CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

BENCH-DB

COURT –II

Service Tax Misc. Application No.ST/M/55543/2014-ST [DB] in Service Tax Appeal No.ST/58244/2013-ST [DB]

[Arising out of Order-in-Original No.61-62/2012-13 dated 31.03.2013 passed by the Commissioner of Central Excise, Delhi-II]

M/s. J. Mitra and Company Pvt. Ltd. …Appellant

Vs.

C.S.T., New Delhi … Respondent

Present for the Appellant : Mr.B.L.Narasimhan, Advocate
Mr.Narendra Singhvi, Advocate
Present for the Respondent: Mr.Amresh Jain, D.R.

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

Date of Hearing: 24.03.2017

Pronounced on :31.05.2017

FINAL ORDER NO. 53592/2017

PER: ASHOK K. ARYA

Appellant, M/s. J. Mitra and Company Pvt. Ltd. is in appeal against Order-in-Original No. No.61-62/2012-13 dated

31.03.2013 passed by the Commissioner of Central Excise, Delhi-II. Hereunder two demands of Rs.7,54,67,276/- and Rs.60,255/- alongwith equivalent penalty have been confirmed against the appellant.

2. The brief facts are that :-

(i) While the appellant- assessee interalia received commission income of Rs.7,47,96,885/- from foreign client in foreign currency for rendering marketing services in India for sale/export of their products to various customers in India, the assessee did not pay any service tax on commission income treating the same as "export of services". But Revenue claims that the said services provided by the assessee are covered under "Business Auxiliary Service" (BAS) as defined in Section 65 (19) (i) read with Section 65 (105) (zzb) of the Finance Act, 1994 and are accordingly liable to service tax.

(ii) Further during the course of audit, Revenue observed that assessee – appellant received hiring charges for hiring-out industrial endoscopes on which service tax is payable under the category of 'supply of tangible goods for use service' The assessee appellant gave equipment on rent to various clients for a day-or-two and received rent for the same. Revenue's stand is that the activity undertaken by the assessee falls under "Supply of Tangible Goods Service" as defined under Section 65 (105) (zzzzc) of the Finance Act, 1994, and therefore, the income received as rent on hiring out the industrial endoscope to their clients is liable to service tax. The amount of service tax involved here is Rs.60,255/-.

3. With above background, we have heard both sides represented by ld. Counsels, Shri B.L. Narasimhan, Shri Narender Singhvi and Shri Amresh Jain.

4. From the facts on record and the submissions from both the sides, it appears that the issues involved can be stated as follows:-

(i) Whether Business Auxilliary Services (BAS) rendered by the assessee to their foreign client qualifies as export of service?

(ii) Whether hiring-out industrial endoscopes would qualify as 'supply of tangible goods for use service' or not?

We shall take up these issues for discussion and decision below:-

5. The issue- 'whether rendering of business auxiliary service by assessee to foreign client qualifies as export of service'?:-

In the present case the appellant has been appointed by M/s. Olympus Singapore PTE Ltd., Singapore as their exclusive agent in India for promotion of sales and services of M/s.Olympus. The service which is being called BAS rendered by the appellant is for their client, namely M/s.Olympus and its consumption is also by their clinet M/s.Olympus, who is based in Singapore. Merely because the promotion of sales and services of M/s.Olympus Singapore PTE Ltd. is for the Indian consumers, it does not mean that BAS rendered by the assessee appellant is consumed within the country, when in-fact they are rendering service to their client, namely M/s.Olympus Singapore PTE Ltd. Thus, consumption of services rendered by the assessee is in foreign land i.e. in Singapore by the service recipient, M/s. Olympus.

5.1 From the facts on record it appears that the subject matter is covered by the Tribunal's decisions in the cases of *Paul Merchants Limited vs. Commissioner* – 2013 (29) STR 257 (Tri.-Del.) and *M/s.Gap International Sourcing (India) Pvt. Ltd. vs. CST* – 2014 –TIOL-465-CESTAT-Del. The Tribunal in the case of *GAP International* (supra) has 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.

Since service is normally an activity performed by a person A for some other person B for some consideration and this activity by A may affect some other persons C, D and E in some manner, good or bad, the persons C, D and E are the person affected by the service, they cannot be treated as service recipient the service recipient would be B who has paid for the service and whose need has been satisfied by the provision of service. The only situation where in respect of some service provided by A which was ordered and paid for by B, a person C who has benefited from the service, can be treated as service recipient, when B has acted purely as an agent of C. Therefore in respect of services covered by Rule 3 (1) (iii) of the Export of Service Rules, 2005, which are the service in relation to business or commerce, the same provided by a person in India for use in relation to business or commerce would be treated received outside India and hence, exported, if -

(i) the services have been provided on the instruction of a person located outside India for use in his business ;

(ii) payment for those services has been made by him in convertible foreign exchange and it is he who

has used the service to satisfy the need of his business.

It would be absolutely wrong to say that the services like advertisement, publicity, marketing etc. provided by a person in India on the instructions of a corporation located outside India for use in its business and the payment for which has been made by that corporation located outside India, have been received/consumed in India, just because the same have been performed in India.

8.4 Thus the Export of Service Rules, 2005 and Taxation of Service (provided from outside India and received in India) Rules, 2006, read-with Section 66A of the Finance Act, 1994 are fully in accordance with the law laid down by the Apex Court in case of All India Federation of Tax Practitioners (supra) and Association of Leasing and Financial Service Companies (supra) that service tax is a value added tax, which, in turn, is a destination based consumption tax in the sense that it is not a charge on business but is a charge on the consumer. Therefore what constitutes export of service has to be decided strictly in accordance with the provisions of Export of Service Rules, 2005 and for this purpose, in case of services in relation to business or commerce covered by Rule 3 (1) (iii), the term 'service recipient' has to be understood in the sense as explained in para 8.3 above.

8.5 In the context of export of service, once a service, on the basis of Rule 3 (1) (i), 3 (1) (ii) or 3 (1) (iii) of the Export of Service Rules, 2005 has been determined to have been received outside India i.e. consumed outside India, the conditions in Rule 3

(2) regarding their delivery outside India and use outside India are automatically satisfied as, as explained in para 8.1 above, in the context of services, the receipt, consumption and delivery of the service is the same. Therefore the condition regarding delivery of service being outside India and use of service being outside India prescribed in Rule 3 (2) of Export of Service Rules, 2005 were superfluous and for this reason only, these conditions were deleted, first, the condition regarding delivery of service being outside India was deleted w.e.f. 1/3/07 and thereafter the condition regarding use of service being outside India was deleted w.e.f. 27/2/10. These amendments, therefore, have to be treated as clarificatory amendments. Therefore if some service covered by Rule 3 (1) (iii) of Export of Service Rules, 2005, i.e. service in relation to business or commerce, has been provided by a person in India to a company located abroad, not having any branch or establishment in India, for use in its business, the service provided in India shall be treated as export, if the payment has been received in convertible foreign exchange. The performance of such service in India, would not make them received/consumed in India, if beneficiary user/recipient of said service provided in relation to business or commerce, who has paid for these service and has used the service in his business, is located abroad. The position would be different if the company located abroad who has paid for the service, also has some branch/ project in India and the service provided in India is meant for that branch/project - only in that case, the consumption of service would be in India and the

service would be taxable in India. But if the recipient company located abroad, has no branch or project or establishment in India and the service covered by Rule 3 (1) (iii) provided in India is meant for use in the business of the company located abroad, it would be export of service.

8.6 In view of the above discussion, the Board's Circular No. 141/10/2011 dated 13/5/11 clarifying that for the period prior to 27/2/10, the condition regarding 'used outside India' also needs to be independently satisfied for availing the benefit of export and that "effective use of advertisement services shall be the place where the advertising material is disseminated to the audience though the actual benefit to my finally accrue to the buyer who is located at another place" is not only not in accordance with the provisions of Rule 3 (1) of the Export of Service Rules, 2005, but is also contrary to the law laid down by the Apex Court in the case of All India Federation of Tax Practitioners (supra) and Association of Leasing and Financial Service Companies (supra), as a service which has not been consumed in India, cannot be taxed in India.

9. In this case, M/s GAP, U.S.A. do not have any branch or project or business establishment in India. The service in relation to procurement of goods being provided by the appellant are entirely meant for M/s GAP, U.S.A. and the service in question, - business auxiliary service, covered by Rule 3 (1) (iii) of the Export of Service Rules, 2005 have obviously been used by M/s GAP, U.S.A. in relation to their business located abroad. Therefore these services have to be treated as delivered outside India and

> *used outside India and since payment for the service has been received in convertible foreign exchange, the same would have to be treated as exported out of India. The impugned order passed by the commission is an absurd order contrary to the provisions of Export of Service Rules, 2005."*

5.2 Following the observations made in the case of *GAP International Sourcing (India) Pvt. Ltd.* (supra) and *Paul Merchants Ltd.* (supra), in this regard, the impugned order is set aside and the appeal is allowed with consequential benefit, if any.

6. Now we take up the issue – whether hiring of endoscope would qualify as 'supply of tangible goods for use service' or not?:-

During the hearing it has been submitted by the ld. Counsel for the appellant that they were hiring out industrial endoscope(s) independently as well as along with a technical person to handle the said endoscopes at the site. However, the ld. Counsel for the Revenue submits that the documents given by the assessee indicate that endoscopes are always given alongwith operator and, therefore, effective control and possession of endoscopes remain with the assessee; that is why it is not a sale but is covered under the category of 'supply of tangible goods for use service' for which, service tax is liable to be paid. The main point is that if effective control and possession of goods has been passed on to the customer, then it may come under the category of sale otherwise the subject activity would be covered under the category of "supply of tangible goods for use service". Each and every transaction, therefore, is required to be examined independently. If in any-one transaction, no operator has accompanied the endoscope and the customer handles the endoscope taking its effective control and possession, then it may be called a temporary sale. But if in any transaction, endoscope is accompanied by an operator, where the effective control and possession lies with the operator, such transaction would be covered by the 'service of supply of tangible goods for use'. Therefore, this issues needs examination transaction-wise at the level of original adjudicating authority, who shall decide the matter after giving necessary opportunity of personal hearing and of submission of documentary evidence to the assessee. The matter, consequently, is remanded to the original adjudicating authority for fresh decision.

6.1 Further as support in this regard, we refer to CBEC Circular No. 334/1/2008 TRU dated 29.02.2008, which gives certain clarifications with reference to the "service of supply of tangible goods for use" Para 4.4. of the said circular is given below:-

> ***4.4 Supply of tangible goods for use:***
>
> *4.4.1 Transfer of the right to use any goods is leviable to sales tax/ VAT as deemed sale of goods*

[Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."

The Circular is clarifying that wherever supply of tangible goods for use involves transfer of both possession and control it is deemed sale leviable to VAT /Sales Tax, then the said activity would not be liable to service tax under 'supply of tangible goods for use service'. The circular mentions, that if the item/ instrument has been supplied for use but without any legal right of its possession and effective control, then the use of the item is to be treated as 'service' and not the 'sale' and in that case service tax will be liable to be paid under the category of 'supply of tangible goods for use service'.

6.2 We seek support also from Hon'ble Supreme Court's decision in the case of *BSNL vs. Union of India* 2006 (2) S.T.R. 161 (S.C.), which mentions – 'what are the attributes for treating a transaction as transfer of rights to use the goods?' The Hon'ble Supreme Court in the said case on this issue interalia observes as under:-

> ***"90.*** *The entire infrastructure/ instruments/ appliances and exchange are in the physical control and possession of the petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.*
>
> ***91.*** *To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes :*
>
> *a. There must be goods available for delivery;*
>
> *b. There must be a consensus ad idem as to the identity of the goods;*
>
> *c. The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;*
>
> *d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the*

> *right to use" and not merely a licence to use the goods;*
>
> *e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*
>
> ***92.** In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service.*

6.3 In the light of above discussion and observation of Hon'ble Supreme Court, we note that wherever transaction involves transfer of possession and effective control of the goods, then it is a 'sale' and the activity will not be subjected to serviced tax; and where possession and effective control has not been transferred, then the transaction will be covered in the category of 'service of supply of tangible goods for use'.

6.4 Thus, the subject transactions are to be verified by the original authority, whom we are remanding this matter, then only it can be determined whether there is a 'service' or a 'sale'.

7. In the result, the impugned order is set aside and the appeal is allowed in above terms.

[Pronounced in the open Court on 31.05.2017)

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita