

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

PRINCIPAL BENCH

SERVICE TAX APPEAL No. 52321 OF 2016

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-065-16-17 dated May 5, 2016, passed by the Commissioner (Appeals), Customs, CE & ST, Bhopal)

M/s Wintech Taparia Ltd.

1st Floor, Film Bhawan,
60-B, Ahilya Mata Colony
Near Rani Sati Gate, Y.N. Road,
Indore – 452 003.

.....Appellant

Versus

**Commissioner of Customs,
Central Excise & Service Tax**

Manik Bagh Palace,
Post Bag No. 10,
Indore 452 001 (M.P)

.....Respondent

APPEARANCE:

Shri B. L. Narasimhan, Advocate for the Appellant

Shri Anup Thapliyal, Authorised Representative for the Respondent

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

FINAL ORDER NO. 51648/2020

Date of Hearing/Decision: 08.12.2020

JUSTICE DILIP GUPTA :

This appeal seeks to challenge the order dated May 5, 2016 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Bhopal¹, by which the appeal filed by appellant for setting aside the order dated February 25, 2014

1. the Commissioner (Appeals)

passed by the Additional Commissioner confirming the demand of service tax by invoking the period of limitation under the proviso to section 73(1) of the Finance Act, 1994², has been dismissed.

2. The issue involved in this appeal is regarding confirmation of the demand of service tax on the commission received by the appellant for the services rendered to foreign companies under "business auxiliary service"³. The period involved is 2007-08 to 2010-11 and the show cause notice was issued on September 27, 2012.

3. The appellant is a manufacturer of food processing machines. The appellant is also registered under service tax for the provision of taxable services under the category of 'erection, commissioning and installation service'. During the relevant period, the appellant provided services to various food processing machine manufacturers located outside India by way of acting as a commission agent for sale of their products in and outside India. In this regard, the work undertaken by the appellant for foreign companies involves procuring orders on behalf of foreign companies and receiving sales commission in lieu thereof. The commission received by the appellant from the foreign companies in convertible foreign exchange was duly reflected in the balance sheets for the relevant period. The said services provided by the appellant are classifiable under BAS. Considering these services

2. the Finance Act

3. BAS

to qualify as “export of services”, the appellant did not pay service tax during the relevant period.

4. An audit of the appellant was, however, conducted and the same resulted in issuance of a show cause notice dated September 27, 2012, wherein the service tax demand was proposed on the amount of commission received from the foreign companies under BAS.

5. The appellant filed a reply to the aforesaid show cause notice. However, the Additional Commissioner by the order dated February 25, 2014 confirmed the demand for the following reasons:

(a) The appellant never contended that the services provided by it to foreign entities are not covered under the category of BAS. Thus, the appellant is liable to pay service tax;

(b) The appellant failed to provide evidence like copy of agreements, invoices, ledger accounts to prove that the services were provided to service recipients located outside India and commission was received in lieu thereof; and

(c) The Foreign Inward Remittance Certificates⁴ submitted by the appellant cannot be considered as evidence of export in absence of corroborative documents.

4. FIRC

6. This order passed by the Additional Commissioner was assailed by the appellant by filing an appeal before the Commissioner (Appeals). The Commissioner (Appeals) dismissed the appeal by order dated May 5, 2016 and the relevant portion of the order is reproduced below:

"The appellant have not contested the issue of provision of services or the receipt of commissioner. Their only contention is that since that have provided services to the clients, located outside India, the payment received is exempt from service tax as it is covered by export of service.

Thus for the services to be treated as export of services, the recipient should be located outside India and order for provision of such service is made from any of his commercial establishment or office located outside India, and the remittance should be in foreign currency.

To ascertain the facts, appellant were required to produce all the relevant documents viz copy of agreement with the recipient of services, party wise, copy of invoices as issued to the recipient of services etc. in order to establish that the commission received was for provision of services outside India, however the appellant failed to produce the same. The appellant have submitted some foreign remittance certificates, but in absence of other corroborative documents, these does not come to their rescue.

The case laws as cited by the appellant, are not relevant in this case, as the appellant have failed to provide the documentary evidence to establish export of services. In the case laws as cited, it was established that the services were provided to the clients located outside India, which is not the case with the appellant. When export of services could not be established, benefit of the provision cannot be granted."

7. 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. The activities of the appellant qualify as export of services under the provisions of Export of Services Rules, 2005⁵ in as much as:
 - (a) the service recipient i.e. foreign principal is located

5. The 2005 Rules

outside India; and (b) the payment is received in convertible foreign exchange. In this connection learned counsel placed reliance on various decisions to contend that the provision of services of promotion and marketing of goods of foreign companies in India would qualify as export of service;

(ii) The appellant had provided sufficient evidence of services being export. In the appeal filed before Commissioner (Appeals), the appellant submitted copies of debit notes and corresponding FIRC, which evidence that BAS was rendered to foreign companies in return of convertible foreign exchange. These documents are sufficient proof to show that the services were rendered to foreign principals located outside India and payment thereof was received in convertible foreign exchange. Instead of analyzing these documents, the Commissioner (Appeals) simply rejected the submission of the appellant; and

(iii) In the absence of wilful suppression of facts, the extended period of limitation could not have been invoked nor penalties could be imposed.

8. Shri Anup Thapliyal, learned authorized representative of the Department has, however, supported the impugned order and submitted that it does not call for any interference in this appeal. It is his submission that the appellant had not submitted any evidence to prove that it had provided services to recipients residing outside India and, therefore, the appellant was liable to

pay service tax as the services would not qualify as "export of service".

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

10. In order to appreciate the rival contentions, it would be appropriate to reproduce the relevant portions of the 2005 Rules as they existed prior to and after the amendment made w.e.f February 27, 2010.

Prior to February 27, 2010

11. Rule 3 of the 2005 Rules deals with **export of taxable service**. Rule 3(1)(ii) specifies the taxable services provided in sub-clauses of clause (105) of section 65 of the Finance Act. Sub-rule(2) of rule 3 of the 2005 Rules provides for two conditions to be satisfied for treating any taxable service as export of service and is reproduced below:

"3(2) The provision of any taxable service specified in sub- rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

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

From February 27, 2010

12. Sub-rule (2) of rule 3 of the 2005 Rules was amended by Notification dated February 27, 2010 and the amended provision is as follows:

"3(2) The provision of any taxable service specified in sub- rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) deleted

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

13. Rule 4 of the 2005 Rules provides that any service, which is taxable under clause (105) of section 65 of the Finance Act, may be exported without payment of service tax. .

14. The Circular dated February 24, 2009 issued by the Central Board of Excise and Customs, New Delhi⁶ deals with applicability of the provisions of the 2005 Rules in certain situations. The relevant portion of the Circular is reproduced below :

"In terms of rule 3(2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if 'such service is provided from India and used outside India". Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under rule 5 of the Cenvat Credit Rules 2004 (Notification No 5/2006-CE (N.T.) dated 14-3-2006 on the ground that these activities do not satisfy the condition 'used outside India',-

(i) Call centres engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;

(ii) Medical transcription where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;

(iii) Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;

7. Foreign financial institution desiring transfer of remittances to India, engaging an Indian organisation to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organisation in foreign exchange for the entire activity being undertaken in India.

The departmental officers seem to have taken a view in such cases that since the activities pertaining to provision of service are undertaken in India, it cannot be said that the use of the service has been outside India.

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(I)(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.

4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned. These instructions should be given wide publicity among trade and field officers."

15. When the 2005 Rules were amended w.e.f February 27, 2010, another Circular dated May 13, 2011 was issued by CBEC and the relevant portion is reproduced below:

"Circular No. 111/05/2009-S.T. was issued on 24th February 2009 [2009 (13)S.T.R. C87] on the applicability of the provisions

of Export of Service Rules, 2005 in certain situations. It had clarified on the expression "used outside India" in Rule 3(2)(a) of the Export of Service Tax Rules, 2005 as prevalent at that time. The condition specified in Rule 3(2) has been omitted vide Notification 6/2010-S.T. dated 27 Feb. 2010. In the context of the stated circular an issue has been raised, whether for the period prior to 28-2-2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?

2. In the stated circular it was inter alia, clarified that the words, "used, outside India" should be interpreted to mean that "the benefit of the service should accrued outside India". It is well known that services, being largely intangibles, are capable of being paid from one place and actually used at another place. Such arrangements commonly exist where the services are procured centrally e.g. audit, advertisement, consultancy, Business auxiliary services. For example, it is possible to obtain a consultancy report from a service provider in India which may be used either at the location of the customer or in any other place outside India. In a situation where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India.

3. It may be noted that the words "accrual of benefit" are not restricted to mere impact on the bottom-line of the person who pays for the service. If that were the intention it would render the requirement of services being used outside India during the period prior to 28-2-2010 infructuous. These words should be given a harmonious interpretation keeping in view that during the period upto 27-2-2010 the explicit condition was provided in the rule that the service should be used outside India. In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend on the nature of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place.

4. This, however should not apply to services which are merely performed from India and where the accrual of benefit and their use outside India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or associated enterprises. In order to establish that the services have not been used outside India the facts available should inter alia, clearly indicate that only the payment has been received from abroad and the service has been used in India. **It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India."**

(emphasis supplied)

16. 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.

17. The appellant has not contended that it is not rendering a service under the category "BAS". What is, however, contended by the appellant is that the services rendered by the appellant qualify as "export of service" under the 2005 Rules and, therefore, the appellant would not liable to pay service tax. According to the appellant, it is located in India and the service receiver i.e. foreign entities are located outside India and that the appellant received payment in convertible foreign exchange for which debit note and FIRC have been issued by the banks. Thus, all the conditions relating to "export of service" stand satisfied and no service tax can be levied upon the appellant. The appellant also contends that written agreements were not entered into with the recipient of services but the FIRC that were produced by the appellant sufficiently establish that the services were rendered to foreign principals located abroad and payments were received in convertible foreign exchange.

18. The Commissioner (Appeals) has noted that FIRC's were submitted by the appellant but the same have not been considered "in absence of other corroborative documents"

19. As noted above, the commission amount was received by the appellant from foreign principals in convertible foreign exchange for which debit notes and the corresponding certificates of foreign inward remittance issued by the banks were submitted by the appellant before the Adjudicating Authority. The debit note for commission and the corresponding FIRC have been enclosed from pages 108 to 144 of the paper-book. It is, therefore, apparent that the appellant had received commission in convertible foreign exchange for the service rendered outside India to foreign companies.

20. 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 office in India. The appellant promoted the business of such foreign companies in India and as a consideration for this service, the appellant received commission from the foreign companies in convertible foreign exchange. The appellant has also described the manner in which it had promoted the business of such foreign companies from which it is 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.

21. In **GAP International Sourcing (India) Pvt. Ltd. vs. Commissioner of Service Tax**⁷, the service provided by the appellant therein was in relation to procurement of goods from India and for this purpose, the appellant conducted survey of the manufacturers of various products required by GAP, USA and recommended vendors who could supply the goods. The appellant also conducted inspection of the export consignments and issued the inspection certificates. It was, therefore, not in dispute that the services provided by the appellant were BAS. The dispute, however, was whether the services qualified as export in terms of the 2005 Rules and, therefore, not taxable in India. It is in this context that the Tribunal held that the services provided by the appellant were obviously meant for and were used by GAP, USA for their business and, therefore, these services would be treated as exported out of India. The contention of the Department that the condition of "used outside India" were not satisfied was not accepted by the Tribunal. The relevant portion of the decision of the Tribunal is reproduced below:

"6. The service provided by the appellant to M/s GAP, U.S.A., is in relation to procurement of goods from India. For this purpose, the appellant conduct the survey of the manufacturers of various products required by M/s GAP, U.S.A., and recommend the vendors who can supply the goods of the desired quality. They also conduct inspection of the export consignments and issue inspection certificates. In selecting the

⁷ 2014-TIOL-465-CESTAT-DEL

vendors they also examine not only the quality of their products, but also whether they conform to child labour norms, Pollution control norms etc. as compliance with these norms is important for their Principals. They also recommend the Transporters and logistic service providers for export of the products purchased. Thus, the services being provided by the appellant to their principal are the services in relation to procurement of the goods and there is no dispute that these services are Business Auxiliary Services covered by Section 65 (105) (zzb) readwith Section 65 (19) of the Finance Act, 1994. **The only point of dispute is as to whether the services are taxable in India or the same are export of service outside India in terms of Service Rules, 2005 and for this reason are not taxable in India. Though the services have been performed in India, these services being Business Auxiliary Services are in respect of the business of the appellant's principal located abroad. The services being provided by the appellant are obviously meant for and are used by M/s GAP, U.S.A. for their business. The services being provided by the appellant are covered by Clause (iii) of Rule 3 (1) of Export Service Rules, 2005, as these services are in relation to business or commerce and in terms of this clause, readwith sub-rule (2) of Rule 3, these services would be treated as exported out of India if the recipient is located outside India and the same have been delivered outside India and used India and payment for the same has been received by the service provided in convertible foreign exchange.** There is no dispute that the payment for these services has been received in convertible foreign exchange and the payment has been made by M/s GAP, U.S.A. located abroad, not having any establishment or branch in India. **The department's contention, however, is that the conditions of delivery outside India and use outside India are not satisfied, as the services have been performed in India and the same are not capable of being used in territory other than the place where the same have been provided.** According to the department most of the time, the provision and use of the services is happening simultaneously and it would be to naive to even conceive that services of merchandising, product integrity, vendor compliance, quality assurance, fabric sourcing and logistic support etc. provided in India can even be used remotely in a territory other than where the same have been provided. It has been pleaded that if M/s GAP, U.S.A. were even to try using these services in a place other than India, it will not be physically possible. It has also been pleaded that routing if payment for a service cannot determine the place of consumption.

7. In our view the arguments of the department are absurd as the DR has not mentioned as to who is the consumer of the services in India, if the services, in question, provided in India by the appellant have not been used and consumed by their principal in U.S.A. When the appellant identify the vendors for their principal abroad on the basis of the quality of their products, their manufacturing infrastructure, compliance with child labour laws and pollution control norms and

also provide the services of inspection of the export consignments, besides identifying the logistic service providers for smooth transportation of the goods purchased to the port for their export, the user and beneficiary of all these services is their principal abroad. It would be absurd to say that the recipient and user of these services are the persons in India and not M/s GAP, U.S.A. for whom all these services provided by the appellant are meant, who have used these services for their business and have made payment for these service in convertible foreign exchange."

(emphasis supplied)

22. Thus, for all reasons stated above, it is not possible to sustain the order dated May 5, 2016 passed by the Commissioner (Appeals). It is, accordingly, set aside and the appeal is **allowed**.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Babita