# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## ALLAHABAD

REGIONAL BENCH - COURT NO.I

**Service Tax Appeal No.54211 of 2014**

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/88-89/2014 dated 29/04/2014 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

**M/s Planetcast Technologies Ltd., .....Appellant**
(C-34, Sector-62, Noida)

*VERSUS*

**Commissioner of Central Excise &**

**Service Tax, Noida ....Respondent**

(C-56/42, Sector-62, Noida)

**APPEARANCE:**

Shri Atul Gupta, Advocate &
Shri Amresh Swarnkar, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO.70201/2024**

DATE OF HEARING : 18 January, 2024
DATE OF DECISION : 18 January, 2024

**SANJIV SRIVASTAVA:**

This appeal is directed against order in appeal No NOI/ EXCUS/000/APPL/88-89/14 dated 29.04.2014. By the impugned order following has been held:

"ORDER

(1) The appeal filed by the Revenue (Appellant-2) i.e. Appeal No. 11/ST/Appl/Noida/2014 dated 17/01/2014 is allowed and the Order-in-Original No. 17/DC/N-I/13-14 dated 27/11/2013 is modified to the extent of imposition of penalty under Section 76 of the Finance Act, 1994 (as amended).

(2) The Appeal No. 24/ST/APPL/Noida/2014 dated 12.02.2014 filed by M/s Essel Shyam Technologies Ltd. C-34, Sector - 62, Noida (Appellant-1) is dismissed"

2.1 The Appellant was engaged, apart from other business activities, in procurement of orders from prospective buyers for foreign suppliers to enable them to supply goods to India. The Appellant for such 'Business Auxiliary Service' received remuneration in convertible foreign exchange from such foreign suppliers.

2.2 The Appellant was of the bona fide belief that such 'Business Auxiliary Service' was exported, therefore, the service tax was not payable on the same and accordingly no service tax was paid.

2.3 The audit of the Appellant was conducted by the Department on for the period October, 2006- September, 2007 wherein the issue regarding the above referred 'Business Auxiliary Service' was raised. By letter dated 19.08.2011 Appellant was asked to comply with the audit observations and deposit the service tax. In response, the Appellant further contended that as the service has been exported therefore service tax was not payable.

2.4 A show cause notice dated 24.04.2012 was issued invoking the extended period of limitation on the ground that the Appellant was liable to pay service tax and the Appellant did not make the necessary disclosure during the relevant period.

2.5 The Show Cause Notice was adjudicated vide Order-in-Original No. 17 /DC/Division- I/2013-14 dated 27.1 1.2013 holding as follows:

"ORDER

*(i) I confirm demand of Service tax amounting to Rs. 1,12,241/-(Rupee One lac, twelve Thousand, Two Hundred and Forty One only) under Section 73(1) of Finance Act, 1994.*

*(ii) I confirm demand of interest at applicable rates during the relevant period on the aforesaid amount under Section 75 of the Finance Act, 1994.*

*(iii) I impose a penalty of Rs. 1,12,241//-(Rupee One lac, twelve Thousand, Two Hundred and Forty One only) on the party under Section 78 of the Finance Act, 1994.*

*(iv) I impose a penalty of Rs.1,000/-(Rupee One Thousand Only) on the party under Section 77 of the Finance Act,1994"*

2.6 Both department and Appellant filed an appeal against this order, which were disposed of by the impugned order referred in para 1 above.

2.7 Being aggrieved by the impugned order Appellant has filed this appeal

3.1 Have heard Shri Atul Gupta and Shri Amresh Swarnkar, Advocates for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the Appellant learned counsels submit that:

- Issue is no longer res-integra and the matter covered by series of decisions of CESTAT as follows:
  - M/s Arcelor Mittal Stainless India Pvt. Ltd. [2023-TIOL-469-CESTAT-MUM-LB]
  - Abbott Healthcare Pvt. Ltd. 2019 (31) G.S.T.L. 83 (Tri. - Mumbai)
  - Sumitomo Corporation India Pvt. Ltd. [2017 (50) S.T.R. 299 (Tri. - Del.)]
  - Coperion Ideal Pvt. Ltd. [2020 (34) G.S.T.L. 523 (Tri. - All.)]
- As the Appellant was having the bona fide belief that the service tax was not payable therefore, the Appellant was not having any intention to evade tax. Thus, the extended period of limitation cannot be invoked in such circumstances where due to a bona fide interpretation of a legal provision an assessee did not pay the service tax.

- It is submitted that once an issue is referred to the larger bench for decision then it is to be considered as the complex one and the extended period of limitation is not invokable in such cases alleging intention to evade payment of tax as held by Hon'ble Apex Court in case of Continental Foundation Jt. Venture [2007 (216) E.L.T. 177 (S.C.)]
- No penalty is imposable and no interest is recoverable as demand is not maintainable.

3.3 learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records following findings for holding against the appellant:

> *"I have carefully gone through the records of the case, allegations against the appellant-1 and the defence submissions made by them. The following issue have to be decided in respect of the appeal bearing No. 24/ST/APPL/Noida/2014, dated 12.02.2014:*
>
> *1. Whether the demand of service tax not paid is in order?*
>
> *2. Consequently, whether the demand for interest at applicable rate under Section 75 of the Finance Act, 1994, as amended and the penalty imposed under Section 77 and Section 78 of the Finance Act,1994, as amended, is correct.*
>
> *Further-more, in respect of the appeal no. 11/ST/AppI/Noida/2014 dated 17/01/2014, main issue to be decided is whether the proposed penalty under section 76 of Finance Act, 1994, can be simultaneously imposed along-with penalty under section 78 of Finance Act,1994.*
>
> *5.1 In this regard it is found that the two debit Notes bearing Si No. DB4NV/06- 07/0119 dated 29.01.20074 and ESTUDN/LAL/127 dated 28.3.2007 issued by the appellant-*

*1-1 in favour of Thomson Broadcast & Media Solution, France and 'Leitch Asia Ltd', Kowloon, Hong Kong for an amount of 13100.00 USD and 7820.50 USD for commission on supply of Encoder/Modulator & accessories to MM TV Ltd and for commission on supply of satellite communication Equipment to BECIL respectively and both the buyers i.e. MM TV Ltd and BECIL are located in India.*

*Thus it is found that the business auxiliary service was provided by the party to the foreign concerns and such services were provided in India and was never provided outside India, and hence the ultimate outcome of provision of services reached the consumer in India and that were ultimately meant to be consumed in India.*

*The end user of service being located in India and need of such consumers being met by the party for and on behalf of its foreign companies such services has thus been provided in India, there being no export of service. The foreign companies acted through its agent i.e. the appellant-1. A service provider acting directly or indirectly through its agent is not the beneficiary of service so provided while providing of service is its contractual obligation under terms of contract with clients/customers. Therefore, in the instant case, no service had occasioned to move out of India to a place outside India following well tested meaning of the term 'export under Section 2(18) of the Customs Act. Remuneration for the service for the service provided by the party was linked with expense incurred in terms of agreement. Further to provide service, expenses were incurred in India in terms of the agreement for which the appellant-1 got reimbursement and a percentage thereof was paid to them as remuneration. Thus, expenditure met in India had generated service potentiality in India.*

*5.2 Thus, having held that the rendering services of services to their foreign principle under Business Auxiliary Services I* *now proceed to look into the various provisions of Export of Services Rules, 2005.*

*(1) Export of taxable services shall, in relation to taxable services,*

*…….*

*5.3 Further, the Board circular explaining the various provisions of Export of Services Rules, 2005, needs to be examined.*

*The CBEC circular Export of Services Rules, 2005 -- Applicability clarified Circular No 111/5/2009-ST, dated 24-2-2009, it has been clarified that Sub-rule (1) of rule 3 of the Export of Services Rule, 2005 categorizes the services into three categories*

*……*

*5.4 Thus, the main condition for services viz Business Auxiliary services falling under the category of sub rule (iii) of rule 3 is that the benefit of services should be accrued outside India besides other conditions listed in the rule, ibid This condition has also been re-affirmed by various judicial pronouncements of tribunal. In ELDYNE ELECTRO SYSTEMS PVT. LTD Versus COMMISSIONER OF S.T., KOLKATA reported in 2013 (29) S.T.R. 479 (Tn. - Kolkata), it was held "Assessee's case falling under category Il under Rule 3(b) of Export of Services Rules', 2005 - Board Circular No. 111/5/2009-S.T, dated 24-2-2009 clarifying export of services may take place when all relevant activities taken place in India so long as benefits of service accrue outside India - Benefit in terms of promotion of foreign company's business accruing outside India - Prima facie, case for total waiver made out - Requirement of pre- deposit waived off-Recovery stayed - Rule 3(b) ibid - Section 35F of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994".*

*5.5 Further, I find in the Board Circular No. 141/10/2011-TRU, dated 13-5- 2011 clarification of phrase "used outside India", was made wherein it was stated that it should be interpreted to mean that "the benefit of the service should accrue outside India".*

*In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend upon the nature of the service.*

*5.6 Since the aforesaid Board's Circular lays emphasis on the utilization of services at the end of services recipient, it is found that the appellant-1-1 argument that services are covered under Export of Services, is not valid and therefore not sustainable. Accordingly I find that the said services cannot be treated as export of services.*

*Thus, the service of business auxiliary services rendered by the appellant-1 acting as the commission agent for their foreign principles do not fall within the ambit of the definition and scope of the Export of Service Rules, 2005. Hence, service tax amounting to Rs.1,12,241.00 has been rightly demanded under the provision of the Section 73 of the Finance Act 1994 along with interest under Section 75, ibid.*

*5.7 As regards the demand being time-barred although the party has placed reliance on various it is found that the said case is distinguishable in view of the present system of self-assessment where documents like invoices and other transaction details are not supplied to the Department. Moreover, the appellant-1 did not furnish the required details of receipt of amount of taxable value to the Department in advance.*

*Therefore, it can well be concluded that the element of suppression with intent to evade payment of service tax is conspicuous by the peculiar facts and circumstances of the* *case as discussed above and, therefore, the extended period under Section 73(1) of the Finance Act, 1994 has been rightly invoked for recovery of service tax.*

*5.8 It is further found that in terms of Section 68 of the Finance Act, 1994, read with Rule 6 of Service Tax Rules, 1994, every person providing taxable service to any person is required to pay Service Tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. In the present case, however, the appellant-1-1 have not paid any Service tax at the rate as prescribed under section 66 of the Finance Act, 1994 within stipulated period and they have thus, contravened the said provisions thereby rendering themselves liable for penal action.*

*As regards imposition of penalty under Section 78 of the Finance Act, 1994, it is further found that the appellant-1-1 have suppressed the facts with the intention to evade payment of service tax, penalty under Section 78 is mandatorily imposable as has been held by the Apex court in the case of Dharmendra Textile Mills Ltd-2008 (231) ELT 3 (SC) and Rajasthan Spinning & Weaving Mills Ltd-2009 (238) ELT 3 (SC). Therefore, penalty has been correctly imposed under Section 78 of the Finance Act, 1994.*

*Similarly, in view of the aforesaid discussions the penalty has also been correctly imposed under Section 77 of Act, ibid.*

*5.9 As regards the appeal filed by the appellants-2 it is found that the adjudicating authority has not taken into account the earlier provisions prior to 10.05.2008 when penalty under both the section i.e. section 76 & 78 of the Finance Act, 1994 could have been imposed simultaneously. More so, since the issue regarding non-payment of service tax, in the instant case relates to the period October, 2006 to March, 2007, which is anterior to 10.05.2008, the date when amendment was made into the proviso to the section 78(2), through Finance Act, 2008. It has thus been only in* *respect of the period subsequent to 10.05.2008, that penalty under section 76 & 78 of the Finance Act, 1994 has been made mutually exclusive."*

4.3 We find that the issue involved in the present appeal is squarely covered by the decision of larger bench in case of Arcelor Mittal Stainless India Pvt. Ltd. [2023-TIOL-469-CESTAT-MUM-LB] wherein following has been observed:

> *"6. The division bench, accordingly, referred the following questions of law to be determined by a larger bench of the Tribunal:*
>
> > *i. What is extant and scope of phrase "such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India" used in Rule 3(3)(i) of Export of Services Rules, 2005 upto 18.04.2006.*
> >
> > *ii. What is extant and scope of phrase "such service is delivered outside India and used outside India" used in Rule 3(2)(a) of Export of Service Rules, 2005 from 19.04.2006 to 28.02.2007.*
> >
> > *iii. What is extant and scope of phrase "services provided from India and used outside India" used in Rule 3(2)(a) of Export of Services Rules, 2005 from 01.03.2007 onwards.*
> >
> > *iv. Whether the services rendered to foreign entity located outside India for development of its business in India will qualify as Export of Service in terms of the above phrases used in the Export of Services Rules, 2005 from time to time and the decision of Apex Court in case of GVK Industries?*
>
> *13. The main allegation in the show cause notice issued to Arcelor India is that the condition specified in the 2005 Export Rules that the order for provision of service should be made by the recipient of such service from offices located outside India is not fulfilled since there is no*

*written contract between Arcelor India and Arcelor France and the condition that the service is delivered outside India and is used outside India is also not fulfilled.*

*14. The adjudicating authority found that the requirement of rule 3(2) of the 2005 Export Rules was not satisfied since Arcelor India had performed service in India for ultimate consumption in India. In this context, the adjudicating authority considered whether the two conditions set out in the 2005 Export Rules were satisfied and the findings are as follows:*

*"28. ******

*Condition 1 i.e. the recipient should be located outside India, is not satisfied*

*As discussed above the noticees are acting as sub-agent for AMSI France, and that the services provided by the noticees were only to the benefit of the consumers of Indian territory and the same were provided for and on behalf of the Arcelor Mittal Stainless International. The end user of service being located in India and need of such consumers being met by the noticees for and on behalf of its foreign principal, such services appears to have been provided in India and there is no export of service. It is also observed that the foreign principal acted through its agent, i.e., assessee. The principal was not the beneficiary. A service provider acting directly or indirectly through its agent is not the beneficiary of service so provided while providing of service is its contractual obligation under terms of contract with clients/customers. Therefore, in the instant case, no service had occasioned to move out of India to a place outside India. Further to provide service, expenses were incurred in India for which the assessee got reimbursements by way of commission.*

*Condition 2 i.e. the service should be used outside India, is not satisfied*

> *Had the service been provided to the foreign principal not resulting in ultimate supply of goods or provision of service to the consumer in India, such services might have assumed the character or nature of export of service from India. But in instant case the noticee is an intermediary meant to provide well-defined services to its clients/customers in India with the technical assistance of foreign principal. Thus it is observed by me that the noticee had performed service in India for ultimate consumption thereof in India by its clients/customers in India. The service was destined to exhaust in India and extinct soon after performance thereof." (emphasis supplied)*

*15. The Commissioner (Appeals) also held that Arcelor India had performed service in India for ultimate consumption in India by the customers in India and the observations made by the Commissioner (Appeals) are as follows:*

> *"16. In the instant case, I find that the Appellants are receiving commission in convertible foreign currency in two different situation, in respect of the orders booked by the prospective customers with the foreign supplier directly, but through the Appellants, whereby the goods are directly exported by the supplier outside India and payments are made to them directly by the customers in India and in another situation where the goods are imported directly by the Appellants for trading purposes for which they are holding dealers' Registration under Central Excise. Thus, I am of the view that the Appellants had performed the service in India for ultimate consumption thereof in India by its customers in India." (emphasis supplied)*

> *54. The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the following manner:*

> *(i) Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient.*

*Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides 'export of service' as contemplated under rule 3 of the 2005 Export Rules; and*

*(ii) Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange."*

4.4 As we find that the issue involved in the present appeal is squarely covered by the above decision of larger bench, we do not find any merits in the impugned order demanding the service tax and imposition of penalty. As the demand is set aside on the merits itself, we are not going into the issue of limitation.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

Sd/-
**(P.K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

**Sd/-**
**(SANJIV SRIVASTAVA)**
**MEMBER (TECHNICAL)**

*akp*