

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

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 53097 OF 2016

(Arising out of Order-in-Appeal No. 127/ST/APPEAL-II/MK/GGN/2015-16 dated 26.08.2016 passed by the Commissioner, Service Tax (Appeal –II), Haryana)

**M/s. Ozone Plant Design Service
Private Limited**

.... Appellant

VERSUS

**The Commissioner of
Service Tax (Appeal – II), Delhi**

....Respondent

APPEARANCE:

Shri Bimal Jain, Advocate for the Appellant

Shri Anup K. Thapliyal, Authorized Representative of the Department

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

**Date of Hearing: 18.08.2021
Date of Decision: 24.01.2022**

FINAL ORDER NO. 50052/2022

JUSTICE DILIP GUPTA:

The order dated 26.08.2016 passed by the Commissioner, Service Tax (Appeal-II), Delhi¹, has been assailed in this appeal filed by M/s. Ozone Plant Design Service Private Limited². The appeal filed by the appellant before the Commissioner (Appeals) has been disposed of by maintaining the order dated 16.03.2016 passed by the Assistant Commissioner, Service Tax, Division³ except to the extent that the matter has been remitted to the Assistant Commissioner only to determine whether the appellant would also be entitled for interest on

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1. the Commissioner(Appeals)
 2. the appellant
 3. the Assistant Commissioner

the amount of Rs. 4,82,072/- ordered to be paid to the appellant towards the refund claimed by the appellant under rule 5 of the CENVAT Credit Rules, 2004⁴ out of the amount of Rs. 72,84,585/- that was claimed by the appellant. It is the denial for the balance amount of Rs. 68,02,503/- towards refund that has led to the filing of this appeal before the Tribunal.

2. The appellant registered itself with the Department under the taxable category of “consultancy engineering services” defined under section 65(31) of the Finance Act, 1994⁵ and made taxable under section 65(105)(g) of the Finance Act. The appellant exported consultancy engineering services to various overseas clients, including M/s. Wasco Engineering Technology PTE Limited, Singapore⁶ for whom the services were provided to M/s. Cairn India Limited⁷ situated at Barmer in Rajasthan for and on behalf of Wasco Engineering.

3. The appellant filed three refund claims on quarterly basis on the export of consultancy engineering services under rule 5 of the CENVAT Rules and the claims are as follows:

S.No.	Impugned Period	Date of refund	Refund claim amount (Rs.)
1.	July to September 2014	July 9, 2015	10,24,548/-
2.	October to December 2014	August 12, 2015	16,42,245/-
3.	January to March 2015	September 9, 2015	46,17,792/-
	Total		72,84,585 / -

4. A deficiency memo dated 04.12.2015 was issued to the appellant by the Department. Certain facts in regard to the refund claims filed by the appellant after scrutiny were noted and the appellant was asked to

4. CENVAT Rules
5. the Finance Act
6. Wasco Engineering
7. Cairn India

appear on 10.12.2015 along with all the required papers The said office memo is reproduced below:

“Sub: Personal Hearing in respect of Refund Claims of M/s. Ozone Plant Design Services Private Limited :- reg.

Please refer to the above cited subject.

In this regard, It is to inform you that a personal hearing for the following cases (in the table) have been on 10.12.2015 at 11:30 AM before the Assistant Commissioner of Service Tax, Division-XI, at 4th floor, Ambedker Bhawan (off. G3S Cinema), Sector-16, Rohani, New Delhi-85.

Sr. No.	Name of the Party	Period	Filed date	Amount
1.	M/S. Ozone Plant Design Services Private Limited	July to Sep 2014	09 July 2015	1024548/-
2.	M/S. Ozone Plant Design Services Private Limited	Oct to Dec 2014	12.08.2015	1642245/-
3.	M/S. Ozone Plant Design Services Private Limited	Jan to March 2015	09.09.2015	4617792/-

On scrutiny of the available records of the above said refund claims, it is observed that :-

1. You have claimed to export service to M/s Cairn India Ltd., please give the location of the project where the services have been provided by you,
2. Provided copy of agreement with other services receiver aboard,
3. The value of export of services have not been shown in ST-3 ?
4. Most of the Input invoices are not pertain of the relevant period of refund claim ?
5. Most of the Input Invoices are not related the export of service ?
6. You have late filed the most of the refund Claim ?
7. The Cnevat Credit balance are not co-related with the ST-3 and with refund claim application ? Please explain,
8. Co-relation Statement i.e. amount of Export Invoice and BRCs in perform as under, may please be provided :-

Export of Billing Details					Export Realization Details			
S. No.	Export Invoice No.	Date of Export Invoice	Amount		BRC No.	Date of BRC	Amount	
			(in Foreign Currency)	(in INR)			(in Foreign Currency)	(in INR)

9. Bank realization Certificates are not submitted ?

You are therefore hereby requested to be present in person or through your authorised representative at the address given above on the date and time fixed for personal hearing alongwith all the papers and facts on which relied upon and which is relevant to above said refund claim (submitted the documents/facts separately for above each refund claim).

If you or your authorized representative fails to attend the same, it will be presumed that you do not have anything more to say in the matter and these refund claim would be decided on the basis of available records without giving further opportunity.”

5. The appellant filed a detailed reply dated 09.12.2015 to each of the nine points noted in the deficiency memo and the reply is also reproduced below:

“Sir,

Please refer your letter dated 4th December 2015 in respect of our service tax refund claim filed for the quarter 2, 3 and 4 of 2014-15. We are submitting the point wise reply to your observations as follows:

1. You have claimed to export services to M/s Cairn India Ltd., please give the location of the project where the services have been provided by you.

We have not claimed export services to M/s Cairn India Limited. We have exported services to our client Wasco Engineering Technology PTE Limited, Singapore. The contract with Wasco Engineering Technology PTE Limited, Singapore is enclosed for your reference. Also we would like to submit that the payment was received in foreign exchange for which the FIRC were also enclosed with the refund claim. Cairn India was the client of Wasco Engineering Technology PTE Limited, Singapore and we had no contract or agreement with Cairn India in respect of the project with the Wasco Engineering Technologies PTE Limited.

2. Provide copy of agreement with other service receiver abroad.

All the agreements with the service receivers abroad are provided with our refund application. In some cases the Purchase Order itself serves the purpose of the agreement and hence the purchase order Copy is provided.

3. The value of export services have not been shown in ST-3.

The value of export services were not shown in ST-3 for the Q2, however the same is properly mentioned in Quarter 3 and Quarter 4. The missing information in Q2 was an inadvertent mistake of our Accountant. We have correctly paid the taxes and the non-mentioning of the export turnover did not cause any loss to the revenue. Further we have provided all documents-Invoice, Agreements, FIRC etc to support the claim of export. We therefore request your goodself to kindly consider the correct export figures as per the refund application and supporting documents.

4. Most of the Input Invoices are not pertain of relevant period of refund claim.

The objection pertains to some of the input credit invoices which were dated prior to the second quarter of 2014-15, in this regard we would like to submit that in some cases the invoice is received from the service provider and thereafter the same is verified and approved in the company and only thereafter the same is taken into the books of accounts. Therefore there is always a time gap between the raising of invoice by the service provider and the recording of the same by the Company. The Cenvat Credit Rules provide that the input credit can be claimed within one year. Therefore claiming the input credit after one or two months should not deny the credit.

5. Most of the Input services are not related to the export of services.

Most of the input services pertain to the export of services, which is explained in the enclosed schedule. Some of the services are common service for the company. The proportionate formula for the input credit is applied on all the services to reduce the input credit proportionate to the credit which may belong to the domestic services.

6. You have late filed most of the refund claim.

The refund claim to be made before the expiry of the period specified under section 11B of Central Excise Act, 1944 which is the period of one year from the date of export. We have filed all the claims within one year of the date of export and hence we submit to your goodself that the claim be admissible and within the time limit.

7. The Cenvat credit balances are not co-related with the ST-3 and with refund claim application ? please explain.

At one place, there is an inadvertent typing mistake in the closing balance of cenvat credit in our refund application. The balance in ST-3 is correct and the mistake does not affect our claim since the credit balance as per ST-3 is also higher than the refund claim.

8. Co-relation Statement i.e. amount of Export Invoice and BRCs in perform as under, may please be provided:

The statement is enclosed.

9. Bank realization certificates are not submitted?

Bank realization certificates are enclosed."

6. The Assistant Commissioner, as noticed above, sanctioned only an amount of Rs. 4,82,072/- towards refund and rejected the claim for the balance amount of Rs. 68,02,513/-. The Assistant Commissioner noted that the refund claims had been filed within time and that the doctrine of unjust enrichment was not applicable. However, in regard

to the refund for the quarter ending December 2014 for Rs. 16,42,245/-, the Assistant Commissioner observed that refund could be admissible only upto Rs. 11,74,651/- which was equal balance of credit in the CENVAT credit register. The Assistant Commissioner also examined whether the appellant had exported the services in accordance with the procedure contemplated under rule 6A of the Service Tax Rules, 1994⁸. The Assistant Commissioner accepted that the appellant had exported consultancy engineering services to all the overseas client except Wasco Engineering. In regard to Wasco Engineering, the Assistant Commissioner concluded that the services were actually provided to Cairn India which was located in India, though the Agreement was with Wasco Engineering to provide services. Thus, the appellant did not fulfill the conditions laid down in rule 3 of the Export of Services Rule, 2005 read with rule 6A of the Service Tax Rules as both the service provider and service receiver were located in India. The Assistant Commissioner also found that the appellant had availed CENVAT credit in respect of Rent-a-Cab for service which credit was not admissible and, therefore, deducted an amount of Rs. 2,25,739/-. Thus, after deducting the value of services provided to Wasco Engineering, the admissible refund claim was determined at Rs. 7,07,811/- out of which Rs. 2,25,739/-, was deducted. The Assistant Commissioner, therefore, ordered for sanction of Rs. 4,82,072/- towards refund claim and rejected the balance claim for Rs. 68,02,513/-.

7. This order passed by the Assistant Commissioner was assailed by the appellant before the Commissioner (Appeals). The contentions

8. Service Tax Rules

advanced on behalf of the appellant that it was also entitled for refund on the services rendered to Wasco Engineering and non issuance of a show cause notice for denying any part of the refund claim had also rendered the order bad in law were rejected by the Commissioner (Appeals). However, the contention of the appellant that it was entitled for interest on the amount of refund sanctioned by the Assistant Commissioner was remitted to the adjudicating authority. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

“As discussed above, I find that Wasco has entered into a contract with Cairn India Limited ("Cairn") for the inland transportation, installation and commissioning of the Electrical Power House ("Main Contract Scope of Work") for Magalam Polymer Project for Cairn's operations in RJ-ON-90/1 Block, and Wasco had provided subcontract, specific parts of the Main Contract Scope of Work to Ozone.

The scope is for the Services to be performed on 15 nos. of Electrical Power House, for Magalam Polymer Project for Cairn India Limited operations in RJ-ON-90/1 Block, Barmer, Rajasthan, India.

The conditions laid down in provisions of Rule 3 of Export of Services Rules, 2005 read with Rule 6A. of the Service Tax Rules 1994 have not been fulfilled. As per Rule 6A of the Service Tax Rules 1994, the provision of any service provided or agreed to be provided shall be treated as export of service when, -

(d) the place of provision of the service is outside India...

Whereas in the instant case the place of provision of Service is for Magalam Polymer Project for Cairn India Limited operations in RJ-ON-90/1 Block, Barmer, Rajasthan, India. Thus it cannot be considered as export of services. **Thus I find that the adjudicating authority had rightly denied turnover related to Wasco Engineering as export turnover, while deciding the refund claims in question.**

Non issuance of Show Cause Notice for denying any part of the refund claims, itself renders the Impugned Order unlawful to the extent, for disobeying procedure of law - thus, against the principle of natural justice.

The personal hearing in the case was fixed for 10.12.2015 and Sh. Rajiv Bhargava & Sh. Naresh Mongia appeared on behalf of the appellant before the adjudicating authority and it was explained that their contract is with M/S WASCO and not with Cairn India. They also stated that they

will submit a written reply to the querries., as mentioned at page 3 of the impugned order.

The submission of Appellant that the Department has passed the impugned Order without giving any fair opportunity to the Company by non-issuance of Show Cause Notice which is preliminary requirement before concluding any adjudication proceedings, is not sustainable as fair opportunity was provided by issuing deficiency memo and by providing personal hearing as discussed above."

(emphasis supplied)

8. This appeal has, accordingly, been filed for sanction of the remaining refund amount of Rs. 68,02,513/-.

9. Shri Bimal Jain, learned counsel for the appellant made the following submissions:

- i. It was necessary for the authority to have issued a show cause notice to the appellant before rejecting the refund claims and mere issuance of the deficiency memo, which is in the nature of a query, does not serve the purpose. In support of this contention, reliance has been placed on the decision of the Tribunal in **Commissioner of C.EX. & CUS., Aurangabad vs. Sidheshwar SSK Ltd.**⁹;
- ii. The "consultancy engineering services" provided by the appellant to Wasco Engineering qualifies as "export of services" in terms of rule 6A of the Service Tax Rules read with rule 3 of the Place of Provision of Services Rules, 2012¹⁰;
- iii. Merely because the end user of the service exported to foreign client is located in India cannot be made a ground to hold that export of services had not taken place. In support of this contention reliance has been placed on the

9. 2011 (274) E.L.T. 141 (Tri. – Mumbai)

10. the 2012 Rules

decisions of the Tribunal in **Gap International Sourcing (India) Pvt Ltd. vs. Commr. of S.T., Delhi**¹¹; **Paul Merchants Ltd. vs. Commissioner of C. Ex. Chandigarh**¹²; and **Microsoft Corporation (I) (P) Ltd. vs. Commr. of S.T., New Delhi**¹³; and

- iv. The appellant would also be entitled to interest if it is held that the appellant is entitled to refund of Rs. 68,02,513/-. In support of this contention reliance has been placed on the decision of the Supreme Court in **Ranbaxy Laboratories Ltd. vs. Union of India**¹⁴.

10. Shri Anup K. Thapliyal, learned authorized representative appearing for the Department has, however, supported the impugned order and made the following submissions:

- i. The finding recorded by the Commissioner (Appeals) that the appellant had provided services to Cairn India situated within the taxable territory does not suffer from any infirmity, since the said service would not qualify as “export of services” under rule 6A(1)(b) of the Service Tax Rules; and
- ii. Adequate opportunity was provided to the appellant by issuance of the deficiency memo and, therefore, it is not open to the appellant to contend that non issuance of the show cause notice vitiates the impugned order.

11. 2015 (37) S.T.R. 757 (Tri. – Del.)
 12. 2013 (29) S.T.R. 257 (Tri. – Del.)
 13. 2014 (36) S.T.R. 766 (Tri. – Del.)
 14. 2011 (273) E.L.T. 3 (S.C.)

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

12. The facts reveal that the appellant had claimed refund to the extent of Rs. 72,84,585/- in terms of rule 5 of the CENVAT Rules on services which the appellant claimed it had exported to overseas clients. The issue that arises for consideration in this appeal is with regard to the rejection of the refund claim on the services said to have been exported by the appellant to Wasco Engineering.

13. To appreciate this issue, it would be appropriate to refer to the relevant clauses of the Agreement entered into between Wasco Engineering and the appellant and the relevant clauses of the Agreement are reproduced below:

“THIS AGREEMENT is made this __ day of August, 2013

BETWEEN

- (1) WASCO ENGINEERING TECHNOLOGIES PTE LTD,** a company incorporated in Singapore, having its principal place of business at No. 5 Pandan Road (hereinafter referred to as the “Wasco”, which expression, unless the context requires otherwise, shall include its successors and permitted assignees); and
- (2) Ozone Plant Design Services Private Limited,** a company incorporated under the laws of India and having its address at Unit No. 201 to 204, Aggarwal City Square, Mangalam Place, Sector 3, Rohini, Delhi – 110085 (hereinafter referred to as the “Ozone”, which expression, unless the context requires otherwise, shall include its successors and permitted assignees.)

RECITALS

Whereas:

- A. Wasco has entered into a contract with Cairn India Limited (“Cairn”) for the inland transportation, installation and commissioning of the Electrical Power House (“Main Contract Scope of Work”) for Mangala Polymer Project for Cairn's operations in RJ-ON-90/1 Block, and

- B. Wasco wishes to subcontract specific parts of the Main Contract Scope of Work to Ozone, and
- C. Ozone wishes to perform such parts of the Main Contract Scope of Work as set out in this Agreement and its exhibits, appendices, schedules, annexures and attachments ("Services"), and
- D. Ozone recognizes that the timely performance of such Services comprise a vital portion of the Main Contract Scope of Work and agrees to perform the Services on a call out basis, in accordance with the terms and conditions as set forth herein, and
- E. The parties agree that this Contract shall be governed and construed as a back-to-back contract with the Main Contract (as defined hereunder) and Ozone accepts that the terms and conditions of the Main Contract shall apply fully to this Contract, except as specifically identified herein.

NOW THEREFORE IT IS HEREBY AGREED as follows:

1. Ozone agrees to perform the Services in accordance with the terms and conditions of this Contract and, in consideration of the due performance of the Services and fulfillment of other obligations under the Contract, Wasco agrees to pay Ozone according to the terms and conditions herein contained.

8. This Contract shall remain in force for a period of 2 years from the Effective Date ("Term") and Wasco may at any time during the term of this Contract issue a call out order in the form of a purchase order ("Call Out Order") to Ozone specifying:

- (a) the Specification for such Services
- (b) the required place for delivery of the Services; and
- (c) the required date for Completion of Services;

Upon receipt of a Call Out Order, Ozone shall provide the Services in accordance with such Call Out Order and the terms and Conditions of this Contract.

The scope is for the Services to be performed on 15 nos. of Electrical Power House, subject to Wasco being awarded a contract (including call out order) from Cairn for the services for 15 nos. of Electrical Power House. The order for the Services shall be placed through various Call Out Order(s) during the Term. However, the discretion for issuance of Call Out Order(s) shall remain with Wasco.

9. Ozone warrants strict adherence to the milestone completion dates in Annexure 4 (Project Milestone for Services Scope), time being declared of the essence. If Ozone fails to complete the Services by the Completion Date, then Ozone shall be liable to Wasco for liquidated damages of 1% per week (or pro rata in respect of a part week) up to a maximum of 2% of the total Call Out

Order price. The Parties agree that such liquidated damages are a genuine pre estimate of the losses which may be sustained by Wasco for late completion and are not a penalty.

10. The Services shall be provided for a fixed period of 2 years from the Commencement Date (the "Primary Term"). Wasco shall be entitled to extend the Contract on the same rates, terms and conditions for a further period of 6 months beyond the Primary Term of 2 Years by giving Ozone notice in writing no later than the expiry of the Primary Term.

11. Ozone shall be required to provide Wasco with an irrevocable and unconditional performance bank guarantee in the sum of 10% of the total price of the respective Call Out Order valid up to expiry of Warranty Period in the form attached as Appendix 4 to Schedule I (General Conditions of Contract) from a bank in Singapore (the "Performance Bank Guarantee"). The Performance Bank Guarantee shall be provided by Ozone promptly following execution of the Contract. If requested by Wasco, Ozone agrees to extend the validity period of the Performance Bank Guarantee or to issue a further Performance Bank Guarantee in the event that there is any delay in the performance of this Contract and/or the Contract is extended beyond the date referred to above for any reason.

13. Ozone shall invoice Wasco in accordance with Annexure 5 (Payment Schedule). For the purposes of Clause 17 (Payment) of Schedule I (General Conditions of Contract), Wasco shall make payment of a correct invoice within 30 days of receipt to Ozone's nominated bank account. For this purpose Ozone shall submit details pertaining to (1) Bank Name, (2) Bank Account No., (3) Branch Address, and (4) SWIFT code to facilitate Wasco making the payment. Ozone shall also ensure the submission of invoice containing all details along with other documents, as per requirement of Clause 17 (Payment) of Schedule I (General Conditions of Contract). *****"

14. A perusal of the aforesaid Agreement clearly reveals that it has been executed between the appellant and Wasco Engineering and that Wasco Engineering had entered into a contract with Cairn India for the inland transportation, installation and commissioning of the electrical power house in Rajasthan. The appellant had agreed to perform the services in accordance with the terms and conditions of the contract and was to receive payment from Wasco Engineering. If the appellant failed to complete the services by the stipulated date, then it would be liable to Wasco Engineering for liquidated damages. The appellant was

also required to provide Wasco Engineering with the irrevocable and unconditional performance bank guarantee and also invoices.

15. Rule 6A of the Service Tax Rules, which was inserted w.e.f. 01.07.2012, deals with export of services and is reproduced below:

“6A. Export of services

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when, -

- (a) The provider of service is located in the taxable territory,**
- (b) The recipient of the service is located outside India,**
- (c) The service is not a service specified in the section 66D of the Act,
- (d) The place of provision of the service is outside India,
- (e) The payment for such services has been received by the provider of service in convertible foreign exchange, and
- (f) The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.”

(emphasis supplied)

16. Thus, for the purpose of this appeal, provision of any service provided or agreed to be provided shall be treated as export of service when the recipient of service is located outside India.

17. The contention of the appellant is that the recipient of service, which is Wasco Engineering, is located outside India and, therefore, the services rendered by the appellant to Wasco Engineering would qualify as “export of services”. The Department, however, contends that since the appellant provided services to Cairn India, which is located within India, the services rendered by the appellant would not qualify as “export of services”.

18. It needs to be noted that earlier the Central Government made the "Export of Services Rules, 2005" by Notification No. 9/2005-ST, dated 03.03.2005. Subsequently, the Central Government made the "Place of Provision of Services Rules, 2012" by Notification No. 28/2012-ST dated 20.06.2012. These 2012 Rules were in supersession of the Export of Services Rule, 2005 that had been notified by Notification No. 9/2005-ST dated 03.03.2005. Rule 3 of the 2012 Rules deals with place of provision generally and it provides that the place of provision of a service shall be the location of the recipient of service. "Location of the service receiver" has been defined in the section 2(i) of the 2012 Rules and the relevant portion is reproduced below:

"(i) "location of the service receiver" means:-

- (a) where the recipient of service has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;
- (b) where the recipient of service is not covered under sub-clause (a):
 - (i) the location of his business establishment; or
 - (ii) where services are used at a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or
 - (iii) where services are used at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service; and
 - (iv) in the absence of such places, the usual place of residence of the recipient of service"

19. The Commissioner (Appeals) found that though Wasco Engineering had entered into a contract with Cairn India for inland transportation, installation and commissioning of the electric power house at Rajasthan but the scope of the Agreement was for performance of services at Rajasthan and, therefore, the conditions

laid down in rule 3 of Export of Services Rule, 2005 read with rule 6A of the Service Tax Rules had not been fulfilled.

20. In the first instance, the Commissioner (Appeals) wrongly placed reliance upon rule 3 of the Export of Services Rules, 2005, which Rules as noticed above, had been superseded by the 2012 Rules w.e.f. 20.06.2012.

21. Section 65B(44) of the Finance Act defines “service” and is reproduced below:

“65B(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

- (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
- (iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.”

22. A bare perusal of the aforesaid definition of “service” would indicate that service means any activity carried out by a person for consideration.

23. A perusal of the Agreement between the appellant and Wasco Engineering shows that the appellant was required to perform the services for which Wasco Engineering was to make the payment to the appellant. There is no flow of consideration from Cairn India to the appellant.

24. This apart, the Agreement for performance of service was executed between Wasco Engineering and the appellant. Wasco

Engineering was stated to be a company incorporated in Singapore having its principal place of business at No. 5 Pandan Road. The service was, therefore, required to be provided by the appellant to Wasco Engineering located outside India. Rule 6A of the Service Tax Rules provides amongst others, that the provision of any service provided or agreed to be provided shall be treated as export of service when the recipient of service is located outside India and the place of provision of the service is outside India. The 2012 Rules dealing with place of provision of services in rule 3 provides that the place of provision of a service shall be the location of the recipient of service. The location of the service recipient has been defined in rule 2(i) of the 2012 Rules. The business establishment of Wasco Engineering is in Singapore and it has received the services from the appellant, though, under the Agreement the appellant was to provide the service within India for and on behalf of Wasco Engineering. The finding recorded by the Commissioner (Appeals) is, therefore, not on a correct interpretation of the Service Tax Rules and the 2012 Rules.

25. In this connection it would be useful to refer to the decision of the Tribunal in **Gap International Sourcing (India)**. The appellant therein had entered into a contract with **M/s. Gap U.S.A.** for rendering various services for export of the purchased products out of India. The Department formed a view that since the services were rendered in India, they would not qualify as export of service in terms of the Export of Service Rules, 2005 and so the appellant would be liable to pay service tax. The Tribunal did not accept the view taken by the Department and the observations contained in paragraph 9 of the decision are reproduced below:

“9. In this case, M/s. GAP, U.S.A. do not have any branch or project or business establishment in India. The service in relation to procurement of goods being provided by the appellant are entirely meant for M/s. GAP, U.S.A. and the service in question, - business auxiliary service, covered by Rule 3(1)(iii) of the Export of Services Rules, 2005 have obviously been used by M/s. GAP, U.S.A. in relation to their business located abroad. Therefore these services have to be treated as delivered outside India and used outside India and since payment for the service has been received in convertible foreign exchange, the same would have to be treated as exported out of India. The impugned order passed by the Commissioner is an absurd order contrary to the provisions of Export of Services Rules, 2005.”

26. Though, the decision has been rendered in the context of the Export of Service Rules 2005, but the principle laid down would equally apply in the present case.

27. In **Paul Merchants**, the Tribunal observed as follows:

“(v) The consumer of the service provided by the agents and sub-agents of WU in India is the Western Union, located abroad who use their services for their money transfer business not the persons receiving money in India. Since the service provided is Business Auxiliary Service classifiable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 2005, and has been provided in relation to business of Western Union located abroad, and the payment for the service has been received in India in convertible foreign currency, the same has to be treated as export of service. It is the person who requested for the service and is liable to make payment for the same who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India and who is liable to make payment for these services, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of service, in the case of this service.”

28. It cannot, therefore, be doubted that the consultancy engineering services provided by the appellant to Wasco Engineering would qualify as export of service and the findings to the contrary recorded by the Commissioner (Appeals) cannot be sustained.

29. The contention of the learned counsel appearing for the appellant that it was obligatory on the Department to issue a show cause notice

to the person filing refund claims if it proposed to reject the claim also has substance.

30. In the present case, upon filing of the refund claims, only a deficiency memo was issued to the appellant requiring the appellant to appear on a particular date and produce the required documents indicated in the memo to substantiate the claim. What information was required to be provided by the appellant has been stated in the deficiency memo and they relate to the location of the project where the services were provided by the appellant, copy of the Agreement with the service receiver and bank realization certificates, amongst others. This deficiency memo does not even remotely indicate the reason why the refund claim would be rejected. It was, therefore, obligatory on the Department to have issued a show cause notice to the appellant before rejecting the claim, since seeking information on certain matters would not suffice.

31. In **Sidheshwar SSK Ltd.**, the issue that arose for consideration was whether grant of personal hearing without issuing a show cause notice would be sufficient if refund claims were to be rejected. The Commissioner (Appeal) had set aside the order for the reason that a show cause notice had not been issued by the Department. The appeal filed by the Department was dismissed for the reason that it was necessary for the Department to have issued a show cause notice.

32. Thus, the impugned order deserves to be set aside for this reason also.

33. It has also been contended by learned counsel of the appellant that it would be entitled to interest if the balance amount of refund claimed by the appellant is allowed and in support of this contention

reference has been made to the decision of the Supreme Court in **Ranbaxy Laboratories**. The Supreme Court observed in paragraph 15 as follows:

“15. In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made.”

34. Section 83 of the Finance Act makes applicable the provisions of sections 11B and 11BB of the Excise Act in relation to service tax as they apply in relation to duty of excise. Thus, the provisions of section 11B and 11BB of the Excise Act would also be applicable and so would the decision of the Supreme Court in **Ranbaxy Laboratories**.

35. The impugned order dated 26.08.2016 passed by the Commissioner (Appeals) to the extent it rejects the refund of Rs. 68,02,513/- is set aside. The appellant would be entitled to refund of this amount with interest in terms of section 11BB of the Central Excise Act, 1944. The appeal is, accordingly, allowed.

(Order Pronounced on 24.01.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)