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

REGIONAL BENCH- COURT NO. 1

Service Tax Appeal No. 11973 of 2017

(Arising out of Order No. VAD-EXCUS-001-APP-101-2017-18 dated 19.05.2017 passed by Commissioner - Vadodara)

Koch Chemicals Technology Group India Pvt Ltd. **...Appellant**
315-317, Sankarda-bhadarva road,
Vil-moxi, Taluka-savli, Vadodara
Gujarat

VERSUS

C.C.E & S.T. – Vadodara-I **...Respondent**
1st Floor, Central Excise Building,
Race Course Circle,
Vadodara-Gujarat- 390007

APPEARANCE:
Shri Virendra Nayyar, C.A. with Shri Sanjay Saraswat, Consultant appeared for the Appellant
Shri M.P. Solanki, Assistant Commissioner (AR) appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. 10069 /2025

DATE OF HEARING: 27.01.2025
DATE OF DECISION: 30.01.2025

SOMESH ARORA

In the instant case the dispute is that department terms after sales services and promotion of goods as intermediary services rendered by the appellant to USA Company i.e. Koch Membrane INC. U.S.A. as per the agreement dated 08.02.2011 as taxable, which appellant disagrees. The period involved is from July 2012 to September 2014. A show cause notice dated 27.09.2016 was issued to the appellant for non-payment of service tax of Rs. 39,16,972/- along with interest and penalty. Same was adjudicated by Assistant Commissioner/ Adjudicating Authority vide order-in-original dated 06.02.2017 and by virtue of which the service tax demanded along with interest and penalty was confirmed against the party. Being aggrieved, the appellant filed appeal before Commissioner (Appeals) who vide order dated 19.05.2017 rejected the appeal and upheld the order-in-original.

2. Pleading for the party, learned consultant submits that they were promoting and providing design and installation facilities on the goods

manufactured by M/s Koch Membrane INC. U.S.A. and since they were dealing with the goods, prior to the period of October 2014 i.e. the date on which Notification No. 14/2014 became effective i.e. 01.10.2014, they could not have been called upon to pay duty as the services related to goods were never in ambit of Place of Provision of Services Rules and only services related to various services provided as intermediary services were earlier (i.e. prior to 01.10.2014) within the ambit of taxation. While there is no serious dispute that they were or not intermediary as such but that by virtue of amendment being brought in Place of Provision of Service Amendment Rules 2014 the definition of 'intermediary' could not have been given the retrospective effect and therefore dealing with goods or supply of goods between two or more persons could not have brought within the ambit of the service. He draws attention to Rule 2 of Clause (f) which after substitution (w.e.f. 01.10.2014) reads as follows:

> '(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;'

Prior to this as per Notification No. 28/2012-ST dated 28.02.2012 the clause 2(f) prior to amendment reads as follows:

> '(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account;'

It was thus his submission that since they were dealing with marketing and promotion of goods, therefore, such dealing of goods could not have been brought within its ambit of service tax during the impugned period. He also seeks to place reliance on various case law in this regard which are as follows:

- 2009 (13) STR 65 (Tri Bang) ABS India Ltd. vs CCE & ST-Bangalore
- 2008 (11) STR 156 (Tri Del.) - National Engg. Industries Ltd. vs CCE Jaipur
- 2008 (11) STR 10 (Tri. Del.) - CST-New Delhi vs Cani Merchandising Pvt. Ltd.
- 2008 (11) STR 23 (Tri. Bang.) – Blue Star Ltd. vs CCE-Bangalore

2.1 He also draws our attention to the Certificate dated 16.03.2011 issued by Koch Membrane Systems USA, in which it is, inter alia, certified that M/s Koch Chemicals performs such ancillary services in connection with sales promotion of their production in India along with other services which have been generally described in Appendix – II of the agreement dated 08.02.2011, which has also been placed on record as an Exhibit in appeal as part of appeal memorandum. It was, therefore, his prayer that their appeal should be allowed in view of the amendment which happened later and was not holding the sway during the period in dispute.

3. Learned Authorised Representative, on the other hand, seeks to rely upon the object clause of the agreement dated 08.02.2011, to emphasize that the purpose of agreement between two corporate entities i.e. Indian Entity which is the present appellant and M/s Koch Membrane USA was to have an agreement for provision of Services in India by the Indian Entity i.e. the present appellant. He also reiterated various findings of Commissioner (Appeals) which indicated that the services being object of the agreement, it cannot be said that prior to amendment dated 01.10.2014, the ambit of definition of intermediary services did not cover their kind of services. Therefore, the services having been provided in India by an Indian entity, same is with the ambit of service tax in the impugned period, whole of which is negative list period. He also justified the extended period as there was no interpretational issue involved and the judgments quoted by appellants were of cosmetic value, irrelevant, cited out of context and just for the sake of taking some argument, when statute itself was clear and company operating in international environment was generally expected to be better aware of tax laws.

4. This court has gone through the adversarial submissions, it is found that the Ld. Commissioner (Appeals) has given his relevant findings which are contained in para 5.1-6 of his order reproduced below:

> *"5.1 Before I take up the issue, it would be proper to refer to the definition of intermediary as defined in Rule 2(f) of the Place Of Provision of Service Rules (POP),2012 reads as follows [From July 2012 to September 2014]: "(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.;"*
>
> *As per the contract dt 08.02.2011 made between the appellant and KMS, it is observed that as per para A of the Agreement: 'KMS is engaged in the manufacture of membrane equipment as more particularly set out in Appendix I hereto ("products")*

and wishes to appoint a service provider to provide certain services in respect of the Products to customers in India……….

From the above said clause, it is evident that the appellant has been appointed as a service provider to provide certain services in India for KMS's customers. In the instant case for the relevant period, Section 66B of the FA, 1994 stipulates that:

> *"there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed".*

Thus, as per the contract, I find that the appellant has provided Engineering & Technical Services, piloting design installation commissioning testing to various clients of KMS in India and arranged skilled work force under guidance and training imparted by KMS and thereby acted as an Intermediary between KMS and their clents in India. I also find that the various clauses of the contract/agreement clearly manifests that the services provided by the appellant are not covered under the Negative List as given under Section 66D of the Act and as the said services were provided in India, they are leviable to service tax.

Hence, it is on records that the appellant had rendered services as an 'intermediary' and having collected the remuneration, is liable to pay the Service Tax on such amount of fees received from M/s KMS, USA in terms of Rule 9 of POP rules, 2012.

Rule 9 of POP rules, 2012 for the relevant period reads as under :-

> ***"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, or 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*

5.2 Now, coming to the main plea that in the present case there has been export of service in terms of Rule 3 of the Place Of Provision(POP) Rules, 2012. I observe that the adjudicating authority had rightly pointed out that Rule 3 is applied in case when none of the other Rules apply. Thus, if a service is not covered by an exception under one of the later rules (Rule 4 to Rule 12 of POP Rules) then only it will be covered under default rule i.e Rule 3, wherein the receiver's location will determine whether the service is levaïble to tax in the taxable territory. But in the present case, the appellant has provided the service of 'intermediary' which is one of the specified services under Rule 9, thus the service has to be treated as provided from the location of the service provider, which in this case is located in the taxable territory and therefore, liable to pay service tax. Thus, I find that Rule 9 shall prevail over Rule 3 for the purpose of determining taxability. Moreover, in the present case, condition (d) of Rule 6A of Service Tax Rules, 1994 has not been fulfilled as the place of provision of service is within India and therefore, the appellant's plea that the said service is export of service cannot be considered as the said services are not sales promotion services covered under "Business Auxiliary Service" to a foreign customer and thereby not exempted.

6. Now, I take up the plea of the appellant regarding invocation of extended period beyond the normal limitation of one year. I find that the above facts were noticed during the course of CERA audit only, otherwise the same could have remained undetected. Accordingly, I am of the opinion that extended period has been rightly invoked in the present case and as all the ingredients mentioned in Section 78 of the Finance Act, 1994 are present in the instant case. Therefore, I find no infirmity in the imposition of penalty on the appellant as specified in Section 78 of the FA 1994. As is evident in the instant case, the appellant also had failed to assess their tax due on the services provided by them; I hold that they are liable for penal action under

> *Section 77(2) of FA, 1994. Further, the appellant are liable to pay interest under Section 75 of the Finance Act, 1994."*

5. It is clear from the above discussion which correctly pointed out that with coming into force of Place of Provision Rules, 2012 firstly the situation in relation to export has been considerably changed with services provided by intermediary to be determined by not from the general rule of location of recipient of service but from the specific rule of location of service provider. These exceptions have also been embodied in the provisions of GST Regime. It is thus clear intermediary services have certain exceptions in relation to the General Rule of Determination of Place of Supply being the place of recipient or destination principle as is commonly known. Therefore, in view of statutory provision the services having been provided in India to the customer of Koch Membrane, USA through the intermediary which in this case was the appellant, same as discussed by the Commissioner in order, cited above, cannot be treated as 'Export of Services'. Secondly, this court is also not impressed by the argument advanced by the appellants that they having provided technical services and technical promotional quality design installation, commissioning and testing services to clients of Koch Membrane Systems, USA in India, such services were not covered as intermediary services prior to amendment of 2014 in Section 2(f) as they prior to the period of Notification 14/2014 dated 01.10.2014 were only dealing with the goods and prior to amendment vide above notification for the impugned period i.e. July 2012 to September 2014 they were not providing service in relation to services but only in relation to the goods. This position is untenable as is evident from the agreement and has been rightly pointed out by the Commissioner (Appeals) in the impugned order, the amendment had no effect as they were providing services as an intermediary between Koch Membrane Systems, USA and their client in India. The same were clearly covered as intermediary services even prior to amendment. It is clear from the facts of the matter read with terms of the contract especially the object clause that the appellants were not acting on principal to principal basis in relation to goods but only as intermediary on behalf of Koch Membrane, USA. The appellants were facilitating and arranging for the services between the buyers of Koch Membrane, and Koch Membrane Systems, USA who was otherwise required to provide such services in India. Such services were very much within the ambit of Notification No. 28/2012-ST dated 20.06.2012 even prior to the

amendment carried out by Notification No. 14/2014-ST dated 11.07.2014 which only widened the scope to include even those intermediaries which arrange for supply of goods between two or more persons which term would include importing of goods on behalf of the main producer or client or between two or more persons and therefore, would include those intermediaries or brokers or agents who act from the point of importation to the point of consumption and supply of goods which is not the case in this instance as only installation and designing and such other services in India were provided were being provided in relation to and for Koch Membrane Systems, USA,which they would have been required to provide in India. Therefore, considering the scope of the contract, it becomes abundantly clear from the object clause itself that they were provisioning for services and arranging and facilitating provision of service in India which as per statutory provisions was always covered under the ambit of Place of Provisions Rules, 2012. Therefore, it is clear that on merits as per the Scheme as it existed during the impugned period they were very much intermediaries as envisaged and hence, were liable to discharge service tax as proposed by the department. Further, this court agrees that but for the audit the terms and conditions of the contract were not revealed to the department and the statutory provisions in this regard were quite clear even as per literal text. The judgments quoted by the party do not in any way support or enhance their case, as they are not in context of present controversy and relate to various other situations prior to Place of Provisions Rules, 2012 coming into existence and none of them are directly on the point. Therefore, even the findings given by the Learned Commissioner (Appeals) on limitation are sustainable. In view of foregoing discussion the order of the lower authorities is sustained and appeal by party is rejected. Appeal rejected.

(Order Pronounced in the open court on 30.01.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Neha