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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/239 /2007 - CU[DB] Date 16/03/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S NATIONAL ENGINEERING INDUSTRIES LTD.
KHATIPURA ROAD, JAIPUR

M/S NATIONAL ENGINEERING INDUSTRIES LTD. Appellant
Vs
C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/105 2009 CU[DB]** dated 05.03.09 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C.E. JAIPUR I
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   MR.BIPIN GARG, ADV
   B-F1/1289-A VASANT KUNJ NEW DELHI -70
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

ST/239/07-Cus

(Arising out of Order-in-Appeal No.3/GRM/ST/JPR-I/2007 dt.19.1.07 passed by Commissioner(Appeals), Jaipur)

Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities: :

M/s. National Engg. Ind. Ltd. Appellant

Versus

CCE, Jaipur Respondent

Appearance
Shri Bipin Garg, Adv. For Appellant
Shri S.Gautam, Authorised Departmental Representative(DR) For Respondent

Coram : Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of hearing : 23.2.09
Date of Pronouncement : 5/3/09

Final Order No. ST/105/09

Per Rakesh Kumar:

The Appellant is agent of M/s. General Motor Corpn., USA (hereinafter referred to as GMC) and they procured orders/contracts from Indian Railways for GMC. They are registered with the jurisdictional Central Excise Office as service tax assessee providing the taxable service of "Business Auxiliary Services." For procuring the orders/contracts from Railways for GMC, the Appellant received a commission on which the service tax was paid by them. The commission, however, was not received directly from GMC but was received through Indian Railways in Indian currency as per understanding between GMC and Indian Railways, the GMC received payment from Indian Railways after deducting the commission payable to the Appellant, which was paid by the Railways to the Appellant in Indian rupees. The Appellant claiming that the services provided by them to GMC, on which service tax had been paid during April'05 to June'05 period, are service exports under Export of Service Rules,2005, filed a refund claim for service tax amounting to Rs.2,05,489/-. The Asstt. Commissioner vide order-in-original dt.22.9.06 rejected the refund claim on the ground that this cannot be treated as export of service, as the Commission was received in non-convertible Indian rupees. The Appellant's appeal was rejected by the Commissioner(Appeals) vide the impugned order-in-appeal dt.19.1.07 against which the present appeal has been filed.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, learned Counsel for the Appellant pleaded that when the Business Auxiliary Service, Taxable under Section 65(105)(zzb) of the Finance Act,1994 is provided by a service provider in India to a recipient located outside India and service is used in or in relation to commerce or industry of the recipient, the same has to be treated as export of the service in terms of sub-Rule 3 of Rule 3 of Export of Services Rules,2005, that the conditions (a)(b)&(c) of the proviso to sub-rule (3) are applicable only in a situation where the service recipient abroad has any commercial or industrial establishment or any office relating thereto, in India, and only in such a situation the conditions mentioned in clause (a)(b) & (c) of the proviso have to be satisfied one of such condition being that the payment for such service is received by the service provider in convertible foreign-exchange; that GMC, do not have any commercial establishment or office in India and therefore, the proviso to sub-rule (3) of Rule 3 is not applicable and that in view of this, the business auxiliary service provided by the Appellant to GMC has to be treated as service export and therefore, no service tax is payable in respect of services and the Appellant is eligible of the refund of the service tax paid by them. He cited Tribunal's judgment in the Appellant's own case, reported in 2008 – TIOL - 939 – CESTAT-DEL, wherein the Tribunal has held that the services provided by the Appellant to GMC,USA is export of services under Export of Services Rules,2005.

2.2 Shri S. Gautam, learned Sr. Departmental Representative defended the impugned order and he relied upon the Tribunal's judgment in the case of ETA Travel Agency Pvt. Ltd. vs CCE, Chennai reported in 2007(7)STR.454(Tri.-Bang,).

3. We have carefully considered the submissions from both the sides. The Appellant provided taxable business auxiliary service to GMC by procuring orders/contracts for them from

Indian Railways, for which they received the commission from GMC. But the commission instead of being directly received from GMC received through Indian Railways in Indian currency as the Indian Railways, while making the payment to GMC in foreign currency retained commission part with them and paid the same to the Appellant in Indian rupees. The point of dispute as to whether in such a situation, the service provided by the Appellant to GMC can be treated as export of service under Export of Services Rules,2005.

4. Rule 3 of Export of Services Rules,2005 reads as under:

"3. Export to taxable service – The export of taxable service shall mean, -

(1) in relation to taxable services specified in sub-clauses (d),(p),(q),(v) and (zzp) of clause (105) of section 65 of the Act, such taxable services as are provided in relation to an immoveable property which is situated outside India'

(2) in relation to taxable services specified in sub-clauses (a),(f),(h),(i),(j),(l),(m),(n),(o),(s),(t),(u),(w),(x),(y),(z),(zb),(zc),(zi),(zj),(zn),(zo),(zq),(zr),(zt),(zu),(zv),(zw),(zza),(zzc),(zzd),(zzf),(zzg),(zzh),(zzi),(zzj),(zzl),(zzm),(zzn),(zzo),(zzp),(zzs),(zzt),(zzv),(zzw),(zzx) and (zzy) of clause (105) of Section 65 of the Act, such services as are performed outside India :

Provided that if such a taxable service is partly performed outside India, it shall be considered to have been performed outside India;

(3) in relation to taxable services, other than, -

(i) the taxable services specified in sub-clauses (a),(f),(h),(i),(j),(l),(m),(n),(o),(p),(q),(s),(t),(u), (v),(w),(x),(y),(z),(zb),(zc),(zi),(zj),(zn),(zo), (zq),(zr),(zt),(zu),(zv),(zw),(zza),(zzc),(zzd), (zzf),(zzg),(zzh),(zzi),(zzj),(zzm),(zzn),(zzo), (zzp),(zzq),(zzs),(zzt),(zzv),(zzw), (zzx), and (zzy); and

(ii) the taxable service specified in sub-clause(d) as are provided in relation to an immovable property, of clause (105) of Section 65 of the Act, -

(i) Such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India :

Provided that if such recipient has any commercial or industrial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of services only if –

(a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;

(b) service so ordered is delivered outside India and used in business outside India; and

(c) payment for such service provided is received by the service provider in convertible foreign exchange;

(ii) Such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the taxable service is located outside India at the time when such services are received.

Explanation – For the purposes of this rule "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs Nos. S.O.429(E), dt.18th July,1986 and S.O.643(E),dt.19th Sept'06".

5. The service provided by the Appellant to GMC is taxable under Section 65(105)(zzb) of the Finance Act,1994 and this service is covered by sub-rule 3 of Rule 3, as there is no dispute about the fact that it has been provided in relation to the business of the recipient, located outside India. The Deptt.'s contention is that since the payment for the service has been received in Indian currency from Railways, in view of the proviso to sub-rule (3), this cannot be treated as service export. However, the proviso is applicable only if the service recipient have any commercial or industrial establishment or any office relating thereto, in India, and only in such a situation conditions enumerated mentioned in clause (a)(b) & (c) have to be satisfied. In this case, it is not the

case of the Deptt. that GMC, USA have any office of commercial or industrial establishment in India. Therefore, the proviso to sub-rule 3 and the conditions (a)(b) and (c) enumerated therein are not applicable. We find that the Tribunal, in the Appellant's own case, reported in 2008-TIOL-939-CESTAT-Del. has held that just because commission was received by the Appellant through Indian Railways in Indian Rupees as Indian Railways made payment to GMC in foreign currency after deducting the commission payable to GMC, it cannot be said that the service provided by the Appellant to GMC, USA is not export of service. In the case of ETA Travel Agency Pvt. Ltd.(supra) cited by Ld. DR, the off shore service receiver had an office in India and the commission had been received from the bank account of such local office of the off shore service receiver and in view of the facts of the case, the Tribunal held that the service has been provided and received in India and it was not a case of export of service. Therefore, this judgment of the Tribunal is not applicable to the facts of this case. We, therefore, held that the service provided by the Appellant to GMC, USA has to be treated as 'export of service' under Rule 3(3) of the Export of

Service Rules and therefore, the terms of the provisions of Rule 5 ibid, the Appellants were eligible for refund of the service tax paid on such service exported to GMC, USA.

6. In view of the above discussions, the impugned order is not correct and the same is not sustainable. The impugned order is, therefore, set aside and the appeal is allowed.

(Order pronounced on 5/3/09)

(D.N.Panda)
Judicial Member

(Rakesh Kumar)
Member Technical

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