IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
<u>REGIONAL BENCH : ALLAHABAD</u>

ST/58121/2013-CU[DB]

Arising out of Order-in-Original No.62/Commissioner/Noida/2012-13 dated 11.03.2013 passed by Commissioner of Customs, Central Excise & Service Tax, Noida.

M/s. Coperion Ideal Pvt.Ltd.

…APPELLANT(S)

VERSUS

CC & CE & ST.-Noida

RESPONDENT (S)

APPEARANCE

Shri Utkarsh Malviya (Advocate) for the Appellant (s)
Shri Pawan Kumar Singh (Supdt.)(A.R.) for the Revenue

CORAM:

SHRI ANIL CHOUDHARY, HON'BLE(JUDICIAL)
SHRI ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

<u>DATE OF HEARING/DATE OF DECISION : 28.02.2018</u>

<u>FINAL ORDER NO.71035/2018</u>

Per Shri Anil Choudhary :

This appeal has been filed by the appellant against Order-in-Original No.62/Commissioner/Noida/2012-13 dated 11.03.2013 passed by Commissioner of Customs, Central Excise & Service Tax, Noida vide which the ld.Commissioner has confirmed the demand of Service Tax amounting to Rs.2,02,66,241/- under section 73(1) of the Finance Act, 1994 along with interest under section 75 of the Act. The impugned order has further confirmed penalty at the rate of 2% of service tax per month not paid or penalty of Rs.200/- for everyday whichever is higher under section 76 of the

Act, penalty of Rs.10,000/- or Rs.200/- for everyday during which the failure continues whichever is higher under section 77 of the Act.

2. Brief facts of the case are that M/s.Coperion Ideal Pvt.Ltd. has entered into an agreement with M/s.Coperion Warner Pfleiderer & Gmbh Co. KG Germany and M/s. Coperion Waeschle Gmbh & Co. KG Germany wherein it provides information to the foreign parties required to understand the domestic market condition and for preparing quotes.

2. The foreign parties were engaged in production and supply of various machineries. Coperion Waeschle Gmbh & Co. KG, was engaged in manufacture of bulk material handling systems and components of plastics. Similarly, Coperion Werner Pfleiderer & Gmbh & Co was engaged in manufacture and supply of Twin Screw Compounders LSK, machinery for compounding and pelletising etc.

3. The appellant and the foreign parties had entered into an agreement dated 03.01.2007 w.e.f. 01.01.2007 wherein the appellant had been authorized to represent the foreign parties in India.

4. The department conducted an audit of the appellant's business for the financial years 2007-08 to 2012-13 (upto 30.06.2012). During the audit, the department perused the ST-3 return and Balance Sheet of the appellant wherein the department noticed that the appellant had received commission from the foreign parties. The detailed transactions were explained by the appellant to the department by way of letters dated 01.04.2011, 30.01.2012 & 26.07.2012. Pursuant to the enquiries, the department issued show cause notice dated 13.09.2012 alleging –

(i) that the services provided by the appellant are classifiable under Business Auxiliary Service.

(ii) that the services have been provided by the appellant from India and have been used in India and therefore it does not qualify as export of service under the Export of Services Rules, 2005.

(iii) the appellant has failed to perform its duties as per agreement.

(iv) that the appellant have suppressed facts that they acted as commission agent for the foreign parties by not taking service tax registration as required under the Act.

(v) the show cause notice further placed reliance on the stay order of Delhi Tribunal in the case of M/s.Microsoft Corp. (I) Pvt.Ltd. v. CST, Delhi [2009 (15) STR 680 which has been upheld by Hon'ble Delhi High Court reported in 2009 (16) STR 545 (Del.).

5. The said show cause notice culminated into the impugned order passed by the ld.Commissioner, which is under challenge before this Tribunal.

6. At the outset, ld.Advocate for the appellant submitted that the issue is no more res integra in view of the decision of Tribunal in the case of Sumitomo Corporation India Pvt.Ltd. v. Commissioner of S.T., Delhi [2017 (50) S.T.R. 299 (Tri.-Del.)], where the Tribunal has decided in favour of the appellant/assessee.

7. Ld.Supdt.(AR) appearing on behalf of the Revenue reiterated the findings of the ld.Commissioner in the adjudication order.

8. After hearing both sides and on perusal of the record, we find that the issue is decided by the Tribunal in favour of the assessee/appellant in the case of Sumitomo Corporation of India Pvt.Ltd. (supra), wherein this Tribunal has held as under:-

> ***"8.*** *We have heard both the sides and perused the appeal records. On the first two issues relating to liability of appellant/assessee for service tax under the category of BAS we note that the service tax*

liability and the activities similar to the ones undertaken by the appellant/assessee were subject matter of decision by the Tribunal in earlier cases. In Paul Merchants Ltd. (supra) it is recorded that Export of Service Rules, 2005 are in accordance with Apex Court's ruling to the effect that service tax is a value added tax which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but a charge on the consumer. We note in the present case, the recipient of service are foreign entities and they are the consumers of these services provided by the appellant/assessee from India. The various persons in India to whom the goods were sold by the foreign entities or from whom various details and information were collected were not to be considered as recipient of service provided by the appellant/assessee. In Airbus Group India Pvt. Ltd. v. CST, Delhi reported in 2016-TIOL-2312-CESTAT-DEL. = 2016 (45) S.T.R. 120 (Tri.-Del.), the Tribunal after referring to the decisions in Paul Merchants Ltd. (supra), Microsoft Corporation (I) (P) Ltd. v. CST, New Delhi reported in 2014 (36) S.T.R. 766 (Tri.-Del.) and Gap International Sourcing India Pvt. Ltd. reported in 2014-TIOL-465-CESTAT-DEL. = 2015 (37) S.T.R. 757 (Tribunal) held that what constitutes export of service is to be determined strictly in accordance with the Export of Service Rules, 2005. It is the person who requested for the said service and is liable to make payment for the same, who has to be treated as recipient of service and not the person affected by the performance of the service. The destination has to be decided based on place of consumption not the place of performance of service in the case of Category III, Business Auxiliary Service. The appellant/assessee were engaged in promoting market for foreign entities in India. This will amount to export of service.

9. *In view of the settled position of law as discussed above, we find no merit in the impugned order in so far it confirms the demand against the appellant under BAS.*

10. *Regarding the third issue with reference to quantification of amount to be reversed from Cenvat credit in terms of Rule 6(3A) of Cenvat Credit Rules, we note that impugned order discussed the issue in detail and held that in terms of Explanation 1(c) under Rule 6(3D) of Cenvat Credit Rules the quantification can be made. Accordingly, the value of exempted service was arrived at by the Original Authority as* *difference between sale price and cost of goods sold or 10% of the cost of goods sold whichever is more. Accordingly, he arrived at the Cenvat credit to be reversed by the appellant in terms of Rule 6(3). Admittedly, the formula adopted by the Original Authority was not part of the provisions under Cenvat Credit Rules, 2004 during the material time. However, trading to be considered as "exempted service" is inserted by an explanation under Rule 2(e) of Cenvat Credit Rules. The said insertion clearly states that it is for removal of doubts. Accordingly, in the absence of any other statutory formula to arrive at the quantum of Cenvat credit to be reversed on common input services, we find no impropriatory in the decision of the Original Authority in this regard. Regarding the contention of the Revenue that the appellant/assessee should not be allowed to utilize more than 20% of the total duty liability we note that there is no legal backing for such assertion. Further, the proposal made in the show cause notice that the reversal of credit should be on the basis of proportion between value of traded goods and service income earned by the appellant/assessee is not supported by any legal provisions. Now the Revenue is pleading on a different ground and has not placed any support on the allegation made in the show cause notice. We find no support for the proposition that the reversal of credit should be based on value of traded goods. The methodology adopted by the Original Authority is fair and justified in view of the reasons recorded therein. We find no merit in the appeal filed by the Revenue in this regard."*

9. In view of the above discussions and findings, the appeal filed by the appellant/assessee is allowed.

(Dictated and pronounced in the court.)

SD/	SD/
(ANIL G. SHAKKARWAR)	**(ANIL CHOUDHARY)**
MEMBER(TECHNICAL)	**MEMBER (JUDICIAL)**

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