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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/524 /2006 - CU[DB] Date **27/06/2011**

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

To :
M/S GILLETTE INDIA LTD(THROUGH COUNSEL
C.HARISHANK
C.HARI SHANKAR, ADVOCATE, 46, BANK
ENCLAVE,DELHI.
110092

M/S GILLETTE INDIA LTD(THROUGH COUNSEL
C.HARISHANK Appellant

Vs

C.C.E.JAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/237/ 2011 CU[DB]** dated 16.06.11 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
NCRB, STATUE CIRCLE, C-
SCHEME, JAIPUR.

2. Adv. / Consult
MR.C.HARISHANKAR
46, BANK ENCLAVE,DELHI-110092

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K.PURAM, NEW DELHI

Date of Hearing:18/05/2011
Date of decision:18/05/2011

Appeal No.ST/524/2006-CU[DB]

(Arising out of Order-in-Appeal No.60(GRM)/ST/JPR-I/06 dt. 22/8/2006 passed by CCE&C(Appeals), Jaipur)

For approval and signature:

Hon'ble Mr. M.V. Ravindran, Member(Judicial)
Hon'ble Mr. M. Veeraiyan, 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?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their Lordship wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. Gillette India Ltd. **.....Appellant(s)**

Vs.

CCE, Jaipur **.....Respondent(s)**

Appearance
Mr. C. Hari Shankar, Advocate and Mr. S. Sunil, Advocate for the appellant.
Mr. Amrish Jain, SDR for the Revenue.

Coram:
Hon'ble Mr. M.V.Ravindran, Member(Judicial)
Hon'ble Mr. M. Veeraiyan, Member(Technical)

FINAL ORDER No. ST/237/**2011**

Per M.V.Ravindran

This appeal is directed against Order-in-Appeal No.60(GRM)/ST/JPR-I/06, dt. 22/8/2006.

2. The relevant facts that arise for consideration are that the appellant herein is subsidiary of M/s. Gillette USA. The appellant had, on instruction of their parent company, conducted a study viz. "South Asian Market Research" and charged fees from their parent company in the year 2000-01. The Revenue authorities on scrutiny of the balance sheet noticed that the said amounts have been shown as income arriving from 'Management Fees(Consulting fees)'. After calling for explanation from the appellant, a show-cause notice was issued directing them to show-cause as to why service tax amount be not demanded from them along with interest and why consequent penalties and interest be not demanded. The appellants contested the show-cause notice on merits as well as on limitation before the adjudicating authority. The adjudicating authority after considering the submissions made before him confirmed the service tax demand of Rs.33,25,550/- under the head 'Management Consultancy Service' along with interest and imposed penalties under Section 75(A), 76, 77 and 78 of the Finance Act, 1994. Aggrieved by such an order, appellant preferred an appeal before the ld. Commissioner(Appeals). Ld. Commissioner(Appeals) after considering the written and oral submissions made before him, upheld the Order-in-Original. Hence, this appeal.

3.1. Ld. Counsel appearing on behalf of the appellant would submit that the appellant is not rendering 'Management Consultancy Service' as understood under Section 65(37) of the Finance Act. It is his submission that as per the existing definition during the relevant point of time, the definition could be divided into two parts i.e. one any person who is engaged in providing any service in connection with the management of any organization and inclusive portion which indicated the service of advice, consultancy or technical assistance relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organization. It is his submission that the services would not come under the ambit of the expression 'Management Consultant" as the appellant had rendered only the services of marketing research undertaken by them to gauge the acceptability of Gellette's products in India market. For this submission he would rely upon the following decisions:

a. ***Castrol Ltd. Vs. CCE [2007(8) STR 254]***
b. ***CCE Vs. Sundaram Finance Ltd. [2007(7) STR 55]***
c. ***Telephone Cables Ltd. Vs. CCE [2007(7) STR 657]***
d. ***Maini Industrial Consultants Vs. CCE [2006(2) STR 358]***
e. ***Glaxo Smithkline Consumer Healthcare Ltd. Vs. CCE [2007(7) STR 334]***

3.2. It is his submission that for the purpose of the services rendered by the appellant to be covered under Section 65(37), it must be rendered in relation to the management or working system of the organization and the services rendered by the appellant which is in respect of market research, it cannot be regarded as rendered in relation to marketing system of the organization. It is his submission that by Finance Act, 2007, the definition of 'management or business consultant' was substituted which would include the activity of the appellant. It is his submission that the definition was substituted by the Finance Act, 2007 and it can be made applicable only prospectively as the said definition was not included as retrospective effect. It is his next submission that the appellant would be eligible and entitled to the benefit of Notification No.6/99-ST dt. 09/04/1999. He would take us through the said notification and submit that the notification squarely covers the assessee's case. It is his submission that both the lower authorities have relied upon the proviso to the notification which would not be applicable in this case. It is his submission that Notification No.6/99 was rescinded in 2003 and the activities of the appellant were prior to 2003, hence the notification would apply in full force. It is his submission that Circular No.56/5/2003-ST dt. 25/4/2003 would also cover the issue in the appellant's case, as the amounts which were accounted by the appellant as income were received in foreign exchange. It is the alternate submission that the services provided by the appellants were exported and no service tax can be levied. He would submit that the demand is time barred as there is no claim of willful suppression with intends to evade tax, besides a bald repetition of the words of the statute. It is his submission that the Hon'ble Supreme Court in the case of ***Continental Foundation Joint Venture Vs. CCE [2007(216) ELT 177 (SC)]*** and ***Cosmic Dye Chemical Vs. CCE [1995(75) ELT 721 (SC)]*** has clearly held that there has been something more than mere allegation of suppression.

4. Ld. ~~Sr~~. SDR appearing on behalf of the Department would reiterate the findings of both the lower authorities. He would

specifically draw our attention to the definition of 'Management Consultant' during the relevant period. It is his submission that the activity done by the appellant would fall under the category of 'Technical Assistance' relating to upgradation of any working system in organization. It is his submission that the market research conducted by the appellant was in respect of upgradation of the marketing system of the parent company inasmuch as the parent company could strategize the marketing of the products in India which is a management function. It is his submission that there is no dispute that the appellant is a subsidiary of the parent company. It is his submission that Notification No.6/99-St will not be applicable in this case as the proviso to the said notification very clearly reads that the notification will not apply if any of the taxable services which is received in convertible foreign exchange is repatriated from or sent outside India. He would stress on the words "from or sent outside India" and submit that the amount of dividend paid by the appellant to the parent company towards the shareholding was nothing but repatriation of the said amount. He would submit that the appellant was not able to fulfill the condition of the notification and hence the denial of the benefit of notification was correct. He would also submit that the appellant at no stage declared that they are providing services of 'Management Consultancy', suppressed the facts from the Department with intention to evade the service tax liability. It is his submission that the appellant had not obtained registration under Section 69 for the services rendered but had received the amount and accounted the same in the balance sheet as consulting fee. He would submit that both the lower authorities are correct in coming to the conclusion that appellant is liable to discharge the service tax and consequent interests and penalties.

5. We have considered the submissions made at length by both sides and perused the records.

5.1. The undisputed facts are that the appellant, during the period 2000 and 2001, had shown receipt of an amount of Rs.4,32,00,000/- and Rs.2,33,11,000/- respectively during the relevant year as income for providing services to their parent company M/s. Gillette USA. It is also undisputed that the amounts received by the appellant were for the market research conducted by the appellant for their parent company. We find that both the lower authorities have not disputed of this fact that the appellant had conducted market research for the suitability of the parent company's products in South Asian market.

5.2. The entire findings of the lower authorities in this case for taxing the amount received under the 'Management Consultancy Service' revolve around the definition of 'Management Consultancy Service'. The said definition during the relevant period reads as under:-

> "Any person who is engaged in providing any service, either directly or indirectly in connection with the management of any organization in any manner and includes any person who renders any advise, consultancy or technical assistance relating to conceptualizing, devising, development, modification, rectification or upgradation of any working systems of any organization."

It can be seen from the above reproduced definition, as submitted by the ld. Counsel, it contains two portions. We are concerned with the interpretation of the second portion i.e. inclusive definition. It is undisputed in this case that the appellant has not given any advice or consultancy to the parent company. As regards the interpretation of definition of technical assistance relating to conceptualizing, devising, development, modification or rectification or upgradation of any working system of any organization, we have to stick to the facts of this case, in which the appellant has only done research of the acceptability of the products of the parent company. The market research did not include any assistance in relation to conceptualizing, devising, development, modification or rectification or upgradation of any working system of parent company. We also find that market research which was done by the appellant would never fall under any of the working system of the parent company as was sought to be addressed by the ld. SDR. The report of the market research survey given by the appellant to the parent company could have been put up to use by the appellant's parent company for the many purposes viz. opening of new manufacturing facility in South Asia etc.

5.3. It is also to be noticed that by the Finance Act, 2007, the definition of 'Management or business consultant" was substituted, which reads as under:-

> "Management or business consultant" means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization or business in any manner and includes any

person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management.

It can be seen from the above reproduced substituted definition of 'Management or business consultant", the services rendered in respect of marketing was specifically brought into definition. Both sides could not produce anything to indicate that this definition was with retrospective effect. In the absence of any evidence, we are of the view that the substituted definition could be only perspective.

5.4. In view of the foregoing, we find that the appellant's services rendered to the parent company could not ~~have~~ fall under 'Management or Business Consultant'.

5.5. We also find that during the relevant period, there was a separate category of service which included the marketing research activities under Section 65(69) of the Finance Act, 1994. We find that the appellant was not issued any show-cause notice nor demands were raised for including the services rendered by them under Section 65(69) of the Finance Act, 1994.

5.6. As regards the submissions of the appellant that they are not liable to pay any service tax by virtue of Notification No.6/99-ST, we find that it is undisputed that the amounts which were indicated in the balance sheet as income from the consulting fees for market research conducted by the appellant, was received in convertible foreign exchange. It is also undisputed that the said amount has been recorded in the accounts and reflected in the balance sheet as an income. In light of this above, it is to be seen whether the appellant is eligible for the benefit of Notification No.6/99 or not. The said notification is reproduced herein:-

Notification: 6/99-ST dated 9th April, 1999

> Service Tax — Exemption when payment for taxable services is received in India in convertible foreign exchange — Notification No. 2/99-S.T. superseded
>
> In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 2/99-Service Tax, dated the 28th February, 1999, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in sub-section (48) of section 65 of the said Act, provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the service tax leviable thereon under section 66 of the said Act :
>
> Provided that nothing contained in this notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered is repatriated from or sent outside India.
>
> [Notification No. 6/99-S.T., dated 9-4-1999]

It can be seen from the above reproduced notification that during the relevant period, any taxable services provided were exempted for which payment is received in India in convertible foreign exchange. Undisputedly the appellant is covered by the above portion of the Notification. Both the lower authorities have held and it is the submission the ld. SDR that the proviso to the notification would apply in the appellant's case. On careful reading of the proviso, we find that the said proviso talks about a situation where the payment which is received in convertible foreign exchange for taxable service is "repatriated from or sent out side India". The plain reading of the said proviso would indicate that any amount received for the taxable services has to be indicated or shown as repatriated from or sent outside India. Both the lower authorities have extended the proviso to read the amount given as dividend by the appellant would fall under the category of repatriated from or sent outside India. This submission made by the ld. SDR and the conclusion reached by the lower authorities needs to be deprecated for more than one reason. The amounts which have been given by the appellant for parent company is in form of dividend, which is for the shares held by the parent company in the appellant's company. It is a common knowledge that dividend is paid to the shareholders only if there is disposable profit. It is common knowledge that profit of the company is arrived only after the entire income and expenditure is accounted for and when there is income over the expenditure. It cannot be, by any stretch of imagination, held that the amounts which have been received by the appellant in convertible foreign exchange for the market research conducted for the parent company and indicated in the balance sheet as income are repatriated in form of dividend. In our view, both the lower authorities have erred in coming to such conclusion and such conclusion is nothing short of words in the notification, which has been always held as impermissible by the various judicial pronouncements.

6. In view of the foregoing reasons, we are of the considered view that the impugned order is incorrect and liable to be set aside and we do so. The impugned is set aside and the appeal is allowed with consequential relief, if any.

7. Since we have disposed the appeal on merits itself, we are not recording any findings on the various other submissions made by both sides.

(Operative portion of this order was pronounced
on conclusion of the hearing)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(M.V.RAVINDRAN)
MEMBER (JUDICIAL)

Kr...