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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 11369 of 2018 - DB

(Arising out of OIA-AHM-EXCUS-002-APP-169-170-17-18 dated 28/11/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SERVICE TAX – AHMEDABAD)

Commissioner of C.E.-Ahmedabad-ii ....**Appellant**
CUSTOM HOUSE... FIRST FLOOR,
OLD HIGH COURT ROAD, NAVRANGPURA,
AHMEDABAD,
GUJARAT-380009

VERSUS

Arvind Ltd ......**Respondent**
Naroda Road,
AHMEDABAD,GUJARAT

APPEARANCE:
Shri Rajesh K Agarwal, Superintendent (AR), appeared for the Appellant
Shri S. J. Vyas, Advocate appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No.12795/2024

DATE OF HEARING: 27.09.2024
DATE OF DECISION: 25.11.2024

RAMESH NAIR

The revenue has filed the present appeal against OIA No.AHM-EXCUS-002-APP-169-170-17-18 dated 21.11.2017 passed by Commissioner (Appeals), Central Tax, Ahmedabad.

1.1 The assessee is a major textile manufacturer and exporter. The assessee has branches abroad. These branches mainly provide support and facilities in respect of the goods exported by the assessee. Foreign branches did not have any source of revenue and were dependent on the assessee's office in India for financing expenses incurred at such foreign branches. Assessee had paid service tax in respect of the reimbursement of expenditures incurred by the said foreign branches. The service tax was paid on reverse charge basis. Assessee came across the Tribunal decision in the case of Tech Mahindra and realised that the assessee was not liable to pay service tax in respect of reimbursement of the expenses of foreign branches. The assessee therefore filed refund applications for claim of refund of service tax paid.

1.2 A show cause notice dated 21 June 2016 was issued, seeking to reject the refund applications on the ground that the refund was hit by period of limitation. The notice did not dispute merit of the claim. The said show cause notice was adjudicated under the impugned order-in-original where claim within the period of limitation was accepted and the balance claims were rejected. Both, the assessee and the department, carried the matter in appeal before the Appellate Commissioner. In the impugned order, Department's appeal was rejected and the assessee's appeal was accepted. Therefore, the present appeal is filed by the revenue.

2. Shri Rajesh K Agarwal, Ld. Superintendent (AR) appearing on behalf of the revenue appellant reiterates the grounds of appeal. He submits that since the issue in the present case is involved in the Tribunal's judgment of Tech Mahindra (supra) which is pending before the Hon'ble Supreme Court. Therefore, this appeal cannot be decided till the pendency of the appeal before the Hon'ble Supreme Court in the case of Tech Mahindra.

3. Shri S J Vyas, Ld. Counsel appearing on behalf of the assessee at the outset submits that the revenue's appeal is filed on the ground that since the issue in the present case is relates to the judgment in the case of Tech Mahindra Limited vs. Commissioner of Central Excise, Pune-I 2016 (9) TMI 191 CESTAT, Mumbai which has been appealed against by the revenue before the Hon'ble Supreme Court. The revenue also taken ground in the appeal on merit about the taxability of the reimbursement of expenses made by the assessee to their foreign branch office. He submits that as regards the ground of appeal that Tech Mahindra case (supra) is pending before the Hon'ble Supreme Court, the present appeal cannot be withheld. In this regard he placed reliance on the judgment in the case Commissioner of Service Tax, Delhi II vs. Religare Securities Limited, 2023 (9) TMI 413 CESTAT, New Delhi. Therefore, as of now the Tribunal judgment in the case of Tech Mahindra is in force and according to which revenue's appeal fails. He further submits that on the activity, in the first Commissioner (Appeals) order, it was categorically held that the reimbursement made by assessee to their foreign office to meet out the expenses for business activity of the assessee does not involve any provision of service and hence. the same is not taxable, however, without challenging the said categorical finding the revenue now in the present appeal has raised this issue which is not permissible in law. Since, the earlier Commissioner (Appeals) order was not challenged by revenue; at this stage revenue cannot take this ground. He also placed reliance on the decision of CESTAT, Kolkata in the case of Ganga Carrier Private Limited 2023 (9) TMI 809.

4. On the careful consideration of the submissions made by both the sides and perusal of the records, we find that in the present case the Ld. Commissioner (Appeals) in the impugned order as categorically held that the

transaction between the assessee and their foreign branch is not a provision of service and it is only reimbursement of expenses to the foreign branch, the same is not taxable. In the Commissioner (Appeals) order, it was also observed that this issue was not raised in the show cause notice, therefore, now the same cannot be raised. On this fact, we do agree with the respondent that there is no service received by the assessee from their foreign branch. The transaction is only of reimbursement of expenditure incurred by the branch of the assessee. Therefore, firstly the same is not taxable. Without prejudice, we also find that even if it is considered that there is service, the same is not chargeable to services in the light of the CESTAT Mumbai Bench decision in the case of Tech Mahindra Limited (supra) wherein, this Tribunal has passed following order:-

> *"12. At the core of the dispute are four issues, viz., the status of overseas branches vis-`-vis the head office and the limitation thereof, the jurisdiction to classify the services under section 65(105) of Finance Act, 1994, the receipt of business auxiliary service by the assesse-appellant from its branches and the inclusion of reimbursable expenses for computation of gross receipts under section 67 of Finance Act. All of these are to be required to be answered to sustain the confirmation of demand by the adjudicating authority.*
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> *13. That the branch and head office are distinct entities for the purpose of taxation cannot be a matter of dispute. The law relating to taxation of service, an indirect, destination-based tax, is constitutionally restricted to India. In the scheme of Chapter V of Finance Act, 1994, the incidence of tax on services is to be borne by the recipient of service and levy is enforced on the provider of service. As the tax can be collected only from a service-provider within the jurisdiction, undertakings beyond the territory are beyond the ambit of the statute irrespective of the nature of the structural form or the linkage - organic or contractual. In such a taxing law, an entity that is beyond the jurisdiction of the statute has an existence independent of the taxable entity. A branch is, therefore, an entity distinguishable, for purposes of Finance Act, 1994, from its head office.*
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> *14. Consequently, an entity that is not subject to a domestic taxing statute is not amenable, by any stretch of argument, to scrutiny for conformity with the provisions of that statute. Activities of the overseas entity cannot be subject to ascertainment of classification of services in section 65(105) of Finance Act, 1994. More so, as tax authorities are bereft of wherewithal to scrutinize the activities of such an entity and there is, indeed, no cause to embark upon such a venture either. Undoubtedly, such entities are subject to tax in the territory in which they operate. We notice that decisions of this Tribunal in Torrent Pharmaceuticals Ltd v Commissioner of Service Tax Ahmedabad [2015 (39) STR 97 (Tri-Ahmd)] and KPIT Cummins Infosystems Ltd v Commissioner of Central Excise, Pune-I [2014 (33) STR 105 (Tri-Mumbai)] have considered the subjection to tax by another State for deciding on exclusion from tax levied by the laws of India. A note of caution must be recorded here: this acknowledgement of evidentiary value is not intended to be construed as a condition sufficient for exemption. As the Tribunal expressed in re Torrent Pharmaceuticals Ltd:*
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>> *5.8 …... Therefore, payment of VAT abroad will be an indicator to decide whether service is provided and consumed outside India or has been consumed/received in India. The agreements/documents available with the appellant have to be accepted for the purpose of determining place of providing and consumption of service in India*
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> *That it is to be taken as an indicator arises from the absence of cross-border tax facilitation that extends availment of credit beyond the tax frontiers of the*

country. For these reasons, it is neither feasible nor necessary to delve into the activities of the overseas entity except where the tax liability of the assessee is sought to be mitigated on grounds of discharge of tax abroad. Correspondingly, the refund of any tax abroad is not necessarily detrimental to the assesse without a clear understanding of the tax laws under which refund was sanctioned. The principles and procedures of the tax statute in India should not be presumed to apply to the overseas tax law for crystallising tax liability in relation to activity that has been undertaken by the overseas entity.

15. However, that does not foreclose the jurisdiction over or preclude necessity of examining an overseas activity from the point of view of the recipient of service. Section 66A of the Finance Act, 1994 has been specifically enacted to tax services received by an assessee as though the assessee has provided the service to itself. And in providing the framework for such tax shifting, various organizational forms may have to be disaggregated accordingly, a branch in another country is deemed to be an establishment distinct for the purposes of ascertaining the receipt of service. Therefore, notwithstanding the identifiability of all the essential factors relevant to charge of tax, viz., supplier, customer, supply and place of provision, tax becomes leviable to the extent that receipt of service in India is established. The business auxiliary servicethat the impugned order has found to have been rendered by the branch office of the appellant-assessee has to cross this hurdle.

> *16. Section 66A of Finance Ac, 1994 taxes all taxable services received by a person who has his place of business, fixed establishment, permanent address or usual place of residence in India*

from

> *"a person who has established 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*

Revenue has alleged that Explanation 1 in sub-section (2) having designated branches as business establishment overseas and section 66(2) mandating that

> *(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.*

Tax liability devolves on the appellant-assessee.

17. Tax-shifting arises from the nature of the levy. It is now well-settled that service tax is a destination-based indirect tax; its incidence is borne by the recipient of the service though mechanics of the collection are entrusted to the provider of the service. As a provider who is not within the tax jurisdiction of this country cannot be subject to such entrustment reverse charge is resorted to. Furthermore, akin to the import of goods, equivalence requires that the tax be collected as though it was a domestic transaction with responsibility devolving on the taxable entity in the country.

18. A commercial organization establishes its subordinate formations to further the commercial activity that the principal body is engaged in. Commercial feasibility mandates that such branches exist to render services or to facilitate placement of goods. Therefore, to posit that the overseas branches render services does not require genius of a high order. At the same time, reasonable intelligence suffices to identify the recipient of the service and the nature of the service rendered.

19. The appellant-assessee has established branches for furthering its commercial objectives. The benefit of assigned activities of the branch will, undoubtedly, accrue to the appellant. There is no dispute that it is the appellant-assessee who enters into contractual agreements with overseas customers for supply of information technology services which have off-shore components rendered directly to the overseas entity by the appellant-

assessee. On-site activity is undertaken by deputing employees working at the site of the customer. These employees are, without doubt, on the rolls of the appellant-assessee which, save for the specific and limited role of section 66A (2), encompasses the branches within its corporate structure. As section 66A (2) is limited to being a charging section in a specific context, it is not elastic enough to govern the corporate intercourse and commercial indivisibility of a headquarters and its branches. Therefore, any service rendered to the other contracting party by branch as a branch of the service provider would not be within the scope of section 66A. Merely because there is a branch and that branch has, in some way, contributed to the activities of the appellant-assessee in discharging its contractual obligations, the definition of business auxiliary service in section 65(19) of Finance Act, 1994 may not apply. That is where the impugned order has erred in not reading section 65(105) along with section 66A and Rules framed for the purpose of charging tax on services received from abroad. Unless both are applied together, the jurisdiction to tax would be in question.

20. It would be worthwhile to look at the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006

2. Taxable services provided from outside India and received in India.-

Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services,-

*(i) specified in sub-clauses ****** as are provided or to be provided in relation to an immovable property situated in India;*

*(ii) specified in sub-clauses ****** of clause (105) of section 65 of the Act, be such services as are performed in India:*

Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;

(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 clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and

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

be such services as are received by a recipient located in India for use in relation to business or commerce.

And the successor Place of Provision of Services Rules, 2012

RULE 3. Place of provision generally. - The place of provision of a service shall be the location of the recipient of service :

Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

RULE 4. Place of provision of performance based services. - The place of provision of following services shall be the location where the services are actually performed, namely :-

(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service :

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service :

[Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair;]

(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.

RULE 8. Place of provision of services where provider and recipient are located in taxable territory. - Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.

RULE 9. Place of provision of specified services. - The place of provision of following services shall be the location of the service provider :-

(a) Services provided by a banking company, or a financial institution, a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of all means of transport other than,-

(i) aircrafts, and

(ii) vessels except yachts, upto a period of one month.

21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to overseas activities should, therefore, have a reason.

22. Section 66A of Finance Act, 1994 does not prescribe promulgation of any Rule for its administration. The two sets of Rules extracted supra are framed under the general provision in section 94 of Finance Act, 1994. Moreover, the Rules draw upon section 93 of Finance Act, 1994 in a manner akin to Export of Service Rules, 2005. It is noticed that the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 also mirrors the Export of Service Rules, 2005. That, however, cannot be taken as intent to tax the inflow of service merely because of a corresponding exemption accorded to the outflow of services. Reference to section 93 as an authority for prescribing the Rules would make it appear that the purpose of the said two sets Rules is to exclude from tax such services that do not fall within the three classifications predicating the import of service. The residuary provision in the Rules of 2006 make it clearly that such services have to be received by a recipient located in India for use in relation to business or commerce. The provisions of the successor Rules are no different.

23. The catena of judgments cited for both sides, viz., British Airways v Commissioner of Central Excise (Adjn) [2014-TIOL-979-CESTAT-Del], Torrent Pharmaceuticals ltd v Commissioner of Service Tax [2015 (19) STR 97 (Tri-Ahmd)] and Infosys Ltd v Commissioner of Service Tax [2014-TIOL-409-CESTTAT-Bang] does support the proposition that a service is taxable under section 66A of Finance Act, 1994 only when such service is rendered in India. The question that arises then in the context of the present dispute is whether the branch renders a service is rendered in India within the meaning of the above statutory provisions. A forced disaggregation merely for the purpose of *tax when similar domestic structures are not taxed and when commercial soundness calls for establishment of branches would be clearly inequitable.*

24. Hence, the legislative intent of this legal fiction may have to be ascertained. In doing so, the goals of the appellant as an exporter cannot be far from our mind.

25. Section 66A requires taxing of taxable services rendered by an overseas branch to its head office and the two sets of Rules limit tax demand only to the extent that these services are received in India in relation to business or commerce. A plain reading would make it apparent that the services referred to must be for pursuit of business or commerce in India. The two sets of Rules provide for availment of CENVAT credit of the tax paid by the Indian entity on reverse charge basis. As an exporter, the Indian entity is entitled to claim refund of taxes lying unutilized in CENVAT credit account. There is no dispute that the activities of the branch are in connection with the export activity of the appellant assessee. That the legislature would prescribe the collection of a tax merely for the purpose of refunding it subsequently does not pass the test of reason. More so, as there is no inference of any monitorial aspect in undertaking such an exercise. An exporter who operates through branches is clearly not the target of the legal fiction of branches being distinct from head office. The proposition that the intent of section 66A in taxing the activity rendered by an overseas branch to its headquarters in India is limited to the local commercial or business activities of the head office is thereby confirmed. Consequently, mere existence as a branch for the overall promotion of the objectives of the primary establishment in India which is essentially an exporter of services does not render the transfer of financial resources to the branch taxable under section 66A.

26. The legal fiction of service rendered by overseas branch to its primary headquarters would appear to be intended to prevent escapement from tax by resort to branches specifically to take advantage of the principle of mutuality. When a service to be rendered in India by the primary establishment is deliberately routed through an overseas branch or when a service that would otherwise be contracted from an overseas entity is, instead, sourced through an overseas branch, this legal fiction will come into play. The transaction of the appellant assessee and the branches which is under dispute before us being related to exports is unambiguously not intended to be taxed as it has nothing to do with business or commerce in India.

27. We do not need to examine whether the flow of funds from the head office to the branch is consideration or reimbursement as the test of services having been received in India fails. Nevertheless, we do so. A branch, by its very nature, cannot survive without resources assigned by the head office. The business of the appellant assessee is such that credibility in the eyes of its overseas clients lies in the name and style of the appellant assessee. It cannot be substituted by any other entity. The activity of the head office and branch are thus inextricably enmeshed. Its employees are the employees of the organization itself. There is no independent existence of the overseas branch as a business. The economic survival of the branch is entirely dependent on finances provided by the head office. Its mortality is entirely contingent upon the will and pleasure of the head office. The transfer of funds by gross outflow or by netted inflow is, therefore, nothing but reimbursements and taxing of such reimbursement would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994 whether before 2012 or after.

28. In view of our findings above, the demand of tax in the impugned order is without authority of law and does not survive. The penalties imposed on the assessee appellant and the principal officers are also set aside. All appeals are, consequently, allowed."

4.1 From the above judgment, it is clear that even if the said activity amounts to service, the same is not chargeable to service tax. The revenue's ground of appeal that this order has been appealed against before the Hon'ble Supreme Court, the same will not be any help to the revenue as on raising the same issue this Tribunal's principal branch at Delhi taken a view in the case of Religare Securities Limited as under:-

> *"14. Learned authorized representative appearing for the department also contended that the decision of the Tribunal in* ***Milind Kulkarni Vs CCE-Pune-1 [2016 (44) STR 71 (Tri-Mumbai)]*** *which was relied upon by the Commissioner to drop the demand, had been appealed by the department before the Supreme Court in Civil Appeal No. 8204-8207 of 2016, wherein the Supreme Court after condoning the delay issued notice. Thus, the issue of taxability of expenditure in foreign currency on reverse charge basis made towards reimbursements to representative offices located outside India has not attained finality. The Commissioner, in such circumstances, erred in dropping the demand.*
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> *15. Learned counsel for the respondent submitted that the representative offices have been established by the respondent outside India as relationship driven effort with foreign investors who were envisaging to invest in Indian market and all the execution was carried out by the respondent in India. The amount paid by the respondent to representative offices was not in relation to any service but only as a reimbursement for the expenses incurred by the representative offices on account of salaries, rent, legal/professional charges etc. Thus, no service tax would be payable as there is no relationship of service provider and service recipient in the transaction and it cannot be said that the said offices were rendering any service to the respondent.*
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> *16. This issue has been decided by Courts in various cases. Thus, the reimbursement of the expenses incurred by the representative offices located outside India with respect to rent, professional services, salaries of employees can by no stretch of imagination be equated as consideration to any service rendered to the respondent by the representative offices. Therefore, the reimbursements made to representative offices located outside India is not leviable to service tax.*
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> *17. The Commissioner has relied upon the decision of the Tribunal in Milind Kulkarni to drop the demand. It is not the contention of the department that the said decision does not cover this issue and all that has been contended is that it should not have been relied upon by the Commissioner since notice has been issued by the Supreme Court in the Civil Appeal filed by the department. This contention of the learned authorized representative of the department cannot be accepted. Mere issuance of notice in the Civil Appeal will not mean that the decision of the Tribunal has been set aside.*
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> *18. Thus, for all the reasons stated above, there is no merit in the appeal. It is, accordingly, dismissed."*

4.2 From the above judgment, it can be seen that despite the revenue raised the issue that against the Tech Mahindra Ltd., Milind Kulkarni case the department has filed Civil Appeal in the Supreme Court, the Tribunal has decided the matter finally. In view of the above judgments, even if the activity amounts to service, the same is not taxable.

5. As per our discussion and findings, the revenue's appeal has no substance. Accordingly, the impugned order is upheld and revenue's appeal is dismissed.

(Pronounced in the open court on 25.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi