CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

E-Hearing

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70211 of 2019

(Arising out of Order-in-Appeal No.629-ST/APPL/LKO/2018 dated 31.12.2018 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

M/s Raj Sourcing, **.....Appellant**
(1st Floor, Jyoti Kunj 2, UPSIDC Road,
Sikandra, Agra)

VERSUS

Commissioner of Central Excise &
CGST, Agra **....Respondent**
(113/4, Sanjay Place, Agra)

APPEARANCE:

Ms. Surabhi Sinha, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70661/2024

DATE OF HEARING : 10.10.2024
DATE OF DECISION : 10.10.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.629-ST/APPL/LKO/2018 dated 31.12.2018 passed by learned Commissioner (Appeals) Customs, GST & Central Excise, Lucknow.

2. The facts of the case in brief are that the Appellant is a partnership firm registered with Service Tax Department under the category of Technical Inspection and Certification Service, provided instructions issued by their principal prior to import of footwear. They received agreed consideration in freely convertible foreign currency (Euro) through proper banking channel. The Appellant paid service tax to the Department on the amount received by them from their principals and reported the same in their ST-3 Returns. However, the Appellant realised

that the service performed by them came under the category of 'export of service' for which service tax was not payable. Therefore, they filed a refund application dated 28.09.2017, which was received in the office of the Assistant Commissioner of Goods & Service Tax, Division, Agra-II on 04.10.2017. The amount deposited was reported in their relevant ST-3 Returns for the period April, 2016 to September, 2016 and October, 2016 to March, 2017. In their refund application, the Appellant categorically mentioned that the service performed by them comes under the category of 'export of service' as the recipient is located outside of India and having fixed place of business in Germany for which they are receiving consideration in foreign currency. The services provided by the Appellant confirm the character of "export of service" as defined under Rule 6A of Service Tax Rules, 1994 (as inserted by Notification No.36/2012-ST dated 20.06.2012 effective from 01.07.2012) and the Appellants have relied upon the relevant Rule 6A of Service Tax Rules, 1994. The Appellant deposited the amount of Service Tax (including Swacch Bharat Cess, Krishi Kalyan Cess and interest) by mistake due to insufficient understanding of the legal provisions as advised by their tax consultant. In view of the above provisions, service tax was not payable by them. The amount deposited is liable to be refunded in terms of Section 11-B of Central Excise Act, 1944 as applicable to the Finance Act, 1994. The entire amount was deposited as under:-

SI. No.	Challan CIN No.	Challan Date	Service Tax Amt.	S.B. Cess	K.K. Cess	Interest	Challan Amount
1.	63904810707201650095	07.07.2016	35,383	1263	0	0	36,646
2.	63904810710201650401	07.10.2016	79,247	2830	2,830	85	84,992
3.	63904810501201751985	05.01.2017	1,40,261	5009	5,009	0	1,50,279
4.	63904812803201750322	28.03.2017	90,571	3235	3,235	0	97,041
			3,45,462	12337	11,074	85	3,68,958

3. The Appellant received a refund claim rejection notice from the Assistant Commissioner, alleging that the service was performed in India and therefore not eligible for export service benefits. The Appellant refuted this claim, arguing that the place

of provision of service is determined by the recipient's location which is governed by Rule 3 of the Place of Provision of Services Rules, 2012[1] which in this case is outside India. They provided evidence to support their claim and requested a refund of the service tax paid. The learned Assistant Commissioner rejected the Appellant's refund claim and passed the impugned Order-in-Original dated 11.05.2018, stating that the service was performed in India and therefore not eligible for export service benefits. The Appellant filed appeal assailing this decision before the Commissioner of Central Excise & CGST (Appeals) Lucknow, who also rejected the appeal vide the impugned order-in-appeal dated 31.12.2018. Hence, the present appeal before the Tribunal.

4. Heard both the sides and perused the appeal records.

5. We find that Rule 6A of the Service Tax Rules, 1994 defines the export of services as the provision of services by an Indian entity to a foreign client, where the services are not listed in Section 66D of the Act, the place of provision is outside India, payment is received in convertible foreign exchange, and the provider and recipient are not related entities. If any service provided cumulatively satisfies all the above conditions, it will be considered as export of service and one of the essential condition (d) of the above said service would not be chargeable to service tax under the provisions of Section 66B of the Act. It is also not in dispute that the recipient of service is located outside India and there is no dispute about receipt of foreign exchange. Rule 3 generally states that the place of service provision is the recipient's location, unless unknown, in which case it's the provider's location. Rule 4 specifically addresses "performance-based services" and defines their place of provision as the location where the services are physically performed. This applies to services related to goods that need to be physically available to the provider or their representative for service delivery, or to services requiring the physical presence of the recipient or their representative with the provider. Prior to

[1] POPS

the negative list regime, the Export of Services Rules defined "export of taxable service" based on the type of service and its recipient's location. For services related to immovable property outside India or services performed outside India, the rules specified different conditions for qualifying as exports. The Export of Services Rules classified services into three categories: object-based, performance-based, and recipient-based. Technical inspection services, falling under sub-clause (zzi) of clause 105 of Section 65, were categorized as performance-based. As a result, the performance of these services was considered to occur outside India, leading to their classification as exports. While the Export of Services Rules, 2005 were rescinded in 2012, their guidance value remains relevant. The negative list regime was not meant to harm or benefit existing assessments unless specifically authorized. The Appellant, previously eligible for export benefits due to services rendered to foreign recipients, continues to be eligible under Rule 6A of the Service Tax Rules, 1994. The change in tax regulations should not retroactively remove previous benefits. Exports are generally not taxable, and receiving foreign currency from an overseas recipient indicates an export of invisibles. Services often involve multiple interconnected activities, and taxability arises when the recipient consumes them. We find that the issue is settled by the Tribunal in number of cases as under:-

- In the case of **COMMISSIONER VS. SAI LIFE SCIENCES LTD.- 2016 (42) S.T.R. 882 (TRIBUNAL):-** the issue was relating to rejection of the refund claims by Dy. Commissioner of Service Tax**,** Pune-I with regard to 'research and development expertise in new compounds of pharmaceutical products', The Appellate Authority determined that two conditions were necessary to classify the place of service provision: goods must be made available to the service provider, and services must be provided in relation to those goods. Relying on the Commissioner Vs. SGS India Pvt. Ltd. – 2014 (34) S.T.R. 554 (Bom), the Hon'ble Tribunal rejected the appeal of the revenue thereby holding that the respondents are eligible for refund.

- In the case of **PRINCIPAL COMMISSIONER OF CENTRAL EXCISE, PUNE-I VS. ADVINUS THERAPEUTICS LTD.-2017 (51) S.T.R. 298 (TRI.-MUMBAI):-** the issue was refund of accumulated CENVAT credit. The Tribunal held that research and development services provided by Advinus Therapeutics Ltd. were eligible for export benefits under the Service Tax Rules. The Tribunal rejected the Revenue's argument that the place of provision of the services was in India. The Tribunal concluded that the services were provided in relation to goods that were required to be made physically available by the recipient of service to the provider of service, and hence the place of provision of the service was outside India, and held that the respondents are entitled to refund of the accumulated CENVAT Credit. And the appeals of Revenue are dismissed.
- In the case of **INDEUS LIFE SCIENCES PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, BELAPUR-2018 (10) TMI 1254- CESTAT MUMBAI:-** it was held that the Appellants' services were deemed as export of service, entitling them to cash refund of the accumulated CENVAT Credit. The revenue's contention that the services were performance-based in India and not export services was rejected.

- In the case of **FERTIN PHARMA RESEARCH & DEVELOPMENT INDIA PVT. LTD. VS. COMMISSIONER OF CGST, NAVI MUMBAI-2018 (10) TMI 1373- CESTAT MUMBAI:-** the Appellant, a research and development company, claimed that these services were exported and sought a cash refund of the accumulated CENVAT credit. The Department contended that the services were not exported as the Appellant had received the goods from the foreign client for testing. The Tribunal held that the appellant's services constituted export of services under the Place of Provision of Service Rules, 2012. The Tribunal emphasized that the place of provision of service is where the service is consumed, and in this case, the service was consumed by the foreign client outside India. Therefore, the Appellant was eligible for a cash refund of the accumulated CENVAT credit.

- In the case of **INDEUS LIFE SCIENCES PVT. LTD. VS. NAVI MUMBAI, BELAPUR-2018(11) TMI 848- CESTAT MUMBAI:-** the learned AR for the revenue argued that the ratio laid down in SGS Pvt. Ltd.'s case cannot be applied to the present case due to the non consideration of the Place of Provision of Service Rules 2012. However, the tribunal, while interpreting these rules, adhered to the consumption based principle of service tax levy. They concluded that the technical and consultancy service began with testing the procured goods and ended with delivering the test report to the overseas client. Therefore, the tribunal found no reason to deviate from previous judgments, including those that dealt with the levy of service tax on FDA certificate procurement.

6. In view of the above discussion, the impugned order cannot be sustained and is therefore set aside. The appeal filed by the Appellant is allowed with consequential relief, as per law.

(Operative part of the Order pronounced in open court)

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

Separate but
concurring Order.
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS

SANJIV SRIVASTAVA:

I have gone through the order prepared by Learned Member (Judicial), however, I am concurring with the same order but I would like to add a decision by Larger Bench of This Tribunal in the case of M/s. Arcelor Mittal Stainless (I) P. Ltd. Vs Commissioner of Service Tax, Mumbai-II Interim Order No.26 of 2023 dated 09.06.2023, wherein following has been held:-

> *"50. Arcelor France and Arcelor India act as main agent and subagent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India. Therefore, even though the goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France. Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.*
>
> *51. The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24.02.2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.*
>
> *52. As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.*

53. The division bench, while making the reference, intended to deviate from this settled position of law only because, in its considered view, the decision of the Supreme Court in GVK Industries. The division bench, after recording a finding that there was no dispute that Arcelor India was providing BAS to Arcelor France, noted that the dispute was only as to whether the service rendered by Arcelor India will qualify as export of service in terms of the 2005 Export Rules. The division bench concluded that since the services provided to Arcelor France was for developing its business in India, the services received by Arcelor France, even though it is located outside India, would be in relation to business activities in India in view of the decision of the Supreme Court in GVK Industries. Reliance placed by the division bench on GVK Industries, as noticed above, is misplaced. The decision of Supreme Court in GVK Industries is based on an interpretation of Explanation (2) to section 9(1)(vii)(b) of the Income Tax Act, under which the income is deemed to have accrued in India. The Finance Act and the 2005 Export Rules do not contain a provision providing a deeming fiction. The distinguishing features of the decision of the Supreme Court in GVK Industries have been pointed in the earlier paragraphs of this order. The decision of the Supreme Court in GVK Industries, therefore, cannot be applied to the facts of the present case.

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."

2.0 In view of the above decision of the Larger Bench the services of commission agent provided by the appellant to the foreign entity qualify as export of services even though these are in respect of the Indian customers of the foreign entity.

3.0 With the above observation, I concur with the aforesaid order of Learned Member (Judicial).

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp