CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 890 of 2009

(Arising out of Order-in-Original No. 77/2009-Commr. LTU dated 30.07.2009 passed by the Commissioner of Central Excise & Service Tax, LTU, Bangalore)

M/s. Fanuc India Pvt. Ltd. **....Appellant**
41, A Electronics City,
Hosur Road,
Bangalore-560100

VERSUS

C.C.E. & S.T.-Bangalore-LTU **....Respondent**
100 Ft Ring Road JSS Towers,
Banashankari-III Stage,
Bangalore,
Karnataka
560085

WITH

Service Tax Appeal No. 891 of 2009

(Arising out of Order-in-Original No. 81/2009-Commr. LTU dated 12.08.2009 passed by the Commissioner of Central Excise & Service Tax, LTU, Bangalore)

M/s. Fanuc India Pvt. Ltd. **....Appellant**
41, A Electronics City,
Hosur Road,
Bangalore-560100

VERSUS

C.C.E. & S.T.-Bangalore-LTU **....Respondent**
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Bangalore,
Karnataka
560085

APPEARANCE:

Shri B.V. Kumar, Advocate for the Appellant
103, 17 'c' main road, 5th block,
koramangala, bangalore-560 095

Shri K.B.Nanaiah, Asst. Commissioner, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 20015-20016/2019

DATE OF HEARING: 19th December, 2019
DATE OF DECISION: 7th January, 2020

PER: P. ANJANI KUMAR

The appellants, M/s Fanuc India are manufacturers of CNC Systems, Robot Systems etc.; they are registered under the category of 'Business Auxiliary Services', 'Maintenance or Repair Services' and 'Commissioning and Installation Services'. The Department alleged that the appellants have rendered services relating to sales promotion of the specified products produced by their parent company, Fanuc Ltd., Japan and the said services fall within the ambit of 'Business Auxiliary Services'; they have also rendered Maintenance and Repair Services' in respect of products manufactured by Fanuc Ltd., Japan and imported by customers in India during the warrantee period. A SCN dated 17.10.2008 was issued to the appellants demanding Service Tax of Rs.4,99,01,239/- for the period 01.07.2003 to 19.11.2003 and 15.03.2005 to 30.09.2007 on the 'Business Auxiliary Services' and Service Tax of Rs.42,49,818/- on the 'Maintenance or Repair Services'. The SCN was adjudicated vide Order No. 77/2009 dated 28.07.2009 confirming the demands along with penalties. For the subsequent period i.e. 01.10.2007 to 30.09.2008 another SCN dated 22.12.2008 demanding Service Tax of Rs.1,99,44,422/- on 'Business Auxiliary Services' was issued to the appellants and was confirmed vide Order No. 81/2009 dated 06.08.2009. Hence, Appeals No. ST/890/2009 & ST/891/2009.

2. Learned Counsel for the appellants submits that the impugned order is contrary to the provisions of Export of Service Rules, 2005 and Circulars issued by CBEC from time to time; Learned Commissioner ignored the CBEC Circular No. 111/05/2009-ST dated 24.02.2009; Learned Commissioner failed to follow the decision of the Hon'ble Tribunal in the case of M/s Blue Star Ltd., 2008 (11) STR 23 (Tri. Bang.) wherein it was held that

booking orders in India for a foreign principal and receiving commission in India in convertible foreign exchange, would amount to services provided from India and used outside India. Therefore, the services so rendered are exported in terms of Rule 3 (2) of Export Service Rules, 2005. He also relies upon the following cases:

- *KSH International Pvt. Ltd. Vs CCE, Belapur – 2010 (18) STR 404 (Tri. Mumbai)*
- *EM Jay Engineers Vs CCE, Mumbai – 2010 (20) STR 821 (Tri. Mumbai)*
- *Mapal India Pvt. Ltd. Vs CCE, Bangalore – 2011 (22) STR 454 (Tri. Bang.)*
- *SGS India Pvt. Ltd. Vs CST, Mumbai – 2011 (24) STR 60 (Tri. Mumbai)*

2.1. He further submits that Notification No. 06/99-ST dated 09.04.1999 granted exemption to the payments received in India in convertible foreign exchange; the exemption was rescinded w.e.f. 01.03.2003 by virtue of Notification No. 02/2003; even after such withdrawal the position w.r.t. export of services was clarified by CBEC vide Circular No. ST-56/5/3 dated 25.04.2003 stating that Service Tax is destination-based consumption tax and is not applicable on export of service and that export of services would continue to be tax free even after the withdrawal of exemption on payments received in foreign exchange w.e.f. 01.03.2003. Notification No. 21/2003-ST dated 01.03.2003 (effective up to 14.05.2005) provides that the payment received in India in convertible foreign exchange w.r.t taxable services is exempted from payment of Service Tax leviable thereon under Section 66 of Finance Act, 1994; the learned counsel submits that therefore there is no doubt on the availability of exemption to the 'Business Auxiliary Services' rendered by them to Fanuc Ltd., Japan till 15.03.2005.

2.2. Learned Counsel further submits that Export of Service Rules, 2005 were notified vide Notification No. 09/2005-ST dated 03.03.2005 (w.e.f. 15.03.2005); 'Business Auxiliary Service' rendered by the appellants as defined under Section 65 (105) (zzb) fall under Rule 3(3) of the Export

Service Rules, 2005; subsequently Rule 3 of the Export of Service Rules have been substituted by Notification No. 13/2006-ST dated 19.02.2006 wherein criteria has been amended to treat the taxable services as an Export of services if the following criteria are met:

Under Rule 3(3), two situations have been contemplated and read as follows:

(i) such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such service is located outside India:

Provided that if such recipient has any commercial or industrial establishment or any office relating thereto in India, such taxable services provided shall be treated as export of services only if-

(a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;

(b) service ordered is delivered outside India and used in business outside India; and

(c) payment of such service provided is received by the service provider in convertible foreign exchange;

(ii) such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the taxable service is located outside India at the time when such services are received.

Subsequently, Rule 3 of Export of Service Rules has been substituted by Notification No. 31/2006-ST dated 19.02.2006 wherein the following criteria to treat the taxable service as export of services have been placed:

(i) provision of such service must be to a recipient located outside India;

(ii) such service is delivered outside India and used outside India (prior to 01.03.2007) or such service is provided from India and used outside India (from 01.03.2007); and in addition,

(iii) payment for such service is received by the service provider in convertible foreign exchange.

2.3. Learned Counsel further submits that during the period 15.03.2005 to 17.04.2006, 'Business Auxiliary Services' under Section 65 (105) (zzb) (vi) fall under Rule 3(3) of Export of Service Rules, if such taxable are used in or in relation to commerce or industry and the recipient of such service is located outside India. Therefore, the exemption is available to them in view of the Rules and CBEC Circular No. 111/05/2009 - ST dated 24.02.2009. From 18.04.2006, the 'Business Auxiliary Services' rendered by the appellant to Fanuc Ltd., Japan still qualifying as export of service as they satisfied the following conditions:

- such services are provided to a recipient located outside India;
- such services are delivered outside India and used outside India;
- payment of such services are received by the service provider in convertible foreign exchange.

2.4. Learned Counsel further submits that as the services rendered by them are covered under of export of services and therefore, demand amounting to Rs.4,99,01,239/- and Rs.1,99,44,422/- vide above SCNs is not sustainable and accordingly penalties under Sections 76, 77, 78 are also not sustainable.

3. Regarding the 'Maintenance or Repair Services', the Learned Counsel fairly concedes that the duty demand was sustainable. However, he submits that due to the continuous change in law and interpretation by the Courts, the appellants were under the bona fide belief the tax is not payable; CBEC Circulars have also contributed to the confusion. Moreover, the appellants will be entitled the avail the CENVAT credit on the said amount of Rs.42,49,818/- in as much as this amounts to "Output Service" provided by them to the India customers for whom it becomes "Input Service" in terms of Rule 3(1)(ix) of CCR, 2004. Learned Counsel submits that under the circumstances, the penalty is not maintainable.

4. Learned AR for the Department reiterates the findings of OIO.

5. Heard both sides and perused the records of the case. We find that as per Article of the Consignment Sales Agreement dated 17th August, 1998 entered into by the appellants and Fanuc Ltd., Japan, the appellants are expected to visit customers, to explain customer on Contract Product and to supply customers with documents; make advertisement on Contract Products in Contract Territory; inform customers of the conditions of sales agreements and to inform FANUC of the progress of the contract negotiation, provide the employees of Fanuc India engaged in sales activities with necessary training; advise FANUC of the market trends of Contract Product and competitive products in Contract Territory; to do other activities necessary for receiving orders from customers. We find that as submitted by the Learned Counsel, the services are rendered to Fanuc Ltd., Japan by the appellants. The beneficiary of the service is situated outside India and the services rendered in India. It is not disputed that the remuneration was paid in convertible foreign exchange. We find that CBEC vide Circular No. 56/5/2003-ST dated 25th April, 2003 has clarified that Service Tax is destination-based consumption tax and is not applicable on export of services; export of services would continue to remain tax free even after withdrawal of Notification No. 06/99 dated 09.04.1999. CBEC vide Circular No. 111/5/2009-ST dated 24th February, 2009 has clarified that:

> *"3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect service (a Category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India.*

> *Similarly, if an Indian event manager (a Category II service [Rule 3(1)(ii)]) arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the* ***benefits of these services accrue outside India****. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well."*

5.1. We further find that the ratio of this Bench's decision in the case of *Mapal India Pvt. Ltd., 2011 (22) STR 454* and other cases cited by the appellants, hold that the services such as rendered by the appellants to their foreign principal fall under Export of Service Rules and are eligible for exemption in terms of Notifications, Export of Service Rules and the Circulars issued by CBEC from time to time for the entire period i.e. 01.07.2003 to 19.11.2003, 15.03.2005 to 30.09.2007 and 01.10.2007 to 30.09.2008. Therefore, we hold that the issue is no longer res integra and the appellants are not liable to pay Service Tax during the said period under the heading 'Business Auxiliary Service'.

6. Coming to the Service Tax demanded on 'Maintenance or Repair Service' for the period 01.10.2007 to 30.09.2008 as discussed above, the Learned Counsel for the appellants fairly conceded the applicability of such tax. Therefore, we find that there are no reasons to discuss the applicability

of the same. However, as requested by the appellants, looking into the facts and the circumstances of the case, we set aside the penalties.

7. In view of the above, in respect of Appeal No. ST/890/2009 and ST/891/2009 demanded related to 'Business Auxiliary Service' are set aside; in respect of Appeal No. ST/890/2009, demand of Rs.42,49,818/- on 'Maintenance or Repair Services' is upheld along with interest; however, all penalties are set aside. In the result, ST/890/2009 is partially allowed and ST/891/2009 is allowed in toto.

(Order pronounced in the open court on 7th January, 2020)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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