IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/353/2012-ST [DB]

[Arising out of Order-in-Appeal No. 447/S.Tax/D-II/2011 passed by the Commissioner (Appeals), Central Excise, Delhi-I]

M/s.Haldor Topsoe India Private Limited …Appellant

Vs.

C.S.T., New Delhi … Respondent

Present for the Appellant : Mr.P.K. Sahu, Advocate
Present for the Respondent: Mr.Ranjan Khanna, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing/decision:22/03/2017

FINAL ORDER NO. 52581/2017

PER: B.RAVICHANDRAN

The appellant is contesting the order dated 16.12.2011 of Commissioner (Appeals), Delhi-II. The appellants are engaged in providing various engineering service to M/s.Haldor Topsoe, Denmark. The foreign Company has Indian clients, licensed to use the technology and process in manufacture. The appellant, in terms of agreement with the said foreign company, were engaged in providing various consulting engineering services to the foreign company in connection with their licensed units in India. They also availed credits on various input services in terms of Cenvat Credit Rules, 2004. As they could not utilize the credit they have filed rebate claims in terms of Rule 5 of the Export of Services Rules, 2005. The present dispute is relating to their eligibility for such claims. The original authority rejected the appellants claims for rebate mainly on the ground that the services provided by the appellant appear to fall under the category of 'intellectual property service' and not under 'engineering consultancy service' as claimed by the appellant. Further, it was held that the services were rendered in India and cannot be categorized as export. On appeal, vide the impugned order, the ld. Commissioner (Appeals) held that classification of service is vital and in the present case the claims field by the appellant suffers because of it could not be conclusively determined as category (iii) services covered by Export of Services Rules, 2005. He further held that the services rendered by the appellants are in India.

2. The ld. Counsel for the appellant submitted that the scope of service rendered by them to the foreign client is clearly mentioned in the impugned order at para 3. The facts are not disputed. Perusal of the terms of agreement will clearly show that they are essentially engaged in engineering consultancy in respect of the licensed units of the foreign client, in India. The impugned order did not give a finding about the classification of taxable service. The rejection of the

claims was only on the basis of the original authority's finding, who held the classification under IP services. The appellants did not get any possession of any intellectual property during execution of the work. The licensed unit in India may get the IP rights from the foreign client. The appellants are only providing consultancy service with reference to the erection and commissioning of the licensed units in India. There work is mainly of consultancy side not involving the physical activity of erection and commissioning. The services are clearly classifiable under consulting engineering service and, based on the location of the recipient it has to be held as export of service. The ld. Counsel submitted that the eligibility of their input services and payment of service tax on such input services and other requirements regarding foreign exchange realization etc. can be established with the documentary evidence by the appellant. He relied on various decided cases to support his claim regarding classification of service as well as export of service.

3. The ld. A.R. supported the findings in the impugned order. He submitted that the conditions mentioned in Notification No.12/2005 – ST are to be strictly complied with. Further, the original authority held that the appellants are engaged in taxable activity in India and this is in connection with setting up of licensed units of foreign supplier, in India. Hence, there is no export of service.

4. We have heard both the sides and perused the appeal records.

5. The scope of work carried out by the appellant as recorded in the impugned order is as below:-

> *"The clauses of this agreement relating to its contractual obligations and scope of the work assigned to the appellant are reproduced below:-*
>
> *2.0 OBLIGATIONS OF HTIN*
>
> *2.1. HTIN shall upon request of HTAS provide engineering services (including but not limited to the preparation of project proposals, engineering packages, equipment designs for licensed unit and providing supervision services during implementation and test runs of LICENSED TECHNOLOGY in LICENSED UNITS in India and elsewhere.*
>
> *2.2 Unless otherwise agreed from case to case in writing, HIN shall be remunerated for its services and assistance under sub-clause 2.1 of this Agreement as specified in sub-clauses 6.2 of this Agreement.*
>
> *3.0 SCOPE OF WORK BY HTIN*
>
> *3.1 The scope of work to be done by HTIN, in respect of implementation of contracts with engineering contractors or operating companies undertaken by HTAS, may include the following"*
>
> *(a) Proposals for new projects and for modifications of process plants based on LICENSED TECHNOLOGY and THIRD PARTY TECHNOLOGY.*
>
> *(b) Feasibility studies concerning modification or extension of existing process plants based on*

LICENSED TECHNOLOGY and THIRD PARTY TECHNOLOGY.

(c) Design of LICENSED UNITS.

(d) Design for modification of existing process plants based on LICENSED TECHNOLOGY and Third Party Technologies.

(e) Design for extension or conversion of existing process plants into LICENSED UNTIS by incorporation of LICENSED TECHNOLOGY.

(f) Procurement and inspection services relating to LICENSED UNITS.

(g) Consulting services relating to process plants and LICENSED UNITS.

(h) Technical assistance services for erection, pre-commissioning, commissioning and test runs of Licensed Units and other process plants.

(i) Technical services and supervision services for loading of HTAS catalysts in Licensed Units and other process plants."

6. The plain reading of the above terms of agreement will clearly show that the services rendered by the appellant will fall under the category of taxable services provided or to be provided to any person by a consulting engineer in relation to advise, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering [Section 65 (105) (g)]. We also refer to the trade notice of the Department dated 04.07.1997 which explained the scope of tax entry. We note that the appellants are not

involved in any service of intellectual property and do not come in possession of any such IPR. The terms of the agreement do not provide for payment of any consideration for transfer of any such IP Rights. The appellants are engaged in providing consultancy with reference to licensed unit in India for and on behalf of foreign entity. As such, based on the location of the recipient of service, the service is to be considered as exported. The benefit of service accrues to a foreign company and the said company pays consideration for such service. In this connection, we refer to the decision in the case of Airbus Group India Pvt. Ltd. vs. C.S.T., Delhi – 2016 (45) STR 120 (Tri. Delhi.) the Tribunal observed as below :-

> ***"5.*** *On the first issue relating the appellants liability under BAS it is now a well settled legal position that the service involved is in fact exported out of India and there is no service tax liability. In M/s. Paul Merchants Ltd. v. CCE, Chandigarh reported in 2013 (29) S.T.R. 257 (Tri. - Del.) it is held that what constitutes export of service is to be determined strictly w.r.t. the provisions of Export of Services Rules, 2005. It is the person who requested for the 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. Thus, when the person on whose instructions the services, in question, has been provided and is located abroad, the destination of services, in question, has to be treated abroad. The destination has to be decided on the basis of place of consumption, not the place of performance of service in case of Business Auxiliary Service. In Microsoft Corporation (I) Pvt. Ltd. v. CST, New Delhi reported in 2014 (36) S.T.R. 766 (Tri. - Del.), the Tribunal held that the Business Auxiliary Services of promotion of market in India for foreign company amount to export of services. The Export of Services Rules, 2005 is considered as*

destination based consumption tax in accordance with declaration of law by the Hon'ble Supreme Court in All India Federation of Tax Practitioners v. Union of India reported in 2007 (7) S.T.R. 625 (S.C.). In Gap International Sourcing (India) Pvt. Ltd. v. Commissioner reported in 2015 (37) S.T.R. 757 (Tribunal), it is held that the Tribunal followed the similar ratio w.r.t. interpreting the Export of Service under BAS. We find that the decided case laws, as discussed above, and the factual position as reflected by the agreements entered into by the appellants clearly show that the impugned order regarding service tax liability of the appellant on these services is not legally sustainable."

7. Since consulting engineering service also is a category (iii) service as mentioned in Export of Services Rules, 2005, the location of recipient of service is relevant. As such, following the principles already laid down in various decided cases, we hold that the appellants were engaged in providing services, which are exported out of country.

8. In view of the above discussion and analysis, we find that the appellant's eligibility to refund claim under Rule 5 of the Export of Services Rules, 2005 read with Notification 12/2005- ST has to be examined. The ld. Council submitted that they have all the supporting evidences regarding payment of service tax on various eligible input services, receipt of foreign exchange from the service recipient and due discharge of tax on various output services. He submitted that they will establish with supporting evidence their eligibility to the claim for refund.

9. We note that the impugned order is not legally sustainable in view of the discussion recorded above. Accordingly, we set aside the impugned order. We remand the matter to the original authority for examination of the claims afresh, keeping in view of the above observations. The appellants shall be provided opportunity to submit all evidence in support of their claims. The appeal is allowed by way of remand.

[Dictated and pronounced in the open Court]

(B. RAVICHANDRAN)	**(S.K. MOHANTY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Anita