

2. The factual matrix of the case is that the respondent is engaged in providing software solutions both in India and abroad primarily to clients in the hospitality and travel sectors. Around 90% of its revenue is derived from exports. The services of the respondent is procured and consumed by UK branch (Rategain, UK) and the Indian entity merely reimbursed the UK office. The respondent participated in exhibitions, seminars and conferences abroad to promote exports and these services were performed and consumed entirely outside India. The local VAT and taxes were paid out of India.

3. During verification of the financial records of respondent, it was observed that while they had incurred expenditure in foreign currency, the ST-3 periodical returns filed by them with the department for the period 2010-11 to 2014-15 did not show any payment of Service Tax under Reverse Charge Mechanism² on the aforesaid foreign currency expenditure. The respondent had two premises and was holding centralized Service Tax registration for both the premises. The respondent also submitted that they were registered under SEZ scheme upto August 2012 and being a unit registered under SEZ they were not liable to pay Service Tax on the import of services under erstwhile Notification No. 09/2009-ST, which was superseded by Notification No. 17/2011 dated 01.03.2011 as amended. On scrutiny, it was found that during the relevant period, the respondent had three units, one in SEZ and other two units in Domestic Tariff Area (Noida and Delhi) outside SEZ. The respondent claimed exemption in respect of service procured in SEZ unit, but the respondent did not submit copies of list of taxable

² RMC

services required for authorized operations duly approved by the approval committee of SEZ and declaration in Form A-I, as required to be submitted as per Notification No. 17/2011 ST dated 01.03.2011. Hence they were not eligible to claim *ab initio* exemption thereunder.

4. Show cause notice dated 21.04.2016 was issued for the period 2010-11 to 2014-15, demanding a sum of Rs.5,97,36,178/- under Section 73(2) along with interest and penalty towards the expenditure borne by the respondent in foreign exchange for export of software solution under the heads of professional fee (sales and marketing), Marketing expenditure, Conference, Advertisement and Data Cost, Hoisting, Proxy Charges, and Software License Fee etc. The Adjudicating Authority dropped the proceedings relying on the statutory provisions and series of decisions of this Tribunal. On reviewing the said order, the Revenue has filed the present appeal.

5. Heard both sides and perused the records of the case. Ms. Jaya Kumari, the learned Authorised Representative for the Revenue has challenged the findings of the Adjudicating Authority on the ground that there is material difference in the facts of the cases relied upon and in the present case and hence the same are not applicable. She has distinguished the present case on the ground that the payments were not made to the branch office situated outside India, rather the same were made to the service providers situated outside India. On the contrary, in the relied upon decisions, the issue pertains to the payments made by the appellant (Indian entity) to its branch office situated outside India. The learned Departmental Representative for the Revenue has tried to

distinguish that merely mentioning inclusive of taxes did not indicate that services had suffered local taxes.

6. Shri Rajesh Jain, learned counsel for the respondent contested the appeal, submitting that the expenses incurred for software solution services provided outside India are not subject to service tax under RCM. No services are received by the respondent, but the services were provided by agents and consumed by clients outside India and, therefore, are not taxable. He submitted that the respondent reimbursed the marketing and sales promotion expenses and other expenses through the branch office of the respondent and all the services by foreign agents were rendered through the branch office at UK. The respondent being an Indian company has neither received nor consumed any services in India. The learned Counsel has referred to series of decisions by the Tribunal supporting his arguments, which are as under:-

- (1) Milind Kulkarni Vs. CCE, Pune-I³**
- (2) Commissioner Vs. Tech Mahindra Ltd.⁴**
- (3) UOI Vs. Kamlakshi Finance Corporation Ltd.⁵**
- (4) Cox & Kings India Ltd. Vs. Commissioner of Service Tax, New Delhi⁶**
- (5) Commissioner Vs. Cox & Kings India Ltd.⁷**
- (6) Tata Technologies Ltd. Vs. CCE, Pune-I⁸**
- (7) Kpit Cummins Infosystems Ltd. Vs. CCE, Pune-I⁹**
- (8) Intas Pharmaceuticals Ltd. Vs. CST, Ahmedabad¹⁰**

7. The distinction drawn by the learning Authorised Representative for the Revenue with reference to the decisions cited is very superficial,

³ 2016(44) STR 71 (Tri.-Mumbai)

⁴ 2016 (45)STR J-308 (SC)

⁵ 1991 (55) ELT 433 (SC)

⁶ 2014(35) STR 817 (Tri.-Del.)

⁷ 2015(39) STR J-308 (SC)

⁸ 2014(34) STR 404 (Tri.-Mumbai)

⁹ 2014(33) STR 105 (Tri.-Mumbai)

¹⁰ 2009(16) STR 748 (Tri.-Ahmd.)

considering that the essence of service tax is that the service should be taxed in the jurisdiction of consumption. Section 65B as inserted w.e.f. July 1, 2012 is titled as 'Interpretations' and Clause (51) thereof defined the expression 'taxable service' to mean service on which service tax is leviable under Section 66B. Clause (52) of Section 66B defines 'taxable territory' as territory to which the provisions of this Chapter apply. The new charging section, Section 66B enables taxation of such services as are provided in the taxable territory. Reading Section 66B along with Section 64(1) and Section 66B(52) makes it clear that service tax is leviable, only on services provided or agreed to be provided in the 'taxable territory' i.e. the whole of India, except Jammu and Kashmir. In other words, services that are provided in a non-taxable territory would not be chargeable to service tax and, therefore, it is essential to determine the "place" where the services have been provided or deemed to have been provided or agreed to have been provided. The Central Government has notified the rules called the Place of Provision of Service Rules, 2012, w.e.f. July 1, 2012. Since the controversy in the present case revolves around the plea taken by the appellant that the foreign agents are actually intermediaries, it is necessary to take note of the definition of 'intermediary' as defined in Rule 2(f), which reads as follows:-

"Rule 2(f) defines 'intermediary services' means a broker or any agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;]"

Education Guide Guidance Note dated June 20, 2012 issued by CBEC clarified the meaning of intermediary as under:—

"Para 5.9.6 What are intermediary services – Generally, an intermediary is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration of further processing."

In terms of the definition and the clarification, given by CBEC, the definition of 'intermediary' contemplates:

1. An intermediary arranges or facilitates a provision of a 'main service' between two more persons;
2. An intermediary is involved with two supplies at any one time: (i) the supply between the principal and the third party; and (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged;
3. An intermediary cannot alter the nature or value of service, the supply of which he facilitates on behalf of his principal, although the principal may authorize to negotiate a different price;
4. The consideration for an intermediary's service is separately identifiable from the main supply of service that he is arranging and is in the nature of fee or commission charged by him;

8. The foreign agents were acting as 'intermediaries' and the Adjudicating Authority had considered the consulting services agreement entered into by the appellant with Junaidil Kasyief, which recognises the second party an agent by nature has provided business development services as business manager and is not providing main service. The services rendered out of India and they are performed and consumed out of India. The second party raised separate bills for his services and duly paid the local VAT and taxes out of India. All such clauses in the agreement points to the fact that no services are received by the appellant, but the services were provided by agents and consumed by clients outside India.

9. Further, Rule 9 of Place of Provision of Services Rules, 2012¹¹ provides for place of provision for specified services, as under:-

"9. Place of provision of specified services

The place of provision of following services shall be the location of the service provider:-

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

[(d) Service consisting of hiring of all means of transport other than, --

(i) aircrafts, and

(ii) vessels except yachts upto a period of one month.]”

The ‘intermediary services’ are covered under Rule 9(c) and in terms thereof the place of provision of intermediary services shall be the location of the service provider. Therefore, all the expenditure incurred by the head office in India/respondent in foreign exchange for reimbursing the marketing and sales promotion expenses and other expenses through the branch office of the respondent company and all the services rendered by the foreign agents were all done through the branch office at UK, i.e. out of India are fully covered under Rule 9(c) as ‘intermediary services’. Further, the invoices placed on record shows that the expenditure is including all local taxes which intermediary agents or consultants rendered, performed and consumed services out of India. Thus what emerges is that the respondent is having its independent branch in UK, who are facilitating and providing services to their various clients and the respondent merely reimburses the expenditure to the branch, which do not fall in the category of taxable services under Section 66A.

¹¹ POPS Rules

10. The marketing and professional expenses incurred by the respondent relates to the marketing services performed and received outside India and location of service provider is also outside India which falls under the non-taxable territory in terms of Section 65B of the service tax. Consequently, the company is not liable to pay service tax.

11. As the company provides its IT services to the clients, situated outside India, the company participates in various exhibitions, conferences and events organized by foreign forums so as to attract potential customers and promote its services outside India. The location of exhibition or conference is outside India. In terms of Rule 6 of POPS, the place of provision of services provided by way of event or conference shall be the place, where the event is actually held. The advertisement and print media is non-taxable service as per Section 66D of the negative list of services. Hence, no service tax is leviable in this regard.

12. Similarly, the respondent has incurred web hosting and proxy charges in foreign currency on account of accessing web servers and data centres located outside India. The location of web service provider is not in the taxable territory and hence there cannot be any liability to pay service tax under the provisions of the Finance Act. Rule 9 of POPS clearly provides that in respect of online information and database access or retrieval service to any person in electronic form through a computer network, the place of provision shall be the location of the service provider and hence, no service tax is required to be paid by the respondent.

13. The respondent company was registered as SEZ unit till August 2012. The provisions of the SEZ Act under Section 51 provides that the

provisions of SEZ Act shall have overriding effect notwithstanding anything inconsistent in any other law or any instrument. Also in terms of Section 53 of SEZ Act, SEZ is treated as a territory outside the Customs territory of India. Further, the Central Government issued the Notification No.9/2009, as amended by Notification No.15/2009, to provide unconditional exemption to services provided in relation to authorise operations in SEZ. Considering the said provisions, the liability of service tax cannot be imposed on the respondent during the period it existed as SEZ unit.

14. The impugned order has relied on the decisions in the case of **British Airways Vs. Commissioner**¹², **Torrent Pharmaceuticals Ltd. Vs. CST, Ahmedabad**¹³ and **Infosys Ltd. Vs. Commissioner**¹⁴ —to support the proposition that a service is taxable under section 66A of the Act only when service is rendered in India. In **Milind Kulkarni**, the appellant was engaged in the business of developing software for overseas customers and rendered information technology service. The appellant had established branches for furthering its commercial objectives. The Tribunal held that branch is an entity distinguishable for purpose of the Finance Act, 1994 from its head office. Section 66A(2) is limited to being a charging section in a specific context. It is not elastic enough to govern the corporate intercourse and commercial indivisibility of headquarters and its branches. Therefore, any service rendered to other contracting party by branch as a branch of service provider would not be within the scope of Section 66A. In the

¹² 2014(36) STR 598 (Tribunal)

¹³ 2015(39)STR 97 (Tri.-Ahmd.)

¹⁴ 2015 (37) STR 862(Tribunal)

context, the observations of the Tribunal, are relevant, which is as under:-

“21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to overseas activities should, therefore, have a reason.”

(Emphasis laid)

14. Similarly, in the case of **KPIT Cummins Infosystems Ltd. Vs. Commissioner of C. EX. Pune-I**, the appellant had their branch office in three countries outside India, who were engaged in software development and consultancy services and the services were provided to overseas customers. Consideration for the services rendered abroad are received by the branches, who raised such bills on the customers. After deducting the expenditure incurred for rendering the services abroad, excess of income over expenditure of the branches is remitted to their head office of the appellant in India. The issue was whether the service rendered by the overseas branches on behalf of the parent company falls under the category of “Business Auxiliary Service”. The Tribunal held that the appellant has provided services through their branches abroad to customers located abroad and, therefore, it is not a case of the appellant receiving the services, but it is a question of rendering services abroad. The appellant has not made any payments for the receipt of any services,

whereas on the other hand, the appellant has received proceeds of the service rendered abroad by their branches. It was further held that if the services rendered abroad have been subjected to local taxation, the question of levying service tax in India on the very same transactions would not arise at all. There cannot be two taxing jurisdictions for the same transactions. Service tax is a destination based consumption tax and taxability would arise only at the place where the consumption takes place. Service has been rendered to the clients abroad and, therefore, the consumption of the service is not in India but abroad and, therefore, the question of subjecting the said activity to service tax in India does not appear to be sustainable in law. Para 5.4 of the said decision is quoted below:-

“5.4 In this view of the matter, it appears that the adjudicating authority has not considered any of the issues germane to the matter. Further, this Tribunal in the case of Intas Pharmaceuticals Ltd. (supra) held that when service is provided outside India, liability to pay Service Tax under reverse charge mechanism under Section 66A would not arise. Similarly, in the case of IDS Systems Pvt. Ltd. also this Tribunal held that, as regards reimbursement of expenditure relating to employees deputed to USA, the activities have taken place in USA and therefore, liability to Service Tax would not arise. In the case of Aztescsoft Ltd. also, this Tribunal held that, if the activities have been undertaken in a foreign territory, the question of levying Service Tax in India would not arise.”

15. In **Tata Technologies Limited**¹⁵, there was an agreement entered into between TTL, TTL Korea and TDCVL, whereby TTL and TTL, Korea rendered information technology services to TDCVL in Korea. The Tribunal noticed that VAT/GST liability has been discharged by TTL, Korea at the time of supply of services to TDCVL, therefore, subjecting the same transaction to service tax in India at the hands of TTL would not arise at

¹⁵ Final Order No.A/85807/2022 dated 25.08.2022

all. Reliance was placed on the clarification issued by CBEC that onsite services rendered abroad would not be treated as service provided from India and, therefore, the question of subjecting such transactions under service tax in India would not arise at all. The appeal was allowed as the impugned order was held to be unsustainable.

16. In case of **Infosys Ltd.** ¹⁶, Bangalore Bench has in similar facts observed as follows:-

"7.5 *If the service has been rendered in USA or Canada received by the branch office of the appellant in USA or Canada and utilised by the branch office at USA or Canada and paid for out of the foreign exchange earned, unless the Revenue is able to show that the service has been received in India, or the benefit of service rendered abroad has been received in India, the tax, in our opinion, would not be payable.*

7.6 *The taxable event when Service Tax is paid by the service receiver under reverse charge mechanism is the receipt of service and of course their liability would arise when payment is made. Unlike the case of availment of Cenvat credit where the receipt of service is required to be proved and shown to the Department by the assessee, in the case of determination of liability for Service Tax in the hands of receiver or provider, it is for the Department to show that taxable event has taken place. This issue is no longer res integra and there are several decisions in the case of Central Excise matters and Customs matters wherein it has been held that taxable even has to be proved by the Revenue. In the case of Central Excise duty, it is for the Revenue to show that manufacture has taken place and if the Revenue cannot show it, no liability arises. Therefore in this case the observation of the Commissioner that payment has been made by Infosys and when the payment is made by the branch, it has been made by Infosys through their branch and therefore obviously service has been received cannot be a conclusion and especially in this case when such an allegation is made and is rebutted, such rebuttal will have to be properly*

¹⁶ [2015 (37) STR 862 (T-Bang)],

considered and evidence shown to show why such rebuttal is not accepted which, in our opinion, has not been admitted even.

7.7 *It is not the case of the appellant that money was not paid. It is the case of the appellant that whatever consideration is received for services rendered by them abroad goes into EEFC account and the appellant is entitled to spend 75% of such receipts in EEFC account for payments abroad. Therefore the fact that appellants have made payment from EEFC account and not from funds in the hands of Infosys in India would go to show that whatever payments were made were made from export earnings only. This would mean that services were paid for by the earnings abroad. In a similar case in the case of KPIT Cummins Infosystems Ltd. v. CCE, Pune-I in the Final Order No. A/676/2013/CSTB/C-I, dated 6-3-2013 [2014 (33) S.T.R. 105 (Tri.-Mum.)], the Tribunal had taken the view that in such cases there will be no liability of Service Tax on the assessee in India as a receiver of service. In that case in Para 5.1 the Tribunal observed as follows :-*

5.1 The provisions of Section 66A are attracted only when services are received in India by a person situated in India even if such persons may have permanent establishment abroad. In the present case, the appellant has provided services through their branches abroad to customer located abroad. Therefore, it is not a case of the appellant receiving the services but it is a question of rendering services abroad. Further, the appellant has not made any payments for the receipt of any services whereas on the other hand, the appellant has received proceeds of the service rendered abroad by their branches, after deduction of expenditure incurred for rendering of services abroad. Therefore, prima facie, we are of the view that the provisions of Section 66A are not at all attracted.

The observations made by the Tribunal in the case of KPIT are similar to the one which we have also made above. There also there was no evidence to show that KPIT had received some services. In that case also, they had paid. The only difference being in that case, there was evidence to show that the

appellants had received payments for the services provided abroad and the payments made were much less than the amounts received. In our opinion, when payments are made from EEFC account, it would automatically mean that the amount received for services provided are much more than the amount payable. In any case, the appellants have produced evidence to show that according to agreements and the invoices, the payments were received for services rendered abroad, utilised abroad and paid from funds received abroad. That being the position, concrete evidence to show that the payments made by the appellants either directly or through their branches to the sub-contractors in different countries has to be linked with service received in India and in the absence of any evidence to show that such receipt of service in India, the demand for Service Tax in the hands of receiver cannot be sustained.

7.10 *In view of the above observations and discussions, we find that Revenue has not been able to show that ITSS has been received through their branch office in India and in the absence of receipt of service, in our opinion, there is no taxable event and therefore there is no liability on the receiver to pay tax. Therefore the entire demand of Rs. 132,35,71,266/- cannot be sustained and has to be set aside and is set aside."*

17. In view of the aforesaid decisions and the statutory provisions, the learned Commissioner was justified in observing as under:-

"9.8 Thus, on perusal of the agreement dated 01.10.2012 entered into by them with Rategain Inc. Ltd., 121A. High Street 64 Grove Road, Houndslow England TW3 3PT, it is noticed that the UK company shall work as branch office for Indian company. Also the UK company shall provide software solutions to the clients of various countries, to expand its business operation in global market. Further, to promote its services, the UK company may participate in various exhibitions, conference and events organized by foreign commerce industries. Also, on perusal of the copy of certificate of incorporation dated 20.09.2012 and the copies of letters from service providers addressed to the Rategain UK requesting for arranging payments for the services

provided to the clients of Rategain UK and intimating that they have forwarded a copy of invoice to the Rategain India suggests that there is force in the contention of the Noticee that the impugned amount was incurred through branch office located in UK and thus the services have been taken and consumed outside India.

9.9 Further, levy of taxes outside India is also a fact which supports the contention of the Noticee that the services were received and consumed outside India. The levy of local taxes is an important criteria to determine the consumption of the services. Since, local taxes have been levied, it is imperative that the services have been received and consumed outside India. Had the services being imported into India, the same should not have been subjected to local taxes.

9.10 It has further been contended that in order to provide IT services outside India they also procured data and information about the foreign market which provided relevant input to supply the service in more effective manner. In this connection they have incurred web hosting and proxy charges in foreign currency on account of accessing web servers and data centres located outside India. Such hosting and proxy services allow access to database servers and information in electronic form through electronic network. The web host server provides connectivity to data centres and space use for its subscribers over computer network, for example cloud hosting.

9.11 Besides above, the Noticee has provided a certification from the Chartered Accountant Dharam Raj & Co. wherein it has been specifically certified that the Noticee M/s Rategain Travel Technologies Pvt. Ltd. (formerly known as Ridann Real Estate Private Limited) (M/s Rategain Travel Technologies Private Limited is the resultant company formed post the Demerger order passed by High Court for RateGain IT Solutions Private Limited) has reimbursed the impugned expenditure pertaining to services rendered, performed and consumed outside India against the export of software by the company export sales for the aforesaid period.

9.12 Thus, from the foregoing, I find that the nature of the expenses incurred by the Noticee coupled with the fact that 96-98% of the income is from foreign clients i.e. export of service, clearly indicate that the impugned services were received and consumed outside India. It would be naïve to say that the expenses were incurred overseas for providing services in India particularly in the given facts. The marketing done outside India would obviously be for obtaining clients outside India in the region where the marketing is done. Similarly, the advertising done in an area would be done for fetching clients in that particular area for purpose of export. It cannot be said that the marketing/advertising is done in USA for clients in India. Similarly, the web hosting charges or

proxy charges incurred outside India would be for use outside India. It is not the case that such services are not available in India or Indian vendors do not provide. Contended that such services have been used for providing services outside India, I find that there is force in the contention of the Noticee that such services have been used outside India. I further find that there is no dispute that the exhibitions and conferences have also been held outside India for which expenses have been incurred and such expenses have been deducted in the SCN for the purpose of calculation service tax liability. The Noticee has also provided copies of photos and contended that the advertisement was done outside India as the same is done outside India, used and consumed outside India, in pursuit of foreign clients."

18. We do not find any infirmity in the impugned order which has been passed in conformity with the decisions of this Tribunal interpreting the statutory provisions referred above. Consequently, the impugned order is affirmed. The appeal filed by revenue is dismissed.

[Order pronounced on 9th October, 2025]

(BINU TAMTA)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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