CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No: 89438 of 2013

[Arising out of Order-in-Original No. 45/ST-II/RS/2013 dated 12th August 2013 passed by the Commissioner of Service Tax, Mumbai – II.]

Wartsila India Ltd. … ***Appellant***
21st Floor, Kesar Solitair, Plot No. 5, Sector 19, Palm Beach Road, Sanpada, Navi Mumbai – 400 705

versus

Commissioner of Service Tax …***Respondent***
Mumbai – II
115 New Central Excise Building, MK Road,
Churchgate, Mumbai – 400 020

APPEARANCE:

Shri JH Motwani with Shri Prateek Bansal, Advocates for the appellant

Shri Bidhanchandra, Additional 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/87502 / 2019

DATE OF HEARING: 10/06/2019
DATE OF DECISION: 29/11/2019

PER: C J MATHEW

This appeal has been filed against order-in-original no. 45/ST-II/RS/2013 dated 12th August 2013 of Commissioner of Service Tax, Mumbai – II by which demand of tax of ₹ 12,06,39,710/-, as provider of 'business auxiliary service' between 1st June 2003 to 31st March 2008, and ₹ 1,16,84,140/-, as provider of 'online information data base access or retrieval service' for the period from 18th April 2006 to 31st March 2008, on reverse charge was confirmed under section 73 of Finance Act, 1994, along with appropriate interest under section 75 of Finance Act, 1994 besides imposition of penalty of like amount under section 78 and under section 76 of Finance Act, 1994.

2. The appellant, as a distributor of 'spare parts' in its own right, also acts as agent for transfer among group companies for which remuneration is also agreed upon. It is the commission amount received for the said period amounting to ₹ 110,01,38,251/- which was sought to be subjected to tax of ₹ 12,06,39,710/- in the show cause notice.

3. It is contended by Learned Counsel that the service itself, being exported, is not liable to tax and that, for the period from April 2008 to March 2009, proceedings initiated against them that were dropped in adjudication, and, after dismissal of appeal of Revenue before the Tribunal, was upheld by the Hon'ble High Court.

4. On a perusal of the order of the Tribunal in *Commissioner of Service Tax, Mumbai – II v. Wartsila India Ltd [order no. A/3702/15/STB dated 30th October 2015*], disposing off appeal no.

ST/134/2011 challenging order-in-original no. 24/ST-II/KKS/ 2010 dated 8th December 2010, the finding that

> *'5. We are in full agreement with order of the Commissioner wherein after analyzing the services provided, he has came to the conclusion that both conditions of Export of Services are satisfied. He has also relied on clarification issued by the Ministry vide Circular No. 111/5 /2009-ST dated 24/2/2009. The said circular clarifies at Sr. No. (iii) (that taxable services shall be treated as Export of Services if "Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and received commission for his services from foreign seller in convertible foreign exchange".'*

is relevant to the present dispute

5. The Hon'ble High Court of Bombay, in *Commissioner of Service Tax VII v. Wartsila India Ltd [order dated 18th September 2018 in Central Excise appeal no. 141 of 2017]* held that

> '*8. We find that the issue raised herein is no longer res-integra. An identical nature of services as rendered by the Respondent to its foreign clients, had come up for consideration before this Court in Commissioner of Service Tax, Mumbai v/s. ATE Enterprises (P) Ltd., 2018 (8) GST 123. This Court followed its earlier decision in SGS India (P) Ltd., v/s. Commissioner of Service Tax 34 STR 554 and held that services of procuring orders and passing it to its overseas principal/parties and receiving payments for the same in foreign exchange, is an activity of export of services covered by the Export of Service Rules, 2005. Therefore, the*

issue stands concluded in favour of the Respondent and against the Appellant by the decision of this Court in ATE. Enterprises (P) Ltd., (supra). Further, Circular No.111 of 2009 dated 24th February, 2009 issued by the CBEC also supports the case of the Respondent. Nothing has been shown to us as to why above Circular cannot be read in the manner in which the Commissioner of Service Tax and the Tribunal has read it.

9. The decision of the Tribunal in the case of Blue Star Ltd., rendered on 24th September, 2014 which was also a subject matter of appeal before this Court being Commissioner of Service Tax, Mumbai VII, Commissionerate v/s. M/s. Blue Star Ltd., (Central Excise Appeal No.173 of 2017). This appeal on an identical issue, was dismissed on 11th September, 2018, as not giving rise to any substantial questions of law.'

6. Learned Authorised Representative reiterated the findings of the original authority.

7. Learned Counsel submits that, insofar as the second demand for ₹ 12,06,39,710/- is concerned, the demand has been raised on the 'annual licence fee' charged by M/s Wartsila Corporation, England for certain software licences and it is contended that tax has been discharged on the said payments under section 66A of Finance Act, 1994 as recipient of 'information technology software services' which was taxable only from 16th May 2008. He drew attention to the finding in impugned order that

'26. Para 13 of the SCN mentions the nature of the services provided and also the reason as to why the services provided are classifiable under 'On-line information and database access or retrieval service'. The Noticee stated that the services received are Information Technology related services. The Noticee in para 18 of the reply dated 05.01.2009 stated that they are receiving information through the media of intranet. The Noticee has not produced any evidence to prove that the services they received fall within the definition of 'Information Technology Software service' except the fact that they will pay the Service Tax under 'Information Technology Software service' from the subsequent date. I, therefore, do not find any merit in the argument of the Noticee that the service received by them is not liable to Service Tax under "On-line information and database access or retrieval service". I, therefore, conclude that Service Tax of Rs. 1,16,84,140/- is liable to be demanded from the Noticee under "On-line information and database access or retrieval service" for the period 18.04.2006 to 31.03.2008.'

8. Learned Counsel contends that the burden of classification, which falls on the adjudicating authority, has not been discharged. It is also contended that the show cause notice itself has failed to justify coverage of the said activity under this taxable service.

9. According to Learned Authorised Representative, the show cause notice very clearly summarises the allegation of receipt of the said service and failure to discharge tax liability thus

'12. It is also observed from the agreement that the noticee

company has agreed and undertaken to pay a service fees to Wartsila as described in the Appendix of the agreement, in connection with the services rendered by Wartsila. The scope of service is also found to be incorporated in Appendix 1 which is as under:

i) *The agreement covers all global IM services provided by Shared IM to noticee company concerning supported application.*

ii) *The IM services include all necessary global On-going and New Development/Enhancement related services of client's (noticee's) business applications needed to allow noticee company to continue its day-to-day business operation and to accomplish its development targets and*

iii) *The basic fee consists of five main components viz. SONAD Service, Employee On-line, Network, WE SAP and Business Reporting (COGNOS).'*

10. We find that the appellant had been discharging tax liability on the licence fee paid to overseas entity as recipient of 'information technology software service' ever since the incorporation of that entry in section 65(105) of Finance Act, 1994. On the face of it, the contention of Learned Counsel that the tax was not liable to be discharged for the period prior to such imposition would appear to be tenable. The only way in which the tax liability could crystalise before 16th May 2008 is its coverage by an existing taxable entry coupled with the express intent to discard it from such entry while

including the service in a substitute entry. It is the finding of the original authority that the said activity would, within the territory, have been liable to tax in the hands of a domestic provider of service as 'online information and data base access and retrieval service'. However, from our examination of the relevant entries, we do not find 'information technology software service' to have originated from a discarded entry or carved out of an existing entry. The finding of the original authority is bereft of any examination of the taxable entry, unconnected with the definition and bereft of even alluding to the activities of the overseas entities for ascertainment of the delivery of such service to the appellant. Mere reference to a paragraph in the show cause notice, and especially in the context of lack of finding, does not constitute a proper adjudication that devolves upon the original authority. The only issue that remains to be decided is the purposiveness of the agreement. For that, there has to be an allegation in the show cause notice beyond mere reference to the agreement between the appellant and the overseas entity and its elaboration by extracting appendix – I. Beyond that, the show cause notice has merely taken note of the payments made by the appellant, the definition of the said services under section 65(75) of the Finance Act, 1994 and by drawing upon the definition of 'information' in the Information Technology Act, 2000 and without adducing any other evidence has come to the conclusion of taxability. This, in our view, does not constitute a notice appropriately justifying crystalising of tax liability.

11. On the contrary, it would, enable the adjudicating authority with an unrestricted access for fitment of the activity of the overseas entity to the definition without the constraints of the framework required within the show cause notice. This would not be in accordance with the fundamentals of natural justice and thus precludes scope for remand. The taxability of commission received from overseas entities for promoting the sale of their products having been decided in their favour for the subsequent period, is no longer *res integra.*

12. Accordingly, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 29/11/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*