IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal No. ST/41536/2017

(Arising out of Order-in-Appeal No. 179/2017 (STA-I) dated 31.03.2017 passed by the Commissioner of Service Tax (Appeals-I), Chennai)

M/s. Sella Synergy India Pvt. Ltd. : Appellant

Vs.

The Commissioner of Service Tax, Division III, Commissionerate-III, Chennai : Respondent

Appearance:-

Shri. N. Amit Kumar, Consultant
for the Appellant

Shri. R. Subramaniyan, AC (AR)
for the Respondent

CORAM:

Hon'ble Shri P Dinesha, Member (Judicial)

Date of Hearing/Decision:**16.07.2018**

Date of Pronouncement:31.03.2018

Final Order No. 42418 / 2018

The appellant was in the business of provision of "Information Technology Software Services". The appellant entered into Business Transfer Agreement (BTA) on 10.02.2010 with M/s. Sella Servizi Bancari S.C.P.A, a company established in Italy, agreeing to sell, assign, transfer and convey the business, including transfer of personnel on a slump sale (as defined under Section 2(42C) of the Income Tax Act, 1961) as a going concern and on "as is where is" basis, for a consideration specified in the said agreement. In relation to those services rendered during the period 01.01.2010 to 14.02.2010, the appellant made a claim for refund of service tax inputs used for provision of export services, under Rule 5 of CENVAT Credit Rules, 2004. The Assistant Commissioner-adjudicating authority thereafter issued a Show Cause Notice No. 13/2015 dt. 18.11.2015 as to why the claim of refund made by the appellant should not be rejected in terms of Section 73(1) read with Rule 14 of the CENVAT Credit Rules, 2004.

1.2 The point for consideration before the adjudicating authority as could be seen from the above Show Cause Notice, is reflected in paragraph 5, which reads as under:

> *"5. On verification of invoices it is seen that the amount is credited to "**DRESDNER BANK AG JURGEN-POINO-PLAZA 1, D-60301 FRANKFURT MAIN EUR A/C NO.: 499/08 063 527 11 OF IDBI BANK LTD., 37, C P RAMASWAMY ROAD, CHENNAI – 600 018 TAMIL NADU INDIA HAVING SWIFT CODE: DRESDEFFXXX**. According to Bank Statement submitted by assessee, it appears that the amount instead of crediting to the Account of **SELLA SYNERGY INDIA PVT. LTD., 1st Floor ELNET Software City, TS140 Rajiv Gandhi Salai Taramani, Chennai** has*

> *been credited to SELLA Servizi Bancari S.C.P.A. Hence it appears that the transaction cannot be considered as export of Service."*

1.3 In response to the above, the appellant filed its explanation vide letter dt. 16.12.2015, seriously resisting the proposal of rejection by the adjudicating authority, *inter alia* contending that it had transferred its software service business to M/s. Sella Servizi Bancari S.C.P.A. pursuant to BTA; that in terms of BTA all assets of the assessee, including its 'book debts' (i.e., Debtor/receivable balances) were transferred; that the business itself was transferred as a going concern, which business was being continued by the successor and that therefore, the export invoices raised by the appellant were realized by its successor in business. The adjudicating authority however, vide his order dt. 26.04.2016 rejected the claim for refund *interalia* on the ground that as per the bank statement submitted by the appellant, the amount was credited to the account of Sella Servizi Bancari S.C.P.A. instead of M/s. Sella Synergy India Pvt. Ltd. Ld.Adjudicating Authority had thereafter proceeded on assumption namely the Euro Account with BANCA SELLA, ITALY was operating at Italy; that on perusal of the corresponding bank statement for the period June, 2009 to May, 2010, it was evident and clear for him that the transactions made were for the operations at

Italy, that it appeared that the amount instead of directly credited to the Account of SELLA SYNERGY INDIA PVT. LTD., 1st Floor ELNET Software City, TS140 Rajiv Gandhi Salai Taramani, Chennai, had been credited to Italy account and the transaction could not be considered as export of service; that from the said transaction, it is seen that the provider of service and recipient of service are mere establishment and have not satisfied the conditions stipulated in Rule 6A(e) and (f) of the Service Tax Rules, 1994 read with item (b) of Explanation 3 of clause (44) of Section 65B of the Act; that the amount had not been received in convertible foreign currency by the appellant; and that therefore for the above reasons, the transaction could not be considered as an export of service under Rule 6A(e) and (f) of Service Tax Rules, 1994 read with Item (b) of Explanation (3) to clause 44 of Section 65B of the Act. From the records, I do not find any documentary evidence in support of these ('appears' / 'seen') assumptions. Aggrieved by the said rejection, the appellant filed an appeal before the Commissioner of Service Tax (Appeals-I), Chennai and the Commissioner (Appeals) vide impugned order dt. 31.03.2017 has upheld the rejection order wherein also Ld.Commissioner (Appeals) has not referred to any documentary evidence, against which the appellant is before this forum.

2. Heard Shri. N. Amit Kumar, Ld. Consultant for the appellant and Shri. R. Subramaniyan, Ld. Department Representative for the Revenue.

3. During the course of hearing, Ld. Consultant took me through the Business Transfer Agreement, CBEC Notification No. 36/2012-ST dt. June 20, 2012, bank instructions sample Foreign Inward Remittance Certificates (FIRCs) in successor's name placed at pages 35 to 38 of the paper book to prove that the understanding of the Revenue with regard to the non-receipt of FIRCs was incorrect. The BTA reflects that the appellant's business was transferred as a going concern along with the assets and liabilities; subject to the conditions of the agreement title to and risk in the assets shall also be passed on to the transferee on the closing date. On the other hand Ld.DR supported the findings of lower authorities.

4. I have considered the rival contentions and perused the documents furnished in the appeal paper and also paper book and on perusal, I note that the Revenue has not disputed the payment of Service Tax on the input services used by the appellant for its export of service. From a perusal of Order-in-Original as also the impugned Order-in-Appeal, I find that it is not their case that

refund was denied because of violation compliance or violation of conditions of Rule 5 of CCR. The only reason for the denial of refund by the Revenue is on the allegation that the export proceeds were received by the appellant's successor, i.e. realised by its successor at Italy. The findings of adjudicating authority which are at para 15, is extracted herein below :-

> "…..-15. It is observed in the present case that the amount is credited to "DRESDNER BANK AG JURGEN-POINO-PLAZA 1, D-60301 FRANKFURT MAIN EUR A/C NO.499/08 063 527 11 OF IDBI BANK LTD., 37, CP RAMASWAMY ROAD, CHENNAI-600 018, TAMIL NADU INDIA HAVING SWIFT CODE:DRESDEFFXXX. According to the Bank Statement submitted by the assessee, it appears that the amount instead of crediting to the Account of SELLA SYNERGY INDIA PVT. LTD., 1st Floor, ELNET Software City, TS 140, Rajiv Gandhi Salai, Taramani, Chennai, has been credited to SELLA Servizi Bancari, S.C.P.A. Hence, it appears that the transaction cannot be considered as export of service rendered by M/s.Sella Synergy India Pvt. Ltd. …."

5. From the above it is clear that though the account holder with the recipient bank (IDBI Bank Ltd) is the successor, the amount is credited to an Indian Account. In this factual background, the decision relied on by Ld.Consultant in the case of ***National Engg. Industries Ltd. Versus Commr. of C.EX., Jaipur 2008 (11) S.T.R.156 (Tri. - Del.)*** assumes importance. The facts of that case, as noted by

the Delhi Bench, are that the appellant therein was the agent of General Motors Corpn. USA, had provided services of sourcing them the contract from Indian Railways . Under Rule 3 of Export of Services Rule, 2005, export of service was exempted from Service tax. The appellant had wrongly paid Service tax on the commission got from M/s. General Motors Corpn. through Indian Railways and claimed the refund of tax. The adjudicating authority had rejected the refund claim on the ground that it was hit by Rule 3(1)(b) of the said Rules which was upheld by Commissioner (Appeals). The Delhi Bench after analysing the contract between the parties therein and also relevant Rules, concluded as under :-

"…..

7. In order to avail the benefit of Rule 4, the assessee has to fulfil the conditions of Rule 3(2) of the said Rules. I agree with the submission of the ld. DR that the purpose of Rule 3(2) of the said Rules is to earn convertible foreign exchange and then benefit of exemption of Service tax would be extended to the assessee. In the present case, it is revealed from the Purchase Order that payment would be made to the appellant by convertible foreign exchange from USA company through Indian Railways, who paid in Indian Rupees as the same amount of foreign exchange was not released by them. It is well settled that machinery of a statue should be interpreted so as to promote the object and purpose of the scheme. Further, once the legislative intention is properly understood, then the case should be decided in fulfilment with the legislative intention. In the present case, it is revealed from contract that the appellant would be paid USD equipment (sic) (equivalent) to non-convertible Indian Rupee at the Rate of Exchange prevailing on the date of supply order. It is noted that the equivalent amount of foreign exchange payable to the appellant was not released to the Indian Railways, and therefore, the appellant complied with the provision of Rule 3(1)(b) of the Rules.

8. In view of the above discussion, I find that the denial of benefit of Rule 4 of the said Rules is not justified. So, the impugned order is not sustainable and accordingly, it is set aside. The appeal is allowed with consequential relief.

…."

6. The dictum of the above case makes it clear that the receipt of export proceeds in Indian currency, in lieu of Foreign exchange, even makes it sufficient to be considerd as receipt of foreign currency, in India. I also find that the authorities below have proceeded to reject on assumptions; paragraphs 15 and 16 of OIO points out that transactions made were for the operations at Italy which only means that Adjudicating Authority is not disputing that the services were rendered outside India. At the same time, it is relevant to note that the Revenue has not disputed the transfer of business *per se* nor has the Revenue questioned the takeover of assets and liabilities by the successor. It is also not a situation where there has been multiple / separate refund claims, to reject refund claim. Article 265 clearly rules that there cannot be collection of tax without authority to Law, so also, the revenue should justifiably prove its authority to reject refund and retain, when clearly the amount did not belong to it, but to another.

7. I am therefore of the considered view that the authorities below have erred in adjudicating the refund claim and hence, I set aside the impugned order and allow the appeal and refund with consequential reliefs, if any.

*(Pronounced in open court on **31.03.2018**)*

(P Dinesha)
Member (Judicial)

Sdd / VSR