CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Appeal No. 57820 of 2013

(Arising out of Order-in-Original No. 23/2012-13 dated 28.02.2013 passed by the Commissioner of Central Excise, Delhi-II)

DATE OF HEARING : 27.02.2018
DATE OF DECISION : 27.02.2018

M/s Research in Motion India Pvt. Ltd. ….. **Appellants**
(Rep. by Sh. H.B. Madhavan, Adv.)

VERSUS

CCE, Delhi-II ..… **Respondent**
(Rep by Sh. Amresh Jain, DR)

CORAM : **HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT**
HON'BLE MR. B. RAVICHANDRAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 50856/ 2018

PER B. RAVICHANDRAN :

The present appeal is filed by the assessee-Appellants against the Order-in-Original No. 23/2012-13 dated 28.02.2013 passed by the Commissioner of Central Excise, Delhi-II.

2. The brief facts of the case are that, the assessee-Appellants are mainly engaged in promoting the business of the principal, M/s Research in Motion Singapore Pte. Ltd. (RIM, Singapore), in connection with the products and services for the period October, 2005 to

February, 2010. The assessee-Appellants received consideration pursuant to the Service Agreement with RIM, Singapore. The Revenue considered the said receipt as a taxable amount for promotion and marketing of products and services of the client under the category of 'Business Auxiliary Service' in terms of Section 65(19) of the Finance Act, 1994. Further, the assessee-Appellants availed Cenvat Credit of various input services. Certain credits availed during the period 2006-07 and 2008-09 were sought to be denied on the ground that certain premises were not registered with the Department thereby making those input services used in such premises ineligible for credit. Third dispute is with reference to non-payment of interest on delayed payment of Service Tax with respect to book adjustments made in May, 2008 between the assessee-Appellants and RIM, Singapore. The Revenue held a view that, though the book adjustment itself was considered as receipt of taxable consideration as per the amendment carried out in Section 67 w.e.f. 10.05.2008, the entries for such adjustments available on the date of such amendment should be considered for tax liability and any delay in discharging the Service Tax, will attract interest. The original authority adjudicated all these disputes and issued the present impugned order. On all the grounds, he held against the assessee-Appellants and confirmed the Service Tax liability and denied the Cenvat Credit and also demanded the interest on the delayed payment of Service Tax.

3. With this background, we have heard Shri H.B. Madhavan, learned counsel for the assessee-Appellants and Shri Amresh Jain, learned DR for the Department.

4. The learned counsel submits on the following lines :

(i) Regarding tax liability on the services rendered by the assessee-Appellants in terms of the agreement dated 28.07.2004 with RIM, Singapore, for promotion and marketing, technical marketing assistance relating to services, there is no Service Tax liability on them. These services were exported to RIM, Singapore, who received the benefit, consumed the services and paid the consideration for such services. He also relied upon the decision of the Hon'ble Delhi High Court in the case of **Verizon Communication India Pvt. Ltd. vs Asstt. Commissioner of Service Tax, Delhi-III,** 2017-TIOL-1863-HC-DEL-ST, and the decision of the Tribunal in the case of **Microsoft Corporation (I)(P) Ltd. vs CST, New Delhi,** 2014 (36) STR 766 (T-Del.). In fact, the impugned order relied upon the interim order of the Tribunal in the case of **Microsoft Corporation (I)(P) Ltd.** (supra), which was not sustained in the final order;

(ii) Regarding receipt of foreign exchange for such exported services, it is submitted that they have received foreign exchange through the bank and drawn the money in Indian rupee in India as no Indian rupee can be transferred from Singapore to assessee-Appellants in India. The transfer of consideration for export of services should all alone be done in foreign exchange only. Singapore dollar, being a convertible foreign exchange, fulfils the conditions of Rule 3 of Export of Service Rules, 2005. Alternatively, it is submitted that, even if it is considered that for the period prior to 01.03.2007 the amount received by the assessee-Appellants is in Indian rupee, the Tribunal in the case of **Nipuna Services Ltd. vs CCE, Cus & ST,** 2009 (14) STR 706, has held that, the amendment carried out in Rule 3(2) of Export of Service Rules, 2005 is clearly prospective and there is no condition of payment to the exporter in convertible foreign exchange prior to 01.03.2007;

(iii) On the issue regarding denial of Cenvat Credit for unregistered premises, he submits that it is only a technical lapse and the Hon'ble High Courts of Madras, Allahabad and Karnataka in various decisions have held that such denial is not legally sustainable. These cases are :

(a) **CST, Chennai-III vs Scionspire Consulting Services,** 2007-TIOL-798-HC-MAD-ST;

(b) **CST, Noida vs Artenta India Pvt. Ltd.,** 2016-TIOL-2741-HC-ALL-ST; and

(c) **CST, Bangalore-II vs Tavant Technologies,** 2016-TIOL-441-HC-KAR-ST.

(iv) On the issue regarding interest liability, he submits that the ruling of the Hon'ble Delhi High Court in the case of **The Pr. Commissioner of GST, Delhi vs McDonalds India Pvt. Ltd.,** 2017 (10) TMI 514, is squarely covering the issue. The Hon'ble High Court has held that, the amendment in Section 67 is not retrospective and as per Rule 6, it is the date when the amount is credited/debited is relevant and not the fact that the amount remains in the books.

5. The learned DR for the Revenue supported the findings of the original authority. He submits that the assessee-Appellants did not bring in detail the actual transfer of foreign exchange from Singapore bank to the bank of assessee-Appellants in India. Further, he submits that the receipt of consideration in convertible foreign exchange is a pre-condition to consider any service as exported out of India. In the present case, such condition should be made applicable for all the period under dispute.

6. After hearing both sides and on perusal of the material available on record, we note that the assessee-Appellants have provided marketing and promotion service which is, admittedly, covered under 'Business Auxiliary Service' (BAS). BAS is a category (iii) service for which the provision of service is determined by the location of service recipient. In the present case, admittedly, the services are provided in pursuant to the agreement between the assessee-Appellants and RIM, Singapore, and the beneficiary is RIM, Singapore, who paid the consideration for such services. The legal position by now is well settled in such situation that the services are to be considered as exported out of India. The decisions of the Hon'ble Delhi High Court and the Tribunal in the case of **Microsoft India (I) (P) Ltd. (**supra), are on similar set of facts where the services are rendered to foreign recipient, though performed in India. Accordingly, following the settled legal position, we find no merit in the impugned order on this issue.

7. Regarding denial of Cenvat Credit for unregistered premises, the three decisions relied upon by the assessee-Appellants are applicable to the facts of the present case. Accordingly, following the ratio of the said decisions (supra), we hold that the Cenvat Credit cannot be denied.

8. Regarding the interest liability, we note that the book entries made between the associate companies is one of the criteria to decide the receipt of consideration for the transaction between the associate companies. Such provision was brought in under Section 67 w.e.f 10.05.2008. Examining the similar dispute for delayed payment of interest, the Hon'ble Delhi High Court in the case of **McDONALDS India Pvt. Ltd. (**supra) has held that the provisions were prospective in application and cannot apply to the book adjustments already made prior to the said amendment. That being the case, we find that no interest liability can be accrue on the entry already made as debit or credit, but available in the books on the date of amendment. Accordingly, the impugned order is not sustainable on this count.

9. We also note that in pursuant to the very same agreement, the assessee-Appellants' claimed the refund under Rule 5 of the Cenvat Credit Rules, 2005 which was allowed by the Commissioner (Appeals). The Revenue has filed an appeal against the said order. From the record, we find that the said appeal of the Revenue was dismissed by the Tribunal vide Final Order No. 50837/2017 dated 09.02.2017.

10. In view of the above discussion and analysis as well as the settled legal position and also the decision of the Tribunal in the assessee-Appellants' own case (supra), we hold that the impugned order is not legally sustainable. Accordingly, the same is set aside and the appeal is allowed.

11. In the result, the appeal filed by the assessee-Appellants is allowed.

(Dictated & pronounced in the open court)

(JUSTICE DR. SATISH CHANDRA)
PRESIDENT

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

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