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

COURT NO.

Appeal No. ST/86913 to 86916/16

(Arising out of Order-in-Appeal No. MUM-SVTAX-002-APP-120 to 123-16-17 date 11.05.2016 passed by the Commissioner of Service Tax (Appeals), Mumbai-II)

For approval and signature:

Honble Shri Ramesh Nair, Member (Judicial)
Honble Shri Raju, Member (Technical)

==========

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

==========

Commissioner of Service Tax, Mumbai-VI
:
Appellant

VS

M/s. Gupshup Technology India Pvt. Ltd.
:
Respondent

Appearance

Shri M.K. Sarangi, Addl. Commr. (A.R.) for Appellant

Shri B.K. Sinha, Consultant for respondent

CORAM:

Honble Shri Ramesh Nair, Member (Judicial

Honble Shri Raju, Member (Technical)

Date of hearing : 07/07/2017

Date of Pronouncement : 06/11/2017

ORDER NO.

Per : Ramesh Nair

These apeeals have been filed by the Revenue are against the Order-in-Appeal No. MUM SVTAX-002-APP- 120 to 123-16-17 date 11.05.2016 whereby the Commissioner (Appeals) has allowed/

upheld the Respondent claim of refund of cenvat credit of input services used in export services.

2. The facts in all the appeals are that the Respondent M/s Gupshup Technology India Pvt. Ltd (previously known as Webaroo Technology Pvt. Ltd.) are engaged in providing services under the category of Business Support Service (BSS). They provide the SMS Aggregator services to M/s Facebook under an agreement for which the bills were raised to M/s Facebook, Ireland and the amount was received in convertible foreign currency. They filed four refund applications towards refund of unutilized cenvat credit of input services used for export of services in terms of Rule 5 of Cenvat Credit Rules,2004 readwith Notification No. 27/2012 CE (NT) DT. 18.06.2012. The Respondent claimed that the services were exported to their client M/s Facebook Ireland Limited during the period January, 2014 to December, 2014. The claim for the period January to March 2014 and April to June 14 were partly sanctioned whereas the two claims pertaining to period i.e July to Sep 14 and Oct to Dec 14 were rejected on the ground that the services of BSS provided by the Respondent to M/s Facebook does not qualify as export of service. The Respondent filed appeals against the rejection of the claim whereas the revenue filed appeals against sanctioning of claims. The Appellate Commissioner allowed the appeals filed by the Respondent whereas the appeals of the revenue were rejected.

3. Hence all the present appeals by Revenue.

4. The Revenue has filed appeal on following grounds :

4.1 The Respondent provide SMS Aggregator services to Facebook within India. The SMS Messages are sent to subscribers of facebook as directed by Facebook. The assessee provided the services in India on behalf of Facebook. Service is provided and consumed in India. Both the actual service provider and recipients of services are located in India. Facebook hired the assessee to provide services in India to the subscribers in India.

4.2 It is a case of both the service provider and service recipient are located in india and accordingly as per Rule 3 of Place of Provision of services Rules(POP), the place of provision of service is the location of service recipient of service. Proviso to Rule 3 of POP categorically states that where the location of the service recipient is not available in the ordinary course of business, the place of provision of service shall be the location of the recipient of the service. The contract is only to enable the assessee to provide services in india on behalf of Facebook. As per Rule 8 of POP, place of provision of service is the location of the recipient of the sercvie where the service provider and sercvie recipient are located in the same taxable territory. Therefore the transaction under consideration cannot be treated as export of services. Hence the impugned order, which sanctioned the refund treating the said BSS Service as export of service are not legal and proper.

4.3 The reliance placed upon the judgment in case of M/s Paul Merchants Ltd. Vs. CCE, Chandigarh 2013 (29) STR 257 (TRI) and M/s Vodafone Essar Cellular Ltd. 2014 ┬ TIOL - 328 CESTAT DEL by the Commissioner (Appeals) is not correct as the appeal against said order are pending before Punjab

& Haryana High Court and Mumbai High Court respectively.

4.4 The transaction under consideration cannot be treated as export of service and the Appellate Authority has erred in allowing the appeal of the assessee and rejecting appeal of revenue.

4.5 The Ld. AR also submitted that the legal effect of majority view in case of Paul Merchant is as good as that of Single member Bench. That the said case has been decided against the very basic of service tax i.e consumption based tax, rather focus has been made on persons who pays for the service. The same was followed in Vodafone case. He also filed written submissions.

5. Shri B.K. Sinha, Ld. Consultant appearing for the Respondent submits that they provided Business Support Service which is in the nature of aggregator of SMS to the Indian subscribers of M/s Facebook Ireland Ltd. for which they entered into agreement with M/s Facebook. They are engaged in activity of sending or receiving SMS to/ from the Indian subscribers of Facebook by using a direct internet connection between the Respondent and Facebook. They collect all the SMS message from Facebooks application collection point specified by the Facebooks and each telecom operators SMS C and Facebooks point of entry as applicable. They transmit MT or SMS message originated by Facebook to a subscriber via the Webaroo network and an operators SMS C to subscriber and also transmit MO or SMS messge originated by a subscriber to Facebook via and operators SMS C and the Webaroo network. All deliverables are property of facebook. All users, usage and other data generated or collected in the course of

providing the service shall be owned by Facebook. They perform service on behalf of facebook in the capacity of independent contractor. They are raising monthly bill to Facebook based on delivery report without indicating the service tax and the payment is received in Foreign convertible currency from Facebook towards these services. They are working as an aggregator/ facilitator of all SMSs either originating from Facebook or subscribers of facebook to transmit between them as per specific discretions of facebook. They cannot charge any fee to the subscriber or send any message to any subscriber other than the SMS message as directed by Facebook. Thus they are simply acting as an aggregator providing SMS Aggregator services to Facebook i.e Application Programming Interface (API) connected with Facebook server which are located in USA & Ireland. The Facebook initiates the transmission of SMS from their server located outside India through assessees API connectivity and the assessee provides the services to Facebook by sending or receiving SMS to subscriber of Facebook as located in india on instruction of Facebook. As per the agreement, Facebook is liable to pay fees for the services provided by them to the subscribers of Facebook i.e API Connectivity. They are not allowed to deal with subscribers of Facebook as an independent service provider pertaining to the service provided.

5.1 They are carrying out the activities solely and principally and as per the express directions of Facebook for which they are paid entirely by Facebook. As per express clause they are in no way to deal with the persons to whom they send SMSs and their role is limited. He relies upon the para 5.3.3 of the Education guide date 26.06.2012 issued by CBEC to contend that the person who is obliged to make

payment to the service provider is service recipient. The subscribers of Facebook are not under obligation to make any payment for any services to Respondent or even to Facebook instead Facebook is obliged to make payment for the services provided by the Respondent. He takes us through the agreement between Respondent and M/s Facebook to show that the services are rendered to M/s Facebook. He cites Para 3 of the agreement wherein it is agreed that ‼Webaroo will not charge any fee to, make any offer to, or otherwise communicate with any subscriber in connection with the service of this agreement¶. The number of recipients of SMSs generated by Facebook changing and is not constant. They do not have any control on SMS. In such a situation there cannot be any reason to hold the Facebook subscribers are service receiver of the respondent, when the subscriber would not be even aware about the identity of the respondent at all. He also placed reliance on Trade Notice No. 20/13- 14 ST-I date 10/02/2014 issued by the Commissioner of Service Tax Mumbai in case of service tax on bank charges paid by foreign banks, clarified that, for a person to be treated as recipient of service, it is necessary that he should know who the service provider is and there should be an agreement to provide service which may be oral or written. That for a service to be treated as a service commercially there is need for consideration which in no case is received by the Respondent from receivers of SMSs. The subscribers of Facebook are not concerned with the activity of Respondent.

5.3 He submitted that the proviso to rule 3 of Place of Provision of Service Rules, 2012 does not apply to present case as it categorically states that where the location of the service recipient is not available in the ordinary course of business, the place of provision

shall be the location of the recipient of service. In terms of definition of location of the service receiver¶ provided in rule 2 (i) of POP Rules wherein it is stated that location of service provider is premises for which service tax registration has not been taken then the location of his business establishment. The business location of M/s Facebook is Ireland which is available, hence the ground of appeal is not correct. The ground of the Revenue is that the subscribers of Facebook are recipient of service and both the service provider and service recipient are located in taxable territory and hence provisions of Rule 8 of POP is applicable and therefore the services cannot be termed as export of services is also incorrect. The Service provider i.e the Respondent is located in India which is taxable territory and the service recipient i.e M/s Facebook is located in Ireland which is a non taxable territory and therefore the provisions of Rule 8 would not apply. He submits that the services clearly fall under the term of Export of Service under Rule 6A of Service Tax Rules and the revenues ground is baseless. He also submits that in case of Muthoot Finance Ltd Vs. UOI 2015 (40) STR 26 (KER), the Honble Kerala High Court while dwelling upon the issue as to whether the adjudicating authority is bound to follow the decision of the Tribunal as adjudicated in case of M/s Paul Merchants supra held that when a Respondent cites a decision of the Appellate Tribunal, the adjudicating authority has to follow the same. In such view the Paul Merchants decision of Tribunal has to be followed and it cannot be said that the same is not applicable for the reason that the revenue has filed appeal before the High Court. He also submits that the Tribunal decision in case of Paul merchants supra has been followed by the Tribunal in following cases :

(i) SIMPRA AGENCIES Vs. CCE, DELHI 2014 (36) STR 430 (TRI ┬ DEL)

(ii) COMM. OF SERVICE TAX, MUMBAI Vs. VODAFONE INDIA LTD. 2015 (37) STR 286 (TRI)

(iii) GAP INTENRANTIONAL SOUR. (I) PVT. LTD Vs. COMM. OF ST, DELHI 2015 (37) STR 757 (TRI ┬ DEL)

(iv) INTERNATIONAL OVERSEAS SERVCIES & COMMR. OF ST, MUMBAI I 2016 (41) STR 230 (TRI)

6. We have carefully considered the submissions made by both the sides and perused the appeal records and written submissions.

7. The issue involved in all the appeals is as to whether the Respondent are eligible to refund of accumulated cenvat of input services in terms of Rule 5 of Cenvat Credit Rules. We find that the facts of services are not in dispute. The Respondent are providing Business Support Services and are registered for the same under Service Tax laws. Under the terms of Services with M/s Facebook Ireland they have to provide the service to M/s Facebook which is in the nature of aggregator of SMS to the Indian subscribers of M/s Facebook Ireland. The Respondent is liable to provide the SMS Aggregator service to M/s Facebook i.e Application programming Interface (API) connected with Facebook Server. The Respondent is working on directions and Instructions of Facebook. The facebook initiates the transmission of SMS from their server located outside India through Respondent↕s API connectivity and respondent provides the services to M/s Facebook by sending or receiving SMS to

subscribers of Facebook located in India. The Respondent is thus working as aggregator/ facilitator of all SMSs either originating from Facebook or subscribers of Facebook to transmit between them as direction and discretion of facebook. The Facebook pays service charges to the Respondent for such services. In this whole process the Respondent neither interacts with the subscribers of the Facebook nor has any connection/ relation/ concern with the said subscribers. They are barred from any relation with the subscribers of Facebook. Under the terms of agreement we find that the Respondent is getting paid by the facebook based upon the number of SMS messages successfully transmitted through Respondents network. It also provides the fees based upon the Billable Message Length Unicode Message, Undelivered Message which would not be chargeable, Long Codes fees etc. It provides the fee structure based upon nature of message. In sum and substance the Respondent is rendering services to M/s Facebook and getting fees for services provided in each month.

7.1 We find that the revenue has viewed the services as being provided in India on the ground that since the actual service recipient i.e the subscribers whose SMSs are being sent or received are located in India and the Respondent is also located in India, hence it is not an Export of Service and not liable for refund of cenvat on Input Services. We are not in agreement with the said reasoning of the revenue for the reason that firstly the services are not provided to any Indian Subscriber by the Respondent. The Respondent has no connection/ interaction or relation with the Indian subscribers of Facebook. The services are provided under the terms and conditions of the agreement made between M/s Facebook

Ireland and the Respondent. The Respondent is not charging any service charges or part thereof from the Indian subscribers. The CBEC itself in its education guide Para 5.3.3 has clarified that the person who is obliged to make payment to the Service provider is Service Recipient. In the present case it is not only the payment for services but even going further it is service agreement between the Respondent and M/s Facebook Ireland which specifically provides for terms and conditions of services to be rendered under the instructions of M/s Facebook. There is no contractual agreement between the subscribers of Facebook and Respondent. The fee is charged to Facebook. The Respondent has no control over the SMSs to be sent or received. The subscriber of Facebook are not even aware the existence of Respondent and the type of services rendered by the Respondent. It is expressly stated in Para 3 of the agreement that Webaroo will not charge any fee to, make any offer to otherwise communicate with any subscriber in connection with the service or this agreement. It is absolutely clear from the nature of services and agreement therefor that the respondent cannot be treated as service provider to subscribers of Facebook. Even the Trade Notice No. 20/13 ┬ 14-st-1 dt. 10.02.2014 issued by Commissioner, Service Tax ┬ Mumbai with reference to services provided by Foreign Bank relied upon by the Respondent clearly states that in case of services provided by the Foreign bank cannot be labeled as having been provided to importer or exporter as for a person to be treated as recipient of service, it is necessary that he should know who the service provider is and there should be an agreement to provide service, which may be oral or written. The importer and exporter does not even know who the service provider is, as they are not aware of the identity of the foreign banks which would

be providing services. Exporter or importer in India does not have any formal or informal agreement with the foreign bank. Importer or exporter in India does not even know the quantum of charges which the foreign bank would be recovering. Therefore, in view of the above mentioned factual position and also in view of the various articles of URC 522/UCP 600, it is clear that services provided by the foreign bank to the bank in India. Going by the same analogy we find that the above facts are also applicable to the present transactions as the subscribers are not even aware of the existence of the Respondent and their role in services provided by Facebook. The Respondent and the subscribers are not into contractual agreement. There is no consideration flowing to the Respondent from such subscribers. The Respondent is working under the directions/instructions and discretion of Facebook. The subscribers are dependent upon facebook for receipt/ delivery of their SMSs. The Tribunal in the case of M/s Paul Merchants Ltd. 2013 (29) STR (Tri) held as under :

Export of services - Tests of - Foreign destination and crossing of international border - It is necessary in respect of export of goods in terms of Section 2(18) of Customs Act, 1962, but not in respect of export of services - Services are different from goods - Goods are tangible and their export or import in traditional sense would involve crossing of international border - Services are intangible, and can be provided by several modes viz. service from India to consumer of some other country in India and meant for use abroad, or supplied from India through physical presence in territory of any other country, like software development for client in USA by sending employees to USA - In such cases, criteria of crossing international border is impossible to apply - In that

view, principle of equivalence between taxation of goods and service was inapplicable - Also, due to their intangible nature and different modes of consumption by recipient, determining place of consumption of service is a complex task, and for that purpose uniform criteria for different categories viz. services in relation to immovable property, business, transport, performance based, etc. cannot be adopted - However, what constitutes export of service cannot be left to deduction of individual taxpayers/collectors, as that will cause chaos - For this reason, Export of Services Rules, 2005 and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 have been framed, following general principle that taxable service provided by a person in India will be subject to tax only when it has been consumed in India, and Service Tax must be levied in that taxable area where service has been consumed; this is in conformity with Apex Court judgments in All India Federation of Tax Practitioner [2007 (7) S.T.R. 625 (S.C.)] and Association of Leasing & Financial Service Companies [2010 (20) S.T.R. 417 (S.C.)].

7.2 The aforesaid decision was relied upon by the Tribunal Divisonal Bench in case of M/s Vodaphone Essar cellular Ltd. 2013 (31) STR 738 (TRI) holding as under :

Rebate Export of services Telecom service provided in India to International in-bound roamers registered with foreign telecom network operator Payment received from impugned foreign telecom operators in convertible foreign exchange HELD : No contract/ agreement between assessee and subscriber of foreign telecom operator. Therefore foreign telecom service provider paying for services as recipient of service Telecom services falling under category III

Export of Services Rules, 2005 Transaction constituting export since services rendered to foreign services provider located abroad Board Circular clarifying benefit accruing to foreign service provider as subscriber billed for services rendered Ratio of Tribunals decision in Paul Merchants [2013 (29) S.T.R. 257 (Tribunal)] squarely applicable Subscriber of foreign telecom service provider not recipient of service Rule 3(1)(iii) of Export of Service Rules, 2005.

7.3 The various benches of Tribunal has adopted the same view in case of SIMPRA AGENCIES Vs. CCE, DELHI 2014 (36) STR 430 (TRI DEL); GAP INTENRANTIONAL SOURCING (INDIA) PVT. LTD Vs. COMM. OF ST, DELHI 2015 (37) STR 757 (TRI DEL) and INTERNATIONAL OVERSEAS SERVCIES & COMMR. OF ST, MUMBAI I 2016 (41) STR 230 (TRI).

7.4 Coming to the Rule 3 of the Place of Provision of Service Rules, 2012 and its application to the instant case, we find that the proviso to said Rule states that in case location of the service provider is not available in the ordinary course of business, the place of the provision shall be the location of the provider of Service. Further as per Rule 2 (i) of the said Rules the ‼Location of Service Provider is the location of his business establishment. In the case in hand there is no dispute about the facts that the service recipient is Facebook which is located outside India and thus its location is available. Hence the Indian subscribers of Facebook cannot be termed as Service Recipient. In such case even the Rule 8 of POP would not apply as the service recipient i.e Facebook is situated in Ireland which is located outside India a non taxable territory.

7.4 We also find that if the revenue considered the services of Respondent as having not been rendered to outside taxable territory, it should have issued demand notice to the Respondent for service tax on bills raised by them to M/s Facebook. Having choosen not to do so, the revenue accepts that the services has been rendered to party situated outside India being falling under the category of Export of Service and is not taxable. Hence in such case the rejection of claim under consideration is not correct. There is no dispute about the fact that the consideration of service was received from M/s Facebook in convertible Foreign Exchange therefore there is no doubt in our mind that the services of the respondent is clearly exported to Facebook, Ireland, hence the refund claim under Rule 5 of Cenvat Credit Rules, 2004 is admissible to the respondent.

7.5 In sum and substance of the above, we do not find any merit in the appeals filed by the revenue. The impugned orders are upheld. The revenue↕s appeals are dismissed.

(Pronounced in court on 06/11/2017)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.