CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
ALLAHABAD BENCH
E-Hearing

Service Tax Appeal No. 70466 of 2020

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-130 & 131-2021 dated 02.06.2020 passed by the Commissioner (Appeals), CGST (Appeals), NOIDA)

Commissioner of Service Tax, Noida .... Appellant
Customs, Excise & Service Tax,
Division V, E-5, Sector 1, CGST, NOIDA

Versus

Ms Samsung India Electronics Pvt Ltd. .... Respondent
B-1, Sector-81, Phase-II, NOIDA

AND

Service Tax Appeal No. 70574 of 2020

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-130 & 131-2021 dated 02.06.2020 passed by the Commissioner (Appeals), CGST (Appeals), NOIDA)

Commissioner of Service Tax, Noida .... Appellant
Customs, Excise & Service Tax,
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Versus

Ms Samsung India Electronics Pvt Ltd. .... Respondent
B-1, Sector-81, Phase-II, NOIDA

APPEARANCE:

Shri B. K. Jain, Authorised Representative of the Department for the Appellant
Shri Atul Gupta, Advocate for the Respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION : 11 January, 2021

FINAL ORDER NO.70001/2021

PER P V SUBBA RAO:

Both these appeals arise out of a single impugned order NOI-EXCUS-001-APP-130 & 131-2021 dated 02.06.2020 by which appeals against Orders-in-Original No. 25-R/AC/N-V/2018-19 and 26-R/AC/N-V/2018-19, both dated 30.5.2018 passed by the Assistant Commissioner, Central GST Division V, NOIDA were set aside. The assessee-respondent in this case filed two claims seeking rebate of Rs.1,53,261/- and Rs.3,60,63,022/- on June 29, 2009 and June 02,2009 respectively under Notification No. 11/2005-ST dated April 19, 2005 read with Section 93A of the Finance Act, 1994 in respect of the Service Tax and Cess paid on all taxable services exported in terms of Rule 3 of the 'Export of Service Rules, 2005' for the services said to be exported between December, 2008 to March, 2009 and June, 2008 to March, 2009.

2. After scrutiny of the claims, the Original Authority rejected both the rebate claims and on appeal, learned Commissioner (Appeals) by his Order-in-Appeal dated April 30, 2010 remanded the matter to the Original Authority to pass reasoned order after providing an opportunity of being heard.

3. Aggrieved by this remand order passed by the Commissioner (Appeals), Revenue filed the appeals before CESTAT which were dismissed. Consequently, denovo adjudication order was passed by the Original Authority again rejecting both rebate claims on the ground that the assessee failed to satisfy the conditions of export stipulated

under Notification No. 11/2005-ST dated April 19, 2005. In other words, it was held that the services rendered by the respondent herein do not qualify as "Export of Services" and hence no rebate is available.

4. Aggrieved by the de-novo orders passed by the Original Authority, the assessee filed appeals before the Commissioner (Appeals), who, by the impugned order, followed the ratio of order of this Tribunal in the assessee's own case **[Samsung India Electronics Pvt. Ltd. Vs. Commissioner of Central Excise, NOIDA [2016 (42) STR 831 (Tri-Del)]** and held that the assessee is entitled to rebate in respect of services which are said to have been exported.

5. Revenue has filed these appeals against the impugned order on the following grounds:

1. The assessee-respondent provides maintenance and after sale services to M/s. Samsung Electronics Company Ltd., Korea (in short SEC) in respect of CDMA and GSM mobile phone in the territory of India and other South west Asian countries. Respondent was getting compensation in foreign currency from SEC and paying service tax on such services and seeking rebate of Service Tax so paid holding the services rendered by them to M/s. SEC as export of services. In this case, the services rendered by the appellant are being consumed within India and not outside India. Therefore, the services are being rendered in India and not being exported outside India. Therefore, no rebate

is admissible as per Rule 6A of Service Tax Rules, 1994 and Rule 3 of Export of Services Rules, 2005.

2 (a). There is no ambiguity in law and services can be said to have been exported only if they are consumed outside India. The definition of Export under section 2(18) of the Customs Act is 'taking out of India to a place outside India'. Therefore, export of service shall mean that the outcome of service should have been consumed outside India. However, in the instant case, the consumer of services to whom services were provided were in India and even the contents of the agreement establish in substance that the ultimate consumption of service was in India. The respondent herein was intermediary to connect the foreign principal to the end users of service who were consumers here in India.

(b) As per the CBEC circular No. 111/5/2009-ST dated February 24, 2005, it was clarified as follows:

> 2. "The matter has been examined. Sub-rule (1) of rule 3 of the Export of Services Rule, 2005 categorizes the services into three categories:
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> (i) Category (I) [Rule 3(1)(i)] : For services (such as Architect service, General Insurance service, Construction service, Site Preparation service) that have some nexus with immovable property, it is provided that the provision of such service would be 'export' if they are provided in relation to an immovable property situated outside India.
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> (ii) Category (II) [Rule 3(1)(ii)] : For services (such as Rent-a-Cab operator, Market Research Agency service, Survey and Exploration of Minerals service, Convention service, Security Agency service, Storage and Warehousing service) where the

place of performance of service can be established, it is provided that provision of such services would be 'export' if they are performed (or even partly performed) outside India.

(iii) Category (III) [Rule 3(1)(iii)] : For the remaining services (that would not fall under category I or II), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable (such as, Banking and Other Financial services, Business Auxiliary services and Telecom services), it has been specified that they would be 'export',-

(a) If they are provided in relation to business or commerce to a recipient located outside India; and

(b) If they are provided in relation to activities other than business or commerce to a recipient located outside India at the time when such services are provided."

(c) Thus, for the services covered under the category II [Rule 3(1)(ii)], it is clarified that if an Indian event Manager arranges a seminar for an Indian Company in UK, the service has to be treated to have been used outside India because the place of performance is UK even though the benefit of such a seminar may flow back to the employees serving the company in India i.e., the place of performance is a relevant factor. In the case of All India Federation of Tax Practitioners vs. Union of India [2007 10 STT 166], the Hon'ble Supreme Court held that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. In this case the respondent herein was contracted by M/s. SEC to provide services on their behalf to consumers in India and, therefore, it does not qualify as export of services.

3. Although CESTAT has, in respect of same assessee, for an earlier period, in respect of same type of transaction, held that the services rendered qualified as export of services, the matter has not yet attained finality because the Revenue has filed SLP which is pending before the Hon'ble Supreme Court. Therefore, the Commissioner (Appeals) has erred in relying upon the order of CESTAT which has not yet achieved finality.

6. The Departmental Representative reiterated all the arguments and prayed that the impugned order may be set aside and appeals may be allowed.

7. Per contra, the learned Counsel for the respondent submitted as follows:

1. Two issues to be decided are:

(a) Whether the impugned order is legal and correct as it has been passed following the ratio of the decision of the Hon'ble CESTAT in respondents' own matter which is pending for a decision before Hon'ble Supreme Court.

(b) Whether the export of service during the relevant period covered the services which were provided to an entity located outside India though the same were utilized by the customers of the foreign entity in India.

2. The impugned order has been passed following the Final order of this Tribunal No. **ST/A/50142-50143/2015-CU(DB) dated January 8, 2015.**

Merely because an appeal/SLP has been filed by the Revenue against that order, it does not lose the force of being precedent. Reliance is placed on **M/s. Involute Engineering Pvt. Ltd. V Commissioner of Central Excise and Service Tax, Meerut I [2020-VIL-551-CESTAT-DEL-ST].**

3. The impugned order is correct even on merits and the respondent has exported services. What is important is to identify the client. In this case, the client is M/s. SEC and the exporter is the assessee. The respondent is being paid by M/s. SEC Korea in foreign currency and, therefore, the services are rendered to M/s. SEC who is in Korea. Even though the performance of services were done in India, if they are being performed for the business of Company located abroad, it would qualify as export. Reference is placed on the following case laws:

1. **ABS India Ltd. Vs. CST, Bangalore [2009 (13) STR 65 (Tri-Bang)];**

2. **Blue Star Limited vs. CCE Bangalore [2008 (11) STR 23]; and**

3. **Lenovo (India) Pvt. Ltd. Vs. CCE (Appeals II) & Ors [2009-TIOL-911-CESTAT-DEL]**

4. The services provided by the respondent is classified as 'Business Auxiliary Services' as it is a case of services rendered on behalf of the client, i.e. M/s. SEC and qualified as export of service. Section 65(105)(zzzb) defines the taxable service as any service provided or to be provided to a client, by a commercial

concern related to business auxiliary service. The definition of Business Auxiliary Service as per Section 65 (19) of the Finance Act is –

> "business auxiliary service means any service in relation to –
>
> (i) ….
> (ii) ….
> (iii) ….
> (iv) ….
> (iv) provision of service on behalf of the client…"

5. In this case they are rendering service on behalf of M/s. SEC to its customers and, therefore, they are getting paid by M/s. SEC and not by its customers. They have no direct contract with the customers for whose benefit they were providing the services.

6. Lastly, they also claimed that out of two appeals one relates to rebate claim of only Rs.1,53,262/-, which is below the monetary limit fixed for filing the appeal by the department in terms of instruction F.No. 390/MISC/116/2017-JC, dated August 22, 2019 and therefore, needs to be dismissed on this ground also.

7. Summing up, learned Counsel for the respondent prays that this Bench may follow its own precedent decision passed in respondent's own case and dismiss the appeals.

8. We have considered the arguments made by both sides and have gone through the records of the case.

9. The facts of the case are not in dispute. Respondent-assessee provides repairing service to the mobile phone customers of M/s.SEC, Korea in India and in South West Asia. There is no privity of contract between respondents and the customers of M/s. SEC, whose mobiles are being repaired. The contract is between the respondent and M/s. SEC, Korea. Having sold the mobile phones to its customers, M/s. SEC has obligation to maintain and repair them. They have outsourced this job to the respondent. The respondent provides these services on behalf of M/s. SEC to their customers. The customers do not pay the respondent. M/s. SEC pays them in foreign currency.

10. The argument of Revenue is that although the client is located abroad and services are being paid for in foreign currency, the actual service is being rendered in India. Therefore, this does not qualify as export of service and no rebate is available.

11. On the other hand, the contention of the respondent-assessee is that they have nothing to do with the customers of M/s. SEC. They are rendering services on behalf of M/s. SEC to their customers. Therefore, the consideration is being received from M/s. SEC Korea in foreign currency. This qualifies as export of service and rebate is available.

12. We find that this issue is no longer res integra as this Bench had in respect of the same assessee, in Final Order No. **ST/A/50142-50143/2015-CU(DB) dated January 8, 2015** in Appeal Nos. ST/141/2009 and ST/53664/2014-CU(DB) held that such services qualify as

export of services. Paragraphs 8 to 10 of the order are reproduced below:

> "8. As the facts of this case are similar to the case of Blue Star Ltd., therefore, we have no hesitation to hold that in this case appellant had provided services of business support and maintenance and repairs to their client located outside India and performed in India on behalf of client located outside India. Therefore, it is the case of export of services. For the period prior to 2005 when the export of services and goods came into force the appellant is covered by the CBEC Circular No. 53/5/2003-ST dated 25.4.2003 wherein the CBEC has clarified as under:
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> > "The Board has examined the issue. In this connection, I am directed to clarify that the Service Tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax free even after withdrawn of Notification No. 6/99, dated 9.4.1999. Further, it is clarified that service consumed/ provided in India in the manufacture of goods which are ultimately exported, no credit of service tax paid can be availed or reimbursed at present as inter-sectoral tax credit between services and goods are no allowed."
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> 9. As we have decided the issue on merits, therefore, we are not considering the issue on limitation as stated by the appellant.
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> 10. In these circumstances, we hold that appellants are not liable to pay service tax at all. Therefore, question of imposition of penalty does not arise. Consequently, we set aside the impugned order and allow the appeals with consequential relief, if any. "

13. Revenue's argument is that they have filed an SLP against this order of the Tribunal and, therefore, it should not have been followed by the Commissioner (Appeals) in the impugned order. We find nothing on record that the order of this Tribunal has either been stayed or set aside by the Hon'ble Supreme Court or any High Court and, therefore, the ratio holds good. Therefore, Commissioner (Appeals) has correctly followed the ratio and held that rebate is admissible on the export of service. We are inclined to follow the decision as the case is identical.

14. Accordingly, we find that both the appeals filed by the Revenue are liable to be rejected and we do so.

Sd/-

(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/-

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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