CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No.	Appellant	Respondent	Impugned order No. and date
ST/1447/2010	CCCE&ST, Hyderabad-II	Price Waterhouse	O-I-O No 17/2010 ST, dt. 30.03.2010 passed by CCCE&ST, Hyderabad-II Commissionerate
ST/1594/2010	Price Waterhouse	CCCE&ST, Hyd.II	.do.

Appearance
Shri Pulak Kumar Saha, CA for the Appellant.

Shri N. Bhanu Kiran, Superintendent/AR for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 04.10.2018
Date of Decision: 25.10.2018

FINAL ORDER No. A/31339-31340/2018

[Order per: Mr. M.V. Ravindran]

1. These two appeals are directed against Order-in-Original No. 17/2010-ST, dated 30.03.2010.

2. The relevant facts that arise for consideration are that the appellant applicant is engaged in rendering Chartered Accountants Service (CAS) to their parent company in USA and others and were receiving consideration for the same; they have charged one of the clients M/s Satyam Computer

Services Limited for the certification work to file registration statement in Form F-3 under the United States Securities Act of 1933 and before the US Securities and Exchange Commission; when they had paid the Chartered Accountant fees to their parent company in USA and U.K and had availed CENVAT credit of the service tax paid by Lovelock and Lewis and did not follow the procedures/conditions of Rule 6(3)(c) of CENVAT Credit Rules, 2004. All these were noticed by the revenue authorities during the verification of records of the appellant for the period 2004-05 and 2007-08. After calling for explanation, appellants were issued a show cause notice by the lower authorities demanding service tax alongwith interest and also seeking to impose penalties, by invoking extended period. Appellants contested the show cause notice on merits as well as on limitation. Adjudicating authority after following due process of law, confirmed the demands so raised with interest and also imposed penalties. Hence this appeal.

3. Ld. CA appearing on behalf of appellants, after taking us through the records submits the following issues arises in this appeal.

(a) Services provided by the appellant to the foreign network firms and other foreign companies and the consideration for such services collected in convertible foreign currency would be qualified to be Export of Services under the Export of Services Rules, 2005. The

amount involved is Rs. 42,03,846/- and the period involved was April 2005 to September 2008.

(b) Services provided to Satyam Computer Services Ltd. in respect of certification of Form F-3 which is required tobe filed before the US Securities and Exchange Commission (SEC) would be eligible for exemption from payment of service tax in terms of the Notification No. 58/89-ST, dated 16.10.1998. The amount involved is Rs. 28,65,486/- and the period involved was 2005.

(c) Services procured from foreign Chartered Accountants Firm namely PrincewaterhouseCoopers USA and UK is liable to be taxed under reverse charge mechanism under the category of “Chartered Accountants’ Service”. Amount involved is Rs. 43,71,065/-.

(d) The appellant would be attracted under the mischief of Rule 6(3) of the CENVAT credit rules 2004 when the appellant had not provided any exempted services during the relevant period. Amount involved is Rs. 1,71,00,751/-

3(i). He would address the Bench stating that as regards point No. (a), appellant had, during the period, rendered services to overseas network entities as well as their clients. Since the entities to whom the services were rendered were situated outside India and the consideration was

received in convertible foreign exchange, appellant entertained the bonafide belief that the services rendered by them on this point are Export of Services. He would submit that the adjudicating authority has held that these services do not fall under category of Export of Services as the services are not delivered and used outside India. He would take us through the provisions of export of services, more specifically rule 3(1)(ii) and submit that appellant had satisfied all the three conditions as is required to be done. He would submit that similar issues came up before the Tribunal in the case of GST, Ahmedabad vs. B.A. Research India Limited [2010(180 STR 439 (Tri.-Ahmd.)], CCE, Ludhiana vs. Nestle India Limited [2014(36) S.T.R. 563 (Tri. – Del.), C3i Consultants India Pvt. Ltd. vs. CCE, C&ST, Hyderabad-II [2014(35)S.T.R 556 (Tri.-Bang.)] are directly on the point and are in favour of the assessee. It is his further submission that destination of any service has to be decided based on the place of consumption of service and not on the basis of place of performance of service. He submits that adjudicating authority has held against the appellant only on the ground that appellant is residing in India, rendering services only submitting the report to their clients situated outside India, is nothing but performing the services in India, which is held as unacceptable by the Tribunal. It is his submission that all the foreign entities on whose instructions/services in question were provided by the appellant have to be treated as recipient/consumer of services.

3(ii) As regards point No. (b), it is his submission that adjudicating authority has held that services provided by the appellant to Satyam Computer Services Limited as 'auditing and accounting services' and liable to pay service tax under the category of 'Chartered Accountant Services'. It is his submission, on this point, that the services rendered by the appellant are in respect of certification of information to be filed in Form F-3 and providing comfort letter, does not amount to rendition of accounting and auditing service. He would submit the term 'accounting' means systematic recording of transactions and the term 'auditing' means an independent examination of records; hence merely providing certification services and issuance of comfort letter for listing on US Stock Exchange does not amount to rendition of accounting or auditing service as contended by the department. He submits that notification No. 59/1998-ST, dated 16.10.1998 exempts all the services provided by a Chartered Accountant in his professional capacity other than 11 categories listed in the said notification and one of the category relied upon by the adjudicating authority is certification of documents to be filed by companies with the Registrar of companies under Companies Act, 1956. It is his submission that in the instant case, the documents are filed with US Securities and Exchange Commission under the US Securities Act, 1933, therefore Sl. No. (vii) is not applicable in the case of appellant.

3(iii) As regards point No. (c), it is his submission that this is rendered by foreign chartered accountant firm namely PricewaterhouseCoopers USA

and U.K, their parent concern, is sought to be taxed under reverse charge mechanism under Chartered Accountant Services, is incorrect as during the relevant period in question, provisions of Section 65(105) defined taxable service in relation to Chartered Accountant's service, which will cover the services rendered by 'practicing chartered accountant' and is not satisfied in appellants case. It is his submission that the said definition mandates for registration of a Chartered Accountant under Chartered Accountants Act, 1949 in India and PricewaterhouseCoopers USA & UK who rendered the services to them are not a practicing Chartered Accountant within the meaning of Section 65(83) of the Finance Act, 1994, it dovetailed the provisions Chartered Accountants Act, 1949. It is his further submission that service tax liability under reverse charge mechanism arises only for the period post 18.04.2006; no demand is raisable on the appellant as these services do not fall under the category of Chartered Accountant Services. It is his submission that since no tax liability arising on the appellant, any amount paid by the appellant under this head needs to be refunded back to them.

3(iv) On point No. (d), it is his submission that the revenue authorities held that appellant, during the period in question, have rendered taxable and exempted services; they have not maintained separate accounts/records for the commonly used services, they are entitled for credit of 20% of the amount of service tax payable as per the provisions of Rule 6(3) (c) of CENVAT Credit Rules, 2004 and appellant having utilised

the entire CENVAT credit, is required to return back the amount. IT is his submission that for the purposes of Rules 6(1), 6(2) and 6(3) of CENVAT Credit Rules, 2004, the inputs and input services which are exclusively used for manufacture of exempted goods or rendering of exempted services shall not be allowed to assessee subject to a condition that if an assessee is able to maintain separate accounts for exempted and dutiable goods or services, he will be eligible to avail CENVAT credit on dutiable goods or services rendered by them. It is his further submission that during the period in question, they did not provide any exempted services at all, all the services provided by them were of taxable nature and availed CENVAT credit of service tax paid on the invoices raised by Lovelock and Lewes which were exclusively used for providing of auditing services and amounts received as consideration for such services rendered to their clients were taxed and same was discharged. It is his submission that extended period cannot be invoked in the case in hand as all the services rendered by them are not taxable is their bonafide contention. It is his submission that one of the argument is of interpretation of statutory provision, extended period of limitation cannot be invoked, that during the period in dispute they regularly submitted periodical returns disclosing all the required information, hence invoking of extended period is wrong. For this proposition, he relies upon the decision of the Tribunal in the case of Sujana Metal Products Ltd. vs. CCE Hyderabad [2011(273)ELT 112 (Tri.-Bang.)] and Pushpam Pharmaceuticals Company vs. CCE [1995(78) ELT 401 (S.C.)]. It is his

further submission that the penalty imposed on them under section 78 be set aside.

4. Ld. DR on the other hand reiterates the findings of the lower authorities and submits that the adjudicating authority in the impugned order has very clearly dealt the same arguments in detail. It is his submission that he adopts the entire discussion of the adjudicating authority.

5. We have heard both sides and perused the records.

6. We would now address the issue involved in these appeals, point wise as indicated herein above.

6.1 On point 3(a): Whether the services provided by the appellant to foreign network firms and other foreign companies for a consideration collected in convertible foreign exchange would be qualified for export services under export of services rules 2005 or otherwise, needs to be answered in affirmative in favor of the appellant. It is undisputed that the appellant herein rendered services to their overseas network entities as well as to their clients located outside India and the consideration for such services was collected in convertible foreign currency. The findings of the adjudicating authority is that the services rendered by the appellant are in the form of auditing and accounting of various entities situated in India but

had only forwarded the certificate to the foreign entities which is not service rendered outside India; it is also finding that the services are rendered to foreign clients, but performed wholly within India. We find the period during which the appellant had rendered the services is April 2005 to September 2008 and there being undisputed fact that the services are rendered to foreign clients but performed in India in the form of various inspections and auditing of their clients and for the network firms, we find that the judgment of the Tribunal in the case of B.A. Research India Limited (supra) would directly apply in the case in hand wherein in para 10, the bench held as under:

> *" From the above provision it is clear that the said services came under Rule 3(1)(2)(sic) of the Rules. It is very much clear that the performance of the service is not complete until the testing and analysis report is delivered to its client. In the present case, when such reports were delivered to the clients outside India, it amounts to taxable service partly performed outside India. The performance of testing and analysing has no value unless and until it is delivered to its client and the service is to be complete when such report is delivered to its client. Thus, delivery of reports to its client is an essential part of the service report was delivered outside India and same was used outside India. This is not the disputed fact. We hold that the respondent satisfied the conditions of Rule 3(2) and accordingly the respondents are eligible for the exemption under Notification No. 11/2007-ST dated 1.3.2007."*

6.2 It is to be mentioned here that in the case of B.A. Research India Limited, the respondent therein was testing the samples of the products manufactured in India and were informing the clinical report of the testing

and analysis to their clients situated abroad for which they would be getting consideration. This activity was considered as export of service by the Bench. If that be so, the activity undertaken by the appellant herein in this appeal would definitely qualify for as export of services and no service tax liability arise and we hold it so. The same view is expressed by various decisions of the Tribunal in the case of Nestle India Limited and C3i Consultants India Pvt. Ltd. In view of the judicial pronouncements and the facts of the case in hand, we hold that the demand of tax liability on this account is unsustainable and liable to be set aside and we do so.

7. On point 3(b): As regards the service tax liability for the consideration received by the appellant provided to Satyam Computer Services Limited, it is undisputed that the appellant was engaged in providing certification of information to be filled in Form F-3 to be filed before the United States Security Exchange Commission and also providing report in the form of comfort letter. It was the argument of Ld. CA that the services in respect of certification of information and providing comfort letter does not amount to rendition of accounting and auditing services and he relied upon the meaning of the words 'accounting' and 'auditing'. It is his submission that merely providing certification services and issuance of comfort letter would not mean that the amount received by appellants is to be taxed under "certification of documents to be filed by the companies with the Registrar under the Companies Act, 1956."

7.1 We do find strong force in the contentions raised by Ld. Counsel. Now the issue is whether the certification fee received by the Appellant is taxable under the head "Chartered Accountant Services". The appellant had issued a certificate to Satyam Computers Limited for Satyam's listing of shares on New York Stock Exchange and the said certificate was to be tendered by Satyam to Securities Exchange Commission, USA. The said certificate mentions about checking of various aspects and reporting as per the norms laid down by Securities Exchange Commission. It is the department's contention that the said service is included under head 'accounting and auditing' and hence, taxable in terms of Section 65(83) read with Section 65(105)(s). While the appellant's contention is that the said service is not so covered under that head and is fully exempted under notification No. 59/98-ST, dated 16.10.1998 as amended. From Notification No. 59/98 (supra), it is seen that except for 11 services covered by the said notification, all other services rendered by a Chartered Accountant are exempt from service tax. The said notification was in force till 28.02.2006 before being rescinded vide notification No. 2/2006-ST, dated 01.03.2006. From the wording of the certificate, it is seen that the appellant had checked the books of accounts and thereafter had issued the required certificate. In our opinion, the word 'accounting' implies pure accounting i.e. maintaining and writing of books of accounts etc. and there is no dispute that the appellant was not maintaining or writing any books of accounts for Satyam Computers Limited as they could not have since they were the statutory auditors of Satyam and statutory auditor cannot

undertake to write and maintain books of accounts of its clients. Now, coming to the word "audit" it implies thorough checking of books of accounts, vouchers and legal and other supporting documents with a view to verify the authenticity or otherwise of the particular transaction. Audit of the company is mandated under section 224 of Companies Act, 1956 which requires every company to get its accounts audited from Chartered Accountant and audited accounts and report thereon of the Auditor is to be placed before the shareholders of the company in the AGM of the company. The auditor after thoroughly auditing the books, prepares his report as required under section 227 (2) of Companies Act, 1956. Thus, auditing is a statutory function in terms of Companies Act, 1956 and the report of the Auditor clearly mentions that 'they have audited the attached balance sheet and the P&L account of the Company". As compared to the above, the certificate issued in the present case is not even remotely concerned with auditing. It just states that the Chartered Accountant has verified/checked the books of accounts and thereafter has issued the certificate as per the norms laid down by Securities Exchange Commission. Thus, it was purely a certification work and nothing to do whatsoever with auditing. As can be seen, the certification service by a Chartered Accountant was not included in the 11 services enlisted in Notification No. 59/98 (supra) which were taxable. And hence, the certification service being not included in the 11 services so mentioned was clearly exempt in terms of the said notification till 28.02.2006. In view of the foregoing, we

hold that the tax demand on this point is unsustainable and liable to be set aside and we do so.

8. On point No. 3(c): As regards the services procured from foreign Chartered Accountant firm viz; PricewaterhouseCoopers USA and U.K, are liable to be taxed under reverse charge mechanism under the category of chartered accountant services for the services rendered and received during the period pro 18.04.2006 and post 18.04.2006, we find that it is undisputed that appellant was paying consideration to PricewaterhouseCoopers USA and U.K, for various chartered accounting and auditing services rendered to the appellant. The demands have been raised on appellant under reverse charge mechanism holding that the appellant is liable to do so.

8.1 As regards the demand of service tax liability for the period prior to 18.04.2006, are before provisions of Section 66 A of the Finance Act 1994 were introduced, no demand arises on the appellant. In short, for the period prior to 18.04.2006, the law is now settled by the judgment of Hon'ble Apex Court in the case of Indian National Shipowners Association, which upheld the decision of Hon'ble High Court of Bombay in the case of Indian National Shipowners' Association vs. Union of India reported at [2009(13)S.T.R. 235 (Bom.)]. This position is accepted by Board and has issued a clarification stating that the service tax liability under reverse charge mechanism will be applicable from 18.04.2006 only. In view of this,

the demands prior to 18.04.2006 under this head are unsustainable and liable to be set aside and we do so.

8.2 As regards the demands raised post 18.04.2006 under this head, we find that the main argument of the appellant is that the appellant is not getting covered under the definition of 'chartered accountant services' for the amounts repatriated by them to PricewaterhouseCoopers USA and U.K. For this proposition, reliance was placed on the definition of 'chartered accountant services' as envisaged under section 65(105)(s). We reproduce the same.

> "*taxable service means any service provided or to be provided to a client, by a practicing chartered accountant in his professional capacity, in any manner.*"

Further, Section 65(83) of the Finance Act, 1994 defined the term 'practicing chartered accountant' as follows:

> *"practicing chartered accountant" means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 (38 of 1949) and includes any concern engaged in rendering services in the field of chartered accountancy."*

It can be seen from the above reproduced definitions that it includes any concern engaged apart from Chartered Accountants who is a Member of

Institute of Chartered Accountants of India and holding a practice granted under the provisions of Chartered Accountants Act also includes any concern engaged in rendering services in the field of chartered accountancy. In the present case, the appellant is a Chartered Accountancy firm rendering services in India. It had taken help from the associate concern from abroad and to whom they duly paid the fees. The services which were received by the appellant from their associated firm would amount import of service and hence the service tax was correctly demanded from the appellant under reverse charge mechanism.

8.3 The contention of the appellant is that they do not fit into the definition of 'practicing chartered accountant' service as envisaged under section 65983) of the Finance Act, though at the first blush looked very attractive and impressive, but on deeper perusal it is seen that the term 'practicing chartered accountant' service has been defined in the Act and latter part "includes any concern engaged in rendering the services in the field of chartered accountancy". Thus, the definition is an inclusive one and a very wide inasmuch as it includes any concern rendering services in the field of chartered accountancy. In the case in hand, it is undisputed that appellant herein had availed the services rendered by PricewaterhouseCoopers USA and U.K, in the areas of accounting and auditing and various other functions related to chartered accountant services. In our view, the definition of practicing chartered accountant, the emphasis is on the membership of Institute of Chartered Accountants of

India and certificate of practice granted under the provisions of Chartered Accountants Act, 1949 (38 of 1949) may not apply to the appellant as the second part i.e. inclusive part is emphasizing on independent concern engaged in rendering chartered accountancy services. It can be noted that the second part of the definition does not talk about requirement of the concern being Indian or otherwise. So, in our view, it applies to all concerns whether it is in India or abroad. Further, in our view, if the associated concern is situated abroad and engaged in rendering services in the field of chartered accountancy, will get covered under the definition of 'practicing of chartered accountants' and in our view the demand confirmed by the authorities is sustainable and accordingly appeal to this extent is rejected.

9. On point No. 3(d): The last issue regarding which demand has been confirmed is on the point that appellant having availed CENVAT credit on common input services and having not maintained separate accounts records for such common input services and rendered taxable as well as exempted services, should not have utilised the CENVAT credit in excess of 20% of service tax payable during the period October 2006 to March 2008, we find that the said provisions of Rule 6 of CCR 2004 places various obligations of manufacturer or provider of taxable and exempted services; sub rule (1) specifically states the provider of exempted output services are based from availing any CENVAT credit on inputs or input services; sub rule (2) talks about when an output service provider avails CENVAT credit

in respect of common input services used for taxable and exempted services to maintain separate accounts for receipt, consumption and inventory of input services may not be used in taxable output services and used for exempted services. Sub rule (3) talks about if an output service provider who renders taxable and exempted services is not able to maintain separate account, is required to follow the options as mentioned therein. We find that the entire case of Revenue is on the allegation in the show cause notice that appellant had rendered taxable and exempted services without segregating the same in records, hence cannot utilise more than 20% of the tax payable but has missed the major submission of the appellant that during the period in question on this point, they did not provide any exempted services and all the services provided by them were of taxable nature. Furthermore, going into the substance in this case, we find that revenue authorities have sought to deny the CENVAT credit to this appellant on the invoices raised by Lovelock and Lewes, Chartered Accountants. Appellant has been stating consistently that services of M/s Lovelock and Lewes, Chartered Accountants were utilised for conducting audits of various clients and the amounts received from various clients are taxable and they have discharged the service tax liability. This factual position is not disputed by the adjudicating authority in the Order-in-Original. The findings in the Order-in-Original on this point are totally on a different direction. The adjudicating authority has misinterpreted the notification No. 59/1998-ST, dated 16.10.1998 read with notification No. 25/2006-ST. We find that the said notification No. 59/1998-ST exempts the

chartered accountant services from payment of tax but for the services as per list indicated therein. We reproduce the entire notification No. 59/1998-ST, dated 16.10.1998.

"Service Tax – Notifications

Exemption to taxable services other than the specified and provided by practicing chartered accountant, Company secretary or cost accountant

[Notification No.-59/98-S.T., dated 16-10-1998]

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of Government of India in the Ministry of Finance (Department of Revenue) No. 57/98-Service Tax, dated the 7th October, 1998, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided by a practicing chartered accountant, a practicing company secretary or a practicing cost accountant, in his professional capacity to a client, other than the taxable services relating to –

i.) accounting and auditing; or

ii.) cost accounting and cost auditing; or

iii.) secretarial auditing; or

iv.) verification of declarations in prescribed forms of compliance's for obtaining a certificate of commencement of business or commencement of other business under section 149 of the Companies Act, 1956 (1 of 1956); or

v.) signing of the annual return of listed companies under section 161 of the Companies Act, 1956 (1 of 1956); or

vi.) certification that requirements of Schedule XIII to the Companies Act, 1956 (1 of 1956) have been complied with as regards statutory guidelines for appointment of managerial personnel and payment of managerial remuneration to them without the approval of the Central Government under section 269 and Schedule XIII, of the Companies Act, 1956 (1 of 1956); or

vii.) certification of documents to be filed by companies with the Registrar of Companies under the Companies Act, 1956 (1 of 1956); or

viii.) certification in Form 1 that the whole of the amount remaining unpaid or unclaimed for a period of three years from the date of transfer to the special account under sub-section (1) and sub-section (2) of section 205A of the Companies Act, 1956 (1 of 1956) has been transferred to the General Revenue Account of the Central Government under the Companies Unpaid Dividend (Transfer to General Revenue Account of the Central Government) Rules, 1978; or

ix.) certification of documents under the Exports and Imports Policy (1997-2000) of the Government of India; or

x.) certification for exchange control purposes which a practicing chartered accountant can issue as documentary evidence in support of certain applications under the Foreign Exchange Regulation Act, 1973 (46 of 1973); or

xi.) certification in respect of valuation of instruments or assets as per rule 8A (7) of the Wealth Tax Rules, 1957, from whole of service tax leviable thereon.

10. It can be seen from the above reproduced notification that taxable services related to accounting and auditing are not exempted and the claim of the assessee has been that they have never sought exemption from the services under the said notification No. 59/1998. The provisions of notification No. 25/2006-ST, dt. 30.07.2006 is for seeking exemption for the amount received as consideration for appearances before the statutory authorities in the course of proceedings initiated under any law for the time being in force by way of issue of notice. It is the submission that this benefit of notification No. 25/2006 was also not claimed by the appellant during the relevant period in question. Nothing adverse is recorded in the adjudication order on this claim made by the appellant. In view of the factual position, we hold that the demands confirmed under this head are unsustainable.

11. As regards the question of limitation raised by the appellant against various submissions and the demands raised, we find that since on merits we have allowed the appeals filed by the appellant in respect of items No. 3(a), 3(b) & 3(d), we do not address the question of limitation in this point. As regards the question of limitation, we hold against the appellant at point no. 3(c), we find that appellant being practitioner in Service Tax, should have discharged the service tax liability on their own and can not take the shelter under the bonafide belief for claiming relief under limitation.

12. In view of the foregoing, appeal filed by the appellant as regards point Nos. 3(a), 3(b) and 3(d), we hold that appellant has made out the case and with regard to point No. 3(c), we hold against the appellant. The demands raised on the points which we hold against appellants have been confirmed alongwith interest and penalties and in respect of other which were held in favor of the appellant, the demands, interest and penalties are set aside.

(Pronounced in open Court on 25.10.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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