Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 12027 of 2016 - DB

(Arising out of OIO-BHR-EXCUS-COM-66-2016-17 dated 30/08/2016 passed by Commissioner of Central Excise and Service Tax-Bharuch)

Solvay Specialities India Pvt Ltd ....**Appellant**
3526-26, Gidc Estate,
Panoli
Bharuch, Gujarat

VERSUS

Commissioner of C.E-Bharuch ......**Respondent**
Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara, Gujarat- 390023

APPEARANCE:
Shri Vinay Kansara, Advocate for the Appellant
Shri Ashok Thanvi, Assistant Commissioner (AR) the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10704/2024

DATE OF HEARING: 22.11.2023
DATE OF DECISION: 28.03.2024

RAMESH NAIR

Facts as briefly stated are that during the period April 2012 to March 2014 the appellant had provided Sales Promotion & Marketing services to the company situated outside India and accordingly, the appellant had received the commission in convertible foreign exchange. The demand of Service Tax was raised on the ground that the services were not exported as the same were provided and used in India. The department has confirmed the demand along with interest and penalty vide Order – in – Original No. BHR/EXCUS/COM/66 – 2016 – 17 dated 30.08.2016 on the ground that the Appellant has not fulfilled the condition as provided in clause (d) of the Rule 6A as per which the place of provision of service is outside India and that since the service in the present case is provided in the taxable territory of India the Appellant is liable to pay Service tax by virtue of Section 66B of the Finance Act read with Rule 6A of the Service Tax Rules.

Hence the present appeal.

2. Shri Vinay Kansara, Learned Counsel appearing on behalf of the Appellant submits that the Appellant has entered into agreement with the companies located outside India to provide Sales Promotion Services and Marketing Services including to pass on due diligence of market conditions, the situation of competitive products, negotiation of contract, to send monthly activities report on business realized and on prospective customers etc. Against such services the appellant received Commission in Convertible foreign exchange. He has relied on the clarification issued by the Board vide Circular No. 111/5/2009 ST dated 24.02.2009 that states that the relevant factor is the location is the service receiver and not the place of performance which in the present case is the location of recipients being outside India therefore it when services have been exported, service tax liability does not arise. Without prejudice to above he submits that the Appellant fulfills conditions as prescribed under Rule 6A of the Service Tax Rules, 1994 including that enumerated under clause (d) where in the present case the recipients of the service are admittedly located outside India & such recipients do not have office in India. He submits that the issue is no longer res – integra and has been decided in a series of judgements including that in Appellant's own case vide Order No. A/10934/2023 dated 20.04.2023. He takes support of the following judgments in support of his claims:-

- Evonik Specialty India – Final Order No. A/11778/2022 dated 28.11.2022
- Medgenome Labs Ltd. – 2022 – TIOL – 283 – CESTAT Bang
- Verizon Communication India Pvt. Ltd. – ST-2018(8)GSTL 32
- Linde Engineering India Pvt. Ltd. – UOI 2022(57) GSTL 358
- Bellatrix Consultancy Services CT- 2022 (67) GSTL 59
- Celtic Systems Pvt. Ltd. – 2023 (70) GSTL 74
- Yamazaik Mazak India Pvt. Ltd. 2018 /912/0 GSTL 66
- Pulcra Chemicals (India) Pvt. Ltd. 2015 (39) STR 700

3. Shri Ashok Thanvi Assistant Commissioner (AR) appearing on behalf of the Department reiterates findings of the impugned Order.

4. We have heard both the sides and perused the records. We find that the issue in the present case is whether the Service tax liability arises on the Appellant for services of sales promotion and marketing provided outside

India. We find that the said issue has been settled by this Tribunal vide Order No. A/10934/2023 dated 20.04.2023 in the Appellant's own case. The Order is reproduced below:-

> *"4. We have carefully considered the submissions made by both the sides and perused the record. As regards the demand of service tax amounting to Rs. 1,49,24,272/- related to service of sales promotion and marketing provided outside India and commission thereof received in India in foreign exchange, we find that since the recipient of service is located outside India and the payment of commission against said service is received in India, service clearly falls under the category of Export of Service in terms of Rule 3(1) of Export of Service Rules, which is reproduced below:-*
>
> *Export of taxable service. –*
>
> *3. (1) Export of taxable services shall, in relation to taxable services,– (i) specified in sub- clauses (d), (m), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz), (zzzza) & (zzzzm) of clause (105) of section 65 of the Act, be provision of such services as are provided in relation to an immovable property situated outside India;*
>
> *(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), [* * *], (n), (o), [* * *], (w), (x), (y), (z),*
>
> *(zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv),(zw), (zza), (zzc), (zzd), (zzf), (zzg),*
>
> *(zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzp), (zzzzg), (zzzzh), (zzzzi), (zzzzk) and (zzzzl) of clause (105) of section 65 of the Act, be provision of such services as are performed outside India:*
>
> *Provided that where such taxable service is partly performed outside India, it shall be treated as performed Outside India;*
>
> *[Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated outside India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed outside India, shall be treated as the taxable service performed outside India;]*
>
> *(iii) specified in clause (105) of section 65 of the Act, but excluding,–*
>
> *(a) sub-clauses (zzzo) and (zzzv);*

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule,

when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:

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

Provided further that where the taxable service referred to in sub-clause (zzzzj) of clause

(105) of section 65 of the Act is provided to a recipient located outside India, then such taxable service shall be treated as export of taxable service subject to the condition that the tangible goods supplied for use are located outside India during the period of use of such tangible goods by such recipient.

[(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

(b) payment for such service is received by the service provider in convertible foreign exchange.

Explanation.- For the purposes of this rule "India" includes the designated areas in the continental shelf of India and the exclusive economic zone of India, as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated 18th July 1986 and S.O. 643(E), dated 19th September, 1996]

From the above Rule 3(1) clause (iii), it can be seen that service being Business Auxiliary Service falling under sub-clause (zzb) of Section 65(105) of the Finance Act, 1994 is covered under clause (iii). There is no dispute that service of Promotion and Marketing was provided in relation to business or commerce and such service was received by the recipient located outside India. Therefore, the service is clearly covered under Export of Service Rules. Accordingly the same cannot be charged to service tax. This issue is clarified in the Board Circular No. 111/05/2009-ST in Para 2 and 3. Identical issue has been considered by this Tribunal in the case of Yamazaki Mazak India Pvt. Limited *(supra) wherein after considering various decisions, the Tribunal has observed as follows:-*

"54. In view of the above, the difference of opinion on various points is resolved as under :

(i) That the Business Auxiliary Services of promotion of market in India for foreign principal made in terms of agreement dated 1-7-2005 amount to Export of Services and the Hon'ble Supreme Court decision in the case of State of Kerala and Others v. The Cochin Coal Company Ltd. - 1961 (12) STC 1 (S.C.) as also Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. Commercial Tax Officers [1960 (11) STC 764] explaining the meaning of export is not relevant inasmuch as the same deals with the export of goods and not export of services

(ii) That the Business Auxiliary services provided by the assessee to their Singapore parent company was delivered outside India as such was used there and is covered by the provisions of Export of Services Rules and are not liable to Service Tax.

(iii) The principle of equivalence between the taxation of goods and taxation of services, as laid down by the Hon'ble Supreme Court in the case of All India Federation of Tax Practioners [2007 (7) S.T.R. 625 (S.C.)] as also the principles of destination based consumption tax were in the context of Constitutional Authority of levy of Service Tax on certain services and the issue of Export of Service in terms of Export of Services Rules was not the subject matter of said decision. The Export of Services Rules, 2005, being destination based consumption tax are in accordance with the declaration of law by the Hon'ble Supreme Court.

(iv) Inasmuch as the appeal No. ST 828/20 10 was not argued by both the sides, the same can be listed for final disposal even though issue involved is identical."

Relying on the aforesaid decision, we hold that services provided by the appellant classify as export of service and consequently appeal is allowed."

5. In view of above observation, the service of the appellant in present case being absolutely identical, under the same set of facts, it amounts to Export of Service hence it is not liable to service tax. Accordingly, the demand on the Export of Service i.e. Business Auxiliary Service is not sustainable hence the same is set-aside.

6. As regards the demand of Rs. 23,67,163/- related to commission paid to the foreign based agent towards the service of sales promotion and marketing received by the appellant, we find that there is no dispute that the receipt of service from the service provider located outside India and the recipient of service is in India, the appellant is liable to pay service tax under reverse charge mechanism in terms of

Section 66A of the Finance Act, 1994. The appellant up to 30.09.2009 paid service tax along with interest. As regard the balance service tax amount for the period 01.10.2009 onwards, the appellant claimed exemption Notification No. 18/2009-ST dated 07.07.2009. We find that exemption was denied only on the ground that the appellant have not mentioned invoice number in the shipping bills for export of goods. However, the use of input service received is meant for export of goods only. Except the lapse of not mentioning invoice number in the shipping bill, there is no other violation of notification. Merely for the small procedural lapse exemption cannot be denied as held in various decisions cited by the appellant. Therefore, we are of the view that the appellant is entitled for the exemption Notification No. 18/2009-ST dated 07.07.2009.

7. As regards the imposition of penalty, we find that since the appellant have admittedly paid service tax along with interest and moreover, they were otherwise entitled for the Cenvat credit for the service tax they have paid, in a routine course, no malafide intention can be attributed to the appellant, therefore invoking Section 80, in the facts and circumstance of the case, the penalty is not imposable accordingly, the same is set-aside"

Therefore, in view of the above we find that the services have been provided by the Appellant which have been received outside India thereby establishing that the said services have been exported. The issue is no longer res-integra.

5. In view of the foregoing, we set aside the impugned order. Appeal is allowed with consequential relied, if any.

(Pronounced in the open court on 28.03.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha