CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87419 of 2014

[Arising out of Order-in-Original No: 23/ST/RN/CMR/M II/13-14 dated 28th February 2014 passed by the Commissioner of Central Excise, Mumbai-II.]

Aditya Birla Minacs Worldwide Ltd … ***Appellant***
Teritex Building, Saki Vihar Road, Saki Naka
Mumbai – 400 059

versus

Commissioner of Central Excise …***Respondent***
9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Mumbai Pune – II

APPEARANCE:

Shri Mehul Jiwani, Chartered Accountant for the appellant

Shri M Suresh , Dy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85762 / 2019

DATE OF HEARING: 17/12/2018
DATE OF DECISION: 18/04/2019

PER: C J MATHEW

The dispute in this appeal of M/s Aditya Birla Minacs World

Wide Ltd, against order-in-original no. 23/ST/RN/CMR/M II/13-14 dated 28th February 2014 of Commissioner of Central Excise, Mumbai-II, arises from various payments made to overseas entities and, for that reason, held to be liable to tax, under section 66A of Finance Act, 1994, from them as ‘recipient of services’ that were utilised for rendering ‘call centre services.’ The consideration that was to be subject to tax were attributed to different activities.

2. One of these pertains to payment of ₹ 24,56.86,224 during 2006-07 and 2007-08 on which tax liability as the recipient of ‘business auxiliary service’ under section 65(105)(zzb) of Finance Act, 1994 had not been discharged. It would appear that the appellant was contractually required to provide ‘on-site outsourcing’ (a.k.a. call centre) to M/s Monster Inc to enable which they had entered into a contract with M/s Technion Communication Corporation to undertake the activity.

3. The second relates to payment against contracts with M/s AT&T, M/s MCI WorldCom and M/s Singtel for ‘international private leased circuits’ services required to provide output service and installation of ‘multiplexers’ at the premises of these ‘co-location’ companies who, in addition to charging for such facilities, also levied ‘long distance charges’ for deployment of their lines for coded transmissions. In addition, M/s Interland Inc, who provided the appellant with facility of ‘Linux’ server, was paid ₹ 17,63,55,867,

between April 2006 and March 2007, which were also considered to be taxable on ‘reverse charge basis’ as the recipient of ‘support services of business and commerce.’.

4. Payment of ₹ 96,34,221, for 2006-07 and 2007-08, to M/s Transwork Inc for the ‘management, maintenance and repair’ of the equipment was also claimed to be liable to tax.

5. The liability under these three categories were computed in the show cause notice as ₹ 3,01,57,011, ₹ 2,08,77,444 and ₹ 11,84,740 respectively. The impugned order, while dropping demand of ₹2,08,37,780, confirmed an amount of ₹ 3,13,81,416 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, and imposed penalties under section 76, section 77 and section 78 of Finance Act, 1994. Aggrieved by the order, appellant is before us.

6. Learned Chartered Accountant, appearing for the appellant, informed that the demand that was confirmed pertains to rendering of ‘business auxiliary service’, in the transaction with M/s Technion Communications Corp, for liability of ₹3,01,57,011 and to ₹12,24,405 in relation to ‘support services business and commerce’ on the charges levied by ‘co-location’ companies and on the charges for renting of server.

7. Learned Chartered Accountant contends that, in the back-to-back agreement of the appellant with M/s Monster Inc and M/s Technion Communication Corporation, the rendering of services to the former, though it be export, has already been assessed and the subjecting of an input service used in rendering of service that was already assessed to tax, even if it be nil, to another assessment is not permitted in law. It is also contended that the said service has been received, and consumed, outside India and thereby beyond the purview of tax as provided for in letter no. F no. B 1/4/2006-TRU dated 19th April 2006, circular no. F no. 137/56/2007-CX 4 dated 16th November 2007 and circular no. 141/10/2011-TRU dated 13th May 2011 of Central Board of Excise & Customs restricting taxability. In this connection, Learned Chartered Accountant claims that all the 'call centre activities' commenced and terminate outside India, that the space and facilities of 'co-location' are outside India and that the servers that were rented are also located outside India. It is also submitted that service tax, being a destination-based consumption tax, can be levied only in connection with services rendered in India. Circular no. 56/5/2003 dated 25th April 2003 of Central Board of Excise & Customs and the decision of the Hon'ble High Court of Bombay in *Commissioner of Service Tax, Mumbai-II v. SGS India Pvt Ltd [2014 (34) STR 554 (Bom)]* are relied upon to counter the finding in the impugned order that the location of the contracting party, on whose behalf the service has been rendered, should determine the

place of taxation. Likewise, it is claimed that the decision of the Tribunal in *Genom Biotech Pvt Ltd v. Commissioner of Central Excise & Customs, Nashik [2016 (42) STR 918 (Tri-Mumbai)]* has restricted the application of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 to services rendered in connection with business or commerce in India whereas the appellant submits that the impugned services have been utilised in relation to business or commerce outside India. Reliance is also placed on *Explanation 1* in section 66A of Finance Act, 1994 though we are unable to comprehend the direction in which that logical trajectory would culminate as *Explanation* in a statutory provision cannot, in isolation of the principal provision, levy or exempt as these are instruments intended to elaborate upon the provisions of the section concerned. Yet another argument place before us is that there is no reference to the relied upon Rules in section 66A of Finance Act, 1994; this, according to us, is a specious reasoning. It is also claimed that the services rendered by M/s Technion Communications Centre is not covered by the definition in section 65(19) of Finance Act, 1994. Reliance is placed on the decision of the Tribunal in *United Telecom Ltd v. Commissioner of Central Excise, Hyderabad [2011 (21) STR 234 (Tri-Bang)]* and in *Sharma Travels v. Commissioner of Central Excise, Jaipur-I [2017 (52) STR 272 (Tri-Del)]*. It is contended that, as per the agreement entered into on 1st November 2006 after terminating the earlier outsourcing agreement, the obligation of M/s

Technion Communications Corporation was limited to providing the infrastructural support facilities with the dedicated employees transferred to the appellant.

8. It is contended that the ‘co-location’ charges are more akin to renting of immovable property and, therefore, not covered by the tax on ‘support services of business or commerce’ and that the server charges are essentially for ‘right to use’ in a manner similar to the dispute resolved by Hon’ble High Court of Karnataka in *Antrix Corporation Ltd v. Assistant Commissioner of Commercial Taxes [2010-TIOL-515-HC-KAR]*. It is also claimed that the demand is revenue neutral as the appellant is entitled to CENVAT credit. Contending that the extended period has been invoked without evidence to conclude the existence of the ingredients for sustaining the demand of tax beyond the normal period, the order is assailed in its entirety.

9. On the demand pertaining to the payments made for services rendered by M/s Technion Communication Corporation, Learned Authorised Representative contends that challenge to the absence of the specific taxable activity in section 65(19) of Finance Act, 1994 is irrelevant in the light of the decision of the Tribunal in *Tata Steel Limited v. Commissioner of Service Tax, Mumbai [2015-2464-CESTAT-MUM]*. It is also submitted that rule 3(3) of Taxation of Services (Provided from Outside India and Received in India) Rules,

2006 squarely places the liability on the location of the recipient which, undisputedly, is in India. He draws attention to the 'explanation' in the agreement to supplement the argument. Reliance is placed in the decision of the Tribunal in *Suntec Business Solutions Pvt Ltd v. Commissioner of Central Excise, Thiruvananthapuram [2017 (51) STR 446 (Tri-Bang)]* and *Indo Hong Kong Industries (P) Ltd v. Commissioner of Central Excise, Delhi [2017 (4) GSTL 257 (Tri-Del)]* to support the findings of the adjudicating authority in relation to 'co-location' service and server hire charges.

10. From the records, there can be no doubt that the appellant is a 'call centre' operator and that their clients are situated outside the country. In order to undertake the contractual obligation, the appellant necessarily has to deploy human resources for interface, as a surrogate for the client, with existing customers or potential customers of clients. The seating of personnel is governed by norms prevailing in the industry and interface is enabled through a telecommunication network that includes servers and connectivity as 'call centres' are generally situated at locations that are the most economically feasible. It is also apparent from the records that the appellant has adopted a model wherein some part of the system functions from India and, in the transaction with M/s Monster Inc, from locations outside India; in either situation, the output service is not consumed in India. For the particular contractual agreement with M/s Monster Inc and with

others, the offerings of ‘co-locations’ for housing of equipment is availed along with the hiring of equipment.

11. In this context, we may be stating the obvious to observe that every outward remittances is not necessarily a consideration for procurement of services. There can be no dispute that, if the payments had been transmitted by the appellant for any one or more of the services enumerated in section 65(105) of Finance Act, 1994 and the services have indeed been received by the appellant in India in accordance with Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, service tax liability will, under section 66A of Finance Act, 1994 and subject to the applicable *Explanation* in that provision, devolve on the appellant. The issue in this dispute is whether these two limbs essential for burdening the appellant, as recipient of service, are in evidence. Appellant claims that the decision of the Tribunal in *re Genom Biotech Pvt Ltd* would have it otherwise.

12. Before examining the other claims of the appellant relating to classification of the activities under either ‘business auxiliary services’ or ‘support services of business of commerce’ and the plea of limitation, the ground that tax liability on ‘reverse charge’ does not devolve must be dwelt upon. This is important as section 66A of Finance Act, 1994, invoked by the adjudicating authority to confirm the tax liability on the appellant, was incorporated on 18th April 2006

following judicial determination that section 65 and section 66 of Finance Act, 1994, read with a specific delineation in rule 2(1)(d)(iv) of Service Tax Rules, 1994, did not suffice as authority to collect tax from recipients of such service procured from abroad. Much water has flown under the bridge since the issuing of the impugned order with sufficient clarity emerging to comprehend the scope of, and limitations in, the mechanics of collecting tax on services rendered by entities located overseas.

13. Under the scheme framed in Finance Act, 1994, the default responsibility for collecting and depositing the tax vests in the provider of the service. In certain circumstances, that responsibility shifts to the recipient of the service and are enumerated rule 2(1)(d)(i) of Service Tax Rules, 1994 as 'person liable for paying service tax' as exceptions to the rule 2(1)(d)(ii) of Service Tax Rules, 1994. These were intended to be restricted to transactions in services where the provider and recipient were within the taxable territory and clearly identifiable as an essential requirement arising from the definition of taxable services in section 65(105) of Finance Act, 1994. At a certain stage in the evolution of taxation of services in India, acknowledging that the practice of procurement services from outside not disincentivize domestic sourcing, tax levy on such imports were imposed. Impediments were encountered when *Explanation* inserted in section 65(105) of Finance Act, 1994, in conjunction with an

inclusion rule 2(1)(d)(iv) of Service Tax Rules, 1994, with effect from 16th June 2005, attempted the taxation of services rendered by entities situated overseas. The limitation of jurisdiction imposed by the charging section as it stood then and the constraint on extending the manner of collection of tax through transfiguring of definition was assailed leading to amendment in the statute with effect from 18th April 2006.

14. Services were made taxable contingent upon conformity to description in section 65(105) of Finance Act, 1994 and the formulation therein necessarily connected provider to a recipient through the medium of an activity with consideration as *quid pro quo*. Understandably, the perceptible absence of a provider, owing to being beyond the pale of the taxable territory, rendered any shift of the burden for liability of tax to be inconsistent and illogical. Accordingly, section 66A of Finance Act, 1994, infused with the legal fiction of the recipient as the deemed provider and *sans* recourse to inclusion in the definition of 'person liable for paying tax', was the alternate charging section. With the impossibility of detecting the arrival of the service in India inherent in such transactions, the charging provision would have remained unenforceable. As an indirect tax that is manifest in consumption at the destination, the superfluity of such detection in domestic transaction could not hold for cross-border transactions and the gap was filled by notifying the

Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 as the 'guide rail' for such determination. The scope and limitation of the pertinent Rules would is of more relevance than the charging section in Finance Act, 1994. This is particularly so as the decision of the Tribunal in *re Genom Biotech Pvt Ltd* has been cited on behalf of the appellant by Learned Chartered Accountant.

15. In the decision referred *supra*, the said Rules have been analysed in depth. It, is therefore, appropriate for us to dwell upon the said decision. The Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 has classified all the taxable services under three distinct categories for acknowledging consumption within the country: where the object of the service is immovable property, where the place of performance is intrinsic to activity and the default location which is the *situs* of the recipient. At the same time, it cannot escape attention that, in notifying the Rules, the Central Government while, undoubtedly, drawing upon the general rule-making powers vested by section 94 of Finance Act, 1994 also drew authority from the power vested in the Central Government, under section 93 of Finance Act, 1994, to exempt any service from tax. Both section 93 of Finance Act, 1994 and the impugned Rules restrict themselves to 'taxable service'; it would, therefore, be reasonable to conclude that on a strict application of the said Rules, any activity not covered therein are exempted from tax

even if otherwise taxable under section 66A of Finance Act, 1994. Consequently, any restriction on the taxability, arising from the said Rules, is also, effectively, an exemption from tax.

16. The adjudicating authority has confirmed that consideration has been made over to entities located outside the country; undisputedly, the consideration was for services provided by the overseas entities at locations outside the country. Taking recourse to rule 3 (3) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, by discarding the applicability of the other two sub-rules which pertain to activities in relation to immovable property and where place of performance is the determinant and from the admitted location of the assessee as relevant to the services on which tax liability is sought to be fastened, the demand was confirmed. In doing so, the adjudication order is premised solely on the first condition, *viz.*, the location of the appellant, and has ignored the second, *i.e.* for use in relation to business of commerce. On the surface, this may even be considered as axiomatic and, therefore, irrelevant to the adjudication. However, the extent of the legislative intent to subject procurement of services from abroad is confirmed therein.

17. From our observations above, there can be no doubt that services procured domestically or imported for carrying on of business or commerce is taxable; to the extent of taxability of output

or output service, the tax liability, borne or paid, as the case may be, is adjusted through CENVAT Credit Rules, 2004 and, to the extent that the output or output service is exported, refund under CENVAT Credit Rules, 2004 is an inalienable entitlement. In the circumstances of the present dispute, such refund is undeniable even if the legal fiction of recipient being the provider burdens the appellant with tax. Hence, the question of legislative intent as framed above; the answer has been provided by the Tribunal in *re Genom Biotech Pvt Ltd*.

18. In that dispute, the Tribunal found that the assessee was, in effect, undertaking two activities: that of manufacture and that of sale. Though the first of these was carried out within the taxable territory, the goods, being exported, were being marketed outside the taxable territory. It was held that, as the appellant was procuring services for enabling the latter activity and as the legislative intent did not extend to taxing of services procured from outside India unless for use in relation to business or commerce in India.

19. Procurement of services for use in business or commerce outside India is, unlike the claim of neutrality in other situations to evince lack of motive for evasion of tax, is revenue neutrality, unalloyed and unadulterated. Here, it is not mere off-set. Here, it is not refund of tax whose incidence was borne. Here it is tax that has to be refunded to the person who paid the tax. The legislative intent of not taking with one hand while disbursing with the other is articulated

by the deployment of the expression

> *'received by a recipient located in India for use in business or commerce'*

and, thus, obviating the cumbersome and avoidable process that the impugned order seeks to institute. That was the foundation of the decision in *re Genom Biotech Pvt Ltd*.

20. Therefore, in accordance with the decision in *re Genom Biotech Pvt Ltd*, we find that the payment made to 'service providers outside the country' does not qualify for being subject to tax under section 66A of Finance Act, 1994. We, therefore, allow the appeal and set aside the impugned order. As the first plea of exclusion from the said Rules has been found acceptable, do not see any reason to examine the other submissions made on behalf of the appellant.

(Order pronounced in the open court on 18/04/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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