

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH COURT-1

Service Tax Appeal No. 51772 of 2014

(Arising out of Order-in-Original No. 70/Commr/Meerut-I/2013 dated 11.12.2013 passed by Commissioner, Customs, Central Excise, & Service Tax, Meerut-I)

M/s. Sara Sae P Ltd.

.....Appellant

(Erstwhile M/s. Nov Sara India P. Ltd.)
Mohabewala Industrial Area, Subhash Nagar
Dehradun

Versus

**Commissioner, Customs, Central Excise
& Service Tax, Commissionerrate, Meerut-I**

.....Respondent

APPEARANCE:

Shri B.L. Narasimhan, Shri Kunal Aggarwal and Ms. Shagun Arora, Advocates for the Appellant

Shri K. Poddar, Authorized Representatives for the Respondent

**CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P ANJANI KUMAR, MEMBER (TECHNICAL)**

**Date of Hearing: 7.12.2020
Date of Decision: 17.12.2020**

FINAL ORDER No. 51639/2020

JUSTICE DILIP GUPTA

This appeal has been filed for setting aside the order dated December 11, 2013 passed by the Commissioner of Central Excise, Meerut¹, by which certain demand raised in the show cause notice dated October 11, 2012 for the period from April 1, 2007 to March 31, 2011, have been confirmed and certain demands have been dropped.

2. The issue involved in this appeal relates to confirmation of demand of Rs. 53,37,177/- on services rendered to foreign

1. the Commissioner

companies for the period April 1, 2007 upto February 27, 2010 and service tax demand under reverse charge on the amount paid to foreign agents from the Financial Year 2008-09 to Financial Year 2010-11.

3. The appellant is engaged in the business of provision of services under the category 'business auxiliary service'² and 'transport of goods by road'³. The appellant represents foreign companies in India who do not have any office in India and promotes the business of such foreign companies. The work undertaken by the appellant for foreign companies, to a large extent, involves procuring orders from Indian clients on behalf of the foreign companies, giving technical support in respect thereof to the foreign companies, assisting the foreign companies for liaisoning, preparing documents, obtaining tenders and negotiating the tenders on behalf of the foreign companies. The said services provided by the appellant are classifiable under 'BAS'.

4. According to the appellant, these services qualify as export of services under the provision of Export of Service Rules 2005⁴ and so no service tax was paid by the appellant during the relevant period from April 2007 to March 2011.

5. In addition to the provision of such services to the foreign companies, the appellant also paid commission to foreign agents for receiving services.

6. Proceedings were, however, initiated by the Department. The Department entertained a view that the appellant had not shown any amount in the ST-3 returns for services

2. **BAS**
3. **GTA**
4. **2005 Rules**

rendered to the foreign companies and had not paid service tax on commission paid to foreign agents.

7. Accordingly, a show cause notice dated October 11, 2012 was issued to the appellant. The Department compared the figure of 'other income' appearing in the Balance Sheet for the period from Financial Year 2007-08 to Financial Year 2010-11 with the figures of ST-3 returns filed by the appellant for the said period and proposed a demand of service tax on the differential income arising on account of 'commission on sale', 'export incentives', 'foreign commission service charge', 'royalty' and 'miscellaneous income' and on expenditure on account of 'commission paid to foreign agents'.

8. The Commissioner partly confirmed and partly dropped the demands, by order dated December 11, 2013. Details of the demands are contained in the following Table.

Sl. No.	Category of Demand	Transaction	Quantum of Service Tax	Findings of the OIO
1.	Commission on Sale	-	Rs. 43,466	Dropped as service tax had been paid.
2.	Export Incentives	Relates to income from sale of DEPB licenses	Rs. 1,06,77,889	Dropped as not taxable
3.	Foreign Commission Service charge	Services rendered to foreign companies. Services rendered to Global in respect of supply of personnel.	Rs. 46,61,774/- confirmed (partially dropped for the period after 27.02.2010 and extending cum-tax benefit)	Demand partially Confirmed
4.	Miscellaneous Income	Relates to amounts received from workers/employees as notice pay or amounts payable to the employees but remained unpaid	Rs. 3,56,474	Dropped as not taxable
5.	Royalty	Services received by the Appellant	Rs. 1,63,385	Service tax paid before issuance of SCN, hence demand dropped. Interest confirmed and deposited.
6.	Commission paid to foreign agents	Commission paid for receipt of services	Rs. 6,75,403 confirmed and Rs. 21,705 dropped as evidence of payment of service tax was available	Demand partly confirmed

9. It is seen that with respect to foreign commission service charge at Serial Number 3 of the above Table, the demand of Rs. 46,61,774/-, for the period from April 2007 to February 27, 2010, has been confirmed. The findings, in short on this issue, are as follows:

- (i)** Upto February 27, 2010, the 2005 Rules mandated that services must be provided from India and used outside India. The appellant was providing services in relation to procurement of orders from customers located in India. These services cannot be delivered outside India and therefore, the appellant does not satisfy the condition of services being 'used outside India'. In this regard, reliance was placed on the Circular dated May 13, 2011;
- (ii)** For the period February 27, 2010, the condition in relation to service being used outside India has been omitted. However, since the appellant could not substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon, service tax demand of Rs. 71,190/- has been confirmed.

10. With respect to the Commission paid to foreign agents, the Commissioner has confirmed the demand as documentary evidence for the claims made by the appellant had not been submitted.

11. This appeal deals with service tax on foreign commission received for services rendered to foreign companies and on commission paid to foreign agents.

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

- (i)** The appellant is not liable to pay service tax on commission received from foreign companies and the findings recorded in the impugned order are clearly contrary to the principles laid down in various decisions that promotion and

marketing of goods of foreign companies in India would qualify as export of service under the 2005 Rules;

- (ii)** The Commissioner has misread the Circular dated May 13, 2011 in as much as the said Circular provides that services would be used outside India if a benefit of such service accrues outside India and accrual of benefit should be tested beyond the factor of the person who pays for such service;
- (iii)** The promotional and marketing services of goods of foreign companies would ultimately result in increase in business and revenue of such foreign companies. Hence, even by virtue of the Circular dated May 13, 2011, service rendered by the appellant would qualify as export;
- (iv)** The 2005 Rules were amended w.e.f February 27, 2012 and the condition "such service is provided from India and used outside India" was deleted from Rule 3(2) of the 2005 Rules. Thus, for the period 2010-11, the only requirement is that the service recipient should be situated outside India and consideration is received in foreign currency. Since both the conditions have been satisfied, no service tax was payable by the appellant, as the service provided by the

appellant to the foreign companies qualifies as export; and

- (v) The demand on commission paid to foreign agents is not sustainable, as the same has been discharged by the appellant. In the connection it has been pointed out of the demand amount of Rs. 6,75,403/-, the appellant has already discharged service tax of Rs. 4,28,369/- and rest of the amount of Rs. 2,47.034/- is not payable.

13. Shri K. Poddar, learned authorized representative for the Department has however supported the impugned order and has made the following submissions:

- (i) The services provided by the appellant is in India and is used in India and, therefore, would not qualify as 'export of services' under the 2005 Rules and the appellant is liable to pay service tax on the commission paid by the appellant to foreign agents.

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

15. The first issue is regarding the levy of service tax on the commission received from foreign companies has recently been decided against the Revenue by this Bench in **M/s Involute Engineering Pvt. Ltd.⁵**, both with regard to the period prior to

February 27, 2010 and w.e.f. February 27, 2010. The relevant portion of the decision is reproduced below:

18. A perusal of rule 3 (2) of the 2005 Rules, as it existed prior to February 27, 2010, would indicate that the provision of any taxable service specified in sub-rule (1) of rule 3 shall be treated as export of service when the following two conditions are satisfied:

- (a) such service is provided from India and used outside India; and
- (b) payment of such service is received by the service provider in convertible foreign exchange.

19. There is no dispute in the present appeal that the payment for the service was received by the appellant in convertible foreign exchange. The dispute is whether the service was provided from India and used outside India. The Commissioner has observed, for the period prior to February 27, 2010, that the appellant was providing services in relation to procurement of orders from customers located in India and these services cannot be delivered outside India. Thus, the appellant would not satisfy the condition of requiring the services to be used outside India and in this connection, the Commissioner placed reliance upon the Circular dated May 13, 2011. Thus, the demand has been confirmed on the premise that the appellant was rendering services in relation to promotion of goods in India (including procurement of orders; collection of payment, etc.), and therefore, the services were being 'provided and used in India'. On this basis, the transactions have been held to not qualify as export of services in terms of rule 3(2) of the 2005 Rules.

22. It would be seen from the aforesaid factual position stated by the appellant in reply to the show cause notice that the appellant had been representing various foreign companies in India and these foreign companies did not have any business or any other office in India. The appellant promoted the business of such foreign companies in India and as a consideration for this service, received commission from the foreign companies in convertible foreign exchange. In fact, the appellant has also described the manner in which it had promoted the business of such foreign companies. The appellant has stated that it procured orders on behalf of such foreign companies in India and whenever any Indian company issued a tender, the appellant sent it to the foreign companies and also bid on behalf of the foreign companies under their instructions. If the bid is accepted, the appellant procures orders from the Indian company on behalf of the foreign companies. The purchase orders are raised in the name of foreign companies. The foreign companies thereafter export the goods to the customers in India and the invoices are raised directly on the customers. The appellant thereafter raises an invoice for its commission on the foreign companies and receives the commission amount in convertible foreign currency. It is, therefore, clear that the appellant supports such foreign companies to procure orders in India. Such service is provided from India and used outside India. The service rendered by the appellant would, therefore, satisfy the twin conditions set out in rule 3(2) of the 2005 Rules as has also been clarified by the Circular dated February 24, 2009.

33. The Commissioner, in regard to the period post February 27, 2011 has recorded a finding that though the condition relating to service being used outside India has been omitted,

but the appellant could not substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon and so the entire demand has to be confirmed.

34. As noticed above, the only requirement after the amendment in rule 3 (2) of the 2005 Rules is that the service recipient should be situated outside India and consideration should be received in foreign currency. Both the conditions stand satisfied. Even otherwise, for the period prior to February 27, 2010, it has been held that no service tax could be levied. Thus, it was immaterial as to whether the appellant was able to substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon.

16. The aforesaid decision in **Involute Engineering** placed reliance upon the following decisions:

- (i) **GAP International Sourcing (India) Pvt. Ltd. vs. Commissioner of Service Tax⁶;**
- (ii) **Commissioner of Service Tax, Mumbai-VI vs. A.T.E Enterprises Private Limited⁷;**
- (iii) **Commissioner of Service Tax-VII vs. Wartsila India Limited⁸;**
- (iv) **Verizon Communication India Private Limited vs. Assistant Commissioner of Service Tax, Delhi⁹;**

17. Thus, for the reasons stated above and in **Involute Engineering**, it is not possible to sustain the demand confirmed by the Commissioner in regard to this commission received from the foreign companies.

18. The Commissioner has confirmed demand of Rs. 6,75,403/- on commission paid by the appellant to foreign agents during the period from Financial Year 2008-09 to Financial Year 2010-11. It has been submitted by learned counsel for the appellant that this demand is not sustainable for the reasons stated in the following Table.

6. 2014-TIOL-465-CESTAT-DEL
 7. 2018(8)GSTL 123 (Bombay)
 8. 2019(24) GSTL 547(Bombay)
 9. 2018(8) GSTL 32(Delhi)

Year	Taxable value	Amount confirmed	Amount deposited	Balance	Comments
2007-08	0	0	0	0	-
2008-09	Rs. 25,52,026	Rs. 3,15,430	Rs. 2,45,430 plus interest of Rs. 9,817 deposited on 20.07.2009 (Annexure-7)	Rs. 70,000	Amount of Rs. 1,69,197 as commission has been reflected twice erroneously in the ledger. Further, the amount of commission was paid in May 2009, when effective rate of ST was reduced from 12.35% to 10.30%. Therefore, total tax payable on Rs. 23,83,829 was Rs. 2,45,430/ which has been deposited. (Annexure-7)
2009-10	-	Rs.4,885/-	Rs 4,885/-	-	Paid alongwith interest (Annexure-B)
2010-11	Rs. 34,47,460 out of which Rs. 12,49,800 was reversed	Rs. 3,55,088/- on amt. of Rs. 34,47,460/-	Rs. 1,78,054 on actual commission of Rs. 17,38,681)	Rs. 1,77,034/-	Service tax is payable only on the amount of commission actually paid.
TOTAL		6,75,403/-	4,28,369/-	2,47,034/-	

- i. Out of the demand amount of Rs. 70,000/- for Financial Year 2008-09, an amount of Rs. 52,571/- has been computed at a wrong rate of Service Tax i.e. 12.36%, instead of 10.30%;
- ii. Demand of Rs. 17,429/- on Rs. 1,69,127/- is not sustainable as the commission has been erroneously entered by the appellant twice in its ledger; and
- iii. The remaining demand of Rs. 1,77,034/- for Financial Year 2010-11 is also unsustainable as the service tax is liable to discharged only on the amount actually paid to foreign agents. In the instant case, the Appellant has paid commission of Rs. 17,38,681/- on which service tax has already been discharged by the appellant. Thus, the demand on an amount not paid as commission (reversed) is not sustainable.

19. These facts are required to be examined by the Commissioner afresh. For this purpose, it shall be open to the appellant to submit a representation with factual aspect and supporting documents before the Commissioner within a period of six weeks from today. The Principal Commissioner shall thereafter take a decision within a period of three months, without being influenced by any of the observation made in this order.

20. The order dated December 11, 2013 passed by the Commissioner in so far as it relates to the demand of service tax on

the Commission received from foreign companies is set aside. However, the Commissioner shall examine the second issue relating to Commission received from foreign agents in the light of the observations made above. The appeal is accordingly, partly allowed.

(Pronounced on **17.12.2020**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

JB