CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85139 of 2017

(Arising out of Order-in-Appeal No. MUM-SVTAX-002-APP-486 to 489/16-17 dated 25.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai.)

Dolby Technology India Private Limited .... **Appellants**
Corporate Office – Solitaire Corporate Parks,
S-14, 5th Floor, 167 Guru Hargovindji Marg
Chakala, Andheri (East)
Mumbai – 400 093.

Versus

Commissioner of Service Tax, Mumbai-V ....**Respondent**
Mumbai East Central Tax Commissionerate
9th Floor, Lotus Info Centre
Station Road, Parel (East)
Mumbai – 400 012.

APPEARANCE:

None for the Appellants
Shri Jitesh Kumar Jain, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87595/2024

Date of Hearing: 06.09.2024
Date of Decision: 06.09.2024

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Dolby Technology India Private Limited, Mumbai (referred to as "the appellants", for short) assailing the Order-in-Appeal No. MUM-SVTAX-002-APP-486 to 489/16-17 dated 25.10.2016 (herein after, referred to as "the impugned order") passed by the Commissioner (Appeals), Service Tax-II, Mumbai.

2.1 The brief facts of the case are that the appellants herein are engaged *inter alia,* in providing marketing business support services mainly to Dolby Laboratories International Services Inc. California, USA. The appellants are registered with the jurisdictional service tax authorities under Service Tax Registration No. AADCD1717FSD001 for providing taxable services under the category Business Support Services (BAS) as provided/ interpreted under Section 65B(49) of the Finance Act, 1994. The appellants use to avail CENVAT credit of service tax paid on various input services which are used in provision of taxable output services. Since the appellants were exporting all the taxable output services, there was no occasion for utilising the CENVAT credit taken in their books of accounts. Therefore, the appellants had filed refund claim applications along with supporting documents before the jurisdictional authorities for refund of accumulated CENVAT credit in terms of Rule 5 of the CENVAT Credit Rules, 2004 (for short, referred to as "CCR of 2004).

2.2 On verification of the refund claims made by the appellants along with certificate of correctness of the refund claims issued by the Chartered Accountant who had audited their books of accounts, the jurisdictional Assistant Commissioner vide Order-in-Original dated 31.03.2016 had partly sanctioned the refund claims, while rejecting certain portion of the refund claims on the ground that it pertains to input credit having been availed wrongly. Being aggrieved with the aforesaid order of the original authority, Revenue had filed appeals before the Commissioner (Appeals), Service Tax-II, seeking for rejection of the refund claims sanctioned by the original authority. Learned Commissioner (Appeals) vide the impugned order dated 25.10.2016, had allowed the appeals filed by the Department by rejecting all the refund claims sanctioned in favour of the appellants. The details of these cases are as follows:

Sl. No.	Period of refund claim	Amount claimed (in Rs.)	Refund Sanctioned (in Rs.)	Refund rejected (in Rs.)
1	April, 2014 to June, 2014	39,62,795	38,92,127	70,668
2	July, 2014 to September, 2014	26,15,188	26,15,188	0
3	October, 2014 to December, 2014	26,26,666	26,26,666	0
4	January, 2015 to March, 2015	27,73,112	27,73,112	0
	Total	1,19,77,761	1,19,07,093	70,668

Feeling aggrieved with the impugned order dated 25.10.2016, the appellants have filed this appeal before the Tribunal.

3. None appeared on behalf of the appellants. However, in the memorandum of appeal filed before the Tribunal, appellants had pleaded that they render business support services only to Dolby USA, located outside India. Therefore, the services provided to such business entity outside India shall qualify as 'export' of services in terms of Rule 6A of the Service Tax Rules, 1944. Further, it has also been stated by the appellants

that they are not involved in developing of any software/technology or generation of applications on behalf of their client M/s Dolby USA.

4. Upon considering that the issue relates to the disputed period of 2014-2015, and in order to dispose of this long pending dispute, the matter was taken up with the assistance of the learned AR appearing for the Revenue.

5. In the impugned order dated 25.10.2016, the learned Commissioner (Appeals) had rejected all the refund claims on the ground that the place of provision of the output service is in India, and therefore the output services rendered by the appellants would not be treated as 'export', in terms of Place of Provision of Services Rules, 2012 (POPS Rules). The relevant paragraphs of the said order is quoted below:

> *"5. I have carefully gone through the facts of the case, impugned order, appeal filed by the appellant department and grounds indicated therein. The issue involved in the instant case is whether the total amount of refund claim amounting to Rs. 1,19,07,093/- sanctioned in terms of Notification No.27/2012-CE (NT) issued under rule 5 of the CCR in the impugned orders is, proper and legal. In the subject case, the impugned period is April 2014 to March 2015 and with effect from 01.07.2012, provisions for determining export of services have been made in Rule 6A(1) of the Service Tax Rules, 1994 (STR). Therefore, whether services rendered by the respondent assessee, was export of service as per Rule 6A(1) of the STR, has to be decided. For this purpose, Rule 6A of the STR, is reproduced below:-*
>
> > *"The provision of any service provided or agreed to be provided shall be treated as export of service when, -*
> >
> > *(a) The provider of service is located in the taxable territory,*
> >
> > *(b) The recipient of the service is located outside India,*
> >
> > *(c) The service is not a service specified in the section 66D of the Act,*
> >
> > *(d) The place of provision of the service is outside India,*
> >
> > *(e) The payment for such services has been received by the provider of service in convertible foreign exchange, and*
> >
> > *(f) The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act".*
>
> *Thus, if any service provided cumulatively satisfies all the above conditions, it will be considered as Export of Service. The fourth condition to be satisfied is that the place of provision of service must be outside India. The fulfillment of this condition will have to be determined in accordance with the POPSR in view of Rule 2 (1) (dd) of the STR. In the subject case, the respondent assessee is engaged in providing the service of support for Licenses of Technology and support for sale of products and services. They receive instructions/confidential information including technical data, schematics, product plans, product designs, marketing plans, research and development activities, customer preferences and data, business opportunities, financial data, source*

code and related unpublished documentation of proprietary computer programs, integrated circuit topography designs, industrial designs and documentation in electronic media from Dolby Laboratories International services, Inc, San Francisco, CA. Since the basic products are made available electronically to the respondent assessee located in India so that required Software application can be generated or other support service can be provided by the service provider located in India, such a situation of making electronically available the data and software etc. is covered under the proviso to Rule 4(a) of the POPSR, which states that when such services are provided by electronic means, then the place of provision shall be the location where goods are situated at the time of the provision of the service. Accordingly, the place of provision would be India and as such the claim i.e "export of service" made by the respondent assessee is not under the provisions of Rule 6A (d) of STR and cannot be termed as export of service. Therefore, the respondent assessee is not entitled for any refund under Rule 5 of CCR, 2004. As regards issue of time bar, from the records available, I find that in respect of all the four appeals filed by the appellant department, the common order issued by the jurisdictional commissioner directing Assistant Commissioner to file appeal against the impugned order was made within a period of three months from the date of communication of the impugned order dated 31.03.2016 as required under section 84 of the FA. Therefore, none of the appeals is hit by time bar.

8. In view of the above findings, I reject the claims of refund of Rs.1,19,07,093/- covered under all the four appeals in terms of the Notification No.27/2012-CE (NT) dated 18.6.2012 issued under Rule 5 of the CCR and accordingly appeal of the department is allowed."

6. The issues for determination before the Tribunal in this case is:-

(i) whether the output services rendered by the appellants to their foreign business entity M/s Dolby Laboratories International Services Inc. California, USA can be considered as 'export' under Rule 6A of the Service Tax Rules, 1994?; and what is the place of provision of the output services in terms of Place of Provision of Services Rules, 2012?; and

(ii) whether the rejection of refund claim benefit of the accumulated CENVAT credit arising on account of exportation of output services by the appellants, under Rule 5 of CENVAT Credit Rules, 2004 read with Notification No.27/2012-C.E. (N.T.) dated 18.06.2012 is legally sustainable?

7. In order to address the above issues, we would like to refer the relevant legal provisions contained in Service Tax Rules, 1994 and Place of Provision of Services Rules, 2012 (POPS), as extracted below:

Service Tax Rules, 1994

"Rule 6A. Export of services. *(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,—*
(a) the provider of service is located in the taxable territory,
(b) the recipient of service is located outside India,

(c) the service is not a service specified in section 66D of the Act,
(d) the place of provision of the service is outside India,
(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Place of Provision of Services Rules, 2012

"Rule 3. Place of provision generally .
The place of provision of a service shall be the location of the recipient of service:
***Provided** that in case of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

Rule 4. Place of provision of performance based services.
The place of provision of following services shall be the location where the services are actually performed, namely:—

(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:

***Provided** that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:*

***Provided further** that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair;*

(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service."

8.1 On plain reading of the above legal provisions it transpires when certain specified conditions under Rule 6A of the Service Tax Rules, 1994 are fulfilled, the provision of service in such cases would be treated as 'export' under the Rules of 1994. Further, it also transpires that in general, the place of provision of service would be the location of the recipient of the service exported; and in certain specified situations such as performance based service, services relating to immovable property, events, goods/passenger transportation service etc., then specific prescription has been given for treatment of the place of provision of service.

8.2 On careful perusal of the case records and the facts of the case, it transpires that the services have been exported by the appellants from their business premises at Mumbai, to their business entity M/s Dolby Laboratories International Services Inc. California, USA, located outside India; the output services are not covered under the Negative list of services as provided under Section 66D of the Finance Act, 1994; and the fact that the payment received by the appellants for such output services in foreign exchange/convertible foreign currency and that they are not merely establishments of distinct person are not disputed in this case. The only issue for verification is whether they provision of service is outside India.

8.3 On the above issue, the learned Commissioner (Appeals) had given a finding that the "*basic products are made available electronically to the respondent assessee located in India so that required Software application can be generated or other support service can be provided by the service provider located in India, such a situation of making electronically available the data and software etc. is covered under the proviso to Rule 4(a) of the POPSR…:.* In this regard, we find that the legal provision under Rule 4 ibid clearly lays down a situation, where the recipient of service physically make available certain goods to the service provider, for working on the same in order to provide the output service, then the place of provision would be the place, where the services are actually performed. Further, a proviso clause of Rule 4 *ibid* state that when the services are performed by the appellants online from a remote location, in respect of goods provided by the services recipient, then the place of provision would be the place where the goods were situated at the time of rendering of service. In the present case, there is no situation of service recipient making physically available any goods to the appellants. Further, as generally understood, the proper function of a proviso clause is to qualify or create an exception to what is in the main enactment, and ordinarily, a proviso is not interpreted as stating a general rule. Therefore, in our considered view the proviso clause to such rule cannot independently create a situation where the goods are not physically provided by the service recipient, for creating an exception; on the other hand, what the proviso intends to do is to state that in respect of service provided online from a remote location in respect of any goods physically supplied by the service recipient, then the place of provision would be the place where the goods were located at the time of provision of service. As seen from the facts of the present case, where no goods are physically made available by the service recipient to the service provider, the Rule 4ibid have no application.

8.4 Furthermore, on careful perusal of the 'Support Services Agreement' dated 11.02.2011 entered between the appellants and their business entity / client, more particularly the scope of services provided under such agreement dealing with services of (i) support for licenses of technology and (ii) support for sales of products and services, nowhere it states that certain goods have been physically supplied or to be supplied by the service recipient to appellants service provider, for rendering the agreed service. The extract of the relevant portion of the said agreement is placed below:

EXHIBIT A

SERVICES

To the extent legally permissible, Service Provider will provide one or more of the following Services under this Agreement:

SERVICE	**INITIAL COST PLUS PERCENTAGE**
1. Support for Licenses of Technology: Collection and analysis of data relating to licenses of Company Intellectual Property: preparation and presentation of revenue forecasts for licenses of Company Intellectual Property, monitoring and reporting marketing opportunities for licenses of Company Intellectual Property, maintenance of relationships with existing licensees of Company intellectual Property through personal communication, exhibitions, promotional materials, events and training, identification of potential new licensees of Company Intellectual Property in accordance with the Dolby Sales Policy, as amended from time to time, support for product quality , licensee compliance verification, including verification of royalty statements from licensees by inspecting licensee facilities to confirm products incorporating Company Intellectual Property and monitoring products offered for sale in local markets, and general liaison and support services of a preparatory or auxiliary character.	15%
2. Support for Sales of Products and Services: Collection and analysis of data relating to sales of products and services; preparation and presentation of revenue forecasts for sales of products and services, monitoring and reporting marketing opportunities for sales of products and services, maintenance of relationships with existing customers of products and services through personal communication, exhibitions, promotional materials, events and training, identification of potential new customers for products and services in accordance with the Dolby Sales Policy, as amended from time to time, support for product quality testing, and general liaison and support services of a preparatory or auxiliary character.	15%
3. Other services: Other services requested by Service Recipient from time to time as agreed upon by the Parties, including without limitation:	15%

- General information gathering
- Accounting services
- Contacts with governmental authorities
- Local administrative support of Service Recipient projects
- Support services and trade shows
- Translation services
- Other general liaison and supporting services

The service recipient will prepare the reports, wherever applicable, for the services provided by it and will forward these reports to service recipient. Service recipient will take an informed decision on the basis of these reports in its business outside India.

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It also transpires from the above scope of services provided by the appellants service provider that the reports and other information sent online and further action is taken by the service recipient at its place of business i.e., in California, USA. Therefore, effectively the services are rendered outside India, even if it is treated that they had supplied goods to the appellants-service provider. Therefore, we find that the findings recorded in the impugned order by the Learned Commissioner (Appeals) is contrary to the facts of the case.

9.1 As regards the second issue i.e., rejection of refund claim benefit of the accumulated CENVAT credit arising on account of exportation of output services by the appellants, under Rule 5 of CENVAT Credit Rules, 2004 (CCR of 2004), it is a settled position of law that the provider of output services is permitted to take CENVAT credit of service tax paid on the input services, and the credit so taken in the books of accounts, is permitted to be utilized for payment of service tax on the taxable output service(s). In the present case, taking of CENVAT credit by the appellants under Rule 3 of the CCR of 2004 has not been objected to by the department, the fact of which is evident from the fact that the order of original authority had after due verification had sanctioned the refunds, under the provisions of Rule 5 of CCR of 2004. Thus, it is evident that taking of CENVAT credit on the input services by the appellants has never been objected to by the department and such credit particulars have been rightly captured in the books of accounts.

9.2 It is also an admitted fact on record that the output services provided by the appellants, for which they were registered with the service tax department, were substantially exported by them. Since, the export of the output service(s) does not attract payment of any service tax, there was no scope or occasion on the part of the appellants to utilize the accumulated CENVAT Credit balance available in their books of accounts. Therefore, during the disputed period, they had filed the refund applications under Rule 5 of the CCR of 2004, claiming refund of accumulated CENVAT balance available in their books of accounts. Rule 5 *ibid,* dealing with the provisions of refund benefit, only provides that the requirement of formula laid down in the said rule has to be adhered to by the assessee. In the case in hand, it is not Revenue's contention that the formula laid down in Rule 5 *ibid* read with notification issued thereunder has not been complied with by the appellants in all the cases. Thus, under such circumstances, denial of the refund benefit on the ground that there is no nexus between the input and output services, and the output services cannot be treated as export, cannot be sustained. We find that the Central Board of Excise and Customs (CBEC) in Circulars dated 19.01.2010 and 16.03.2012 has clarified that while granting the benefit of refund of CENVAT Credit on account of exportation of the output services, establishment of nexus between the disputed services and the output service cannot be questioned.

10. In view of the foregoing discussions, we do not find any merits in the impugned order, insofar as it has rejected all the refund claim applications, by holding that there is no exportation of service under the Place of Provision of Services Rules, 2012 in providing the output services by the appellants service provider in India to the service receiver located outside India. Therefore, the denial of refund benefits of accumulated CENVAT Credit to the appellants, in impugned order dated 25.10.2016, is not legally sustainable and thus it is liable to be set aside.

11. In the result, the impugned order dated 25.10.2016 passed by the learned Commissioner (Appeals), Mumbai-V is set aside and the appeal filed by the appellants are allowed in their favour, with consequential relief, if any, as per law.

(Operative portion of the Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha