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

COURT NO. III

DATE OF HEARING : 03/02/2017.
DATE OF DECISION : 10/02/2017.

Service Tax Appeal No. 3973 of 2012 and 55440 of 2013

[Arising out of the Order-in-Original No. 156/ST/PKJ/Adj/2012 dated 17/09/2012 passed by The Commissioner (Adjn.), Central Excise, New Delhi.]

M/s Sumitomo Corporation India Pvt. Ltd. Appellant

Versus

CST, Delhi Respondent

and

CST, Delhi Appellant

Versus

M/s Sumitomo Corporation India Pvt. Ltd. Respondent

Appearance

S/Shri V. Laxmikumaran and Rachit Jain, Advocates – for the appellant/respondent.

Shri Sanjay Jain, Authorized Representative (DR) – for the Respondent/appellant.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50777-50778/2017 Dated : 10/02/2017

Per. B. Ravichandran :-

These are two appeals against the same impugned order dated 17/09/2012 issued by Commissioner (Adjudication), New

Delhi. The assessee/appellant is aggrieved by the confirmation of service tax demand alongwith imposition of penalties by the Original Authority. The Revenue is aggrieved by the finding in the impugned order with reference to benefit granted by applying formula prescribed under Rule 6 (3D) of Cenvat Credit Rules, 2004.

2. The brief facts of the case are that the appellant/assessee is engaged in trading of goods in India and were also providing various services to M/s Sumitomo entities worldwide. They were registered with the Service Tax Department under various categories of taxable services. After audit of their accounts by the officers of the Department, the Revenue entertained a view that the appellant/assessee did not discharge service tax liability on some of their activities and did not follow the proper procedure for reversal of credit in terms of Rule 6 of Cenvat Credit Rules in respect of trading activities. There are three issues on which the dispute arose. The first one is regarding service tax liability of the appellant/assessee under Business Auxiliary Service (BAS) on the commission received from foreign entities for services provided in relation to importation of goods in India. The second issue is relating to service tax liability under BAS for service fee received from foreign entities for services provided in relation to business of foreign entities. On both these issues a service tax demand of Rs. 11,54,25,700/- was confirmed by the Original Authority. The third issue is relating to reversal of credit to be made by the appellant/assessee on credit of input services used in relation or

attributable to trading activities. A demand of Rs. 25,53,340/- was confirmed on this account.

3. On the first two points of dispute, the learned Counsel for the appellant submitted that the appellant/assessee provided various services to overseas entities for facilitation of importation of goods into India. These activities are mainly relating to transmitting proposals, delivering contract sheets, delivering transportation documents, providing information to foreign entity regarding schedule of vessels, cargo readiness, loading unloading and also dealing with communications receipt to these transactions. The appellant/assessee received commission for these services from overseas entities. Apart from these activities they also provided information on business potential of various sectors and industries in India; provided assistance while submitting bids for the projects in India and facilitated communication with customers with regard to Yen-credit fund scheme of foreign entity. It is the submission of the learned Counsel that these services were qualified as export under the Export of Service Rules, 2005 and no service tax is payable by the appellant/assessee.

4. The learned Counsel elaborated the applicable legal provisions under Export of Service Rules, 2005 during the relevant period and submitted that the services provided by appellant/assessee falls under third category and in such cases when the services are provided in relation to commerce or

industry, the recipient of service is to be located outside India. The payment should be received in convertible foreign exchange. Reference was made to Board Circular dated 24/02/2009 which clarified that services falling under Category III shall be considered to have been used outside India if the benefit of service accrues to a recipient outside India. The impugned order erred in holding that the services provided by the appellant/ assessee do not qualify as export as the business promotion of the foreign entity is performed in India. The reliance placed on a interim stay order of the Tribunal in **Microsoft Corporation (I) (P) Ltd. vs. CST, New Delhi** reported in **2009 (15) S.T.R. 680 (Tri. – Del.)** is misplaced as final order in the said appeal is, in fact, in favour of the appellant.

5. The learned Counsel for the appellant/assessee relied on the decision of the Tribunal in **Paul Merchants Ltd.** reported in **2012 – TIOL – 1877 – CESTAT – DEL.**, wherein the Tribunal held that when the services were provided as per the instruction of a person located abroad, the destination of service has to be treated abroad. The destination has to be decided on the basis of place of consumption and not place of performance. In the present case, the learned Counsel submitted that the services have been provided to foreign entities as per the agreement entered into and the beneficiary is such foreign entities. The amount as consideration for such services was also paid by the said foreign entities in convertible foreign exchange. Therefore, the services rendered by the appellants are squarely covered by

the Export of Service Rules and there is no service tax liability on them. The learned Counsel for the appellant/assessee relied on various case laws which are mentioned and discussed later in this order.

6. Regarding reversal of Cenvat credit on input services attributable to trading activities undertaken by the appellant/ assessee the learned Counsel for appellant/assessee submitted that the appeal by Revenue is without merit during the material time. There is no specific provision regarding quantification of amounts liable to be reversed in terms of Rule 6 (3A) of Cenvat Credit Rules. In the absence of specific formula the Original Authority followed the provisions of Explanation I (c) below Rule 6 (3D) of Cenvat Credit Rules, inserted vide Notification 13/2011 – CE (NT) dated 31/03/2011. Though the appellant/assessee have certain reservations against the correctness of quantification made by the Original Authority they are not contesting this matter in their appeal. However, they are contesting the proposals made in the appeal filed by the Revenue against the quantification made by the Original Authority. Reliance was placed on the decision of Hon'ble Bombay High Court in **Mercedes Benz India Pvt. Ltd. vs. CCE, Pune – I** reported in **2016 (41) S.T.R. 577 (Bom.)**.

7. The learned AR reiterated the findings in the impugned order with reference to the tax liability of the appellant/assessee under the category of BAS. Regarding quantification of amount to

be reversed under Rule 6 of Cenvat Credit Rules, it is submitted that the impugned order is not correct in adopting the formula introduced in 2011 for the previous period. Learned AR submitted that the explanation under Rule 6 (3D) of the Cenvat Credit Rules cannot be made applicable retrospectively. Further, the Board vide letter dated 29/04/2011 clarified that trading is an exempted services and hence credit of any inputs or input services used exclusively for trading cannot be availed for the period prior to 01/04/2008. Credit of common services should be restricted for utilization upto 20% of total duty liability as provided during the relevant period. Accordingly, he submitted that the Original Authority should not have adopted the formula available in 2011 for the period prior to the issued of Notification 13/2011 – CE (NT) dated 31/03/2011.

8. We have heard both the sides and perused the appeal records. On the first two issues relating to liability of appellant/ assessee for service tax under the category of BAS we note that the service tax liability and the activities similar to the ones undertaken by the appellant/assessee were subject matter of decision by the Tribunal in earlier cases. In **Paul Merchants Ltd.** (supra) it is recorded that Export of Service Rules, 2005 are in accordance with Apex Court's ruling to the effect that service tax is a value added tax which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but a charge on the consumer. We note in the present case, the recipient of

service are foreign entities and they are the consumers of these services provided by the appellant/assessee from India. The various persons in India to whom the goods were sold by the foreign entities or from whom various details and information were collected were not to be considered as recipient of service provided by the appellant/assessee. In **Airbus Group India Pvt. Ltd. vs. CST, Delhi** reported in **2016 – TIOL – 2312 – CESTAT – DEL.**, the Tribunal after referring to the decisions in **Paul Merchants Ltd.** (supra), **Microsoft Corporation (I) (P) Ltd. vs. CST, New Delhi** reported in **2014 (36) S.T.R. 766 (Tri. – Del.)** and **Gap International Sourcing India Pvt. Ltd.** reported in **2014 – TIOL – 465 – CESTAT – DEL.** held that what constitutes export of service is to be determined strictly in accordance with the Export of Service Rules, 2005. It is the person who requested for the said service and is liable to make payment for the same, who has to be treated as recipient of service and not the person affected by the performance of the service. The destination has to be decided based on place of consumption not the place of performance of service in the case of Category III, Business Auxiliary Service. The appellant/ assessee were engaged in promoting market for foreign entities in India this will amount to export of service.

9. In view of the settled position of law as discussed above, we find no merit in the impugned order in so far it confirms the demand against the appellant under BAS.

10. Regarding the third issue with reference to quantification of amount to be reversed from Cenvat credit in terms of Rule 6 (3A) of Cenvat Credit Rules, we note that impugned order discussed the issue in detail and held that in terms of Explanation 1 (c) under Rule 6 (3D) of Cenvat Credit Rules the quantification can be made. Accordingly, the value of exempted service was arrived at by the Original Authority as difference between sale price and cost of goods sold or 10% of the cost of goods sold whichever is more. Accordingly, he arrived at the Cenvat credit to be reversed by the appellant in terms of Rule 6 (3). Admittedly, the formula adopted by the Original Authority was not part of the provisions under Cenvat Credit Rules, 2004 during the material time. However, trading to be considered as "exempted service" is inserted by an explanation under Rule 2 (e) of Cenvat Credit Rules. The said insertion clearly states that it is for removal of doubts. Accordingly, in the absence of any other statutory formula to arrive at the quantum of Cenvat credit to be reversed on common input services, we find no impropriatory in the decision of the Original Authority in this regard. Regarding the contention of the Revenue that the appellant/assessee should not be allowed to utilize more than 20% of the total duty liability we note that there is no legal backing for such assertion. Further, the proposal made in the show cause notice that the reversal of credit should be on the basis of proportion between value of traded goods and service income earned by the appellant/assessee is not supported of any legal provisions. Now

the Revenue is pleading on a different ground and has not placed any support on the allegation made in the show cause notice. We find no support for the proposition that the reversal of credit should be based on value of traded goods. The methodology adopted by the Original Authority is fair and justified in view of the reasons recorded therein. We find no merit in the appeal filed by the Revenue in this regard.

11. Accordingly, in view of the above discussions and findings, the appeal filed by the appellant/assessee is allowed. The appeal by Revenue is dismissed.

(Order pronounced in open court on 10/02/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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