CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70211 of 2020

(Arising out of Order-in-Appeal No. NOI-EXCUS-002-APP-1302-19-20, dated - 08/01/2020 passed by Commissioner (Appeals) CGST, Noida)

M/s Schenck Rotec India Ltd. **.....Appellant**
(A-5, Sector 81, Phase II, PPZ
Noida, UP, 201305)

VERSUS

Commissioner, CGST & Service Tax, Noida **....Respondent**
(3rd Floor, Wegmans Business Park, KP-III
Greater Noida, 201306, UP)

APPEARANCE:

Shri R. Krishnan, Advocate for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70811/2024

DATE OF HEARING : 06.11.2024
DATE OF DECISION : 06.11.2024

SANJIV SRIVASTAVA:

This Appeal is directed against the Order-in-Appeal No. NOI-EXCUS-002-APP-1302-19-20, dated-08/01/2020 passed by Commissioner (Appeals) CGST, Noida whereby order in original No 09/ADC/GBN/2018-19 dated 16.05.2018 has been upheld:-

ORDER

"1 I confirm the demand of service Tax amounting to Rs. 75,82,372/-(Rs. Seventy five lacs eighty two thousand three hundred and seventy two only) against the party and order to recover the same under proviso to Section 73(1) of the Finance Act, 1994;-

2 I confirm the demand of service Tax amounting to Rs.1,55,114/-(Rs. One lac fifty five thousand one hundred and fourteen only) against the party and order to recover the same under proviso to Section 73(1) of the Finance Act, 1994. As the party has already deposited Service Tax amounting to Rs. 72,660/-, the same is ordered be appropriated against the demand;

3 I confirm the demand of service Tax amounting to Rs.56.135/ Rs. Fifty six thousand one hundred and thirty five only) against the party and order to recover already deposited Service Tax amounting to Rs. 18,144/-, the same is ordered be appropriated against the demand;

4 I confirm the demand of service Tax amounting to Rs.21,459/-(Rs. Twenty one thousand four hundred and fifty nine only) against the party and order to recover the same under proviso to Section 73(1) of the Finance Act, 1994.

5 I confirm the demand of interest at the appropriate rate, on the amount of Service Tax confirmed at Sl. Nos (1), (2), (3) and (4) against the party and order to recover the same under the provisions of Section 75 of the Finance Act, 1994. Since the party has already deposited the interest amounting to Rs. 49,311/- Rs. Forty nine thousand three hundred and eleven only) against Service Tax Rs. 72.6601- and Rs. 7,964/-(Rs. Seven thousand nine hundred and sixty four only) against Service Tax Rs. 18,144/-, the same is ordered to be appropriated against the interest payable by them; and

6 I impose a penalty of Rs. 78,15,080/- (Rs. 75,82,372/- Rs. 1,55,114/- Rs. 56,135/ Rs.21,459/-) [Rs. Seventy eighty lacs fifteen thousand and eighty only) on the party under the provisions of Section 78 of the Finance Act, 1994. Since the party has deposited the penalty amounting to Rs. 10,899/- against Service Tax Rs. 72,660/- and Rs. 2,722/- against Service fax Rs. 18,144/-, the same is ordered to be appropriated against the penalty adjudged against them."

2.1 The Appellant is engaged in the manufacture of Balancing Machines, Measuring and Checking Instruments and Spares, falling under Tariff Heading Nos. 90311000, 90318000 & 90319000 of the First Schedule of the Central Excise Tariff Act. They are also registered for providing taxable services also as a service recipient for payment of service tax under reverse charge mechanism.

2.2 During the course of audit of record of the Appellant for the period April 2012 to March 2014 discrepancies as follows were noticed.

- nonpayment of service tax on receipts of in respect of certain services provided by the Appellant to their group companies located abroad. The amount received as commission for sale of the goods manufactured by the group companies abroad is Rs.6,13,46,053/- (25% of the total commission income of Rs,24,53,84,213/-) and have been shown in ST-3 Return as export of services.
- have not paid service tax on reverse charge basis in respect of the commission paid to overseas selling agent (Amount Rs 12,54,791/-, Service tax leviable Rs 1,55,114/-), job charges (Amount Rs 4,54,165/- Service tax leviable Rs 56,135/-) and staff training expenses (Amount Rs 1,73,616/- Service tax leviable Rs 21,459/-).

2.3 After completion of the inquiry a Show Cause Notice dated 09.01.2017 was issued to the Appellant asking them to show cause as to why:-

> *"a. Service Tax amounting to Rs. 75,82,372/-(including Education Cess and Secondary and Higher Education Cess) should not be demanded and recovered from them under the provisions of proviso to Section 73(1) of the Finance Act, 1994:*
>
> *b. Service Tax amounting to Rs. 1,55,114/-(including Education Cess and Secondary and Higher Education Cess) should not be demanded and recovered from them under the provisions of proviso to Section 73(1) of the Finance Act, 1994. Since the party has already deposited Service Tax amounting to Rs. 72,660/-, why the same should not be appropriated against the demand;*
>
> *c. Service Tax amounting to Rs. 56,135/-(including Education Cess and Secondary and Higher Education Cess) should not be demanded and recovered from them under the provisions of proviso to Section 73(1) of the Finance Act,*

1994. Since the party has already deposited Service Tax amounting to Rs. 18,144/-, why the same should not be appropriated against the demand;

d. Service Tax amounting to Rs. 21,459/-(including Education Cess and Secondary and Higher Education Cess) should not be demanded and recovered from them under the provisions of proviso to Section 73(1) of the Finance. Act, 1994.

e. Interest at the appropriate rate as applicable from time to time, on the amount of Service Tax at Sl No. (a) (b), (c) and (d) should not be demanded and recovered from them under the provisions of Section 75 of the Finance Act, 1994. Since the party has already deposited the interest amounting to Rs 49,311/- against Service Tax Rs. 72,660/- and Rs. 7,964/- against Service Tax Rs 18,144/-, why the same should not be appropriated against the interest payable by them; and

f the penalty in respect of Sl. Nos (a), (b), (c) and (d) should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994. Since the party has deposited the penalty amounting to Rs. 10,899/- against Service Tax Rs. 72,660/- and Rs. 2,722/- against Service Tax Rs. 18,144/-, why the same should not be appropriated against the penalty adjudged against them."

2.4 Show Cause Notice was adjudicated as per Order-In-Original referred in para 1 above.

2.5 Aggrieved Appellant has filed the appeal before the Commissioner (Appeals) which has been dismissed as per the impugned order.

3.1. We have heard Shri R. Krishnan, learned Advocate appearing on behalf of the Appellant and Shri Manish Raj, learned Authorized Representative appearing on behalf of the Revenue.

3.2 Arguing for the Appellant learned counsel submits that

- the Service Tax demand of 25% of commission received prior to 01.10.2014 is not maintainable either on merits or on the limitation.

- Even if the Appellant is considered as a intermediary the commission received for sale of goods could have been subjected to service tax as intermediary only from 01.10.2014 not prior to that as definition of intermediary was amended to include goods from that date. For the period prior to that there could have been no demand.
- They have not provided any after-sale service as per the record and the clarification given by their counterpart in Germany. Further the same fact has been clarified by the Chartered Accountant's Certificate dated 17.10.2024 wherein it has been specifically clarified that the amount indicated were as per accounting standards as per AS29 to fulfill that requirement. As no separate service commission has been received, the demand made in this respect is bad in law.
- The demand is also barred by limitation as they have declared the entire amount of commission received in their ST-3 Return. Reliance placed on following decisions:
  - Triveni Engineering & Industries Ltd. [2015 (317) ELT 408 (All)]
  - Kenda Farben India Pvt. Ltd. [Final Order No.71578 of 2019 dated 21.08.2019 in Excise Appeal no.70766 of 2017.
- The demand made in respect of the job charges paid by the Appellant to their foreign counterpart in respect of certain job works cannot be upheld as they have paid the requisite Customs Duty on the said charges at the time of re-import of goods they cannot be liable to both Customs and Service Tax.
- In respect of the staff training services the services provided by them outside India should be a place where such event took place. In such case taxes are liable as per the law of the country not the Finance Act, 1994.
- On commission paid to the overseas selling agent demand is of Rs. Rs 1,55,114/- for which they claimed the benefit of Notification No.42/2012-ST dated 29.06.2012. However,

they have not complied with the conditions in the notification. They have against this demand paid an amount of Rs 72,660/- which has been appropriated by the order in original.

3.3 Learned Departmental Representative reiterates the findings recorded in the order of the Original Authority.

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

4.2 In the present case 04 issues are involved. We take up each issue separately.

4.3.1 For confirming the demand in respect of the service commission which is 25% of the total commission received by the Appellant from their foreign counterpart the impugned order records as follows:-

> *7.4 It is also true that that during the impugned period, commission agent's service for 'Supply of Goods was not included in that definition of intermediary', which was subsequently included w.c.f. 01/10/2014 vide amendment made by Notification No. 14/2014-S.T., dated 11-7-2014. From the above provisions of law, it is clear that during the material period, place of provision of service providell by the appellant in relation to sale of goods was governed by general provisions of Rule 3 of POPS Rules 2012, i.e., location of the recipient of service and as the recipients were located outside India, such provision of service in relation to sale of goods (75% of the commission) was correctly treated as 'export of service' and therefore, no demand was raised by the department. However, during the material period, place of provision of service provided by the appellant in relation to arranging/facilitating provision of services as an intermediary of the foreign entities was governed by provisions of Rule 9(c) of POPS Rules 2012, i.e., location of the service provider and as the service provider, i.e., the appellant, was located in the taxable territory, such provision of service in relation to arranging/facilitating provision of services(25% of the commission) was not treated as export of service and correctly held as liable for service tax in the hand of the appellant.*

4.3.2 The fact of the case reveal that the Appellant have received this commission as per the terms of BAP Cooperation Agreement entered between the various group companies of the parent company of the Appellant. These companies are located across the world and engaged in manufacture and sale of goods across the world either directly or through their counterpart located in that territory. The Appellant provided such services as per this contract to group companies located in Germany for promotion of sale of their goods in India.

4.3.3 The term intermediary as defined involves tripartite agreement in which the Appellant be a party. Explaining the concept of intermediary Education Guide at para 5.9.6 records as follow:

> ***"5.9.6 What are "Intermediary Services"?***
> ***Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing.*** *Thus, an intermediary is involved with two supplies at any one time:*
>
> *i) the supply between the principal and the third party; and*
>
> *ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.*
>
> ***For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition****.*
> *Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account.*

From the above explanation as per the Education Guide, even if the appellant is considered as intermediary in respect of the goods then also he is excluded from the definition of intermediary services for the purpose of application of Rule 9 of Place of Provision of Services Rules, 2012.

4.3.4 However, in this case the entire demand has been made in respect of the commission received by the Appellant from their German counterpart for promoting the sale of their goods to Indian customer. In such a situation the place of provision of service would have been the location of service as per Rule 3 of the POPS Rules, 2012 and as the entire place of provision of these services is in Germany they could not have been subjected to service tax in India. The issue is covered by the decision of the Larger Bench of this Tribunal in Arcelor Mittal Projects India Pvt. Ltd. [Interim Order No. 26/2023 dated 09.06.2023 in appeal No Service Tax Appeal No. 88483 of 2014] observed as follows:

> *"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."

4.3.5 In view of the above we do not find any merits in confirmation of this demand against the Appellant. However, we also observed that the demand would be hit by limitation as all the facts with regards to the receipt of commission was declared by the Appellant in their ST-3 Return. This is not disputed by the Revenue. The decisions referred to by the counsel would be squarely applicable.

4.4.1 Service Tax demand in respect of the job charges are in dispute. This job charges were paid by the Appellant to their foreign counterpart for the job work done by them on the goods sent for job work by the Appellant. After completion of the work goods were re-imported by paying customs duty including value of the job charges. These facts have been recorded in the Order-In-Original in para 5.27 and the same is reproduced below:-

"5.27 In the instant case, the party is situated in the taxable territory (India) availing the services of the job workers located in the non-taxable territory. Therefore, the party is liable to pay Service Tax. Further, the party vide their fetter dated 21.08.2015 have informed that out of this amount, they have paid service tax of Rs. 18,144/- along with interest of Rs, 7,964/- on the taxable value of Rs. 1,46,800/- vide GAR-7 challan Nos. 00128 & 00137 both dated 17.08.2015 respectively as it relates to the services provided by the seller for the machine in India. The party also deposited penalty of Rs. 2,722/-. vide GAR-7 challan No. 02238 dated 30.09.2016. I found that on amount of Rs. 3,07,365/- (Rs. 4,54,165/- Rs. 1,46,8000), the party did not discharge the Service Tax liability on such job work charges paid to overseas company. Therefore, remaining Service tax amounting to Rs. 37,991/- (Rs. 56,135/- Rs. 18,144/-) is demandable and recoverable from them along with interest at appropriate rate as applicable from time to time under the provisions of Section 73(1) and Section 75 of the Act. I do not agree with the contention of the party that the payment with regard to Rs. 3,20,365/- (Rs. 2,90,298/- + Rs. 12067/-) is pertaining to import, against BOE No. 8584783 dt.

> *26.11.2012 as they have not submitted any documentary evidences in support of their claim."*

4.4.2 As these amount have been subjected to Customs Duty as provided in law confirmation of demand again for services would not be proper and would amount to double taxation. At the time of audit the Appellant have paid some amount towards this demand but that payment would not amount to admissibility. The demand made in this respect is also liable to be set aside.

4.5.1 On the issue of training expenses received by the Appellant we observed that the impugned Order-In-Appeal observes as under:-

> *"Now I take up the issue in respect of the non-payment of Service Tax of Rs.21,459/- on staff training expenses in foreign currency to foreign trainers during the financial year 2012-13. The appellant contended that the staff training was an event(educational in Character) organized outside the country and under Rule 6 of the POPS Rules 2012, such activity performed outside the taxable territory was not taxable in India'. I find that the word 'outside the country' should be interpreted to mean that "the benefit of the service should accrue outside country". In the instant case, though the training was undertaken by the staff of the appellant in Germany and the expenses was booked by the appellant, the effective use and benefit of aforesaid training was finally accrued by the appellant who was located in taxable territory (India). Accordingly, the services received by the appellant for training of his staff was import of service and the demand of service tax under RCM confirmed by the adjudicating authority is maintainable."*

4.5.2. We find that the impugned order misdirects itself by going into interpretation of the word 'outside the country' to 'the benefit of the service should accrue outside country. The training expenses were incurred by the appellant for the training programme outside India. The employees of the appellant were deputed to attend the training programs/ events outside the taxable territory. Education guide at para 5.6 clarifies in case of event based service as follows:

> ***"5.6 Rule 6- Services relating to Events***
>
> *5.6.1 What is the place of provision of services relating to events?*
>
> *Place of provision of services provided by way of admission to, or organization of a cultural, artistic, sporting, scientific, educational, entertainment event, or a celebration, conference, fair, exhibition, or any other similar event and of services ancillary to such admission, shall be the place where the event is held.*
>
> *5.6.2 What are the services that will be covered in this category?*
>
> *Services in relation to admission as well as organization of events such as conventions, conferences, exhibitions, fairs, seminars, workshops, weddings, sports and cultural events are covered under this Rule.*
>
> ***Illustration 1***
>
> *A management school located in USA intends to organize a road show in Mumbai and New Delhi for prospective students. Any service provided by an event manager, or the right to entry (participation fee for prospective students, say) will be taxable in India.*
>
> ***Illustration 2***
>
> *An Indian fashion design firm hosts a show at Toronto, Canada. The firm receives the services of a Canadian event organizer. The place of provision of this service is the location of the event, which is outside the taxable territory. Any service provided in relation to this event, including the right to entry, will be non-taxable."*

4.4.3 From the above clarification as per the Education Guide, it is evident that the training expenses incurred by the appellant for the training programs organized outside the place of provision of service would be the place where the training programme was organized. In all the case under the consideration the place of event was outside the taxable territory, and hence cannot be subjected to tax as per the Finance Act, 1994.

4.5.1 Now we are left with the last demand of non-payment of service tax of Rs.82,454/- on service commission paid by the Appellant to his overseas selling agents. The impugned order in this respect observes as follows:-

> *"Now I come to the issue for non-payment of Service Tax of Rs.82,454/- on the service commission paid by the appellant to his overseas selling agents and contended that such payment in relation to export was exempted from Service Tax under Notification No.42/2012-ST dated 29/06/2012. I find that Notification No.42/2012-ST dated 29/06/2012 provides exemption from the Service Tax on the payment of commission to overseas selling agents with certain conditions as laid down. I do not find any evidence on which it can be ascertained whether the appellant had fulfilled the conditions of Notification No. 42/2012-ST dated 29/06/2012 for claiming the exemption from Service Tax. In absence of any such evidences, demand of Service Tax is maintainable."*

4.5.2 In this case, this demand has been confirmed against the Appellant for non-compliance with the conditions of Notification No.42/2012-ST dated 29.06.2012. Appellant admitted that they have not complied with the conditions of this notification. In absence of compliance with the conditions of exemption notification benefit of this exemption notification cannot be extended to the appellant. Hon'ble Supreme Court has in case of **Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]** observed as follows:

> **52.** To sum up, we answer the reference holding as under -
>
> *(1)* *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.

4.5.3 We note the submission made by the appellant that amount paid against this demand would have been available as Cenvat Credit to the Appellant. However, on today's date we do not observe anything on the said submission as Cenvat Credit Scheme is not in existence. We uphold the said demand.

4.6 We observe that the issues involved in the present case are interpretational in nature and were in the knowledge of the Revenue at the time of audit. Show cause notice was issued subsequently to the Appellant after a lapse of 03 years (Approx). Appellant cannot be held guilty for contravention specified under Section 78 for imposition of penalty. Entire penalties imposed under this Section is set aside.

4.7.1 Thus impugned order is modified to extent of setting aside the demand of service tax made in respect of

- Commission received from their foreign counterparts towards promotion of sale of their goods in India.
- Amounts paid by the appellant for job work done on their goods by foreign entities.
- Training expenses incurred by the appellant for the training of their employees abroad.

4.7.2 Demand in respect of the commission paid by the appellant towards the sale of their goods to foreign selling agents is upheld.

4.7.3 Penalty imposed under Section 78 of the Finance Act, 1994 is set aside.

5.1 Appeal is partly allowed as indicated in para 4.7 above.

(Operative part of the order is pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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