IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Order: 22.12.2016

Appeal No.ST/299/2012-ST(SM)

(Arising out of Order-in-Appeal No. 419/S/Tax/D-II/2011 dated 21.11.2011 passed by the Commissioner (Appeals), Service Tax, New Delhi)

SITQ India Pvt. Ltd. Appellant

Vs.

CST, New Delhi Respondent

Appearance

Shri Kishore Kunal, Advocate - for the appellant
Ms. P. Bansal, Advocate

Shri R.K. Mishra, D.R. - for the respondent

CORAM: **Hon'ble Mr. V. Padmanabhan, Member (Technical)**

Final Order No. 56384/2016

Per V. Padmanabhan :

The appeal is challenging the order in appeal dated 21.11.2011.

2. The facts of the case in brief are that the appellant had filed a refund claim of Rs.6,21,423/- under Notification No. 5/2006 dated 14.3.2006. The adjudicating authority rejected the claim ex-parte, inter alia, on the ground that :

(a) Export of service does not get established as it is not known whether the service, claimed to have been exported, is taxable or not;

(b) Appellant had failed to establish the exact nature of service;

(c) Service so exported does not qualify as service under he Export of Services Rules, 2005;

(d) Condition “used in providing output services in the material period” of Notification No. 5/2006 dated 14.3.2006 has not been met with;

(e) Use of input service in the export of service is not established;

(f) There was no co-relation between FIRCs and the export invoice;

(g) Relevant original documents were not submitted.

3. The original authority vide his order dated 26.2.2010 rejected the refund claim filed by the appellant. When the issue was agitated before the Commissioner (Appeals), he upheld the impugned order passed by the adjudicating authority. Hence, the present appeal.

4. With this background, I have heard Shri Kishore Kunal and Ms. P. Bansal, ld. Advocates for the appellant and Shri R.K. Mishra, ld. AR for Revenue.

5. The ld. Counsel for the appellant submitted that the issue involved in the present case is squarely covered in their favour by many decisions. He cited the following decisions in their support:

(i) ***Microsoft Corporation India Pvt. Ltd. Vs. CST, New Delhi*** – 2014 (36) STR 766 (Tri.-Del.)

(ii) ***CST, Mumbai Vs. NV Advisory Services Pvt. Ltd.*** – 2015 (39) STR 210 (Tri.-Mum).

(iii) ***Mount Kellett Management (I) Pvt. Ltd. Vs. CST, Mumbai*** – 2015 (40) STR 165 (Tri.-Mum.).

6. The ld. DR, on the other hand, reiterated the impugned order. He emphasised the fact that even if the issue is covered by the above decisions, certain conditions of Notification No. 5/2006 have not been satisfied by the appellant. He prayed that these need to be got verified by the original authority.

7. The refund claim in question has been filed under the provisions of Notification No. 5/2006-CE(NT) dated 14.3.2006 which provides for refund of Cenvat credit in respect of input or input service used in providing output service which has been exported subject to conditions set out in the notification. The conditions stipulated that the exported output service should satisfy the Export of Service Rules, 2005 which has laid down three conditions to be fulfilled. The three conditions applicable are:

(i) Recipient is located outside India;

(ii) Such services are provided from India and used in business outside India.

(iii) Payment for such service is received by the service provider in convertible foreign exchange.

The appellant has entered into an agreement with the foreign parties in terms of which they were required to give advice on investment opportunities related to companies incorporated, headquartered or doing business in India. However, it is not disputed that the recipient of the service is located abroad. It is also not in dispute that payment for the services were received by the appellant in convertible foreign exchange. The dispute is with reference to the question whether the services rendered by the appellant are used outside India.

The nature of the service to be provided indicates that the activities which the appellant is required to undertake such as research and analysis with reference to investment opportunities in India, and related services, is to be undertaken in India. The view taken in the impugned order is that such service provided by the appellant has been used in India and hence one of the conditions prescribed in the Export of Service Rules has not been satisfied.

9. In the Tribunal' s decision in the case of ***Microsoft Corporation India Pvt. Ltd.*** (supra), the issue was identical and it was decided by Three Member Bench. The third Member on reference held as follows:

> *"**51.** Even otherwise also, I find that the disputed service is the service being provided by the appellant to his principal located in Singapore. The marketing operations done by the appellant in India cannot be said to be at the behest of any Indian customer. The service being provided may or may not result in any sales of the product in Indian soil. The transactions and activities between the appellant and Singapore principal company are the disputed activities. As such, the services are being provided by the appellant to Singapore Recipient company and to be used by them at Singapore, may be for the purpose of the sale of their product in India, have to be held as export of services.*
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> ***52.** Apart from the above, we note that there was identical issue was before the Bench of the Tribunal in the case of Gap International Sourcing (India) Pvt. Ltd. [2014-TIOL-465- CESTAT-Del]. Vide its detailed order and after considering the various decisions of the higher Court as also various circulars issued by the Board, it stand held that services of identifying the Indian customers, for procurement of various goods on behest of foreign entity is the service provided by a foreign entity and such service provided by a person in India is consumed and used by a person abroad. It has to be treated as export of services. I also take note of the Tribunal's decision in the case of Vodafone Essar Cellular Ltd. v. CCE, Pune [2013-TIOL-566-CESTAT-Mum = 2013 (31) S.T.R. 738 (T)] wherein it stand held that when the services is rendered to third party at the behest of the assessees' customers, the service recipient is assessees' customer*

and not the third party i.e. his customer's customer. As such, the services being provided at the behest of the foreign telecommunication services provided to a person, roaming India were held to be constituting export services under the Export of Services Rules, 2005. The said decision stand subsequently followed by the Tribunal in the case of CESTAT, Mumbai v. Bayer Material Science Pvt. Ltd. v. CST, Mumbai [2014-TIOL-1064-CESTAT-Mum]. Business Auxiliary services provided by the assessee to their members located outside India by marketing their product in India was held to be export of services inasmuch as the service was held to be provided to the foreign located person who was also paying to the assessee on such services in convertible foreign exchange.

53. *Learned DR appearing for the appellant has not been able to brought to my notice any other decision of any other Court which is contrary to the law declared in the above referred decision. Accordingly, I agree with the learned Member (Technical) that the services provided by the appellant are covered by the Export of Service Rules, 2005 and are not liable to service tax."*

10. On the basis of the above findings of the third Member, the Tribunal held that the services performed are to be considered as used outside India

11. In the case of ***NV Advisory Services Pvt. Ltd.*** (supra), ld. Single Member has taken identical views. It is to be noted that in this case the services involved were of similar nature, i.e. providing advisory services in connection with financial investment opportunities in India, which is in the nature of management consultancy service.

12. In view of the above, the services rendered by the appellant to the foreign service receivers are to be considered as used outside India. In respect the other two conditions prescribed in the Export of Service Rules, there is no dispute that these have been satisfied. Consequently, following the ratio of the above judgements the services in question are eligible for refund under Notification No. 5/2006. However, the ld. DR has pointed out that some of the conditions specified in the notification such as non-submission of relevant documents, the export invoices, use of input service in the export service etc. have not been annexed with original refund application. For this purpose, I remand the matter to the original authority to decide the matter in the light of the above findings but directed to pass an order within a period of three months from receipt of this order after giving an opportunity to the appellant.

15. Appeal is disposed of in the above terms.

(Dictated & pronounced in open Court)

(V. Padmanabhan)
Member (Technical)

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