IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/55666/2013 [SM]

[Arising out of Order in Appeal No. OIA-208-ST-D-II-2012 dated 30.10.2012 passed by the Commissioner (Appeals), Central Excise & ST, Delhi]

Target Sourcing Service India Pvt. Limited ….Appellant

vs.

Commissioner of Central Excise & S.T., Indore ….Respondent

Appearance:

Rep by. Shri Harish Bindumadhavan, Advocate for the Appellant
Rep by. Shri M.R. Sharma, DR for the Respondents

CORAM:

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

Date of Hearing : 24.01.2017

FINAL ORDER NO. 50553/2017 - **CU (SM)**

Per V. Padmanabhan

The present appeal has been filed against the Order-in-Appeal dated 30.10.2012 passed by Commissioner (Appeals), Central Excise & ST, Delhi.

2. The appellant is engaged in providing product sourcing and domestic import inspection service to Target Sourcing Services Asia Limited (Hong Kong) (hereinafter referred as TSS Asia for short). The appellant is subsidiary of TSS Asia for whom they spot trends, design apparel, accessories and house-wares, arrange for their production

and overseas retail delivery. For such outsourcing, they have received consideration from TSS Asia in convertible foreign exchange. The appellants being 100% exporter of specified services are unable to utilize the Cenvat credit availed on the input services procured by them and used for provision of output services. Accordingly, they filed refund claim under Rule 5 of Cenvat Credit Rules, 2004 read with Export of Services Rules, 2005. The dispute pertains to the period July 2009 to January 2010 and the refund claim filed to the extent of Rs. 36,14,123/- was rejected by the Original Authority and such rejection was upheld by the impugned order. Hence the present appeal.

3. With the above background, heard Shri Harish Bindumadhavan, ld. Advocate for the appellant and Shri M.R. Sharma, ld. DR for the Revenue.

4. The refund has been disallowed mainly for the following reasons:-

(i) The services rendered do not qualify the term Export as stipulated in Export of Services Rules, 2005.

(ii) Some of the input services do not qualify the definition of input service in terms of Rule 2(ℓ) of Cenvat Credit Rules, 2004.

5. The ld. Advocate for the appellant has countered both the ground with following reasoning that service exported to TSS Asia by the appellant has been classified under Business Auxiliary Services falling under Section 65 (105 (zzb). In terms of Export of Service

Rules, 2005, export of Business Auxiliary Services is covered under Rule 3(i) (iii) requires the following conditions :-

(i) The service recipient should be located outside India.

(ii) Consideration for the services rendered must be received in convertible foreign exchange; and

(iii) Such services is delivered outside India and used outside India.

He further relied upon the following case laws, wherein the identical issue stands considered and decided in respect of export of services:-

(a) Microsoft Corporation (I) (P) Limited vs. CCE, New Delhi – 2014-TIOL-1964-CESTAT-DEL.

(b) Gap International Sourcing (India) Pvt. Limited vs. CST, Delhi – 2015 (37) STR 757 (Tri. Del.)

6. He submitted that the input services for which Cenvat credit have been availed have not been held to be not covered by definition of Rule 2(a) of Cenvat Credit Rules. Accordingly, the refund of service tax credit cannot be disallowed by taking the view that there is no nexus between input service and the services exported. He placed reliance on the decision of the Tribunal in the case of CST, Delhi vs. Convergys India Pvt. Limited – 2009 (16) STR 198 (Tri. Del.), which was upheld by the Hon'ble P&H High Court. Accordingly, he submitted that the refund claim merits to be allowed.

7. Ld. DR submitted supported the impugned order. He also pointed out that though the payment for the services has been

received in convertible exchange, the lower authorities have recorded that there is no co-relation between the export invoices and FIRCs.

8. The appellant has undertaken the service of outsourcing for its principal situated in Hong Kong. The consideration for such services have been received from the principal abroad in convertible foreign exchange. Since they were not in a position to utilize the accumulated Cenvat credit, refund claim has been filed in terms of Rule 5 of Cenvat Credit Rules. The present dispute is on disallowance of such refund claim. One of the main grounds for disallowing such credit is that the services are rendered in India. The activities such as rendering various merchandise for the principal has been carried out in India. In the impugned order, the ld. Commissioner has taken the view that appellant has failed to satisfy the condition that such service is provided from India and used outside India. I find that similar issue has come up before the Tribunal in the case law relied upon by the ld. Advocate. In the case of Gap International Sourcing (India) Pvt. Limited (supra), the Tribunal had occasion to examine the agreement between Gap International Sourcing (India) Pvt. Limited and the principal situated in USA. The services rendered were similar to the services rendered by the appellant and are related to procurement of goods. In Para 8.3 of the said decision, the Tribunal examined the term "recipient" and observed as under:-

> ***"8.3*** *Though the term 'recipient' in respect of a service is not defined in the Finance Act, 1994 or in the rules made thereunder, the gap has to be filled by construction and on the analogy of the transaction of sale of goods, the service recipient in a transaction of the provision of service, has to be treated as the person -*

(a) on whose instructions the service has been provided and who is obliged to make payment for the provision of service; and

(b) whose need is satisfied by the provision of service - it may be his personal need or the need of his business or need to meet some obligation to some person."

Following the above, the Tribunal has gone on to decide that the services rendered to principal in USA ,who had paid for the services in foreign exchange, has to be considered as export of service. Since the facts in the present case are identical, I am inclined to follow the decision of Division Bench and conclude that the Business Auxiliary Services rendered by the appellant, to their principal in Hong Kong is to be considered as, service provided from India and used outside India.

9. Now, I turn to the ground that some of the input services do not qualify the definition of input services in terms of Rule 2(*ℓ*) of Cenvat Credit Rules, 2004. The ld. Counsel relied upon the Tribunal decision in the case of Convergys India Pvt. Limited (supra), in which identical issue had also been examined. The Tribunal in that case examined the Rule 5 of Cenvat Credit Rules and concluded as follows:-

"6.7 *From the above, it is clear that there cannot be two different yardsticks, one for permitting credit and the other for eligibility for granting rebate. Whatever credit has been permitted to be taken, the same are permitted to be utilized and when the same is not possible there is provision for grant of refund or as rebate. Without questioning the credit taken, the eligibility to rebate cannot be questioned."*

I follow the same decision and conclude that this is not a valid ground for rejection of refund claim.

10. It is not in dispute that the payment for the services rendered to the foreign principal has been received in foreign exchange. However, in the impugned order, ld. Commissioner was not satisfied with the documents submitted by the appellant before him. He observed that FIRCs produced by the appellant do not display the invoice number against which the remittance has been received. He observed that the advance received against future service cannot be related to the services for which the refund claim has been submitted. He has further observed that the appellant has failed to satisfy the conditions in CBEC Circular No. 112/6/2009 dated 12.03.2009.

Ld. Counsel submits that statement of foreign exchange received for various export invoices have been certified by statutory auditor and the appellant is in a position to submit the certified statements to convince the fact that foreign exchange is relatable to foreign export invoices. Since the receipt of foreign exchange has not been explained convincingly to the ld. Commissioner (Appeals), I find it proper to remand the matter to the Original Adjudicating Authority who will extend opportunity to the appellant to submit necessary documents certified by the statutory auditor to satisfy the requirement in this connection.

11. In view of the above, I hold that the appellant will be entitled to refund under Rule 5 of Cenvat Credit Rules, 2004. However, for verification of receipt of foreign exchange and connected matters, the case is remanded to the Original Adjudicating Authority with directions to finalize this long pending issue within two months from

the date of receipt of this order. The appellant may be permitted to make necessary submissions to support their case.

12. Appeal is allowed by way of remand.

[Dictated and pronounced in the open Court]

(V.Padmanabhan)
Member (Technical)

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