

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.78030 of 2018

(Arising out of Order-in-Appeal No.245/S.Tax-II/Kol/2018 dated 20.03.2018 passed by Commissioner of CGST, Howrah Commissionerate, Kolkata.)

M/s. Singhanian & Sons Private Limited

(3D, Duckback House, 41, Shakespeare Sarani, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata South Commissionerate

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

Shri Arvind Baheti, Chartered Accountant for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75871/2023

DATE OF HEARING : 27 June 2023

DATE OF DECISION : 28 June 2023

Per : P.K. CHOUDHARY :

Service Tax Appeal No. 78030/2018 is directed against the Order-in-Appeal No. 245 dated 20 March 2018 upholding the Order of the adjudicating authority confirming the demand of Service Tax of Rs. 48,32,442/- along with interest and penalty.

2. Briefly stated the facts of the case are that the Appellant is engaged, inter alia, in the business of export of iron ore fines during the period October 2007 to March 2012 (the 'relevant period'). The Appellant had availed the services of foreign brokers/commission agents for procuring export orders in respect of iron ore fines as also the services of testing agencies such as, Mitra S K, Hongkong, SGS and TCRC at the discharge Port for demonstrating the quality

parameters of the exported consignments. However, no service tax was discharged on the said two services. Pursuant to an investigation, proceedings were initiated vide Notice dated 22 April 2013, for recovery of service tax on a reverse charge basis under the following two taxable categories:

Sl. No. 1 & 2	Taxable Category	Period Involved	Tax Demand (Rs.)
(A)	Business auxiliary service in respect of export orders procured from foreign agents.	October 2007 to March 2011	42,30,957/-
(B)	Technical inspection and certification service	October 2007 to March 2012	6,01,485/-

2. In the course of investigation, the Appellant had deposited a sum of Rs. 2,70,879/- under business auxiliary service and Rs. 87,916/- under technical inspection and certification service. The tax demand proposed in the Notice was confirmed vide 'OIO' dated 28 July 2014 and the amount of Rs. 2,70,879/- paid during investigation was appropriated. Further, an appeal filed against the said 'OIO' was also rejected vide 'OIA' dated 20 March 2018, which is the subject matter of challenge in this proceeding.

3. The Ld. Authorized Representative appearing for the Appellant submits that they were under the bonafide belief that services of foreign broker/commission agent as also the technical inspection and certification services having been rendered outside India were not

taxable on a reverse charge basis in view of a legal opinion obtained by them in March 2008. In any event, both the services were specifically exempted during the relevant period having been used for export vide parent Notification No. 41/2007-ST dated 6 October 2007. Although, the exemption was refund based, the situation was entirely revenue neutral and under these circumstances, no intent to evade could be attributed on the part of the Appellant so as to justify invocation of extended period. Reference in this regard, is invited to the following decisions:

- (i)** Wanbury Limited reported in 2019 (21) GSTL 154.
- (ii)** Hyundai Motor India Private Limited Vs. Commissioner of CEX & ST, LTU, Chennai reported in [2019 (29) GSTL 452 (Tri.- Chennai) & 2020 (32) GSTL J154 (SC)] (Refer Sl. No. 9 of Index).
- (iii)** Commissioner of CEX, Chennai-IV Vs. Tenneco RC India Private Limited reported in 2015 (323) ELT 299 (Madras HC) (Refer Sl. No. 10 of Index).
- (iv)** Delhi International Airport Limited Vs. Commissioner of CGST, Delhi reported in 2019 (24) GSTL 403 (Tri.- Delhi) (Refer Sl. No. 11 of Index).

4. On merits it is submitted that technical inspection and certification services fall under Rule 3(ii) of the Taxation of Services (provided from outside India and received in India) Rules, 2006 and therefore, not taxable as undisputedly the services were not performed wholly and partly in India which is pre-requisite under Rule 3(ii) *ibid*. The Ld. Departmental Representative reiterates and supports the findings of the 'O-I-A' dated 20 March 2018.

5. Heard both sides and perused the appeal records.

6. The issue before us relates to the alleged non-payment of service tax on a reverse charge basis under taxable categories **(i)** business auxiliary services in respect of export orders procured from foreign agents and **(ii)** technical inspection and certification services provided at the discharge Port

by non-resident service provider. At the outset, we find that the tax demand under both taxable categories have been confirmed by invoking the extended period of limitation. It is well settled that the burden of proving malafide i.e. an intent to evade is upon the revenue as held by the decision of the Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. reported in 2013 (288) ELT 161. In the instant case, the Appellant had specifically averred before the adjudicating as well as the first appellate authority that they acted upon a legal opinion dated 20 March 2008 wherein they were advised about the non-taxability of the said services, which aspect has neither been dealt with nor controverted by the revenue. Therefore, the plea of bonafide belief appears to be available to the Appellant in light of the decision of this Tribunal in Delhi International Airport case (supra) set out below.

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(d) Again as far as non-taxability of Advance Development Cost is concerned, appellant had acted on legal opinion given by PWC which had clearly opined in 2007 that since what has been developed was infrastructure for common facilities and no exclusive rights has been vested in one or any developer. Therefore, such ADC was not taxable as renting of immovable property. The reasoning given by the PWC in its opinion dated 9-7-2007 continues to be valid even after amendment in the definition of renting of immovable property with effect from 1-7-2010, which brought even the vacant land within the scope of renting of immovable property services. Therefore, we hold that extended period of limitation cannot be invoked in the facts and circumstances of the case in hand."

7. Moreover, it is also not in dispute that both these services (i.e., business auxiliary services and technical inspection certification services) were used for export and therefore, exempted vide Notification No. 41/2007-ST dated 6 October 2007 albeit by way of refund. Therefore, there is considerable force in the contention of the Appellant that the situation would

have been revenue neutral and under such circumstances, no intention to evade can be attributed on the part of the Appellant. We find that in an identical fact situation, this Tribunal had dropped the tax demand raised with respect to foreign commission agency services as well as technical inspection and certification services in Wanbury Limited case (supra). The period involved therein was also after 18 April 2006. Relevant para of the said decisions are set out below.

"2. The primary submissions of the appellant are thatin relation to business auxiliary services, it is his contention that the services were engaged in relation to export of goods and, therefore, entitled to the refund in terms of Notification No. 41/2007-S.T., dated 6th October, 2007 and that the decision of the Tribunal in Genom Biotech Pvt. Ltd. v. Commissioner of Central Excise & Customs, Nashik [2016-TIOL-529-CESTAT-MUM = [2016 \(42\) S.T.R. 918](#) (Tri.-Mumbai)] has held

'... .. Services that are undeniably rendered by a foreign 'service provider' in relation to the goods sold abroad cannot be presumed to be covered by the legislative intent to tax. To tax a service using the legal fiction of import and then reimburse that tax because the service was not required for any activity within the country is an exercise in futility and is contrary to the objectives of and means devised for export promotion by the State.'

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6.Learned Authorised Representative submits that the claim of revenue neutrality will not sustain as the confirmed demand pertains to the period after 18th April 2006 and having been duly discharged by them, is an admission of they being aware of the tax liability.

The claim for exemption as provider of 'business auxiliary service' does not lie as the conditions in the notification had not been fulfilled. It is submitted that the arguments against the levy of tax as recipient of the banking and financial service has not been placed before the lower authorities and hence no evidence has been submitted.

It is clear that the impugned order has determined tax 8. liability on the commission that was paid by the appellant to agents situated outside the country. It is also not in doubt that their services were utilised in connection with the promotion of their products which involved exports out of India and, consequent to such exports, the issue stands settled by the decision of the Tribunal in re Genom Biotech Pvt. Ltd. in near identical circumstances. Accordingly, the levy of service tax on an activity rendered by an entity located abroad and in relation to the goods after their arrival in those countries is not liable to tax."

8. In light of the above decision also the demand beyond the normal period cannot sustain and deserves to be set aside. Even on merits, we find that technical inspection and certification services were rendered at the discharge Port outside India and therefore could not be said to have been imported under Rule 3(ii) of the Taxation of Services (provided from outside India and received in India) Rules, 2006 being covered by Section 65 (105) (zzi) of the Finance Act, 1994 and there was no scope to invoke Rule 3(iii) of the said Rules.

9. In view of our discussions above, the entire demand with respect to Foreign Commission Agent for the period October 2007 to March 2011 is hit by limitation and the demand under Technical Inspection and Certification for the period October 2007 to March 2012 is not sustainable on merits and limitation.

10. Accordingly, the impugned 'O-I-A' is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 28 June 2023.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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