

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

REGIONAL BENCH

SERVICE TAX APPEAL NO. 51390 OF 2014

(Arising out of Order-in-Original No. KNP-EXCUS-000-COM-019-13-14 dated 12.12.2013 passed by the Ld. Commissioner, Central Excise & Service Tax, Kanpur)

M/s. Gupta HC Overseas (I) Pvt. Ltd.

.... Appellant

VERSUS

**Commissioner, Central Excise &
Service Tax, Kanpur**

...Respondent

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant

Shri Amit Bhardwaj, Authorized Representative of the Department

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

Date of Hearing: 23.09.2021

Date of Decision: 08.02.2022

FINAL ORDER NO. 70064/2022

JUSTICE DILIP GUPTA:

The order dated 12.12.2013 passed by the Commissioner, Central Excise and Service Tax, Kanpur¹ confirming the demand of service tax under the category of "design services" defined under section 65 (36b) of the Finance Act, 1994² with interest and penalty has been assailed in this appeal.

2. The appellant is an export-oriented unit engaged in the manufacture and export of leather footwear for women. For the purpose of manufacturing footwear, the appellant availed services like prototypes, designs, information about new and innovated materials and components and patterns of footwear from various foreign parties,

1. the Commissioner
2. the Finance Act

which were engaged in the manufacturing of footwear. The appellant remitted foreign exchange to these foreign parties and paid service tax under “fashion designing” services as defined under section 65(43) of the Finance Act under the reverse charge mechanism.

3. Though the period involved in the present appeal is from April 2007 to March 2012, but even for the earlier period during which the appellant had paid service tax from April 2006 to November 2006 on reverse charge basis, the appellant had filed an application on 19.05.2007 for refund of service tax alleging that the service tax was erroneously paid during this period. The appellant contended that in view of the provisions of rule 3(ii) of the Taxation of Service (Provided from Outside India and Received in India) Rule, 2006³, such “fashion designing” services would be taxable in India only when performed in India but as no part of these services was performed in India, service tax liability did not arise on the appellant on reverse charge basis. The Commissioner (Appeals) by order dated 16.05.2012, after remand of the matter by the Tribunal, held that service tax liability did not arise on the appellant since the services were covered under rule 3(ii) of the Import Rules as no part of the service was rendered in India. This order of the Commissioner (Appeals) was challenged by the Department before the Tribunal. The Tribunal, by order dated 12.10.2017, dismissed the appeal filed by the Revenue.

4. An audit of the records of the appellant was, however, conducted on 12.10.2011, pursuant to which the show cause notice dated 12.10.2012 was issued to the appellant seeking to classify the services imported by the appellant from foreign parties under the category of

3. the Import Rules

“design service” taxable under section 65 (105)(zzzzd) of the Finance Act. The show cause notice proposed to demand service tax by invoking the extended period of limitation under the proviso to section 73 (1) of the Finance Act. The ground for proposing the demand was that “design services” fall under rule 3 (iii) of the Import Rules, for which the location of service recipient in India is sufficient to attract service tax liability and not the place of performance of service.

5. This show cause notice was adjudicated upon by the Commissioner by order dated 12.12.2013 whereby the proposed demand was confirmed with interest. The Commissioner observed that the statutory definition of “fashion designing” services would not include the services received by the appellant; the invoices were raised by the foreign service providers with respect to the supply of design lines, patterns and prototypes of footwear and sole patterns, which were used for production of consumer products i.e. shoes; and so the services imported by the appellant would be “design services” defined under section 65(36b) and taxable under section 65 (105) (zzzzd) of the Finance Act.

6. It is this order dated 12.12.2013 passed by the Commissioner that has been assailed in this appeal.

7. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

- (i) The services received by the appellant are classifiable under “fashion designing” services;
- (ii) Footwear, in respect of which patterns and designs were received by the appellant, is an article intended to be worn

by human beings and coverage under section 65(43) of the Finance Act is wide enough to cover 'footwear' under the said category. In this connection reliance has been placed on the Circular dated 28.02.2007 and also the decision of the Tribunal in **Virola International vs. Commissioner, Customs, Central Excise & Service Tax, Kanpur**⁴;

- (iii) The classification of the services under the category of "fashion designing" services has been confirmed upto the level of the Tribunal in appellant's own case in the order date 12.10.2017 and was not disputed by the Department till the issuance of the show cause notice. Therefore, having accepted the classification of the same service under the category of "fashion designing" services for the previous period, it is not open to the Revenue to take a different stand now for the subsequent period;
- (iv) The "fashion designing" services fall under rule 3 (ii) of the Import Rules. Section 66A of the Finance Act, on a general note, makes the recipient of service located in India (via business, fixed establishment, permanent address or usual place of residence) who has received services from a person located outside India (via business, fixed establishment, permanent address or usual place of residence), the deemed service provider. The taxable services which are provided from outside India and received in India are identified in the Import Rules which

came into force by Notification dated 19.04.2006. Rule 3 of the Import Rules provides for the condition as to when any service which is provided from outside India and received in India is chargeable to service tax. "Fashion designing" services falling under section 65(105)(zv) of the Finance Act would be covered in the second category, namely, rule 3(ii) of the Import Rules. Thus, as the services have been totally performed outside India, the same cannot be made taxable under rule 3(ii) of the Import Rules. In this connection reliance has been placed on the decision of the Tribunal in **Intas Pharmaceuticals Ltd. vs. CST, Ahmedabad**⁵ ;

- (v) The charging section for levy of service tax has not been invoked; and
- (vi) The appellant did not suppress any facts and so the invocation of the extended period of limitation for the period from April 2007 to September 2010 amounting to Rs. 62,63,249/- is liable to be set aside.

8. Shri Amit Bhardwaj, learned authorized representative appearing for the Department, however, supported the impugned order and made the following submissions:

- (i) To determine the correct classification of services provided to the appellant, recourse should be taken to the principles of classification provided under section 65A of the Finance Act inserted in 2003 with effect from 14.05.2003. It is

5. 2009 (16) STR 784 (Tri. – Ahmd.)

clear that the services received by the appellant deserve to be classified under “design services” as this service is the most specific description, whereas “fashion designing” is a more general description of the service received by the appellant;

(ii) The definition of “design services” includes services provided in relation to designing of furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three dimensional models. In the instant case “design services” of footwear is covered in “consumer products”;

(iii) The definition of “consumer products” can be easily deducted from the following decisions of the Tribunal:

- a. **Ganesh Exports vs. Collector of Customs, New Delhi⁶;**
- b. **Ispat Metallics (India) Ltd. vs. Commissioner of Customs, Mumbai⁷; and**
- c. **Commissioner of Customs, Chennai vs. R.K. Industries⁸;**

(iv) The classification dispute can also be decided in terms of the Instructions dated 01.08.2002 issued by the Board. In paragraph 3, “fashion designing” has been limited to the designing of articles made up of clothes and they essentially have been included in the articles and accessories that can be worn by an individual. In paragraph 4, “fashion designing” services includes the

6. 1996 (88) E.L.T. 134 (Tribunal)
 7. 2004 (178) E.L.T. 281 (Tri. – Mumbai)
 8. 2002 (150) E.L.T. 640 (Tri. – Chennai)

designing of jewellery but footwear is not mentioned or discussed. Thus, it can be construed that the “fashion designing” services include designing services of clothing material and jewellery that can be worn by human beings and footwear should be classified in the category of consumer goods;

(v) A perusal of the invoices raised by the foreign designer, show that the Point of Sale has been given as India and in some invoices the Destination Port has been given as India, which clearly shows that the services were received in India and consumed in India and thus, the claim made by the appellant is wrong; and

(vi) The extended period of limitation has been correctly invoked in the facts and circumstances of the case.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

10. To determine the head under which the services provided to the appellant would fall, it would be necessary to first examine the nature of services that have been provided to the appellant by various foreign parties. The appellant, as noticed above, is an export-oriented unit engaged in the manufacture and export of leather footwear for women. The Department itself, in its letter dated 25.02.2013, described the nature of services received by the appellant and they are as follows:

a. Procurement and development of different samples;

- b. Providing various types of prototypes, designs, concepts as per new market trends for footwear and sole patterns;
- c. New and innovated materials and components to be used;
- d. Providing various patterns of footwear; and
- e. Purchase of copyrights of various patterns and designs.

11. The appellant also claims that it had received prototypes, designs, information about new and innovated materials and components, patterns of footwear from the foreign parties involved in the manufacturing of footwear.

12. It would also be necessary to reproduce the definitions of “fashion designing” services and “design services”.

13. Section 65(43) of the Finance Act defines “fashion designing” as follows:

“65(43) “fashion designing” includes any activity relating to conceptualising, outlining, creating the designs and preparing patterns for costumes, apparels, garments, clothing accessories, jewellery or any other articles intended to be worn by human beings and any other services incidental thereto;”

14. It is taxable under section 65(105)(zv) of the Finance Act and it is reproduced below:

“65(105)(zv) “taxable service” means any service provided or to be provided to any person, by a fashion designer in relation to fashion designing.”

15. Section 65(36b) of the Finance Act defines “design services” and it is reproduced below:

“65(36b) “design services” includes services provided in relation to designing of furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity designing and production of three dimensional models.”

16. It is made taxable under section 65(105)(zzzzd) of the Finance Act and it is reproduced below:

“65(105)(zzzzd) “taxable service” means any service provided or to be provided to any person, by any other person in relation to design services, but does not include service provided by –

- i) an interior decorator referred to in sub-clause (q); and
- ii) a fashion designer in relation to fashion designing referred to in sub-clause (zv)”

17. A bare perusal of the aforesaid definitions would reveal that “fashion designing” services deal with designing of things and articles intended to be worn by human beings and such service would include activities such as conceptualizing, outlining, creating the designs and preparing patters. “Design services”, on the other hand, would include services provided in relation to designing of furniture, consumer products, industrial products and production of three dimensional models.

18. The contention of learned counsel for the appellant is that footwear, in respect of which pattern and designs were received by the appellant, is an article intended to be worn by human beings and, therefore, section 65(43) of the Finance Act is wide enough to cover “footwear” under this category. Learned counsel for the appellant also placed reliance upon paragraph 6.7 of the Circular dated 28.02.2007 issued by the Central Board of Excise and Customs in connection with the 2007-08 budget that deals with “design services”. It is reproduced below:

“6.7 Design services [section 65(105)(zzzzd)] : Services in relation to conceptualizing, outlining, creating the designs and preparing patterns for costumes, apparels, garments, clothing

accessories, jewellery or any other articles intended to be worn by human beings are leviable to service tax under fashion designing service [section 65 (105)(zv)] and services in relation to planning, design or beautification of spaces is leviable to service tax under interior decorator's service [section 65(105)(q)]. Design services, other than the above specifically mentioned taxable services, like furniture design, aesthetic design, consumer or industrial products, logos, packaging, production of three dimensional models, etc. will be taxable under this category."

19. Learned authorized representative appearing for the Department, however, contended that the services received by the appellant are covered under the definition of "design services" as they are in relation to "consumer products" and in any case, in view of the provisions of section 65A of the Finance Act, the services received by the appellant would be classifiable under "design services" as this service is the most specific description, whereas, "fashion designing" services is a more general description of the services received by the appellant. Learned authorized representative also placed reliance upon the Instructions dated 01.08.2002 issued by the Board in connection with "fashion designing" services, wherein "fashion designing" services includes designing of jewellery but footwear is not mentioned.

20. As noticed above, "fashion designing" services includes any activity relating to creating the designs and preparing patterns for costumes, appearance, garments, clothing accessories, jewellery **or any other articles intended to be worn by human beings.**

21. The issue, therefore, that arises for consideration is whether footwear, in respect of which patterns and designs were received by the appellant, is an article intended to be worn by human beings. There can possibly be no doubt that footwear is worn by human

beings. The Tribunal in **Virola International** also examined this precise issue. The appellant therein had paid certain amount to an entity outside India towards collection and development of samples of footwear and footwear components, which samples were used by them for display before the overseas buyers for obtaining export orders. The appellant contended that it was manufacturing footwear and the service received by it would be “fashion designing” service since the activity was in relation to “any other articles intended to be worn by human beings”. The adjudicating authority accepted this contention of the appellant and further held, that in view of the provisions of rule 3(ii) of the Import Rules, it was not taxable under the reverse charge mechanism. However, the Commissioner (Appeals) held that the service received by the appellant would fall within the ambit of “design services” and, therefore, confirmed the demand. The Tribunal, however, agreed with the view taken by the adjudicating authority and allowed the appeal.

22. This apart, what needs to be noticed is that in the earlier round of proceedings concerning the previous years for which the appellant had claimed refund of the amount paid as service tax under “fashion designing” services as it was not required to pay tax, the classification of the service received by the appellant as falling under “fashion designing” was not disputed by the Department. The Department cannot now be permitted to classify the same element of service provided to the appellant under a different head in subsequent proceedings.

23. The Department has, however, proceeded to classify the service received by the appellant under “design services” that was made

taxable w.e.f. 01.06.2007. The Circular dated 28.02.2007 issued in connection with 2007-08 budget has dealt with “design services”. It refers to “fashion designing” services and “interior decorator” service and states that “design services” would include services other than the services specifically mentioned in the aforesaid two categories. It would, therefore, include services like furniture design, aesthetic design, **consumer products** or industrial products, logos, packaging, production of three dimensional model, etc. It is, therefore, clear that if any service is included in “fashion designing” services, it will not be included in “design services”. Footwear which is worn is specifically covered under “fashion designing” services.

24. The contention of learned authorized representative appearing for the Department that in such a situation aid of section 65A of the Finance Act should be taken cannot be accepted for the simple reason that the services received by the appellant are covered under the definition of “fashion designing” services and this service cannot be included in “design services”.

25. It is also not possible to accept the contention of the learned authorized representative appearing for the Department that “footwear” articles would be covered under **consumer goods** and, therefore, would fall in the definition of “design services”. When a footwear is worn by human beings it is specifically covered under “any other articles intended to be worn by human beings” and, therefore, any activity relating to footwear would be covered by “fashion designing” services.

26. Reliance on the Circular dated 01.08.2002 by the learned authorized representative appearing for the Department to contend

that the services received by the appellant would fall under “design services” is also not correct. Paragraphs 3 and 4 of the Circular, on which reliance has been placed, are reproduced below:

“3. Fashion designer conceptualize and create designs/patterns applying his sense of aesthetic, keen sense of colour, visual imagination, knowledge of market trend and as per requirement of the client. Accordingly, fashion designer may be involved in designing of any goods which are intended to be worn by human being and where aesthetic/looks/fashion is a criterion for wearing it. Fashion designers work include selection of material (for example type of cloth, its colour, design, quantity etc), preparing design as per the trend or as per his visual imagination, preparation of pattern incorporating the requirement of the client. Fashion designer also keeps in mind the occasion, season and time etc. when his designed article is intended to be worn.

4. A point has been raised as to whether tailors and jewellers will be covered under the service tax. Taxable service in this case is designing of goods intended to be worn by human being. A tailor is involved only in stitching of clothes. As such no designing activity is involved. Hence tailor will not be covered under the tax net. Similarly, jeweller essentially makes jewelry and sells it. Therefore, no designing is involved. However, a jeweller may avail services of a designer to design jewelry. Service provided by designer to jeweller would be covered under the tax net in the category of fashion designing.”

27. Paragraph 3 does not limit the “fashion designing” services to articles made up of clothes. Infact, it specifically provides that a fashion designer may be involved in designing of any goods which are intended to be worn by human beings. Paragraph 4 deals only with a specific query raised as to whether tailors and jewellers will be covered under the service tax. It does not talk about a manufacturer of leather footwear for women.

28. The last issue that arises for consideration is as to whether “fashion designing” services would fall under rule 3(ii) of the Import Rules. The relevant portion of the said rule is reproduced below:

“Taxable services provided from outside India and received in India

3. Subject to section 66A of the Act, the taxable services provided from outside India and received in India, shall, in relation to taxable services-

(i) ...

(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India :

Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;

(iii) ... ”

(emphasis supplied)

29. As noticed above, “fashion designing” services fall under section 65(105)(zv) of the Finance Act and, therefore, would be covered in the second category of rule 3(ii) of the Import Rules. These services are performed outside India and, therefore, cannot be made taxable under rule 3(ii) of the Import Rules. In this connection reliance has been placed on the decision of the Tribunal in **Intas Pharmaceuticals Ltd.**, wherein it has been held that if services are entirely provided outside India, the proviso to rule 3(ii) of the Import Rules is not applicable and no tax can be levied on the same.

30. Such being the position, the impugned order cannot be sustained. It would, therefore, not be necessary to deal with the other contentions raised on behalf of the appellant.

31. The impugned order dated 12.12.2013 is, accordingly, set aside and the appeal is allowed.

(Order Pronounced on **08.02.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Shreya