

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. IV**

APPEAL NO. ST/86505/14

(Arising out of Order-in-Original No. 12/ST/RN/CMR/MII/13-14 dated 23.01.2014 passed by the Commissioner of Central Excise, Mumbai-II.)

M/s Ipca Laboratories Ltd.

Appellant

Vs.

Commissioner of CE & ST, LTU, Mumbai

Respondent

Appearance:

Shri S.S. Gupta, C.A.

for Appellant

Shri M.P. Damle, Assistant Commissioner (A.R.)

for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)

HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 04.01.2018

Date of Decision: 26.04.2018

ORDER NO. A/86221/2018

Per: Raju:

This appeal has been filed by M/s Ipca Laboratories Ltd. against demand on Service Tax, interest and imposition of penalties.

2. Learned Counsel for the appellant pointed out that they are contested the demand of Service Tax in respect of that confirmed under the head of "Business Auxiliary Services", "Scientific and

Technical Consultancy Services”, “Online Database Access and Retrieval Service” and “Management Consultancy Service”.

2.1 Learned Counsel for the appellant pointed out that they are engaged in the manufacture of P&P medicaments and have engaged in the distribution of medicaments in various countries where the goods are exported and sold. These distributors appointed sale representative for promotion of the product supplied by the appellant and salary of these sales representatives are reimbursed by the appellant to these distributors on the debit note. Revenue had sought to tax on the said amount under the head of "Business Auxiliary Services". It has been argued by the learned Counsel that the exact head of "Business Auxiliary Services" is not specified by the impugned order and therefore on this count itself, proceeding should be cost. He further argued that the said activities are not clause (i) of the definition of "Business Auxiliary Services" which read as follows – “Promotion or marketing or sale of goods produced or provided by or belonging to the client”. Thus the activity of sales representative is not for the goods belong to them but for the goods belonging to the distributors. He further argued that this amount given as salary of the sales representative hire by the distributors is a reimbursement of expenses. He relied on the decision of Hon'ble Delhi High Court in the case of *M/s Inter Continental 2013 (29) STR 9 (Del.)* wherein it has been held that reimbursement of expenses will not form part of the value of taxable service.

2.2 He further pointed out that the demand under the head of “Scientific and Technical Consultancy Services” had been made in respect of services received from M/s Regulatory Concepts. M/s Regulatory Concepts provided executory services of registration of therapeutic products. The said service is not in the nature of any advise, consultancy or technical assistance in the science and technology and therefore no tax can be levy under the said head. He relied on the clause (1) of the agreement with M/s Regulatory Concepts which is reproduced as follows:-

- “(a) *IPCA appoints Regulatory Concepts as its consultants:*
- (i) to advise and assist IPCA in the registration, listing and clinical research of its therapeutic goods in Australia and New Zealand;*
 - (ii) to coordinate the registration of dossiers with the TGA for each of the Products; and*
 - (iii) to provide the other services contemplated in Annexure-2*
- (b) Bristol is the Australian Sponsor and Distributor of the Products with the TGA*
- (c) The products will be manufactured by IPCA for distribution in the Australian market once they have been registered with the TGA.”*

The other services mentioned in Annexure 2 of the Agreement is reproduced below:

Service	Consulting Fee to be paid to Regulatory Concepts
Review of Bioequivalence Data	\$1,000 fee to be paid upon receipt of data.
Application for Registration of the Products	Total of \$20,000 to be paid as follows: \$10,000 upon receipt of dossier;

	\$5,000 prior to submission of dossier to TGA; and \$5,000 upon receipt of copy of dossier by IPCA, duly filed with TGA
Question under Section 31 of the TGA	\$3,000 to be paid upon receipt of first Section 31 question after acceptance of the application for evaluation
Administrative Costs to be paid when the product has reached ADEC review.	\$2,000 to be made 7-14 days after receipt of an invoice, which will be issued at the time of the events listed above.

He argued that the consultant never performs compliance auditing and training and validating processes, facilities and systems. He argued that the impugned order wrongly held that the service provided by M/s Regulatory Concepts are in the nature of auditing and training and validating process, facilities and systems. Moreover he argued that M/s Regulatory Concepts are not scientist or a technocraft or any science or technology institutions or organisations. In these circumstances, no tax can be levy under the said head.

2.3 Learned Counsel further pointed out that the demand under head “Online Database Access and Retrieval Service” had been made in respect of invoices raised by M/s Dialogue Corporation, USA. He argued that the said invoice is raised for alert storage charges, internet charges etc. It was argued that the M/s Dialogue Corporation do not own any website where this data can be access

and no information is accessed by the appellant from any database of M/s Dialogue Corporation. Learned Counsel argued that M/s Dialogue Corporation simply supply the data to the appellant and the same is not received online but are received as and when asked for.

2.4 Learned Counsel pointed out that the demand under the head “Management Consultancy Service” in respect of services received from M/s B-SRM and Nilesh Bhatt in respect of developing and permitting new bulk drugs, services of identifying licensing opportunities, counselling in respect of negotiation tactics and strategies, assisting in conducting negotiation with prospective corporation partners, etc. are covered within the scope of “Management Consultancy Service”. He argued that under “Management Consultancy Service” only conducted either directly or indirectly in connection with the management of any organisation in any manner and advice, consultancy or technical assistance relating to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management. He argued that the activities rendered by these parties cannot in any circumstances be classifiable under the definition of “Management Consultancy Service” in as much as these parties have not provided any services which is concerned in any with the functioning, operations, affairs, etc. of the management of appellant/organisation. M/s B-SRM is merely providing assistance for procurement of various services and goods for marketing of final products exported by the appellant. Mr. Nilesh Bhatt is advising the

appellant to acquire new company. These parties are not giving any advice or technical assistance to the appellant relating to the management of the organization and therefore the activities performed by the foreign collaborators can by no stretch of imagination be termed as activity relating to management of the organization. He argued that this service do not fall under the “Management Consultancy Service”. He further argued that they had paid an amount of approximately received which had not against the demand.

2.5 He further argued that the demand is revenue neutral that the appellant are entitled to neutral of the entire amount. During the hearing the appellant asked to give figures regarding the exempted clearance on which credit cannot be receivable, which shows that the appellants are clearing small quality of goods under full exemption and thus there is no complete revenue neutrality. The appellant have also raised the issue on the ground that they held bonafide belief that no Service Tax is leviable on these services. They relied on the various decisions for this purpose. The appellant also sought invocation of Section 80 of the Finance Act, 1994 for waiver of penalties. They also pointed out that penalty under Section 76 has been proposed for the period after 10.05.2008 simultaneously penalty under Section 78. He argued that the same is not permissible under law. He further argued that Section 78 should not be invoked as there was no intention to evade payment of duty.

3. Learned AR relies on the impugned order. He pointed out that in the agreement for the appointment of sales distributors a specific

clause for sales promotion which read as follows – “The product promotion activities will be under the direct supervision of the Company.”

4. We have gone through the rival submissions, we find that the demand under the head of "Business Auxiliary Services" had been raised in respect of amount paid to the distributors. The agreement with the distributors provides that the product promotion activities will be under the direct supervision of the Company (appellant). The invoice raised by the distributors in respect of this said expenses describe the same as “amount towards marketing survey and promotional expenses” and “marketing expenses” etc. The invoices do not contain any breakup of the expenses, nor do the debit notes. The appellant have claimed that these amounts are spent by the distributor for promotion of their own products and therefore they are not covered by the "Business Auxiliary Services". The appellants are relied on the decision of Tribunal in the case of *Genom Biotech Pvt. Ltd. Vs. CCE, Nashik - 2016 (42) STR 918 (Tri.-Mumbai)* to assert that no Service Tax liability would come under the head of "Business Auxiliary Services". In the said decision following has been observed as under:-

“15. *Services that are not connected with manufacture or with the transport of goods till the customs frontier of the country can be disassociated from use within the country and hence would not lie within the ambit of the legal fiction of import of services. 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.

16. *The tax liability has been crystallized in the impugned order by recourse to Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 by deeming the provision of ‘advertising agency service’ by the three Cyprus-based entities to be an import of service into India.*

17. *Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is :*

“3. Taxable services provided from outside India and received in India. - Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services -

- (i) *****
- (ii) *****
- (iii) *specified in clause (105) of section 65 of the Act, but excluding -*
 - (a) *sub-clauses (zzzo) and (zzzv);*
 - (b) *those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d),(zzzc),(zzzr) and (zzzzm) does not relate to immovable property; and*
 - (c) *those specified in clause (ii) of this rule, be such services as are received by a recipient located in India for use in relation to business or commerce.”*

18. *From the context in which the appellant has entered into agreements with the three providers who were held to be rendering ‘advertising agency service’ it would appear that these are intended to relate to the activities of the appellant in relation to export goods after their arrival in Ukraine. At no stage are they required for any activity of the appellant in India. The service itself is not warranted except in relation to export by the appellant and hence tax, even if leviable, is not to be burdened onto the export goods.*

19. *The original authority has failed to take note of the destination of the goods manufactured by the appellant and has deemed the services rendered in Ukraine to have been imported into India for business and commerce. From our examination of the scheme of ‘deeming of import of*

services' for taxation supra, it can be reasonably inferred that the 'business or commerce' in Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is not intended tax services that are rendered in connection with business or commerce outside the territory of India. Since the appellant has no requirement of 'advertising agency service' for manufacture and export of goods, the tax demanded in the impugned order is not on the consideration for a service received in India but a tax on the funds transferred in a cross-border transaction. Such a tax is not contemplated in Finance Act, 1994. The demand of tax on the appellant is not in accordance with law."

Relying on the said decision, it is held that no Service Tax can be demanded on the said service. The demand under the head of "Business Auxiliary Services" is therefore set aside.

4.1 The second issue relates to demand under the head of "Scientific and Technical Consultancy Services". It has been argued by the learned Chartered Accountant that the services are in the nature of getting permissions/registration for their product and not in the nature of "Scientific and Technical Consultancy Services". He argued that regulatory services obtained for getting service of their product registered/approved by authorities abroad cannot be classifiable under the head of "Scientific and Technical Consultancy Services". Learned CA relied on the decision of Tribunal in the case of *Administrative Staff College of India – 2009 (14) STR 341 (Tri.-Bang.)*.

In the said decision following has been held as under:-

“13. *As regards the leviability under the category of 'Scientific and Technical Research,' we find that even though the appellants had registered with the council of 'Scientific and Industrial Research,' they do not come out*

the activity of a scientist or technocrat. When we go through the project research activity undertaken by the appellants they are broadly in the field of social sciences for e.g Health Policy Research, Bio-mass Project, Change Management, Water and Sanitation Material Development, City Consultation in Hyderabad, Energy Management. These activities come within the areas of 'Research in Social Sciences' which in our view would not fall within the purview of 'Scientific and Technical Consultancy'. Whereas when we go through the definition of 'Scientific and Technical Consultancy' let us reproduce it again :

"Scientific or technical consultancy" means any advice, consultancy, or scientific or technical assistance rendered in any manner, either directly or indirectly, by a scientist or a technocrat, or any science or technology institution or organization, to a client, in one or more disciplines of science or technology;

Section 65(105)(za) of the Act defines the taxable service as follows :

65(105) taxable service means any service provided or to be provided.....

(za) to a client by a scientist or a technocrat, or any science or technology institution or organization, in relation to scientific or technical consultancy.

14. *It is very clear that in order to assert that an organization is providing scientific or technical consultancy, two basic ingredients have to be established. The organization must be a science or technology institution. The consultancy must relate to one or more disciplines of science or technology. By no stretch of imagination Administrative Staff College of India can be called as a 'science or technology' institution. Since their research activities are all related to social science, we are of the view that they would not come within the ambit of 'Scientific or Technical Consultancy. So service tax cannot be leviable under the category."*

The said decision is approved by Hon'ble Apex Court reported at 2010

(20) STR J117. We are of the view that the regulatory services are not

in the nature of “Scientific and Technical Consultancy Services” and therefore no Service Tax under the said head, the demand is also set aside.

4.2 The next issue relates to demand under the head of “Online Database Access and Retrieval Service”. It has been argued that they are using service of M/s Dialogue Corporation, USA for the purpose of data storage. It has been argued that the said service provider does not provide “online” services and there is no “online” service provider. In absence of online database access, no Service Tax can be demanded under the head of “Online Database Access and Retrieval Service”. The demand on this count is also set aside.

4.3 The next issue relates to demand under the head of “Management Consultancy Service”. The service received in respect of developing and permitting new bulk drugs, services of identifying licensing opportunities, counselling in respect of negotiation tactics and strategies, assisting in conducting negotiation with prospective corporation partners, etc. It has been argued that under “Management Consultancy Service” only activities in the nature of management of any organisation are covered. It is seen that the service provided by technical assistance and consultancy in identifying avenue and product promotion. The said activity falls under the “Management Consultancy Service”. The demand on this count is upheld.

4.4 The appellant have also contested the demand on revenue neutrality. The data submitted by them, shows that part of the final product is exempted and therefore the situation is not fully revenue neutral. However, from the facts of the case it is apparent that the provisions of Section 80 could be invoked in this case. Invoking the provisions of Section 80, penalty imposed under Section 76 & 78 are set aside.

5. Consequently demand under the head of “Management Consultancy Service” is confirmed. Other demand and penalty under Section 76 & 78 is set aside. The appeal is allowed in above terms.

(Pronounced in Court on 26.04.2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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