services and have felt it liable to be taxed under the category of Intellectual Property Service (IPS). The coverage of 'consultant' and 'consultancy' has been discussed elaborately above.

As per Boards **Circular No. 80/10/2004-S.T., dated 17-9-2004,** intellectual property emerges from application of intellect, which may be in the form of an invention, design, product, process, technology, book, goodwill etc. The definition of taxable service includes only such Intellectual Property Rights (IPRs) except copyright that are prescribed under law for the time being in force. As the phrase "law for the time being in force" implies such laws as are applicable in India. The taxable Service has been defined under Section 65(105)(zzr) to mean any service provided or to be provided to any person, by the holder of intellectual property right, in relation to intellectual property service. The requirements of Section 65 (105) (zzr) read with the definition of IPR in section 65 (55 a) should meet the following conditions -

(a) service should be provided to any person

(b) service should be provided by the holder of IPR

(c) service should be any service in relation to IPS.

(d) IPR should be transferred temporarily or permitted to use without transfer.

(e) IPR should not pertain to copyright.

(f) Such IPR should be recognised under Indian laws.

8.3 The Appellant has raised the following grounds for challenge of the impugned order:

a) Scope of services is not merely providing technical know-how but also to assist the Appellant hence the service is liable to be taxed under the category of IPS.

b) Rigs are located in non-designated area and that the services pertaining to these rigs are not received in India.

c) IOI is not an associated enterprise. Shareholding pattern given by M/s.Cameo who is the Registrar and Share Transfer Agent of the Appellant to prove that IOI held 19.15% of shares which is less than 26% prescribed under Section 92A of Income Tax Act, 1961 to be considered as associated enterprise, even though in terms of the agreement there is a reference to 40% of the issue and paid-up capital to be picked up by IOI.

d) They have not made the payments and have only made the provisions in the books and the same is shown as 'trade payables'. It is a commercial call taken by the Appellant.

8.4 The main terms of the Agreement under dispute are;

> 2. The object of the Collaboration is to locate customers who are in need of oil exploration, production and transportation services and to participate in the bids and secure orders and execute them by using the technical capability of IOI and infrastructure facilities of ALCO (and its promoters) and deliver them to the customers. For this purpose, IOI shall provide the following services to ALCO.
>
> **i)** **Pre-bid services** such as locating suitable rigs or other equipment against inquiries floated by operators and supply of complete technical and commercial documentation comprising:
>
> a) Specifications of the equipment offered.
>
> b) Copies of necessary certificates from chartered valuers/surveyors etc.
>
> c) A list of additional equipment, their specifications, prices, spare-parts, consumables and their costs required for operating and maintaining the equipment as per operators' specifications.
>
> d) Data on the number, categories and cost of expatriate manpower required for executing the project.
>
> e) Any other data required for due submission of the bids.

ii) Supplementary information and specialists necessary during discussions with operators or clients on the equipment offered.

iii) On award of contract, to

a) Negotiate with the equipment suppliers and to use its best efforts to obtain the best possible price and terms of payment based on existing market conditions.

b) Use its best efforts to provide necessary documentation and certification required by statutory authorities for clearing the import of such equipment as are required to execute the project.

c) Coordinate between the supplier and other governmental agencies of the exporting country for due certification and arrangement for shipping of the equipment.

d) Select and employ as necessary the agreed expatriate manpower required for operating, maintaining and managing the equipment.

e) Provide material procurement services including preparation of purchase specifications and assistance in world-wide procurement of operating and maintenance spares and other equipment required for the performance of the project.

iv) All necessary technical documentation and "Know How" for the efficient operation of the rigs and the "services".

v) Recommend the organizational structure and procedures and sound systems of planning, administration and financial control and project management.

vi) Provide training for ALCO's personnel in various aspects of operating, managing and maintaining the equipment, planning and coordination etc. both on job as well as in arrangement with specialist institutions if any.

vii) Advise and arrange, as needed, maintenance, repair tests and certification of the rigs and equipment.

viii) Advise and assist in ‘emergency’ situations of operation of the rig.

Hence the main activities provided by IOI to ALCO involve pre-bid and post-bid activities as detailed above. All these activities satisfy the

essential character of consultancy and relate principally to activities performed by management or business consultants. We find from the Agreement that the services provided IOI is a composite service and is classifiable as per sub clause (b) of Section 65A (2) of FA 1994 as 'management or business consultant'.

8.5 On the contrary, apart from the fact that technical documentation and "Know How" is a very small part of the activities provided, the Appellant has not been able to show that this service is provided by the holder of intellectual property rights or that the payments received were 'royalty'. Hence the services rendered by IOI is not Intellectual Property Service related. This pleading of the Appellant fails.

8.6 As regards the Appellants plea that the rigs are located in non-designated area and that the services pertaining to these rigs are not received in India, it is to be stated that the demand pertains to the period from 2003-04 to 2008-09. While Central Excise Law and Service Tax (Chapter V of Finance Act, 1994) have been extended to designated areas in Continental Shelf and Exclusive Economic Zone of India vide notification No 166/87-CE dated 11-6-1987 and 1/2002-ST dated 1-3-2002 respectively. It is seen from para 15 of the SCN dated 26/03/2009 that the Appellant had not provided the best evidence at the stage of enquiry by providing details of rigs operated in the designated areas, which is very much in their knowledge and if true could very easily have been rebutted the allegations at the preliminary stage itself. It was stated by Revenue during the oral hearing before us that the documents were still not produced. On the other hand, Revenue has been able to show that the Agreement was governed by

and construed in accordance with the laws of India. The approvals for the collaboration were issued by the Secretariat of Industrial Approval, (Foreign Collaboration Section of Department of Industrial Approval, Development) and Reserve Bank of India. Without the rigs being within designated areas in the Indian Territory the above laws could not have been made applicable to them. The Appellant is having its registered office in Chennai, Tamil Nadu. Having discharged the primary burden of proof to show that the services were taxable in India, it was for the Appellant to rebut the same. Information that was in the special knowledge of the Appellant, if any, should have been disclosed to the Department. Hence it was correctly pointed out in para 11.7 of the impugned order, that all activities were centered around India and the beneficiary was also the Appellant in India. Further we find that Section 66A imposes two conditions which need to be satisfied for the levy of service tax on import of Services i.e.

(i) Service must be received by a person (recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India

(ii) Service is provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India.

The service provided by the service provider satisfy both the conditions and hence are exigible to tax as per the reverse charge mechanism. Hence this argument of the Appellant does not succeed.

8.7 'Associated enterprise' has been defined as per section 65B(13) as having the meaning assigned to it in section 92A of the Income-tax Act, 1961.

Additional Evidence – The Legal Issues Involved

The appellant has drawn attention to the shareholding pattern statedly given by M/s. Cameo, Registrar and Share Transfer Agent, to state that IOI shares which was less than that prescribed under Section 92A of Income Tax Act, even though in terms of the Agreement there is a reference to 40% of the issue and paid-up capital of ALCO to be subscribed by IOI. It is seen that this information was not placed before the Original Authority as recorded at para 11.8 of the impugned order. Rule 23 of the **Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982** states that the parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal. Thus, the general principle is that the appellate court should not travel outside the record of the Original Authority, unless the Tribunal itself feels the need to do so. No application was filed and prayer made by the Appellant to produce additional evidence before us. Had it been done it would have given Revenue a chance to file additional grounds / evidence as a rebuttal and to test whether the evidence was of an unimpeachable character. The power to allow additional evidence at the Tribunal level, whether on fact or law, oral or documentary is discretionary in nature. The parties are not entitled, as of right, to the admission of such evidence. As per judicial pronouncements an application for additional evidence is not allowed when:

1. no reasonable care or due diligence was shown in presenting the evidence at the Original forum.

2. the evidence would introduce a new cause of action which completely alters the appeal and would aid the appellant to establish a new case in an appeal, which seeks to take away a vested right of limitation or any other valuable right accrued to the other party. This could then lead to unending legal disputes.

3. no compelling reason or substantial cause has been shown to permit the additional evidence

4. the additional evidence seeks to fill in gaps or restore weak areas in the case.

5. the rival party has not been given an opportunity to rebut it.

6. the additional evidence is not of an unimpeachable character.

Thus, it is clear, the admission of additional evidence is not intended to be done routinely and merely for the asking. In the present case there has not even been a formal application to admit additional evidence. This is quite surprising as the appeals have been filed with legal advice. Hence the question of examining any additional evidence at this stage for which there is no formal request does not arise.

8.8 As regards the appellants pleading that they have not made the payments and has only made the provisions in the books and the same is shown as 'trade payables'. That it was a commercial call taken by the them and the amended provisions for demanding service tax in respect of transactions between associated enterprises has been introduced only in May 2008. They however did not substantiate their plea with factual data. The matter has been addressed at para 11.9 of the impugned order. The learned Adjudicating Authority has admitted that demand made on accrued expenses as on 16/05/2008, if any, is not sustainable and is liable to be dropped in line with the judgment of the Tribunal in Sify Technologies (supra). However, he has lamented the lack of duty paid details for the period to tally the payments made.

This should have been provided by the Appellant as it was in their knowledge and interest but was surprisingly not responded to nor sought to be placed before us. The doctrine of 'laches' is commonly construed as the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting one's legal right or privilege. In this case by not providing verifiable details, the same is now hit by the doctrine of 'laches'. Hence their unsubstantiated pleadings merit no relief.

8.9 The prayer of the Appellant that service classified as Management Consultancy Services merits to be classified as Intellectual Property Service does not succeed.

9. Banking and Financial Services

9.1 The Appellant had entered into an agreement with Barclays Capital for advice and for assistance in raising funds by issue of bonds abroad through a bundle of financial service-related activities. No attempt was made to adhere to the best evidence rule and make available a copy of the contract between the parties, hence the onus of disclosing the terms of the services rendered and stating demonstrable tests to show adherence to it are the burden of the Appellant as the matter is in their special knowledge. The appellant states that service tax cannot be levied as the entire activity takes place outside India. Further, Show Cause Notice No.23/ 2009 dt.26.03.2009 at para 8.6 specifically states that for arriving at the service tax liability apart from the fee of 2% paid, reimbursable expenses have been included in the value of the service. It was their view that in the light of the decision of the Supreme Court in the case of **Union Of India vs M/S Intercontinental Consultants and**

Technocrats Pvt Ltd [Civil Appeal No. 2013 OF 2014/ 2018 (10) G.S.T.L. 401 (SC)], decided on 7 March, 2018, reimbursable expenses cannot form part of the assessable value.

9.2 Two issues have been raised by the appellant:

(i) the entire activity takes place outside India hence the service is not taxable under FA 1994.

(ii) Reimbursables cannot form a part of the value.

The Entire Activity Takes Place Outside India, Hence Not Taxable

9.3 Para 8 of the SCN covers the allegations for classifying the activity under the 'Merchant Banking Services' head as per section 65(12)(a)(iii) of FA 1994 with effect from 16.07.2001. However, Service Tax liability on any taxable service provided by a nonresident or a person located outside India, to a recipient in India, would arise w.e.f 18/04/2006, i.e, the date of enactment of Section 66A of the Finance Act, 1994. The impugned order at para 15 states that the demand of service tax on services imported prior to 18/04/2006 has been dropped ispo facto.

9.4 As stated in the Show Cause Notice, the service provider is Barclays Capital PLC, UK (herein after referred to as 'Barclays UK') who do not have an office in India. Based on an application made by the Appellant through Barclays UK, the Reserve Bank of India issued a Loan Registration Number (LRN) for the Appellant's Foreign Currency Convertible Bond (FCCB) to be subscribed by investors abroad. As per RBI's permission cited in the SCN the borrower (Appellant) is required to give the details of the drawls, utilization, repayment, conversion, redemption etc on a monthly basis to the RBI. Barclays UK is paid a consideration by the appellant for advice and assistance to the

Appellant in raising funds through issue of FCCB and in the process receive a fee of 2% of the gross proceeds received in respect of the issue of the FCCB bonds. It is seen that the activity is not linked to an identifiable immovable property, the benefits of these services are received in India and are provided for the benefit of the Indian Company. Although the appellant states that service tax cannot be levied on this activity as the entire activity takes place outside India, they do not indicate what is the service being referred to and who are the provider and recipient of the service abroad. Pleadings are not proof.

9.5 FCCB is a type of convertible bond issued for raising capital abroad in a currency different than the issuing Company's domestic currency. An FCCB investor abroad can purchase these bonds at a stock exchange, and has the option to convert the bond into equity in the Appellants company after a certain period of time. The question then arises as to who is the recipient of service provided by Barclays UK when the Appellant is allowed by RBI to access funds abroad by the issue of FCCB? Is it the FCCB investor abroad or the Indian company issuing the FCCB?

9.6 From the nature of payment and the minimal description of the service provided, it is seen that Barclays UK advices the issuing company (Appellant) on all aspects of the FCCB issuance. It provides all related service only to the Appellant for a consideration. A similar issue came up before a Coordinate Bench of this Tribunal in Final Order No. 40876/2023, dated 10.10.2023, in the case of **M/s. Vodafone Idea Ltd. Vs Commissioner of GST & Central Excise**. The fact of the case was that the appellants (Vodafone) as part of the

telecommunication services provided by them, had tied up with several Foreign Telecommunication Operators (FTO) so that the appellants customers, when on foreign tour, continue to receive telecom related services. This service is known in the telecommunication parlance as 'International outbound roaming'. The FTO's charge the appellant (Home Network Operator – HNO) for the said connectivity provided by the FTO to the appellant's/ HNO's subscribers. The appellant in turn charges their customers for the said services. Therefore, it appeared to the department that the appellant had received services from their FTO's for international outbound roaming services. The Tribunal taking into consideration the majority view in **M/s Vodafone Idea Limited Vs Commissioner of Central Excise and Service Tax, Coimbatore** [2023 990 TMI 68 – CESTAT Chennai], held that during international outbound roaming the HNO was the service recipient of the services provided by the FTO, although it (FTO) provided seamless connectivity to the appellant's subscribers on foreign soil.

9.7 The providing of advice and assistance to the Appellant, who is a juristic person based in India and the only one who entered into a contract / agreement to receive the service from Barclays UK as per the terms of the Agreement, constitutes the taxable event. The liability to pay Service Tax under FA 1994 arises whenever a taxable event occurs. Taxable events in fulfillment of an agreement / contract may arise at several stages across a period of time. Collection of tax is normally at a subsequent stage depending on administrative convenience and as per Rules made in this regard. The consideration that Barclays UK receive is only for the contractual obligations of Banking and Financial Services rendered to the Appellant Company

based in India. No contractual obligation exists between Barclays UK and the investors or any third party abroad in relation to the Appellant issuing FCCB, even if the investor / third party's participation may have been caused based on consultancy and advice received from Barclays UK and implemented by the Appellant. To what use the Appellant puts the contractual services and where, post the taxable event, is not the subject matter of the levy. The amount received as consideration by Barclays UK is a lumpsum fee of 2% of the gross proceeds received in respect of the issue of the FCCB bonds. The person who is legally entitled to receive a service is the one obliged to pay the consideration as per the Agreement which in this case is the appellant only. Further, the question to be asked is did the parties have in mind or intend separate payments for separate activities demarcated in the agreement. If there was no such intention, then it is a composite agreement for a service which cannot be vivisected. Hence it is the Appellant who facilitates the foreign currency investors by offering them the opportunity to invest in their (Appellants) company through the bonds with the potential for equity conversion. In the absence of an agreement, it was deduced that all such activity which takes place outside the taxable territory in connection with the FCCB and involving investors, third parties etc. abroad are on account of the Appellant and are not to be counted as service rendered by Barclays UK to such investor or third party abroad.

9.8 A negative test may also be of help in deciding the issue involved. If the launch offering and sale of the FCCB abroad fails on the very first day, it is the Appellant who will feel the direct pinch of any deficiency in service from Barclays UK or for any other reasons and not the

investors or any third party. As per the agreement Barclays UK will still be eligible for their fee calculated as a percentage of the gross proceeds received in respect of the issue of the FCCB from the Appellant. Hence the services provided from outside India by Barclays UK is received by the Appellant in India with a reverse flow of consideration for the said activity and the service is exigible to tax under the Reverse Charge Mechanism as per section 66A(1) of FA 1994. The appellants averments on this count thus fails.

Reimbursables Cannot Form a Part of the Value.

9.9 The Appellant has further stated that in view of the decision of the Supreme Court in the case of Intercontinental Consultants (supra), reimbursable expenses cannot form part of the value. We find that in Intercontinental Consultants (supra) the Hon'ble Supreme Court held that the expression 'such' occurring in Section 67 of the Act assumes importance. That for valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such 'taxable service'. Hence the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

9.10 The Apex Court in **Commissioner of Service Tax Etc. Vs. M/s. Bhayana Builders Pvt. Ltd.** [Dated 19/02/2018 / 2018 (10) GSTL 118 (SC)] has examined the phrase 'the gross amount charged by the

service provider for such service provided or to be provided by him', as per Section 67 of FA 1994. The relevant portion is reproduced below:

> "12. On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients:
>
> **a. Service tax is payable on the gross amount charged**:- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.
>
> **b. The amount charged should be for "for such service provided"**: Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided.
>
> Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined" (emphasis added)

As stated by the Apex Court in the Bhayana Judgment (supra), the words "gross amount" refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction

of any expenses. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. Thus reading both the judgments harmoniously it is clear that the authorities are to find what is the gross amount charged for providing 'such' taxable services and any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. Hence the agreement needs to be examined to see the intention of parties as to what the nature of reimbursable expenses are. It is noticed from the impugned order at para 11.8, 11.9, 13.2, 16.0 etc. that the Appellant has not been forthcoming with information even before the learned Adjudicating Authority although it is in their exclusive knowledge. The impugned order notes that details called for by DGCEI was submitted in a piece meal manner stretching over a period of two years. Even now we have not been able to discern what the reimbursable expenses sought to be claimed and due to a lack of descriptive information about the same. As stated by the Hon'ble Supreme Court in **AC Arulappan Vs. Smt. Ahalya Naik** [Appeal (Civil) 5233 of 2001 dated 13.8.2001] law courts never tolerate an indolent litigant since delay defeats equity. We hence find no reason to differ with the impugned order on this matter.

10. Technical Inspection

10.1 The Appellants pleadings are that technical inspection and certification services were rendered with respect to rigs situated in the non-designated area and therefore there is no liability to pay service tax. This issue has been discussed elaborately above and found against

the appellant hence the same is not being repeated. Further paras 13 to 13.2 of the impugned order states that no documentary evidence was provided by the appellant to substantiate their claim and rebut the allegations contained in the SCN. Neither have they alluded to the availability of such information before us. We hence do not find any reason to differ from the findings in the impugned order on this issue.

11. Legal Consultancy Services

11.1 The Appellant does not dispute the classification of the service but hold that that since the entire activity has taken place outside India the confirmation of demand under legal consultancy services is not tenable. As discussed earlier, Consultancy is a knowledge or technique-based service and is not linked to any identifiable immovable property. We find that the consultancy with the service providers relate to advice and consultancy in legal matters. Consultancy was provided to the Appellant who is situated in India and hence satisfies the provisions pf Sec 66A to be exigible to Service Tax as discussed in connection with other consultancy services above.

12. <u>Judgments</u>

12.1 The Appellants have referred to the judgments listed below in their favour. It may be stated at the outset that a three Judge Bench of the Apex Court in the case of **Municipal Committee, Amritsar v. Hazara Singh** (1975 (1) SCC 794) has been pleased to record that on facts, no two cases could be similar and the decision of the court which were essentially on question of facts could not be relied upon as precedent, for decision of the other cases.

We now examine the judgments cited by the Appellant.

12.2 Consulting Engineer Service

1. Future Focus Infotech India (P) Ltd. Vs. CST – 2010 (18) STR 308
2. Dinesh Kumar & Co. Vs. CCE – 2008 (9) STR 472
3. CCE & ST Vs. Molex (India) Ltd. – 2007 (7) STR 592
4. Commissioner Vs. Molex (India) Ltd. – 2011 (24) STR J50 (Kar.)

In Future Focus (supra) the issue was whether the services rendered fell under the category of 'Consulting Engineers Service' or "business Auxiliary Service' or under 'IT Service'. The decision was based on the various clauses in the agreement between the contracting parties. There is nothing to show that the agreements are in pari materia and is hence distinguished. The judgment in Dinesh Kumar & Co (supra) is interim in nature and is hence not decisive of the issue. In Molex (india) Ltd the Tribunal and the Hon'ble High Court examined an issue relating to the receipt of Royalty for technical know-how received from foreign collaborator and not regarding consultancy and is hence distinguished.

12.3 Management Consultancy Service

1. BST Ltd. Vs. CCE – 2006 (4) STR 40
2. Day International Inc. Vs. CCE – 2009 (14) STR 333
3. Sify Technologies Ltd. Vs. LTU – 2011 (24) STR 449
4. Enmas Engineering Pvt. Ltd. Vs. CCE – 2013-TIOL-695

In BST Limited (supra) the Tribunal examined an issue relating to technical know-how received from foreign collaborator and not regarding consultancy and is hence distinguished. In Day International (supra) a Single Member Bench of the Tribunal examined to an issue relating to the receipt of Royalty for technical know-how received from foreign collaborator to modify the existing machinery and is distinguished. The Tribunal judgment in Sify Technologies and Enmas

Engineering (supra) is pertaining to pre-deposit and is interim in nature and does not finally adjudicate on an issue and has no precedential value.

12.4 Legal Consultancy, Banking and Financial and Technical Inspection and Certification Services:-

1. All India Federation of Tax Practitioners Vs. UOI – 2007 (7) STR 625

2. Rajasthan Textile Mills Vs. CCE – 2010 (17) STR 405

3. Ishikawajma Harima Heavy Industries Ltd. Vs. DIT – 2007 (6) STR 3

4. Stone & Webster International Inc. Vs. CCE – 2011 (22) STR 467

5. Enso Secutrack Ltd. Vs. CCE & ST – 2019 (22) GSTL 43

6. Jubilant Life Sciences Ltd. Vs. CCE – 2013 (29) STR 529

7. Genom Biotech Pvt. Ltd. Vs. CCE – 2016 (42) STR 918

8. CCE, Bangalore Vs. Northern Operating Systems (P) Ltd. – 2022 (138 Taxmann.com 359 (SC)

In All India Federation (supra) the Hon'ble Supreme Court was called upon to decide whether the State Legislature alone has an absolute jurisdiction and legislative competence top levy service tax. The Hon'ble Court in its ratio rejected the appeal. The judgment of the Tribunal in Rajasthan Textiles is interim in nature and does not have any precedential value. The Judgment of the Hon'ble Supreme Court in Ishikawajma Harima Heavy Industries (supra) relates to the question of payment of Income Tax by a resident to a non-resident and whether it had sufficient territorial nexus with India for imposition of tax. As stated earlier the Hon'ble Apex Court in Hari Khemu Gawali (supra) a Constitution Bench of the Apex Court had cautioned that it is not safe to pronounce on the provisions of one Act with reference to

decisions dealing with other Acts which may not be in pari materia. In Stone & Webster (supra) the Tribunal examined the issue regarding the transfer of technical know-how design and drawing which took place in USA to an Indian Company, wherein it was held that no service was involved. None of these which appear to be in the nature of goods are related to Legal Consultancy, Banking and Financial Services and Technical Inspection and is hence distinguished. In Enso Secutrack (supra) the entire loan was raised and used outside India only the amounts figured in the Appellants books of account in India was held to be not taxable under FA 1994. However, in the present case, no Contract / Agreement has been produced to examine whether they are identical to the case cited. Further, the issue is not of raising loan and consuming it, the services of Barclays UK is a consultancy service rendered to the Appellant based in India, to advice and assist in raising funds through the issue of FCCB bonds abroad, which is also for the appellant's benefit. The matter has been discussed elaborately above. Hence the consultancy service is consumed in India and the facts are distinguished. In Jubilant Life Sciences (supra) the Tribunal held the issue was regarding tax to be paid on Underwriter Service when the appellant was paying tax as Lead Manager and the two services were distinct in nature with separate renumeration fixed for the two services and the dominant service was not that of Lead Manager Services. In Genom Biotech (supra) the Tribunal the primary contention was that no service was rendered in India and hence tax liability will not arise as it is in relation to the export of goods by a HEOU. The issues are distinguished on facts. The Hon'ble Supreme Courts judgment in Northern Operating Systems (P) Ltd. has been cited by the appellant

to state that the overseas employer of the engineers are under the appellants control and hence are liable to be classified under Manpower Recruitment Service and not under Consulting Engineering Services. This issue has been discussed elaborately above and is not being repeated here.

12.5 For the reasons discussed none of the judgments cited by the appellant comes to their rescue based on the peculiar nature of the facts under consideration.

13. Limitation and Penalty

13.1 The Appellant has stated that the Show Cause Notice No.23/2009 is barred by limitation as there is no suppression, fraud etc. as required under proviso to Section 73. It is submitted by them that the entire issue involves interpretation of the statute. Hence penalty is liable to be set aside. The Appellant also seeks for the benefit of Section 80 of the Finance Act as amended which provides that notwithstanding anything contained in the provision of Section 76, Section 77 or Section 78 no penalty shall be imposed if there is reasonable cause for the failure to pay tax. They have relied upon the following judgments:

Limitation:-

1. ECE Industries Ltd. Vs. CCE – 2004 (164) ELT 236
2. Nizam Sugar Factory Vs. CCE – 2006 (197) ELT 465

In ECE Industries Ltd (supra) and in Nizam Sugar Factory (Supra) the Hon'ble Supreme Court held that the extended period would not apply where the department has earlier issued SCN. We find that in this case the extended period has been invoked only in the first SCN dated

26/03/2009 and the impugned order is compliant with the cited judgments.

13.2 Any breach of a civil obligation under the Act is a blameworthy conduct by the assessee. Generally, mens rea is not required to be proved for a statutory offence. However, Section 78 of FA 1994, includes mens rea by incorporating intent to evade service tax. Once the section is found to be satisfied and is applicable in the case, the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty involved. The belief, knowledge and intention of the parties involved are essentially to be ascertained so as to decide whether it formed the foundation of the blame worthy act. What needs to be examined is whether the default was committed with a view to evade tax by concealing the transaction whereby the breach was deliberate or whether it was a bonafide dispute, without any fraudulent / reckless intentional or that the circumstances were special of which he had no knowledge to have taken sufficient safeguard against the same. Care must however be taken to ensure that excuses are not passed off as special circumstances.

13.3 As per **Blacks Law Dictionary** 'tax evasion' means, 'the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability'. When the department comes across such an instance it is expected to issue to the assessee a show cause notice detailing the charges including the provision of law involved and the material on which the case is sought to be made. Particulars of the actions proposed to be taken should also be included. The department need not prove its case at this stage. It has to give the person charged

a reasonable opportunity to defend himself. An adverse inference could be drawn against the appellant-assessee if they fail to rebut the allegations with material and documents very much in their possession as per the best evidence rule. Hence while the onus of establishing that the conditions of taxability are fulfilled lies on Revenue, this is done through a process described in law of evidence as shifting of the onus in the course of the proceedings from one person to the other. The Apex Court in **Commissioner of Income Tax Vs. Best and Co. Pvt. Ltd. [AIR 1966 SC 1325]** stated as under":-

> "When sufficient evidence, either direct or circumstantial, in respect of its contention was disclosed by the Revenue, adverse inference could be drawn against the assessee if he failed to put before the Department material which was in his exclusive possession. The process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other."

13.4 The impugned order notes that the appellant was not co-operative and took a long time to respond to simple queries. The time taken to answer the queries set the SCN back by more than two years. There is no satisfactory reply to this charge by the Appellant. We have also noted above that many details are still pending from the Appellants side. Although all the services received by the Appellant are based on agreements and payment details to service providers would be available in their records, they have not adhere to the best evidence rule to establish their case for reasons best known to them. The matter has been examined in the impugned order in detail. The question is whether this would amount to indicating mens rea on the part of the Appellant to evade payment of duty. If the Appellant had a good cause of action they should have pursued and supplied the information required from them by the department, with reasonable diligence.

Such delays do not serve a larger public interest and only help private gain by retaining tax money in private hands, while at the same time the operation of limitation reduces the tax burden on them. This adversely affects the steady inflow of revenues and thereby affects the financial stability of the State while benefitting the assessee. These delays are hence to be viewed very strictly. It is a matter of common knowledge that every businessman will arrange his affairs to his best advantage. Hence there is a legitimate rebuttable presumption that the unexplained delay is deliberate. The Appellant has not put forward any special circumstance beyond their control in submitting information. Hence the appellants actions has to be viewed as being intentional or deliberate with conscious disregard of their obligations to law and points to an intention to evade payment of duty. The SCN alleges that the Appellant chose to misclassify the service of Management or Business Consultants as IPR and Consulting Engineer as Manpower Supply only to evade duty and reduce their tax liability. This has been denied by the Appellant. However, we find from the discussions above that the alternative classification was done by the Appellant after investigation were started against them and these classifications were not found to be correct. Further the Appellants action cannot be said to be caused by a bonafide dispute, on technical grounds because the sections are clear and the appellant is also one who has been availing of legal and consultative advice in various matters and have not shown that they were in receipt of valid and cogent contrary advice not to pay tax. They have also not sought any clarification from the department for any of the impugned service. Hence the benefit of Section 80 of the Finance Act as amended is also not available to them as there is no

reasonable cause for the failure to pay tax. We do not find any demerit in the impugned order covering the extended period of demand and imposition of penalty.

14. <u>Summary</u>

14.1 For the sake of brevity, we have summarized the position in relation to the issues raised in the appeal:

A. Over the years State activities have become multifarious and the role of the State's Administrative machinery has grown to at times co-exist with the powers of one another. Considering the wide ramifications of sovereign functions, it would not be wrong to say that we live in an age of overlapping and concurring regulatory jurisdiction.

B. The Central Government vide Notification No. 3/2004-ST dated 11.3.2004 have appointed ADG (DGCEI) as a Central Excise Officer for whole of India and have vested in him all the powers that are exercisable by the Central Excise officers and is hence fully competent to issue the present Show Cause Notice under consideration.

C. Whether DGCEI officers are "Central Excise Officers" or not was examined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited** (supra). It was held that without doubt, the officers from the Directorate are "Central Excise Officers" as they have been vested with the powers Central Excise officers.

D. Rule 3(3) makes it clear that any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or Rules on any other Central Excise Officer who is subordinate to him. Hence any officer superior to the officer who is empowered to issue demand notice and adjudicate notice under

Section 73 of Finance Act, 1994 can do the same if the officer designated is subordinate to him.

E. In **Pahwa Chemicals Private Limited** (supra), the Apex Court held that the instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, the Board has no power to cut down that jurisdiction.

F. A **Constitution Bench** of the Apex Court in **Hari Khemu Gawali** (supra), stated that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia. Hence it would be improper to examine the issue of jurisdiction of DGCEI officers based on the **Canon India Judgment** rendered in a case under the Customs Act 1962.

G. Section 91 of the Indian Evidence Act, 1972 gives immense importance to documentary evidence over oral ones. Hence when written agreements and documents are available they are the best evidence to demonstrate a fact or to understand it. Further, as per section 106 of the Evidence Act, the fact within the knowledge of a person must be proved as the burden is cast upon him. The Apex Court in its judgment in **Mohan Lal Sharma** (supra) observed that the cardinal rule in the law of evidence is that only the best available evidence should be brought before the court of law to prove a fact or the point in issue.

H. We find that the Appellant who seeks to classify the service rendered by IOMI under MRSAS has not demonstrated having been in compliance with any set of ‘Tests’, like ‘control and supervision test’,

'organisation integration test', 'mutual obligation test' or the 'multiple sets of factors' test, now preferred by courts etc to show the prevalence of a master-servant or employer–employee relationship between them and the persons on contract. The dominant element running through the Agreement is that of engaging consultants ruling out a linguistic mistake.

I. The Appellant has questioned the classification of the services as Management Consultancy Services rendered by IOI and are of the view that it is liable to be taxed under the category of Intellectual Property Service. They have however not been able to show that the service is provided by the holder of intellectual property rights although it would be very much in their knowledge, if true.

J. The appellant has sought to refer to the shareholding pattern to show that IOI shares was less than that prescribed under Section 92A of Income Tax Act to be termed as an Associate Co. It is seen that this information was not placed before the Original Authority. As per Rule 23 of the **Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982** parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal. No application was filed and prayer made by the Appellant to produce additional evidence before us. Hence the question of examining any additional evidence at this stage without a proper request does not arise.

K. A Foreign Currency Convertible Bond (FCCB) is a type of convertible bond issued for raising capital abroad in a currency different than the issuing Company's domestic currency. The taxable services provided from outside India by Barclays UK, who advices the

issuing company (Appellant) on all aspects of the FCCB issuance, is received by the Appellant who is a juristic person situated in India, which constitutes the taxable event. This service is exigible to tax under the Reverse Charge Mechanism as per section 66A(1) of FA 1994. All such activity which takes place outside the taxable territory in connection with the FCCB and are consumed by investors, third parties etc abroad are on account of the Appellant and are not to be counted as service rendered by Barclays UK to such investor or third party.

L. The Appellants action cannot be said to be caused by a bonafide dispute, on technical grounds because the sections are clear and the appellant is also one who has been availing of legal and consultative advice in various matters and have not shown that they were in receipt of contrary advice not to pay tax or sought clarification from the department. Hence we do not find any demerit in the impugned order covering the extended period of demand and imposition of penalty.

15. We have considered the submissions of the rival parties elaborately above. We find that the lower authority has taken a view which is reasonable, legal and proper and we find ourselves in agreement with the same. The impugned order is hence upheld. The appeals are disposed off accordingly.

(Pronounced in open court on 24.01.2024)

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

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

Rex