CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 52175 of 2016 [DB]

[Arising out of Order-in-Original No. DLI-SVTAX-004-COM-050-15-16 dated 31.03.2016 passed by the Commissioner of Commissioner of Service Tax, Delhi - IV]

M/s. UTStarcom Inc. **...Appellant**
(Through India Branch)
10th Floor, Signature Tower-B,
South City-I, DLF City,
Gugaon (Haryana)

VERSUS

Commissioner of Service Tax – Delhi IV **...Respondent**
New CGO Complex, NH-IV…NIT,
Faridabad, Haryana - 121001

APPEARANCE:
Shri Pawan Shree Agrawal, Advocate for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 30.08.2024
DATE OF DECISION: **18.12.2024**

FINAL ORDER No. 59908/2024

DR. RACHNA GUPTA

The present appeal has been filed to assail the Order-in-Original bearing no. 050-15-16 dated 31.03.2016. The facts in brief relevant for the present adjudication are as follows:

1.1 The appellants namely M/s UT Starcom Inc, India branch (herein after called as UTS-India) are registered for providing taxable services namely Erection, Commissioning and Installation Service, Maintenance and Repair Service, Technical Inspection and Certification Service, Information Technology Software Service and

Business Auxiliary Service. During the audit of UTS-India the department observed that appellants, UTS-India had entered into an agreement with UT Starcom Inc USA (herein after referred as UTS-USA) dated 1 April 2002, initially for three years i.e. upto 31 March 2005 which was further extended up to 31 March 2008, to provide all marketing and supports service requested for by UTS-USA. From the various clauses of the said agreement the department observed that UTS-India agreed to provide, at its own expense and to the reasonable satisfaction of UTS-USA, such officers and other premises administration, facilities, marketing, organization and trained staffs as may be necessary for the efficient and effective performance as exclusive service provider to UTS-USA. Vide the another clause UTS-India agreed to comply all Indian statutes, laws, Regulations and Rules or any other applicable Statutes at all times and shall pay, when due and payable, all taxes, duties, levies and fees including corporate tax, income tax, service tax etc as may be levied on UTS-India by any government or authority on services rendered by UTS-India to UTS-USA.

1.2 The department observed during the test checks of final accounts of UTS-India for the year 2008-09 that the company has raised invoices for various services provided in the project for HYE for an amount of Rs.56,64,89,097/- involving service tax of an amount of Rs.7,00,18,052/-. The appellants had only pay Rs.1,50,28,210. The balance amount of Rs.5,49,89,842/- was yet to be paid. The service tax is therefore alleged to be short paid.

1.3 During the audit itself, it was also observed that the appellant has shown, in their books of account, that the services valuing

Rs.2,26,58,609/- were imported in India during the period from 12/2006 to 02/2007 but no service tax was paid by the appellant on the said amount despite that the said amount being reflected in ST-3 returns of UTS-India for the period October 2006 to March 2007. Thus the service tax amounting to Rs.27,64,350/- was alleged to be short paid.

1.4 Both the noticed short payments of service tax amounting to Rs.5,49,89,842/- and Rs.27,64,350/- were proposed to be recovered from the appellants along with the proportionate interest and the appropriate penalties vide Show Cause Notice (SCN) bearing No. 94/10/159 dated 16.04.2012. The said proposal has been partly confirmed vide the order in original as mentioned above. The demand of short paid service tax of Rs.5,49,89,842/- has been dropped. However, the short-paid service tax amounting to Rs.27,64,350/- has been confirmed along with interest and penalty of equal amount under section 78 of the Finance Act, 1994 has been imposed. The penalty of Rs. 1,00,000/- has also been imposed under section 77 of Finance Act, 1994. Still being aggrieved the appellants is before this Tribunal.

2. We have heard Shri Pawanshree Agarwal, learned Counsel for the appellant and Sh. Rajeev Kapoor, learned Authorized representative for the department.

3. Learned Counsel for the appellant submitted that the UTS-USA provided services, to Telecom Companies in India as that of Management Maintenance or Repair, Erection Commission or Installation Services in the period from December 2006 to February

2007. It is submitted that UTS-USA had directly entered into contract with customer in India like Reliance Infocom for providing the said services. It has also entered into contract directly with BSNL for providing the Support Services and even of supplying of telecommunication equipment including the software. The work orders were issued by the said Indian Telecom companies to UTS-USA directly and later only was raising invoices. The service recipients/ Indian Telecom Companies were paying consideration in US dollars. The said amount of consideration was inclusive of all taxes except the withholding tax. The telecommunication companies in India were also paying service tax on the services provided by UTS-USA considering the services as 'Import of the Service'.

3.1 Learned Counsel further mentioned that the appellant was acting on behalf of UTS-USA, being their branch office in India. The appellant, though was not legally required, but disclosed the value of transaction between UTS USA and the Indian Telecom Company in its ST-3 return filed for December 2006, January 2007 and February 2007. The appellants have also informed the Jurisdictional Assistant Commissioner, Service Tax vide letter dated 20 June 2007, duly received by the department on 27 June 2007 ,that the customer of UTS-USA (Reliance Infocom) has treated the services rendered by the UTS-USA as 'Import the Service' in terms of section 66A of the Finance Act, 1994 read with Taxation of Services (provided from outside India and received in India) Rules 2006. The service tax component of the invoices raised upon

Reliance Infocom has been deposited by Reliance Infocom under Reverse Charge Mechanism.

3.2 Learned counsel also brought to the notice that the appellants submitted a detailed reply to the audit memo vide letters dated 24th May 2010 and 1st June 2010. It was informed that appellant entered into contract with BSNL for supply of telecommunication equipment including software. 531 invoices were raised by the appellants on BSNL during the financial year 2008-09 for Provision of Taxable Service and the appellants had discharged its service tax liability on the same. But still the impunged Show Cause Notice was served upon the appellant demanding the service tax amounting to Rs.5,49,89,842/-. However, the reply to the said show cause notice dated 08.10.2015 has duly been considered by the adjudicating authority below and the order under challenge has dropped the demand of service tax of Rs.5,49,89,842/- along with the interest and penalty as was proposed in the show cause notice. Still the demand of Rs.27,64,350/- in respect of transaction between Reliance Infocom Ltd. and UTS-USA has wrongly been confirmed. The Commissioner has failed to consider the fact that the service tax already standspaid by Reliance Infocom Ltd under Reverse Charge Mechanism (RCM). The demand has wrongly been confirmed wrongly relying on the fact that the amount was shown in ST-3 return filed by the appellant. The said demand is therefore liable to be set aside. Learned counsel has relied upon the decision in the case **of Aker Solutions Ltd. SDN BHD Vs. Principal Commissioner Kakinada Commissionerate, Vishakhapatnam reported as 2022 (64) GSTL 240 (TRI.HYD.)**

3.3 Finally the show cause notice is alleged to be barred by time as the extended period of limitation is wrongly invoked against the appellants despite that the appellants has neither intentionally nor will fully suppressed any fact from the department. Decisions of the Hon'ble Supreme Court in the case of **Anand Nishikawa company Ltd CCE reported as 2005 (188) ELT 149 SC** is relied upon. With these submissions the order under challenge / order in original is prayed to set aside and the appeal is prayed to be allowed.

4. While rebutting the submissions made on behalf of appellant, learned Departmental Representative for the department has mentioned that as per the Books of Account of appellants for the period December 2006 to February 2007, the appellants had imported services amounting to Rs.2,26,58,609/- but service tax of Rs.27,64,350/- has not be paid by the appellants despite that the said amount has also been reflecting in ST-3 returns filed by the appellants for the period October 2006 to March 2007. Hence there is no infirmity in the findings of the order under challenge. Finally retreating the finding therein specifically, in para 19.2 to 19.5 of the impunged order the order under challenged is prayed to be upheld and the appeal is prayed to be dismissed.

5. Having heard both the parties at length and perusing the entire record of the present appeal, we observe that partial demand w.r.t to services provided by the appellants to BSNL, since service tax was already paid by the appellants, stands already dropped and the department admittedly is not in appeal. Hence the moot issue to be adjudicated is:

"Whether the services in question have been provided by UTS-USA directly to Reliance Infocom amounting to 'Import of the Services' or the services are provided by the appellant inviting its liability to pay service tax?"

6. Foremost we need to know as to what constitute "service". Section 65 b (44) of the Finance Act 1994 defines service to mean:-

"Service" means;

- *Any activity*
- *For consideration*
- *Carried out by a person for another*
- *And includes a declared service*

"Service" does not include

- *Any activity which merely constitutes a transfer in title of*
    - *Goods or*
    - *Immovable property by way of sale, gift or in any other manner*
- *A transaction merely in*
    - *Money or*
    - *Actionable Claim*
- *Any service provided by an employee to an employer in the course of employment*
- *Fees payable to a court or a tribunal set up under a law for the time being in force*

7. Further we also need to know the meaning of consideration. Section 67 of Finance Act 1994, the explanation thereof defines consideration as follows:

"consideration" includes-

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

Thus consideration means everything received in return for a provision of service which includes monetary payment and any consideration of non-monetary nature as well as deferred consideration.

8. We observe that the definition of service has a phrase "carried out by one person to another". This phrase signifies that the services provide by one person to self are outside the purview of the service tax. It also includes following:

1. *The service provided by a person located in a taxable territory to the another establishment of the same person located in a non-taxable territory.*
2. *An unincorporated association or body of persons and member thereof are also treated as distinct person.*

9. Reverting to the facts of the present case, it is apparent that the services in question have been agreed to be provided vide Master Annual Maintenance Contract dated 25.02.2003. The perusal reveals that:

- *UTS-USA, Alameda, California, USA has agreed, as contractor, including its legal successor, to provide Support Services as explained in clause 2 of the said agreement to Reliance Infocom Ltd. District Jamnagar, Gujarat, India.*

- *The contractor / UTS-USA shall had to raise the invoice in accordance with the billing methodology described in* *scheduled A of the said agreement alongwith the supporting document quoting the prices based upon the scope of the services and the said prices are agreed by the Reliance.*

- *Clause 3 (b) of the agreement discussed about the payment mentioning that the Reliance Infocom shall pay contractor duly invoice service fee in accordance of the agreed payment terms. Sub clause (iii) and (iv) of clause 3 reads as follows: -*

(iii) All prices for Support Services shall be exclusive of all taxes in India except withholding tax. It is agreed between RELIANCE and CONTRACTOR that, as on the Effective Date of this Contract, service tax is not applicable and RELIANCE represents that it shall pay such tax when such tax becomes applicable as per Applicable Law. RELIANCE shall be responsible for payment of all taxes for every kind Imposed in connection with the sale to RELIANCE of Support Services or which CONTRACTOR may incur in respect of this Contract [(except as provided in this GTC 3) b) iii)] including all levies or imposts, and all use, value added, gross receipts or other taxes of any nature and any penalties, Interest and collection or other costs associated with any of the foregoing items. All such amounts area in addition to other amounts payable hereunder and this obligation shall survive termination or expiration of this Contract and / or any Work Orders.

(iv) RELIANCE shall make all payments to CONTRACTOR after withholding the applicable amounts, if any, required under the Double Taxation Avoidance Agreement between India and USA, at the applicable rate prevailing at the time of payment under this Contract. RELIANCE shall provide CONTRACTOR

with written notice of any change in the applicable withholding tax rate before deducting any withholding tax. RELIANCE shall provide to CONTRACTOR official tax receipts in respect of withholding tax paid in India within ninety (90) days of such payment for CONTRACTOR to claim any tax credits / double tax avoidance. In the event CONTRACTOR does not receive official tax receipts or other evidence within the said ninety (90) days, CONTRACTOR shall have the right to invoice RELIANCE for such withholding tax and RELIANCE agrees to pay such amounts upon receipt of invoice.

- *UTS-USA also warranted that Support Services to Reliance Infocom shall be provided by them with due skill, diligence and care through adequate number of qualified personnel/technicians with suitable training, education and experience as is apparent from clause 4 of the said agreement. UTS-USA has made itself liable in case of any kind of failure in providing the services to Reliance Infocom Pvt. Ltd.*

10. The above discussion about the agreement about rendering of impunged services, makes it clear that the Support Services in question are provided by UTS-USA which is located in non taxable territory, to Reliance Infocom Ltd which is located in taxable territory with the clear agreement that later shall be paying the consideration to UTS-USA excluding all taxes applicable as per Indian laws except withholding tax. Thus it stands established that the service provider is UTS-USA and UTS-India is wrongly alleged as the servicer provider to Reliance Infocom Pvt.

11. Coming to the core issue, we observe that Rule 3 of Place of Provision Rules, 2012.

Rule 3:- Place of provision

Generally the place of provisioning of services is the location of service recipient.

11.1 In terms of Notification No.30/2012 dated 20.06.2012, the taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory [other than non-assesse online recipient], 100% tax shall be paid by the recipient of the service. Further, any service provided from outside India and received in India is Import of Service. The service recipient is liable to pay service tax on import of services.

11.2 Recipient in the present case is Reliance Infocom located in taxable territory. Resultantly it was Reliance Infocom who was liable to pay service tax under reverse charge mechanism on the amount in dispute paid during the disputed period to UTS-USA. It is also the admitted fact on record that the Reliance Infocom has discharged the entire service tax liability on the disputed amount. The appellant / UTS-India is, admittedly, a subsidiary of UTS-USA hence cannot be considered as the distinct entity specifically when the service provider is the main company that UTS-USA. The observation are sufficient for us to hold that appellant is wrongly alleged to be the service provider. The service tax liability confirmed against the appellant is thereof liable to set aside.

13. Finally coming to the issue of invocation of the extended period of limitation while issuing the impunged show case notice we observe that the appellant had filed the service tax return for the period from 1.10.2006 to 31.3.2007 with the specific disclosure that

the *"services treated by Reliance Infocom as import of the service and the tax deposited by the recipients / Reliance Infocom hence appellant is chargeble at nill rate"*. We also observe that the appellant vide letter dated 20.06.2007 had informed the department that : "while we are disclosing the realization of invoices raised on the said customer (Reliance Infocom) in ST-3 return, we are not paying the service tax as it is being paid by the said customer. Even on the reply to audit memo dated 1.06.2010 the appellant clearly stated that the services have been treated by Reliance Infocom Ltd. As import of the services" and they only have discharged the service tax liability. Despite this information with the department the impunged show cause notice has alleged that:

> *"UTS -ndia has shown in books of account that the services valuing Rs. 2,26,58,609 were imported in India during the period from 12/2006 to Feb 2007 no service tax was paid by UTS-India thereon treating the import of service as non-taxable under service tax rule, 1994 which was incorrect"*

14. It is clear that the show cause notice has alleged that the service have been imported by UTS India whereas Reliance Infocom has imported the impunged support services and has also discharged its liability interms of section 66 A as came into effect from 19.04.2006.

15. This observations is sufficient for us to hold that :

(a) the entire information was provided by the appellant to the department.

(b) show cause notice has been issued ignoring the said information and is rather vague.

(c) the service tax demanded has already been paid by the service recipient i.e. Reliance Infocom India to the service provider i.e. UTS USA under reverse charge mechanism.

(d) there is no evasion of tax nor any malified intend to do so.

(e) Resultantly, we hold that the extended period of limitation has wrongly been invoked by the department while issuing the impunged show cause notice. We draw our support from the decisions of the **Hon'ble Supreme Court in case of Anand Nishikawa co. Ltd. V. CCE, 2005 (188) ELT 149 (SC)** that the requirement in law is that such misstatement or suppression of facts must be wilful that is some positive act must be done by the assessee to constitute wilful suppression. Reliance in this regard is placed upon the decision of the Hon'ble Supreme Court in case of **Pushpam Pharmaceuticals Co. v. CCE, Bombay 1995 (78) ELT 401 (SC).**

16. In the light of the entire above discussion we hold that the show cause notice was issued on wrong presumption. The impunged activity is held to be the 'Import of Service' by Reliance Infocom as received from UTS-USA. Hence the demand has wrongly been confirmed against the appellant who is the subsidiary of UTS-USA, the service provider located in non taxable territory. Otherwise also the service tax stands already paid by the service recipient, Reliance Infocom Pvt. Ltd under reverse charge mechanism. This information was already provided to the department. The extended period is wrongly been invoked. Thus

the show case notice is held barred by time. Resultantly, the order under challenge is hereby the set aside. Consequent thereto, the appeal stands allowed.

[Order pronounced in the open court on **18.12.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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