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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75034 of 2016

(Arising out of Order-in-Appeal No. 14/ST-II/Kol/2015 dated 09.10.2015 passed by the Commissioner of Central Excise (Appeals-II), Kolkata, Bamboo Villa, 3rd Floor, 169, A.J.C. Bose Road, Kolkata – 700 014)

M/s. Regent Machine & Servicing **: Appellant**
18/58, Dover Lane,
Kolkata – 700 029

VERSUS

Commissioner of Service Tax **: Respondent**
Service Tax-II Commissionerate,
Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road,
Kolkata – 700 107

APPEARANCE:

Shri Sandeep Kothari, Chartered Accountant for the Appellant

Shri S. Singh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77615 / 2024

DATE OF HEARING: 06.11.2024

DATE OF DECISION: 21.11.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Appeal No. 14/ST-II/Kol/2015 dated 09.10.2015 passed by the Commissioner of Central Excise (Appeals-II), Kolkata.

2. The brief facts of the case are that M/s. Regent Machine & Servicing, Kolkata, (hereinafter referred to as the 'Appellant') are engaged in providing taxable services, including services under the category of

'business auxiliary service' to their clients located in the United Kingdom (U.K.). In the instant case, the Appellant has been rendering the service to M/s. J.S. Humidifiers PLC located in the U.K., who have no establishment in India. The Appellant rendered the service of collecting necessary information based on the questionnaire sent by M/s. J.S. Humidifiers PLC, U.K. and supplying back such information directly to the foreign party in the U.K.

2.1. M/s. J.S. Humidifiers PLC in the U.K., short lists the probable customers from such information supplied by the Appellant. After proper screening of the same, the principals from U.K. contact the relevant customers in India and negotiate the price, delivery schedule, technical evaluation, terms of payment, etc., directly. After all the terms & conditions are agreed by the Indian Buyer and M/s. J.S. Humidifiers PLC, U.K., an order is placed. After the order is placed and the supply made from U.K. to the Indian buyer directly, the Appellant becomes entitled to a 'Commission'.

3. The Department was of the view that the 'Commission' received by the Appellant towards the above activity falls within the ambit of 'Commission Agent' under the definition of 'business auxiliary service' as defined under Section 65(19) of the Finance Act, 1994. Accordingly, the Department held the Appellant liable for discharging Service Tax on the 'Commission' received by them.

3.1. The Appellant submitted that they have already been paying Service Tax in respect of the 'Commission' received for the services rendered in connection with the domestic parties. However, regarding the liability of Service Tax in respect of the 'Commission' received from foreign companies (i.e., from their principals, M/s. J.S. Humidifiers PLC, U.K.) in convertible foreign exchange, they were of the view that the service rendered by them ought to be treated as 'export of service' within the meaning of the Export of Services Rules, 2005 and therefore, exempted from the levy of Service Tax.

3.2. Since the Appellant did not pay the appropriate Service Tax on the 'Commission' received by them from their principals in the U.K., a Show Cause Notice dated 19.04.2012 was issued to them *inter alia* demanding Service Tax for the period from 2006-07 to 2010-11.

3.3. The said Notice was adjudicated by the ld. adjudicating authority vide the Order-in-Original No. 12/JC/ST/Kol/2013-14 dated 30.09.2013 wherein the demand of Service Tax of Rs.11,12,731/-was confirmed, along with interest. Penalty equal to an amount tax confirmed in the impugned order was also imposed under Section 78 of the Act. The demand of Rs.3,49,798/- raised in the Notice was dropped.

3.4. On appeal, the Ld. Commissioner (Appeals) vide the impugned order upheld the confirmation of the demand of Service Tax of Rs.11,12,731/- along with interest and penalty. The dropping of the demand of Rs.3,49,798/- was also upheld.

4. Aggrieved against the confirmation of the demands in the impugned order, the Appellant has filed the present appeal.

5. The Appellant submits that they have already paid the Service Tax in respect of the 'Commission' received from the domestic clients under the category of 'business auxiliary service' . In respect of the 'Commission' received from foreign clients, the Appellant submits that the said services rendered would fall under the category of export of service within the meaning of the Export of Services Rules, 2005.

5.1. The Appellant submitted that 'business auxiliary services' falls under Rule 3(i)(iii) of the Export Service Rules. They referred the Circular No. 111/05/2009 dated 24.02.2009, wherein it has been clarified that for the services under category III [rule 3(i)(iii)], the deciding factor is the location of the service receiver and not the place of performance. In this context, they submit that the phrase "used outside India" is to be interpreted to mean the benefit of the services accrues outside India. In the present case, they have collected the information and provided the same to the foreign principal, who, after analyzing the information, negotiated the price, delivery schedules, technical evaluation, etc., with the customers and delivered the goods directly to the customers. The Appellant submitted that they had no role in the purchase of the goods by the Indian customer; the information gathered by them and provided to the principal viz. M/s. J.S. Humidifiers PLC, U.K., has been utilized by them principal located in a foreign country and thus the benefit of the information gathered by the them accrues only to the foreign principal. Thus, the appellant contended that in terms of Circular No. 111/05/2009-S.T. dated 24.02.2009, the services rendered by them would be appropriately classifiable as 'export of service'. Accordingly, the Appellant submits that the services rendered by them to the foreign principal viz. M/s. J.S. Humidifiers PLC, U.K. are not liable to Service Tax under the category of 'business auxiliary service'.

5.2. The Appellant further submits that the Department has relied upon the Circular No. 141/10/2011-TRU dated 13.05.2011 to interpret the words "used outside India"; however, in this case, the demand Notice has been raised for the period from 2006-07 to 2010-11 which is prior to the issuance of the above Circular. Hence, the Appellant contends that the Circular No. 141/10/2011-TRU dated 13.05.2011 cannot be applied to the instant case for interpreting the phrase "used outside India".

5.3. In view of the above, the Appellant submits that the demand confirmed in the impugned order under the category of 'business auxiliary service' is not sustainable in law.

5.4. The Appellant further submitted that the intention to evade payment of service tax has not been established in the instant case and accordingly, penalty under Section 78 of the Act is not imposable on them in the facts and circumstances of this case.

6. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal records.

8. We observe that the Appellant has been rendering business auxiliary services to their clients. In respect of such business auxiliary services rendered to their Indian/domestic clients, the Appellant have paid Service Tax for the 'commission' received by them. However, for the 'commission' received from their foreign clients in convertible foreign exchange, the Appellant have not paid the Service Tax on the ground that the said services rendered by them would fall within the ambit of 'export of service' in terms of the Export of Services Rules, 2005. The Appellant has referred to the Circular No. 111/05/2009-S.T. dated 24.02.2009, wherein the phrase "used outside India" has been interpreted to mean that the benefit of the service should accrue outside India. In the present case, the principals are not having any establishment in India and the services are used by them outside India. Accordingly, the appellant has contended before us that the said activity falls within the ambit of 'export of services'.

8.1. We observe that the impugned order has relied upon the Circular No. 141/10/2011-TRU dated 13.05.2011 to interpret the words "used outside India". We observe that the demand in this case has been raised for the period from 2006-07 to 2010-11 which is prior to the issuance of the above Circular. Hence, we hold that the Circular No. 141/10/2011-TRU dated 13.05.2011 cannot be applied to the instant case for interpreting the phrase "used outside India". We observe that the Circular No. 111/05/2009-S.T. dated 24.02.2009, has also interpreted the phrase "used outside India", which is relevant to this case; As the demand involved in this case is from 2006-06 to 2010-11, which is prior to the issue of Circular dated 13.05.2011 referred to above, we observe that the Circular dated 24.02.2009 is applicable in this case.

8.2. We observe that the Appellant collected the information regarding the prospective clients and submitted the information to the foreign principals, which was processed and utilized by the principals in U.K. The principals then initiated the negotiations directly with the customers and arrived at the price, delivery schedules, terms of payment, etc., directly with such customers. We find that the appellant had no role in the purchase of the goods by the Indian customer. The information was gathered by the appellant and provided to the principal viz. M/s. J.S. Humidifiers PLC, U.K., and has been utilized by them who are located in a foreign country.

8.3. In the Circular No. 111/05/2009-S.T. dated 24.02.2009, it has been clarified that for the services under category III [rule 3(i)(iii)], the deciding factor is the location of the service receiver and not the place of performance. The relevant portion of the said Circular is reproduced below: -

> *"3. …*
>
> *For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the* ***benefits of these services accrue outside India****."*

8.4. From the Circular reproduced above, we observe that the said Circular has interpreted the phrase "used outside India" to mean the benefit of the services accrues outside India. 'Business auxiliary services' falls under Rule 3(i)(iii) of the Export Service Rules. Thus, in this case we observe that the phrase "used outside India" has to be interpreted to mean that the benefit of the services accrues outside India. In the present case, we observe that the appellant has collected the information and provided the same to the foreign principal, who, after analyzing the information, negotiated the price, delivery schedules, technical evaluation, etc., with the customers and delivered the goods directly to them. We observe that the Appellant had no role in the purchase of the goods by the Indian customer. The information gathered by the appellant and provided to the principal viz. M/s. J.S. Humidifiers PLC, U.K., has been utilized by the principal located in a foreign country and thus the benefit of the information gathered by the them accrues only to the foreign principal. Accordingly, we hold that in terms of Circular No. 111/05/2009-S.T. dated 24.02.2009, the services rendered by the appellant would be appropriately classifiable as 'export of service'. Accordingly, we hold that the services rendered by the Appellant in the instant case are exempted from Service Tax, being export of services, and thus the demand of Service Tax confirmed vide the impugned order is not sustainable. The same is therefore set aside.

9. As the demand itself is not sustainable, the question of demanding interest and imposing penalty on the Appellant does not arise.

10. In view of the above, we set aside the impugned order and allow the appeal filed by the Appellant.

(Order pronounced in the open court on **21.11.2024**)

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd