CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO.-2

Service Tax Appeal No. 50362 of 2016-[DB]

[Arising out of Order-in-Original No. 99/ST/APPL-I/2014 dated 23.12.2015 passed by Commissioner (Appeals-I) Service Tax, New Delhi]

National Engineering Industries Limited **Appellant**
Birla Tower, 8th Floor, 23 Barakhabma Road,
New Delhi-110001

Versus

The Commissioner (Appeals-I) of Service Tax,
New Delhi **Respondent**
The Commissioner (Appeals-I) Service Tax, New Delhi
Room No. 208, 17-B, IAEA House, MG Marg, I P Estate,
New Delhi-110002

Appearance
Shri Bimal Jain, Advocate - for the appellant
Shri G R Singh, Authorized Representative - for the respondent

CORAM: **Hon'ble Mr. Anil Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of Hearing/Decision: 30.04.2019

Final Order No: 51232 /2019

Per Bijay Kumar:

1. The present appeal is filed against the Order dated 23.12.2015 passed by the ld. Commissioner (Appeals) service Tax, Delhi by which the order dated 29.04.2014 passed by the Adjudicating Authority has been upheld, confirming the demand of service tax amounting to Rs.

40,62,816/- along with interest at appropriate rate under the provisions of Section 73 of Finance Act, 1944 (for short 'the Act') and Section 75 of the Act respectively. In addition to demand of service tax a penalty of equivalent amount has also imposed on the appellant under Section 78 of the Act.

2. The issue involved in this case is as to whether the activities of the 'project and marketing service' undertaken by the appellant in India on behalf of its overseas clients, who do not have their offices in India are covered under the 'Business Auxiliary Service' and if so, whether the activities undertaken in India for their foreign clients can be terms as export of services under Export of Service Rules, 2005 (for short 'the Rules').

3. Brief facts of the case are that the appellant is registered with the Service Tax Department under 'Renting of Immovable Property Service', 'Management or Business Consultancy Service', 'Consulting Engineers Service', 'Manpower Recruitment or Supply Services', Erection, Commissioning and Installation Service, 'Business Auxiliary Service', 'Business Support Service' and 'Work Contract Service'. The appellant provided project and marketing services to their overseas principals, namely M/s Dr. Mueller AG, Switzerland, Control Y Montage Industrials (CYMI), Spain and GGS Spectrum Ltd., Norway, who do not have their offices in India. During the audit undertaken by the

officers of the service tax, New Delhi on October 19, 2010, October 26, 2010 and November, 2010 for the period from 2005-06 to 2009-10 it was revealed that the appellant has received certain amounts from their foreign principals as stated above and did not pay any service tax on amount so received. Therefore, it was felt by the Revenue that the appellant was required to pay the service tax on such activities undertaken on behalf of their foreign principals who do not have office in India. These services were mainly consumed in India. The appellant has treated the services rendered towards export of service in terms of Export of Services Rules, 2005 (for short '2005 Rules') and did not pay any service tax during the aforesaid period. As per the Revenue, the activities undertaken by the appellant for providing service to their principals which were consumed in India do not qualify as export of services as per Rules 3 of 2005 Rules, and hence taxable under the category of 'Business Auxiliary Service' under the Act. Accordingly, a Show Cause Notice dated 13/04/2011 was issued to the appellant, which was after following the due process of law was adjudicated by the Original Adjudicating Authority vide order dated 29.04.2014. On appeal, the Commissioner (Appeal), by impugned order dated 23.12.2015 upheld the order dated 29.04.2014 passed by the ld. Adjudicating Authority.

4. Ld. Advocate on behalf of the appellant, made the following submissions;

(i) The appellant provided services during period April 01, 2005 to April 18, 2006 which qualified as export of service in terms of Rule 3 (3) of 2005 Rules during the said period. It is also submitted that in the aforesaid period the essential conditions required for treating the service as 'export of services' were when the recipients of services do not had any commercial or industrial establishment or any office in India. In this case service has been provided and used in India and the recipients of such service were located outside India. Therefore, the appellant has correctly treated these services towards the export of services in terms of 2005 Rules.

(ii) Even for period from April 19, 2006 to February 26, 2010 the impugned services provided by the appellant to its overseas clients qualified as export of services as per Rules 3 (1) (iii) read with Rule 3 (2) (a) of amended 2005 Rules on the same ground.

(iii) For the period from April 19, 2006 to February 28, 2007, it was submitted that in addition to what has been stated, the conditions specified under Rule 3 (2) of Export Rules, were also required to be satisfied in order to treat the impugned services as export of service which required that the taxable services to be delivered outside India and also used outside India to qualify as export of service. The condition regarding receipt of payment towards the export services in all these cases remain same that is in the form of convertable foreign exchange.

(iv) Reliance was also placed on CBEC Circular No. 111/5/2009 dated February 24, 2009, the phrase, "use outside India has been treated as benefit accrued outside India". Hence from the combined reading of the provisions which existed during the impugned period the service provided by the appellant, although covered under the taxable category of 'Business Auxiliary Service' but would qualify as export of services in terms of Rule 3 (3) Export Rules and Rule 3 (1)(iii) read with 3(2) of Export of Rules for period 01.04.2005 to February 26,2010.

(v) It was further submitted that there are catena of decisions in respect of services provided to overseas clients situated outside India to promote and marketing their products in India as export of services under 2005 Rules. Merely, because the end users of the impugned service exported to overseas clients, are located in India, the same could not be a reason to hold that no export of services has taken place, for which reliance was placed on the following decisions;

- **Microsoft Corporation (I) (P) Ltd. vs Commissioner of Service Tax, New Delhi (2014-TIOL-1964-CESTAT-DEL)**

- **Yamazaki Mazak India Pvt Ltd. vs Commissioner of Customs and Excise, Pune-I (2018 (12) GSTL 66 (Tri.-Mumbai)**

- **Barco Electonics System Pvt Ltd. vs CC, C, EX & ST, Noida (2016 (45) STR 532 (Tri.-All.)**

- **Commr. of C.E. Jaipur vs National Engineering Industries Ltd. (2018 (11) GSTL 235 (Raj.)**

Accordingly, it was submitted that the impugned order is not sustainable and be set aside in appeal.

5. Ld. Departmental Representative, on behalf of Revenue would submit that the impugned order is sustainable in view of the finding contained therein.
6. We have considered the submissions made by the Ld. Advocate, on behalf of the appellant, and ld. Departmental Representative, on behalf of the Revenue and also perused the case records.
7. The issue to be decided in this case has been already framed at paragraph 2 above.
8. We find that in view of the various submissions made by the appellant and in terms of 2005 Rules and also the various ruling by the Hon'ble High Court and this Tribunal the issue is no more *res integra* and settled in favour of the appellant. It has been held in these decisions that the services provided by the appellant to their foreign principals, who have paid for such services in convertable foreign exchange and has satisfied both the conditions as contained under the

Rule 3 of Export of Services Rules, 2005 will be entitle for the benefit of export of services. We also drew our support in holding so from the decision of Hon'ble High Court of Rajasthan in the appellant's own case, wherein it is held that promoting of the sales to the product of principal by the agent in India would not be liable to pay the service tax as the same would amount to export of services. The relevant paragraph of the order is reproduced as under;

> "4. The facts of the case are that proceeding is initiated in view of Show Cause Notice issued under C. No. V(H) ST/Adj-I/49/2007/1483-15 dated 21.05.2007 to M/s National Engineering Industries Ltd., Khatipura Road, Jaipur (hereinafter also referred to as "the assessee") who are holding service tax Registration No. 101/ST/AMC/JPR-II/03, and were engaged in providing services of Commission Agent falling under the category of Business Auxiliary Services under Chapter V of the Finance Act, 1994. They appeared to have not paid service tax amounting to Rs. 49,99,770/- during the period from January, 2006 to December, 2006 in contravention of provision of Section 68 of the Finance Act, 1994 read with Rule 6 of the service tax Rules, 1994 as per facts detailed below. The assessee were not paying service tax on the commission received in foreign currency for the service rendered in India, the details of commission were called for from the assessee, who vide their letter dated 22.01.2007 submitted that they had received commission (amounting to Rs. 4,41,43,881/-) in foreign currency for the service rendered in India for the period from January, 2006 from M/s NTN Corporation, Singapore, NTN Corporation, Japan and NTN Corporation, USA."

9. Accordingly, we set aside the impugned order and allow the appeal with consequential benefit as per law.

(Operative part of the order pronounced in open court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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