IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87376/2018

Arising out of: Order-in-Appeal No. MKK/32/RGD APP/2018-19 dated 18/04/2018

Passed by: Commissioner of Central Excise (Appeals), Raigad.

Fertin Pharma Research & Development

Appellants – Represented by:
Shri D.H. Nadkarni, Advocate

versus

Commissioner of CGST, Navi Mumbai

Respondent – Represented by:
Shri S.B. Mane, Assistant Commissioner (A.R.)

Date of hearing : 15/11/2018
Date of pronouncement: 18/01/2019

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Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/85131 / 2019

The present appeal has been filed from the impugned order dated 18.04.2018 passed by the Commissioner of Central Tax (Appeals), Raigad, by which the ld. Commissioner rejected the appeal filed by the appellant and held that technical testing and analysis services provided by the appellant cannot be termed as export of service and therefore refund claim of unutilized Cenvat credit of

Rs.4,31,384/- under Rule 5 of CCR, utilized in respect of this service for the period from January 2016 to March 2016 is not admissible.

2. The brief facts of the Appeal are that the Appellant is engaged in the activity of research and development on pharmaceutical products, which is falling under Technical Testing and Analysis Service. The result of testing and research actitivities were/are communicated to their Parent Company, M/. Fertin Pharma, Denmark through e-mail. The goods, on which research and development activity was carried out by the appellant, were purchased from Parent Company for valid consideration after payment of appropriate Customs Duty. In other words, there is no temporary transfer by the Parent Company to the appellant but it is a transaction of sale and purchase, wherein ownership of goods is being transferred from Parent Company to them. The Appellant were carrying out research activity and exporting their service against convertible foreign exchange. In the said activity, whatever Cenvat credit was availed by them during the course of provision of service was getting accumulated on account exports. The appellant has filed a claim seeking refund of accumulated Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004 for Rs.4,31,384/-, but the same was rejected by both the authorities below on the ground that technical testing and analysis services provided by the Appellant cannot be termed as export of service.

3. The Learned Authorised Representative on behalf of revenue reiterated the findings recorded in the impugned order and prayed for dismissal of the appeal filed by the appellant. The ld. Counsel appearing for the Appellants submitted that in Appellants' own case on similar facts, for the period from April, 2013 to June, 2013 this Tribunal has allowed the Appeal filed by the Appellant, which is tilted as M/s Fertin Pharma Research & Development vs. Commissioner of S.T., Mumbai-VII reported in 2017(6) GST 475(T). I have gone through the same and find the same to be on the identical issue. The relevant extract of the said decision is as under:

> " xxx xxx xxx
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> **3.** After careful consideration of the facts of the case and the submissions of both sides, it appears that the appellant fulfills the conditions mentioned under Rule 6A of the Service Tax Rules, 1994 and the subject services are covered as 'export of service', when :-
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> (i) the appellant is a provider of service and is located in India;
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> (ii) the recipient of service is located in Denmark i.e. outside India;
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> (iii) when the service is not covered by negative list of services provided under Section 66D of the Finance Act, 1994;
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> (iv) when the place of removal of service as per Rule 3 of Place of Provision of Services Rules, 2012 is outside India;
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> (v) Payment of such service has been received in convertible foreign exchange;
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> (vi) provider of service and recipient of service are separate establishments and different legal entities having the legal agreement on the subject matter with each other.
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> **3.1** Consequently, the impugned order is set aside and the appeal is allowed with consequential relief, if any to the appellant."

He further submitted that for the subsequent period also i.e. from January, 2014 to December, 2015 this Tribunal in another decision in Appellants' own case involving identical issue *vide* order no. A/87552-87557/2018 dated 28.09.2018, titled as Fertin Pharma

Research & Development Pvt. Ltd. vs Commissioner of CGST, Navi Mumbai decided the issue in favour of the Appellant. He also produced the copy of the said order for my perusal. While going through the same, I find that the aforesaid decision also squarely covers the issue involved in the present appeal. The relevant extract of the said order is as under:

> " xxx xxx xxx.
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> 6. Heard both sides and perused the records. Undisputedly, the appellant had purchased the goods from the overseas company, on which they discharged appropriate customs duty on its import into India. Necessary tests are carried out by them on the said goods in India and after analysis the relevant report was submitted to the overseas Denmark company. In the process of providing the said output service, that is, "Technical Testing and Analysis Service/Scientific and Technical Consultancy Service" various input services were used on which they availed CENVAT Credit. Since the services are exported, they claimed cash refund under Rule 5 of CENVAT Credit Rules, 2004,but Revenue rejected it alleging that the services since performed in India, therefore, do not fall under the scope of 'export of service'. I find that in their own case this Tribunal has already taken a view that the services rendered by the appellant are in the nature of export service and hence eligible to cash refund of accumulated CENVAT Credit. Also, in the case of *Advinus Therapeutics Ltd. (supra)*, this Tribunal more or less under similar circumstances discussing all aspects of the issue held that scientific or technical consultancy service provided for the development of drugs to the overseas recipient of service was held to be 'export service'. This Tribunal observed as follows: -
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> > "**13.** In the context of a *catena* of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinized to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers that were so privileged tell them. There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India. A service is not necessarily a single, discrete, identifiable activity; on the contrary, it is a series of invisibles that cater to the needs of a recipient; it is upon the consumption of the service by

the recipient that service is deemed to have become taxable. This has been so held by the Hon'ble Supreme Court in *All India Federation of Tax Practitioners* v. *Union of India & others* [2007 (7) S.T.R. 625 (S.C.)] below :

> '7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country.'

It would appear from the exposition in the judgment that the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. The new industry of hiving out or outsourcing of what was, conceivably, being done within the enterprise was intended to be subject to the new levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organization or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render it to be an export.

14. In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Not unnaturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule 2(i)(iv) would be his usual place of residence. In what can be considered as a most telling example of the scope of this portion of Rule 4, we could do a lot worse than refer to a decision of the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in *Orient Crafts Ltd.* v. *Union of India* [2006-TIOL-271-HC-DEL-ST = 2006 (4) S.T.R. 81 (Del.)], took note of, and answered, one of the submissions thus -

> '4. The contention of the learned Counsel for the petitioner, based on the interpretation of Section 66A of the Act, is that any service that is obtained by a person who has a fixed place of business in India is liable to tax for services availed by him in a foreign country. By way of an example, learned Counsel for the petitioner has cited that if such a person in India goes abroad, and has a haircut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.

> 5. We are not at all convinced by this argument of learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service-tax. In the example given by the learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4 and in the process, the sovereign jurisdiction to tax is asseted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, *ipso facto*, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.

16. Not intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, Rule 4(1) of Place of Provision of Services Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to be performed without altering its form. The exemplification in the Education Guide referred supra renders it pellucid. Certification is an important facet of trade and such certification, if undertaken in India, will not be able to escape tax by reference to location of the entity which entrusted the activity to the service provider in India. This is merely one situation but it should suffice for us to enunciate that Rule 4(1) is intended to resorted when services are rendered on goods without altering its form that in which it was made available to the service provider. This is the harmonious construct that can be placed on the applicability of Rule 4 in the context of tax on services and the general principle that taxes are not exported with services or goods.

17. The goods supplied to the respondent, minor though the proportion may be, are subject to alteration in the course of

> research. It is not asserted anywhere that these goods, in its altered or unaltered form, are sent back to the service recipient; if it were, the provisions of Customs Act, 1962 would be invoked to eliminate tax burden. If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods. Consequently, the provisions of Rule 4(1) are not attracted and, in terms of Rule 6A of Service Tax Rules, 1994, the definition of export of services is applicable thus entitling the appellant to eligibility under Rule 5 of Cenvat Credit Rules, 2004."

8. I do not find merit in the contention of the learned AR for the revenue that the ratio laid down by the Hon'ble Bombay High Court in M/s SGS India Ltd.'scase(supra) cannot be made applicable to the facts of the present case on the ground that in the said case, the Place of Provision of Service Rules,2012 was not considered. This Tribunal while interpreting the provisions of new Rules, that is, Place of Provision of Service Rules, 2012 followed the ratio laid down in the said case in reiterating the basic principle of levy of service tax and observed that it is a consumption-based levy, accordingly, the technical and consultancy service, commences from the stage of undertaking the test on the goods procured and the service is completed on delivery of the test report/certificate to the overseas client. I do not find any reason to deviate from the aforesaid observation of this Tribunal. Further, the judgements referred by the learned A.R for the revenue, in my opinion, are not relevant to the facts of the present case, inasmuch as in the said judgement the issue raised was levy of service tax on procurement of FDA certificate for the goods to be sold in the respective country. In the result, following the aforesaid precedent, I do not find merit in the impugned order to the extent of holding that the services provided by the appellant are not the export service under Rule 6A of Service Tax Rules,1994. Consequently, the appellants are eligible to cash refund of the accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004, except in relation to credit availed input services denied by the learned Commissioner (Appeals) observing that necessary evidences in relation to Building maintenance charges were not produced to establish the nexus with the output service and secondly the rent-a-cab service since placed under the exclusion clause of the definition of input service after amendment to Rule 2(l) of the Cenvat Credit Rules, 2004 with effect from 01.4.2011. Accordingly, the matters are remanded to the adjudicating authority to calculate the admissibility of

refund amount except the credit availed on input services viz. Building maintenance charges and rent-a-cab service.

9. Appeals are disposed of accordingly."

4. Since the issue involved in this Appeal has already been decided by this Tribunal in Appellant's own case, for the earlier periods, therefore relying upon the same, I hold that the Appellants are entitle for the refund claim of unutilized Cenvat credit. As a result, the impugned order is set aside and Appeal is allowed, with consequential relief, if any.

(Pronounced in Court on 18/01/2019)

(Ajay Sharma)
Member (Judicial)

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