CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Miscellaneous Application No. 85716 Of 2022

(on behalf of Appellant)

in

Service Tax Appeal No. 87146 Of 2018

(Arising out of Order-in-Appeal No. MUM/DGPM/WRU/APP-84/17-18 dated 28.03.2023 passed by Principle, Additional Director General, DGPM, Customs & central Tax, WRU, Mumbai)

M/s Mitsui OSK Lines Maritime (India) Pvt. Ltd. .....**Appellant**
Unit No. 52, 5th Floor, Kalpataru Square,
Kondavita Lane, Off Andheri-Kurla Road,
Andheri (East), Mumbai-400 021.

VERSUS

Commissioner Central Goods & Service Tax-Mumbai (East) .....**Respondent**
9th Floor, Lotus, Parel, Lotus Infocentre,
Near Parel Station, Parel (East),
Mumbai-400 012.

Appearance:
Shri Anupam Dighe, Advocate for the Appellant
Shri Prabhakar Sharma, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86167/2023

Date of Hearing: 24.11.2022
Date of Decision: 11.05.2023

PER : S. K. MOHANTY

The applicant/appellant has filed this miscellaneous application, seeking amendment in the cause title as well as in the ST-5 Form annexed to the appeal memorandum filed before the Tribunal. It has been stated that subsequent to filing of appeal, the name of the company has been changed from "Mitsui O.S.K. Lines

Maritime (India) Pvt. Ltd." to "MOL Maritime (India) Pvt. Ltd.", and that such changes have also been acknowledged by the Registrar of Companies in the certificate dated 23.04.2019 issued by him. Further, it has also been stated that due to inadvertence, the name and address of the respondent were wrongly mentioned in the appeal memorandum in 'Form ST-5' and the correct name and address should be "(1) Commissioner, Service Tax-V, Mumbai; (2) Assistant Commissioner, Division VII Service Tax-V, Mumbai and "2nd Floor, Estrella Battery Compound, Matunga Labor Camp, Dharavi, Mumbai 400 019".

1.1 Heard both sides.

1.2 Considering the facts and circumstances of the case, we are of the view that the miscellaneous application filed by the applicant/appellant can be considered and accordingly, we allow the same. Registry is directed to carry out the following amendments in the appeal memorandum filed before the Tribunal for the purpose of hearing and disposal of the appeal.

(i) Name of the appellant is substituted, to read as **"MOL Maritime (India) Pvt. Ltd."**

(ii) Name and address of the respondent are substituted, to read as:

"(1) Commissioner, Service Tax-V, Mumbai
(2) Assistant Commissioner, Division VII Service Tax-V, Mumbai

2nd Floor, Estrella Battery Compound, Matunga Labor Camp, Dharavi, Mumbai 400 019".

2. Briefly stated, the facts of the case are that the appellant herein had entered into the agreement dated 17.08.2001 with M/s. Mitsui O.S.K. Manning Service SA (for short, "MOMS") to provide Manpower Recruitment or Supply Agency Service. As per the terms of the agreement, the appellant was required to select qualified seafarers for the purpose of their employment with MOMS. Further, the appellant had also entered into another service agreement

dated 01.04.2010 with MOMS for supply of ship/port inspectors for periodical inspection of the vessels and ports. Since, both the category of services as above were exported by the appellant, no service tax liability was discharged by it. Thus, the appellant was not in a position to utilize the Cenvat credit availed on the input services. Accordingly, the appellant had filed the refund applications under Rule 5 of the Cenvat Credit Rules read with Notification No. 27/2012-CE (N.T.) dated 18.06.2012, claiming the refund of un-utilized Cenvat credit amounting to Rs.66,84,891/- for the period April 2015 to March 2016. The refund application filed by the appellant was adjudicated by the Assistant Commissioner vide original order dated 10.11.2016, in sanctioning the refund claim of Rs.62,60,607/- and rejecting the refund claimed amount of Rs.4,24,824/-, as the services were used for personal consumption of its employees. Feeling aggrieved with the original order dated 10.11.2016, Revenue had filed appeal before the learned Principal Additional Director General of Performance Management, Customs & Central Tax, West Zonal Unit, Mumbai. The appeal was disposed of vide Order-in-Appeal dated 28.03.2018 in allowing the appeal in favour of Revenue. Being dissatisfied with the impugned order, the appellant has filed this present appeal before the Tribunal.

3. Heard both sides and perused the records.

4. The impugned order in this case has held that since the employees of the appellant take instruction from the service recipient located abroad and since the 'place of provision of service' is outside India, there is no service provided from India and thus, there is no export of service. On examination of the case records, more particularly the terms of agreements, we find that the employees are operating on behalf of the appellant, who is based in India. Further, the appellant is paid for the services rendered by its employees by the foreign service recipient in convertible foreign exchange. The fact that the place of provision of service being outside India has also been admitted in the impugned order. Therefore, in our considered view, the appellant herein had complied with all the requirements and conditions laid down under

Rule 6A of the Service Tax Rules, 1994 for consideration of the provision of service as export. Appreciating the true intent and purport of the agreements, the original authority vide order dated 10.11.2016 has held that the benefit of refund of input credit should be available to the appellant. We find that the impugned order in this case has failed to appreciate that the staff selected for employment were the employees of the foreign service recipient and not the employees of the appellant. Further, the agreements entered into between the appellant and the overseas entity were not properly scrutinized by the Ld. Commissioner (Appeals), which is evident from the fact that the appellant does not have necessary certificate to carry on the business of Ship Management Services. Hence in our considered view, the services provided by the appellant pursuant to the agreements, would appropriately be classifiable under Manpower Recruitment or Supply Service, for which the appellant got themselves registered with the service tax department. We find that considering an identical issue, the Tribunal in the case of Commissioner of Central Excise, Mumbai Vs. Jubilant Enpro Pvt. Ltd. – 2016 (46) STR 448 (Tri. -Mumbai), has held that the correct classification of services provided by the appellant therein should fall under the taxable category of 'Manpower Recruitment or Supply Service' and not under 'Ship Management Service'. The relevant paragraph in the said order is extracted herein below:

"***5.4*** *The next question is whether the service rendered by the respondent is taxable under "manpower recruitment or supply agency" service or "ship management service". The definitions are as follows :*

'65(68) "manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person.'

'65(96a) "ship management service" includes,-

(i) the supervision of the maintenance, survey and repair of ship;

(ii) engagement or providing of crews;

(iii) receiving hire or freight charges on behalf of the owner;

(iv) arrangements for loading or unloading;

(v) providing for victualling or storing of ship;

(vi) negotiating contracts for bunker fuel and lubricating oil;

(vii) payment, on behalf of the owner, of expenses incurred in providing services or in relation to the management of the ship;

(viii) the entry of ship in a protection or indemnity association;

(ix) dealing with insurance, salvage and other claims; and

(x) arranging of insurance, in relation to a ship;'

From the above definitions, it may be seen that supply of manpower/crew for a ship can be classified both under "manpower recruitment or supply service" as well as under "ship management service". Ship management service is much wider in scope as it covers a gamut of activities in relation to a ship apart from providing of crews. Thus supply of manpower is the 'genus', provision of crew to a ship is a 'species'. The appellant themselves have classified their activity under "manpower recruitment or supply agency" service and have discharged the service tax liability partially under the said category. This Tribunal in the case of Jetlite (India) Ltd. [2011 (21) S.T.R. 119] has observed that "there can hardly be any quarrel about the proposition that introduction of specific entry does not mean that the subject covered by the specific entry was not covered by general entry prior to the introduction of the specific entry". Further the C.B.E. & C. in Circular No. 334/1/2008-TRU, dated 29-2-2008 had clarified that introduction of a later entry under the Service Tax does not ipso facto mean that the said activity was not covered under the previous entry though they were specifically included under the definition of taxable services. Section 65A of the Finance Act pertaining to classification of services prescribes "earlier the better" principle — that is the service shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration. In the present case, sub-clause (68) relating to manpower recruitment or supply agency service occurs first compared to sub-clause (96a) relating to ship management service. Therefore, the classification sought in the present case by the Revenue under "manpower recruitment or supply agency" service cannot be faulted at all and we hold accordingly".

5. On careful examination of the case records, we conclude that during the disputed period, the appellant had provided 'Manpower Recruitment or Supply Service' to the overseas entity and that as per the terms of the agreement, since the recipient of service was located outside India, the service should be considered as export; and as a consequence, the appellant should be entitled for the benefit of refund of input tax credit availed by it.

6. In view of the foregoing discussions, we do not find any merits in the impugned order, insofar as it has set aside the adjudication order and allowed the appeal in favour of the Revenue. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on 11.05.2023)

(C J Mathew)
Member (Technical)

(S. K. Mohanty)
Member (Judicial)

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