

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70414 of 2023

(Arising out of Order-in-Appeal No.279-ST/APPL/LKO/2023 dated 06.04.2023 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

M/s Onyx Studioz,

(633/1137, Kanchanpur, Matiyari,
Adarsh Nagar-2 Lucknow-226028)

.....Appellant

VERSUS

**Principal Commissioner of Central Excise &
CGST, Lucknow**

(3/194, Vishal Khand, Gomti Nagar, Lucknow)

....Respondent

APPEARANCE:

Ms. Vedika Nath, Advocate for the Appellant

Shri A. K. Choudhary, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70457/2025

DATE OF HEARING : 28.03.2025
DATE OF PRONOUNCEMENT : 08.07.2025

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.279-ST/APPL/LKO/2023 dated 06.04.2023 passed by the Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow by which the appeal filed by the assessee has been rejected by the First Appellate Authority.

2. Briefly stated, the facts of the case are that the Appellant is a partnership firm engaged in the business of Software Development, App Development, Web Designing and Graphic Designing on freelance basis. In order to provide these services, the Appellant had registered themselves on online website platforms such as Upwork (www.upwork.com) and Freelancer (www.freelancer.com). These websites work as online job marketplaces which connect the freelancers with overseas clients

that require their services in a particular field. It is the case of the Appellant that since they were engaged in export of services, they were under the *bona fide* belief that no service tax is payable and hence did not register themselves with the Service Tax Department. Consequently, the Appellant neither charged any amount of service tax from their clients nor deposited the same with the Department. The Appellant disclosed the nature of services alongwith receipts thereof in the Returns furnished under the Income Tax Act, 1961. Since the Appellant was compulsorily required to get its accounts audited under the provisions of the Income Tax Act, hence the Appellant also got its accounts audited and furnished the audit report in Form No.3CD alongwith its Income Tax Returns. That on the basis of third party information provided by the Income Tax Department, the Service Tax Department initiated an enquiry against the Appellant and on the basis of the aforesaid information, a letter dated 14.07.2021 was issued requesting the Appellant to furnish documents for verification of their service tax liability. A reply dated 22.07.2021 was filed. On the basis of a reply the Department formed an opinion that the services provided by the Appellant are Online Information and Data Access or Retrieval¹ services in which the place of provision of services is the location of the service provider i.e. India. Thus, the services provided by the Appellant will not qualify as export of services and that the Appellant is required to discharge service tax on Rs.30,61,789/- i.e. the value of sale of service as declared in their ITR for the Financial Year, 2016-17. A Show Cause Notice² dated 16.10.2021 was issued invoking extended period of limitation and requiring the Appellant to show cause as to why:-

(a) Service Tax liability of Rs.4,59,268/- should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 read with Sections 142 & 174 of the CGST Act'

¹ OIDAR

² SCN

(b) Interest should not be demanded and recovered from them at appropriate rate under Section 75 of the Act;

(c) Penalty should not be imposed under Section 78 of the Act read with Section 142 & 174 of the CGST Act, for failure to pay service tax & suppressing the facts and contravening provisions or rules with intent to evade payment of service tax;

(f) Penalty should not be imposed under Section 77(1)(a) of the Act for not taking service tax registration;

(g) Penalty should not be imposed under Section 77(1)(d) of the Act for failure to pay service tax electronically;

(h) Penalty should not be imposed under Section 77(2) of the Act for not filing of statutory service tax returns.

3. Reply to the SCN was submitted vide letter dated 28.03.2022 contesting the proposed demand on merits as well as on other grounds. The SCN was adjudicated vide Order-in-Original dated 17.08.2022 and the demand as proposed in the SCN was confirmed alongwith applicable interest and equal amount of penalty was imposed under Section 78 and penalties of Rs.10,000/- each was also imposed under Sections 77(1)(a), 77(1)(d) and 77(2) of the Finance Act, 1994. On appeal before the first Appellate Authority, the learned Commissioner (Appeals) rejected the appeal before him. Hence, the present appeal before the Tribunal.

4. The learned Advocate appearing on behalf of the Appellant submits that the services provided by the Appellant to overseas clients qualify as "export of services" in terms of the Act readwith the Service Tax Rules, 1994³ and the Place of Provision of Service Rules, 2012⁴. It is also submitted that the overseas clients used to pay the Appellant in foreign currency which would then be transferred to the bank account of the Appellant vide Upwork or Freelancer. The transaction history of the Appellant on Freelancer during the relevant period also shows that the

³ ST Rules

⁴ POPS Rules

overseas clients used to pay the Appellant in convertible foreign exchange. Copies of the Bank statements for the period April, 2016 to March, 2017 and the transaction history of the Appellant on Freelancer are part of the appeal paper book. It is further submitted that the services provided by the Appellant fulfill all the conditions provided under Rule 6A of the ST Rules and thus qualify as 'export of services' on which no service tax can be charged. Reliance has been placed on the decision of the Tribunal in the case of Mitsubishi Heavy Industries India Pvt. Ltd. 2017 (9) TMI 358-CESTAT New Delhi, wherein it was held that the condition of Rule 6A of the Service Tax Rules for payment in convertible foreign exchange, shall stand satisfied if the service recipient transfers the money from his account which is in convertible foreign currency and it is remitted to Indian provider of service. The credit to account of Indian bank will necessarily be in Indian rupees as no foreign exchange amount can be credited in bank located in India. Therefore, the important factor to be considered is whether the service recipient remitted foreign convertible currency irrespective of the form in which it is received by the Indian bank. Thus, when the amount is adjusted in the bank account and remitted to the service provider in India through bank account in Indian currency, the same is to be considered as paid in convertible foreign currency.

5. Learned Authorized Representative appearing for the Revenue justified the impugned order and prayed that the appeal filed by the Appellant being devoid of any merits may be dismissed.

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

7. I find that Rule 6A of the ST Rules defines the term 'export of service' and is reproduced here under for ease of reference:-

"RULE [6A. Export of services. — (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

(a) the provider of service is located in the taxable territory,

- (b) *the recipient of service is located outside India,*
- (c) *the service is not a service specified in the section 66D of the Act,*
- (d) *the place of provision of the service is outside India,*
- (e) *the payment for such service has been received by the provider of service in convertible foreign exchange, and*
- (f) *the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act."*

8. Further, it is imperative to reproduce Rule 3 of the POPS Rules:-

"RULE 3. Place of provision generally. — *The place of provision of a service shall be the location of the recipient of service :*

Provided *that in case [of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service."*

9. In terms of the said Rules, the criteria prescribed for a service to qualify as an 'export of services' is as follows:-

- i. *Service provider is located in the taxable territory (i.e. India);*
- ii. *Service recipient is located outside India;*
- iii. *Service provided is a service other than in the negative list;*
- iv. *Place of provision of the service is outside India;*
- v. *Payment is received in convertible foreign exchange;*
- vi. *Service provider and the service recipient are not merely a branch and head office of the same person.*

10. In view of the above legal provisions the services provided to overseas clients qualify as export of services. It is also observed that:-

- i. The registered address of the Appellant is at Lucknow, India and the Appellant is located within the taxable territory of India;*
- ii. The service recipients of the Appellant are all overseas clients who are based out of India and thus the location of the service recipient is outside India;*
- iii. The services provided by the Appellant were not covered by the list of negative services;*
- iv. The Appellant received payment in convertible foreign exchange;*
- v. In terms of Rule 3 of the POPS Rules which is the general rule, the place of provision of a service would be the location of the service receiver. Thus, the place of provision in our case is outside India; and*
- vi. The Appellant and the overseas clients were independent entities.*

11. I find that the overseas clients used to pay the Appellant in foreign currency which would then be transferred to the Bank account of the Appellant vide Upwork or Freelancer. The transaction history of the Appellant on Freelancer during relevant period also shows that the overseas clients used to pay the Appellant in convertible foreign exchange. I find that Rule 3 of the POPS Rules that generally, as per the default rule, i.e. Rule 3, the place of provision of services is the location of service recipient. Rules 4 to 12 provide specific provisions for specified services. As per the general scheme of the POPS Rules, if the service gets covered under Rules 4 to 12, the provisions mentioned under Rules 4 to 12 shall apply. In all the other cases where specific rules cannot be applied, the default rule (i.e. Rule 3) shall be applicable. Rule 3 further provides that in case, the location of service recipient is not available in ordinary course of business, place of provision of services shall be the location of service provider. Further, I find that even the CBEC Education Guide, 2012⁵ has made observations with respect to the application of Rule 3 of the POPS Rules. The Education Guide

⁵ Education Guide

also reiterated the point that if a service is not covered by an exception under one of the latter rules (i.e. Rules 4 to 12), and is consequently covered under the default rule (i.e. Rule 3), then the receiver's location will determine whether the service is leviable to tax in the taxable territory. Relevant extract of the Education Guide is mentioned herein below:-

"5.3 Main Rule – Rule 3 – Location of the Receiver 5.3.1

What is the implication of this Rule?

The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located. The main rule is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules – see para 5.14 of this guidance paper). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory.

The principal effect of the Main Rule is that:-

- A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.*
- B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service."*

12. I find that Circular No.209/1/2018-Service Tax dated 04.05.2018, provides that in the case of services pertaining to software development, the place of provision of service is the location of the service recipient. Relevant portion of the Circular dated 04.05.2018 is reproduced as follows:-

"3. Applying the definition of "declared services" in section 66E(d) of the Finance Act, 1994, and the provisions of POPS, to the specific cases of services of development, design, programming, customisation, adaptation,

upgradation, enhancement, implementation of information technology software, the conclusions which can be drawn are as follows :

3.1 in the case of services where data, instructions etc. are provided so as to develop software, i.e. development, design and programming of information technology software, the place of provision of service is the location of the recipient of the service.

3.2 in the case of services on software involving testing, debugging, modification etc. i.e. customisation, adaptation, upgradation, enhancement, implementation of information technology software, the place of provision of service is the location of the recipient of the service.

4. Therefore, in both the above cases, the place of provision of service is the location of the recipient of the service."

13. I find that the place of provision of services provided by the Appellant is classifiable under Rule 3 of the POPS Rules and hence no other Rule is applicable for determination of the place of provision of services. Thus, in the instant facts, the place of provision of service shall be the location of the recipient of service, which is outside India and accordingly, such services shall qualify as export of services and hence not exigible to service tax. Section 66B of the Finance Act is the charging provision which provides that service tax shall be levied on all services provided or agreed to be provided in the taxable territory by one person to another. Taxable territory has been defined under Section 65(52) as territory to which provisions of this chapter apply. Section 64 of the Finance Act provides that this chapter extends to whole of India except the State of Jammu and Kashmir. On conjoint reading of above, it emerges that service tax is leviable on all taxable services provided or agreed to be provided within the territory of India. Therefore, the services which are provided outside the taxable territory of India are excluded from the charging provision and therefore not exigible to service tax. Now the question arises regarding the scope of the word 'provided or agreed to be provided'. The

Hon'ble Supreme Court in catena of decisions interpreted the scope of the word 'provided or agreed to be provided' and held that use of above words clearly indicate that service tax is a destination based tax and it is upon the consumption of the service by the recipient that service is deemed to have become taxable. It has been held by the Hon'ble Supreme Court in the case of All India Federation of Tax Practitioners vs. Union of India & Others, 2007 (7) S.T.R. 625 (S.C.) held as under:-

"7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is *destination based consumption tax* in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable *only on services provided* within the country."

From the above, it is clear that service tax is levied only on transactions where the place of provision of taxable service is in India. The charging provision does not extend the levy on service exported and consumed outside the taxable bounds of India. Therefore, the inescapable conclusion is that where the place of provision and consumption of service is outside India, the same would not be taxable in India. As discussed above, since Rule 3 of POPS Rules apply to the provision of services by the Appellant, the said services would not be taxable in India as their place of provision would be outside India.

14. I find that the Adjudicating Authority fails to understand that in demanding service tax, the twin conditions i.e. identification of the particular service rendered and the payment received for such services, either before, during or after providing of such services were to be satisfied. I find that no specific service has been identified by the Adjudicating Authority, while accepting in principle that duty evasion cannot be proved with mathematical precision, the same cannot be established by applying a mathematical formula. I find that Courts and the Tribunal have been consistently holding that service tax cannot be fastened without identifying the specific service provided and consideration received or to be received for the same. I further

find that it is settled law that the SCN is the foundation of the case. The notice to show cause must be clear and unambiguous and the charges in the SCN should not be vague and uncertain. I find support from the judgement of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Bangalore vs. Brindavan Beverages Pvt. Ltd., 2007 (213) E.L.T. 487 (S.C.), wherein it was held as under:-

"10. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted."

15. Similarly, in the case of Commissioner of Central Excise, Nagpur vs. Ballarpur Industries Ltd., 2007 (215) E.L.T. 489 (S.C.), the Hon'ble Supreme Court observed as under:-

"It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule."

16. In the present case, without even ascertaining the nature of taxable service, the demand of service tax has been confirmed merely on the ground that some income is appearing in the income tax return on which service tax has not been paid. Thus, the taxable event has been assumed, which is contrary to the settled law that burden to prove taxable event lies on the

revenue and which has clearly not been discharged in the present case. Since the SCN dated 16.10.2021 as well as the orders dated 17.08.2022 and 06.04.2023, lack the very basis on which service tax can be levied, hence the entire proceedings against the Appellant fail and the impugned order is liable to be set aside on this ground alone. I find that the demand cannot be raised only on the basis of income tax returns without properly ascertaining the reason behind the mismatch in the figures reflected in the income tax return and the service tax return. Reliance in this regard is placed on the Tribunal's order in the case of Kush Constructions vs. CGST NACIN, ZTI, Kanpur 2019 (24) G.S.T.L. 606 (Tri.-All.), wherein it was held that difference in figures reflected in ST-3 returns and Form 26AS filed under Income Tax Act, 1961 cannot be basis for raising service tax demand without examining the reasons for such difference and without examining whether amount as reflected in said Income Tax Return was the consideration for providing any taxable services or the difference was due to any exemption or abatement.

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

(Order pronounced in open court on - **08.07.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS