IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No. 76772 of 2016

(Arising out of Order-in-Appeal No.94/ST-II/KOL/2016-17 dated 21.07.2016 passed by Commissioner of Central Excise (Appeals-II), Kolkata.)

M/s Tega Industries Ltd.,
(147, Bolck-G, New Alipore, Kolkata-700053)

...Appellant

VERSUS

Commr. of Service Tax-II, Kolkata
(2nd Floor, 180, Shantipally, Rajdanga Main Raod, Kolkata-700107)

...Respondent

APPERANCE :
Ms. Ashwini Chandrasekhar, Advocate & Ms. Prity Agarwal, Consultant for the Appellant
Mr. S.S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER(JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No. 76194/2023

DATE OF HEARING : 11.07.2023
DATE OF DECISION :11.07.2023

PER K. ANPAZHAKAN :

Tega Industries Limited (hereinafter referred to as "Appellant") are engaged in the business of manufacture and distribution of wear resistant rubber products and products for mineral processing industries at its plant located in Joka and Kalyani in the state of West Bengal. The Appellant is registered with Service Tax authorities under the categories of Erection, Commissioning and Installation Services, Business Auxiliary Services, Transport of Goods by Road Services, etc.

2. During the period 2007-08, 2008-09 and 2009-10, the Appellant had incurred certain common expenditure for itself and its group company, HOSCH Equipment Pvt. Ltd. (hereinafter referred to as 'HOSCH'). For the purpose of recovery of the expenditure such as salary, insurance, ERP computer packages i.e. SAP license etc., debit notes were raised by the Appellant on HOSCH. The Appellant believed that the said recovery has been made towards expenditure incurred on behalf of group

companies and not towards rendition of any services, no service tax was payable and accordingly, not collected any service tax on the same.

3. The Appellant avails the benefits of CENVAT credit of service tax paid on input services as per the provisions of CENVAT Credit Rules, 2004. The Appellant has their branch offices for seeking export orders in respect of goods manufactured in India. Since the said services are in relation to Appellant's business, service tax paid thereon has been availed as CENVAT Credit.

4. A Show Cause Notice dated 03.12. 2010 was issued to the Appellant demanding Service tax of Rs. 10,45,392/- along with interest and penalty. The said Notice was adjudicated by the Ld. Addl. Commissioner, who confirmed the demands made in the Notice along with interest and penalty equivalent to the total duty confirmed vide Order in Original dated 22.12.2012. On appeal, the Commissioner(Appeals) confirmed the said demands vide Order-in-Appeal dated 21.07.2016. Aggrieved against this impugned order, the Appellant has filed the present appeal.

5. In the impugned order, the demands have been confirmed on the following three issues:

(i) Service tax of Rs. 5,46,532/- has been confirmed along with interest on the ground that the Appellant has provided management consultancy services to HOSCH and not discharged service tax on the amount collected from HOSCH during the period 2007-08, 2008-09 and 2009-10.

(ii) Service tax of Rs. 3,83,750/- has been confirmed along with interest on the amount of Rs. 31,36,335/- so paid to the foreign agencies, for receiving advertisement services during the aforesaid period.

(iii) demanded reversal of irregularly availed and utilized CENVAT Credit on input service related to foreign branch offices to the tune of Rs. 1,15,110/- , along with interest.

(iv) Rs. 10,45,392/- has been imposed as penalty, under Section 78 of the Finance Act, 1994.

6. In their Grounds of Appeal, the Appellant made the following Submissions:

(i) They have merely claimed the share of cost attributable to Hosch Equipment Pvt. Ltd. It is a widely held practice in group companies to procure goods and services commonly so as to get the benefit of competitive prices from the vendor. Mere issuance of 'Debit notes' for recovery or sharing of cost of ERP software package cannot lead to the

conclusion that the appellant has rendered Management Consultancy services to Hosch Equipments and therefore, the decision in case of Tata Technologies Ltd. vs. CCE, reported in 2007(8)STR 358(Tri-Mum) relied upon by them is clearly applicable in the instant case.

(ii) The decision in the case of Sara Services & Engineering Pvt. Ltd. Vs. CCE, reported in 2009(13) STR 177(Tri-Del) is also squarely applicable to them, wherein it has been held that claiming reimbursement to common expenses such as salary, insurance etc. between group companies cannot be termed as 'Management Consultancy Service'.

(iii) Merely for the reason that exemption on services provided by Management Consultancy services provided in respect of ERP software was withdrawn w.e.f. 01.03.2006, it would not per se make an activity liable to service tax when the said activity does not constitute Management Consultant service. Hence, the reasoning stated by the Ld. Adjudicating authority that the exemption was withdrawn from the aforesaid date is of no relevance.

(iv) In the case of Glaxo Smithkline Pharmaceuticals Ltd vs. CCE Mumbai- IV 2006(3) STR 711 (Tri. Mumbai) the Tribunal, Mumbai has held that service tax is not leviable on expenses such as freight, travelling power & fuel, rent etc recovered by the assessee from its group company. The said decision has been affirmed by the Hon'ble Bombay High Court.

(v) Mere raising of debit notes on the sister company, Hosch Equipments, would not make the appellant liable to service tax under the head Management Consultancy services and therefore, the demand of Rs. 5,46,532/- confirmed by the impugned order is liable to be set aside.

(vi) In terms of Rule 3(ii) of the Taxation of Services (provided from outside India and received in India) Rules, 2006 (for brevity, "Import Rules"), the taxable service mentioned in section 65(105) (zzo) of the Act i.e. Business Exhibition Service can be said to have been received in India only when such services are performed in India. Thus, even prior to 01.03.2011, Business Exhibition Service performed outside India was not taxable. The exemption granted vide Notification No. 05/2011-ST dated 01.03.2011 was a specific exemption granted to the Business Exhibition Services held outside India from the whole of Service Tax which does not in any way restricts the earlier exemption provided in Import Rules. It has been held by the judiciary that Business Exhibition Services performed outside India would not be subjected to service tax

in terms of the Import Rules. In this regard, the Appellant placed their reliance on the following cases:

(i) Positive Packaging Industries Ltd. vs. Commissioner. of C. Ex., Raigad 2015 (39) S.T.R. 219(TRI. – Mumbai),

(ii) K.G.Denim Ltd Vs Commissioner of Service Tax, Salem. 2015(37) STR 616(Tri-Mad),

(vii) There cannot be any question of levying service tax on the amount of Rs. 9,94,868/- being the foreign remittance made to the overseas branches of the appellant to meet their advertisement expenses received outside India inasmuch as it is similar to the other remittances made by the appellant for expenses like salary, travelling, conveyance etc. and levying service on the same would amount to services provided to one self. The Appellant submitted a Chartered Accountant Certificate which certifies the nature of foreign remittances made by them under specific heads. Further, the certificate also justifies that the total foreign remittances made by them during the period 2007-08 to 2009-10 amounts to Rs. 21,71,252/- and not Rs. 31,36,335/- and therefore, demand of service thereon is not sustainable.

(viii) In case of Coca Cola India Pvt. Ltd. Vs. CCE it has been held that the term 'business' is an integrated activity and not confined or restricted to mere manufacture of product. Activities in relation to business can cover all the activities related to the functioning of a business. The CENVAT Credit in dispute in the present appeal, has been utilized by the Appellant for the functioning of business as a whole and hence the CENVAT Credit cannot be disallowed on the basis of territorial boundaries. The Delhi Tribunal in the case of HCL Comnet Systems & Services Ltd. vs. CCEx, Noida 2015(40)STR621 (Tri. –Del.) has held that services received by a establishment in India in respect of its office/branch outside India would qualify for input service inasmuch as the onus to fulfill the requirements relating to the overseas office rests upon the Indian establishment.

(ix) The Appellant has branch offices outside for soliciting its customers in India and that the said branches are very much part of the Indian entity for such expenditure is made from India. The Tribunal Bangalore in the case of Mangalore Refinery & Petrochmicals Ltd. vs. CCE & ST, Mangalore 2015(319) ELT 121 (Tri. -Bang.) has held that for smooth functioning of the business of manufacturing/marketing and other like activities, the manufacturer may open offices/'establishments elsewhere and CENVAT Credit on input service cannot be denied by saying that the

function of those offices are not in relation to the manufacture of final product.

(x) Extended period of limitation not sustainable in this case as there is no fraud or suppression on the part of the Appellant in respect of non payment of service tax. Also, the entire exercise would be revenue neutral. In this regard, reliance has been placed on the judgment of the Hon'ble Madras High Court in the case of CCE Chennai-IV vs. Tenneco RC India Pvt. Ltd 2015(323)ELT 299 (Mad.) following the judgment of Hon'ble Supreme Court.

7. The Ld.A.R. reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. With respect to the demand of service tax of Rs.5,46,532/- on Management Consultancy service is concerned, we find that the Appellant has claimed the share of cost attributable to Hosch Equipment Pvt. Ltd. This fact has not been disputed in the impugned order. We find that there is no evidence brought on record that the Appellant has rendered Management and Consultancy service to their Sister concern. The demand has been raised only on the basis of the 'Debit Notes' raised by the Appellant to their Sister concern. We agree with the contention of the Appellant that mere raising of 'debit notes' on the Sister concern, Hosch Equipments, would not make the Appellant liable to service tax under the category of Management Consultancy services . From the impugned order, we find that the Appellate Authority has not accepted the contentions of the Appellant only on the ground that they have failed to adduce any documentary evidence to prove that M/s HOSCH is a sister concern. We observe from the Balance Sheet of Hosch Equipments Ltd. for the Financial Year 2014-15, that M/s Tega Industries was holding 49.9% of equity shares with voting rights. Thus, we find that the evidences submitted by the Appellant clearly indicate that Hosch is a Sister Concern. There is no evidence brought on record by the department to establish that the 'Debit Notes' were raised by the Appellant towards any taxable service. There is no evidence available to dispute the claim of the Appellant that the amount received was on account of sharing of costs between the group companies. Hence, we agree with the claim of the Appellant that the amount received by raising 'Debit Notes' was only towards sharing of cost between the Group Companies. Now, the issue to be decided is whether the amount received on account of sharing of costs would be liable to service tax under the category of 'Management and Consultancy Service or not. We

observe that in the case of Sara Services & Engineering Pvt. Ltd. Vs. CCE, it has been held that claiming reimbursement to common expenses such as salary, insurance etc. between group companies cannot be termed as 'Management Consultancy Service'. The relevant portion of the order is reproduced below:

> **5.** We have carefully considered the submissions and perused the records. No doubt, that the appellant is rendering a variety of services to M/s. Varco Sara (India) Pvt. Limited in areas like procurement of raw material, packing of finished goods, documentation etc. in addition to undertaking job work. The activities are in the nature of providing some employees undertaking certain job work, procuring raw materials, sharing certain common facilities and sharing the expenses, etc. procurement of raw material. All these activities, in our considered opinion, will not amount to rendering management consultant service. Therefore, we hold that they cannot be held as rendering the management consultant service. The order of the Commissioner (Appeals) cannot be upheld.

10. In the impugned order the Appellate Authority has given the finding that this decision is not applicable in this case, as there was no evidence produced by the Appellant that Hosch is their sister concern. As observed above, since the Balance Sheet clearly indicate that Hosch is a sister concern, we hold that the above said decision is squarely applicable in this case. In view of the above, we hold that the Appellant has not rendered Management Consultancy Services and the amount received on account of cost sharing from the sister concern is not liable to service tax. Hence we set aside the demand confirmed in the impugned order on this count.

11. As regards the demand of service tax on the amount of Rs. 548697/- in respect of Busines Exhibition Service is concerned, we find that the Appellate Authority has denied the benefit by holding that the Notification No. 5/2011-ST dated 01.03.2011 giving exemption to exhibitor for holding a business exhibition outside India from the whole of the service tax leviable thereon under Section 66 of the said Finance Act, has come into effect onl with effect from 01.03.2011. Accordingly, the duty was demanded on Business Exhibition Service' for the period prior to 01.03.2011, on the presumption that there was no exemption to such service prior to that date.

11.1. The Appellant further stated that there cannot be any question of levying service tax on the amount of Rs. 9,94,868/- being the foreign remittance made to the overseas branches to meet their advertisement expenses received outside India inasmuch as it is similar to the other remittances made by the Appellant for expenses like salary, travelling, conveyance etc. and levying service on the same would amount to services provided to one self. The Appellant submitted a Chartered Accountant Certificate which certifies the

nature of foreign remittances made by them under specific heads. Further, the certificate also justifies that the total foreign remittances made by them during the period 2007-08 to 2009-10 amounts to Rs. 21,71,252/- and not Rs. 31,36,335/- and therefore, demand of service thereon is not sustainable.

11.2 We observe that in terms of Rule 3(ii) of the Import Rules, Business Exhibition Service can be said to have been received in India only when such services are performed in India. Thus, even prior to 01.03.2011, 'Business Exhibition Service' performed outside India was not taxable. The exemption granted vide Notification No. 05/2011-ST dated 01.03.2011 was a specific exemption granted to the Business Exhibition Services held outside India from the whole of Service Tax which does not in any way restricts the earlier exemption provided in Import Rules. Since, Business Exhibition Service performed outside India was exempted even prior to 01.03.2011 and no service tax was payable, the actual amount remitted has no relevance.

11.3. In the case of Positive Packaging Industries Ltd. vs. Commissioner. of C. Ex., Raigad 2015 (39) S.T.R. 219(TRI. – Mumbai), it has been held as under:

> **6.** We have carefully considered the submissions and perused the records. Undisputedly the business exhibition service is performed outside India and we find that the business exhibition service falling under sub-clause (zzo) would be covered under Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 attracts only if it is performed in India and for the convenience of reference Rule is reproduced below :
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> "(i) specified in sub-clauses (d), (m) …..immovable property situated in India;
>
> (ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (n), (o), (w), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zr), (zt), (zu), (zz), (zzz), (zzc), (zzd), (zzf), (zzg), (zzi), (zzl), (zzm), (zzo), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzk), (zzzzl) and (zzzzo) of clause (105) of Section 65 of the Act, be such services as are performed in India.
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> Provided that were such taxable service is partly performed in India, it shall be deemed to be performed in India and the value of such taxable service shall be deemed to be performed in India and the value of such taxable service shall be determined under Section 67 of the Act and the Rules made thereunder."
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> **7.** We find that the Business Exhibition Service is entirely performed outside India, and not partly performed in India, therefore it would not be covered under taxable service. In these circumstances, the demand is not sustainable. We set aside the demand in case of business exhibition service and the appeal is accordingly allowed to the extent indicated above.

11.4. In the case of K.G.Denim Ltd Vs Commissioner of Service Tax, Salem.2015(37) STR 616(Tri-Mad), it has been held as under.

There are two short issues involved in this appeal. They are

(a) Whether there is Service Tax liability under Section 66A of Finance Act, 1994, on the appellant as a recipient of service in respect of Business Exhibitions conducted abroad for which payments have been made by the appellants to parties located abroad.

(b) Whether there is Service Tax liability on the appellant under Section 66A of Finance Act, 1994 as a recipient of service in respect of "Technical Inspection and Certification Service" in respect of testing done abroad and payments made by appellants to parties located abroad.

> **3.** It is seen from para 2.1 of the adjudication order that the payments made by the appellant were in respect of exhibitions conducted abroad. Similarly, from para 3.3 of the adjudication order, it is seen that the Technical Inspections were done outside India. Therefore, as per the provisions of the Rule 3(ii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, these two services are considered to be imported into India when the service provider is located abroad and service is performed in India. Since, these services are performed outside India there is no Service Tax liability on the services in view of the above provisions. The counsel for the appellant relies on the following decisions in support of his argument.

1. *Paramount Communication Ltd.* v. *CCE, Jaipur* - 2012 (25) S.T.R. 76 (Tri. - Del.)

2. *Intas Pharmaceuticals Ltd.* v. *CST, Ahmedabad* - 2009 (16) S.T.R. 748 (Tri.- Ahmd.)

4. The ld. Counsel also submits that for a subsequent period, the Commissioner (Appeals) himself has allowed their contention and dropped the demand vide Order-in-Appeal No. SLM-S.T.-70-APP- 2012, dated 15-11-2012, and prays that the appeal may be allowed.

5. In view of the clear provisions in Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 and the decisions of the Tribunal cited above, we allow the appeal by setting aside the impugned order.

11.5. We observe that the decisions cited above are squarely applicable to this case. In view of the above, we hold that the demand made under the category of Business Exhibition service, is not sustainable, accordingly, we set aside the same.

12.1. The next issue is regarding irregular availment of Cenvat Credit of Rs.1,15,110/- on input service related to foreign branch offices . The Appellant stated that they have branch offices outside India for soliciting its customers in India and that the said branches are very much part of the Indian entity . Expenditure for the branch offices are incurred from India. Activities in relation to business can cover all the activities related to the functioning of a business. The CENVAT Credit in dispute in the present appeal, has been utilized by the Appellant for the functioning of business as a whole and hence the CENVAT Credit cannot be disallowed on the basis of territorial boundaries. In support of their contention, they cited the decision

in the case of Coca Cola India Pvt. Ltd. Vs. CCE , reported in 2009(242) ELT 168 (Bom), wherein the Hon'ble Bombay High Court has held that the expression/term 'business' is an integrated/continuous activity and not confined or restricted to mere manufacture of product and activities in relation to business can cover all the activities related to the functioning of a business.

12.2. The same view has been held by the Tribunal, Delhi, in the case of HCL Comnet Systems & Services Ltd. vs. CCEx, Noida 2015(40)STR621 (Tri. – Del.), wherein it has been held that services received by a establishment in India in respect of its office/branch outside India would qualify for input service inasmuch as the onus to fulfill the requirements relating to the overseas office rests upon the Indian establishment.

> **3.** I have considered the submissions of both sides. The essential issue to be decided is whether the impugned credit is admissible to the appellant (in which case, it will also become eligible for refund as claimed by them). It is seen that the invoice of M/s. Ernst & Young Pvt. Ltd. for rendering service (which show the impugned amount of Service Tax) was actually raised on the appellants and not on the US establishment. Further, the permanent establishment in US is not a legal entity and is merely an office of the appellants. The onus to fulfill the legal requirement relating to that office clearly rests on the appellants and it was in the discharge of that onus that they engaged M/s. Ernst & Young Pvt. Ltd. engaged on the service. The definition of input service given in Rule 2(l) of Cenvat Credit Rules, 2004 clearly covers that "any service used by a provider of taxable service for providing an output service" and specifically includes the "legal services". It is evident that the service rendered by M/s. Ernst & Young Pvt. Ltd. engaged by the appellants were to fulfil the legal requirements relating to the appellants' office in the US. Thus the impugned Service Tax amount is clearly in respect of input service availed by them. Indeed the Allahabad High Court in the case of *CCE* v. *HCL Technologies Ltd.* - [2014-TIOL-2001-HC-ALL-CX] = 2015 (37) S.T.R. 716 (All.) *inter alia* has held as under :-
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> "7. As regards Consultancy Services, these were comprised of the payment of invoices of the charges involved in relation to the filing of the tax return in the US. The Commissioner held that the service was governed by the definition of "input service". The second related to Legal Consultancy Services which have also been held to fulfil the definition of the expression "input service". Both are admissible."
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> **4.** In the light of the foregoing, I am of the view that the impugned Cenvat credit is admissible and as a consequence, the very basis for denying the refund thereof disappears. Accordingly, I set aside the impugned order and allow the appeal.

12.3. The Tribunal Bangalore in the case of Mangalore Refinery & Petrochmicals Ltd. vs. CCE & ST, Mangalore 2015(319) ELT 121 (Tri. -Bang.) has held that for smooth functioning of the business of manufacturing/marketing and other like activities, the manufacturer may open offices/'establishments elsewhere and CENVAT Credit on input service cannot

be denied by saying that the function of those offices are not in relation to the manufacture of final product.

12.4 We observe that the above cited decisions are squarely applicable to the present appeal. In this case, the Appellant has branch offices outside for soliciting its customers in India and the said branches are very much part of the Indian entity. Hence, we hold that the Appellant are eligible for the credit of Rs.1,15,110/- availed on input service related to their foreign branch offices.

13. We observe that the demands confirmed in the impugned order are not sustainable. Since, the demands are not sustainable, the penalty imposed on the Appellant is also not sustainable. Accordingly, we set aside the same.

14. In view of the above discussion, we allow the appeal filed by the Appellant.

(Dictated and pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pinaki