

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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 133 of 2012

(Arising out of Order-in-Original No. 50/Commr/ST/Kol/2011-12 Dated 15/12/2011
passed by Commissioner of Service Tax, Kolkata)

M/s Mitra S. K. Pvt. Ltd.

(74B, A. J. C. Bose Road, Shrachi Centre,
5th Floor, Kolkata-700016)

Appellant

VERSUS

Commr. of Service Tax, Kolkata

(180, Shantipally, Rajdanga Ma-*in Road, 3rd Floor, Kolkata-700107)

Respondent

APPEARANCE :

Mr. Anand Sen, Mr. S. Mandal & R. Chaudhuri, all Advocates for the Appellant
Mr. Joydip Choudhury, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77200/2023

Date of Hearing : 3 October 2023
Date of Decision : 3 October 2023

PER R. MURALIDHAR

The Appellant is providing the service of Testing, Inspection and Certification Services. During the period October 2005 to September 2010, they have been providing the service for the goods which were to be exported from India to other foreign buyers. The Appellants claimed that the services provided by them amounted to export of services and hence they are not liable for Service Tax payment. The Department issued a Show Cause Notice and after due process, the demands were confirmed. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Advocate appearing on behalf of the Appellant draws our attention to Proviso to Rule (3)(1)(ii) of Export of Service Rules 2005, wherein, the services falling under Section 65 (105)(zz) is included. For such services even if the service has been partly rendered within India, the same would be treated as Export of services. He also points out that though the entire testing service is provided within India but Test report generated, is communicated to the overseas importer by way of internet

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transmission and by way of courier it will still make it a service which has been partly performed outside India to get the benefit of the services being treated as export of services. He cites the case law of SGS India Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai-2011(24) S. T. R. 60 (Tri.-Mumbai), wherein on identical issue, the Tribunal relying on the case law of B. A. Research India Ltd. has held that even when the Test Report was conveyed to the overseas party, in terms of Proviso to Rule 3(1)(ii), the same is to be treated as export of services. Against this Tribunal's Order, the Department had approached the Bombay High Court. The Bombay High Court has upheld the Tribunal's Order and dismissed the Appeal filed by the Revenue. He submits that no further Stay has been granted by the Supreme Court against this High Court Order. Therefore, he submits that the confirmed demand is not sustainable on merits. He also submits that the Show Cause Notice has been issued on 20/04/2011 for the period October 2005 to September 2010 by invoking the extended period provisions. As can be seen from the cited case law, the issue is that of interpretation and during the period under dispute, the Appeal is covered by the cited case law. Therefore, in such a situation, the question of suppression on their part could not arise. Hence, he submits that the demand for the extended period is liable to be set aside on account of limitation.

3. The Learned AR draws our attention to amendment made to Rule 3(1)(ii) by insertion of Second Proviso by Notification No. 5/2008-ST dated 01/03/2008 which reads as under:-

PROVIDED FURTHER that where the taxable services referred to in sub-clauses (zzg), {(xxx)] and (zzi) of clause (105) of section 65 of the Act are provided in relation to any goods or material or any immovable property, as the case may be, situated outside India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed outside India, shall be treated as the taxable service performed outside India.

4. He submits that the situation has changed after 01/03/2008 and in respect of Section 65 (105) (zzi), the goods in question should have been situated outside India to qualify for being termed as export of services. In

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this case, admittedly, the goods in question were very much in India and were being tested here in India only. Only the Test Report was being sent by courier or by internet transmission by the Appellant. Therefore, he submits that after 01/03/2008, the situation has changed and benefit cannot be given to the Appellant.

5. Heard both sides and perused the documents.

6. On going through the cited case law, it is seen that in case of SGS India Pvt. Ltd., the Tribunal was dealing with the dispute which arose for the period 2003. In case of B. A. Research India Ltd. also there is no mention of the amendment carried out with effect from 01/03/2008. This amendment has been brought in, in order to overcome the decisions of the Tribunal and High Court in the cited case law. Therefore, we are in agreement with the Learned AR that after 01/03/2008, the Appellant case does not survive on merits. We set aside the demand for the period October 2005 to 28 February 2008 on merits. However, as pointed out by the Learned Counsel, this matter had been under litigation before the Tribunal/High Court for quite some time and the Appellant may be said to have a genuine belief that they are not required to pay the Service Tax. Since the issue is that of interpretation, we are of the opinion that the Appellant should not be fastened with the demand for the extended period. On account of limitation, we set aside the confirmed demand for the extended period. The Adjudicating Authority to work out the details of the demand pertaining to the normal period which would be payable by the Appellant along with interest.

7. Considering the factual details and the interpretational difficulties, we do not see justification in imposing penalties on the Appellant. Accordingly, all the penalties are set aside.

8. The Appeal is disposed of thus.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

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Pooja