CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 2227 of 2012

(Arising out of Order-in-Original No. 57/2012 dated 23/04/2012 passed by Commissioner of Central Tax, Bangalore North, BANGALORE)

M/s Cades Digitech Pvt Ltd
Kirloskar Business Park, 2nd Floor, Block 'C',
Bytaryanapura, Hebbal, Bangalore 560 024 — Appellant(s)

VERSUS

Commissioner Of Central Tax,
Bangalore North
No-59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE - 560032
KARNATAKA — Respondent(s)

APPEARANCE:
Shri Ravi Raghavan and Shri Rohan, Advocates for the Appellant
Shri P.Gopakumar, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE MR. P DINESHA, JUDICIAL MEMBER

Final Order No. 20002 / 2022

Date of Hearing: 04/01/2022
Date of Decision: 04/01/2022

Per : P. ANJANI KUMAR

The appellants are engaged in providing "Consulting Engineers Services" to their customers through their branches located outside India viz. USA, Korea, Japan, UK, Germany etc. Their branches are manned by their own employees and they are reimbursing the expenses on the account of salaries, rents, other and other expenses etc. They are also receiving consideration/remuneration for the Consultancy Services rendered abroad to their customers through their branches. Remuneration earned in this regard is treated as export of service and no dispute has been made on this count. Revenue has raised an issue stating that the appellants are paying money to

their branches located outside India, as a consideration towards the service that is rendered by the branches to them; such payments made are consideration towards the services provided by the branches to the appellants that is Cades Digital Pvt. Ltd. A SCN dated 04.05.2011, covering the period 2006-2010, has been issued and was confirmed by Order-in-Original No.57/2012 dated 23.04.2012. Hence, the present appeal.

2. Learned Counsel for the appellant submits that the expenses incurred by them are towards salaries and other expenses as can be seen from their books of accounts. He produced a copy of application made to concerned authorities to open offices/branches overseas wherein it can be seen that the recurring expenses per month are considered under the Head of salaries of staff, rent and maintenance, telephone expenses, travelling expenses and other incidental expenses. He also submits that the branches are registered in respective countries in the name of the appellant only and they are rendering services on behalf of the appellant to their ultimate customers and not to the appellant head office of such branches. It cannot be held that the branches are rendering any service to the head office. Learned Counsel for the appellant further submits that the issue is no longer *res integr*a and has been decided by this Tribunal in their favour in various cases. He particularly refers to the case of *Kusum Healthcare Pvt. Ltd. Vs CCE, Jaipur-I, 2018-TIOL-549-CESTAT-DEL* wherein the facts of the case are similar or identical to the impugned case. He also submits that coordinate bench of the Tribunal in the case of *Kusum Healthcare Pvt. Ltd. (supra)* has referred to their earlier decision in the case of *Torrent Pharmaceuticals Ltd. Vs CST, Ahmedabad, 2015 (39) STR 97 (Tri. Ahm.)* and *Milind Kulkarni Vs CCE, Pune-I, 2016 (044) STR 0071 (Tri. Bom)* held that going by the ratio of the above decisions and also the close reading of the proviso to Section 66A along with explanation therein, it is clear that the legal fiction of considering a branch of an assessee as a separate establishment is not to tax a service rendered to its head office. Further, there is no such service which has been identified with supporting evidence. Learned Counsel further submits that Tribunal has followed the case specifically in the case of the same appellant i.e*. Kusum Healthcare Pvt. Ltd. 2019-TIOL-118-CESTAT-DEL* and very

recently vide *2021-TIOL-713-CESTAT-DEL.* He also relies upon the decision in *Precot Mills Ltd. Vs CCE, Tirupati, 2006 (2) STR 495 (Tri. Bang.).*

3. Learned Counsel for the appellants further submits that an amount of Rs.84,66,523/- was confirmed against towards "Professional Consultancy Services" and as well as the commission paid to foreign service providers. He submits that the same has been paid before issue of SCN and hence no penalty can be imposed. He further submits that an amount of Rs.7,81,428/- has also been confirmed on account of sales commission professional charges and expenses. The appellants have paid Rs.6,48,290/- as per their calculation against the demand. He also submits that these penalties are not liable to be imposed as the payment was made well before the issue of SCN.

4. Learned Authorized Representative for the Department submits that as far as the main demand of "Consultancy Engineers Services" by the branches to the appellant is concerned, he reiterates the findings of the OIO. As regards the other demands totaling to Rs.78,18,232/- are concerned, he submits that it is not coming forth on record whether the appellants have discharged the liability along with interest payable. He also submits that demand on account of sales commission professional charges and incidental expenses etc. comes to Rs.7,81,428/- and whereas the appellant claimed that they have to pay only Rs.6,48,290/-.

5. Heard both sides and perused the records of the case.

6. Having gone through the rival contentions, we find that the issue is no longer *res integra* going by the judgments cited by the learned Counsel and the ratio thereof, we find that the amounts incurred by the head office towards the salaries etc. of the employees working in their branches can by no stretch of imagination be equated to any service rendered to them by the respective branches. We find that in the case of *Kusum Healthcare Pvt. Ltd.* (supra), it was held that the legal fiction created in proviso to Section 66A for consideration of branch as a separate establishment is certainly not for the purposes of demanding service tax on the services alleged to have been rendered by the branch to the head office. In fact, going through the records

of the case, we find that the payments made by the appellants are none other than the recurring expenses like salary, travelling allowance, rent, telephone charge etc. It has not been brought on record if any other payments for any other service alleged to have been rendered were made. We find that Tribunal in the case of *Kusum Healthcare Pvt. Ltd.* (supra) in Para 6 & 7 held as under:

> 6. *We find that the Revenue has taken a stand that since as per the proviso, a branch office located outside India shall be treated as a separate business establishment, the services rendered by such establishment should be treated for tax liability. In this connection, we note, similar dispute came before the Tribunal for tax liability under the very same tax entry in Torrent Pharmaceutical Ltd. - 2015 (39) S.T.R. 97 (Tri.-Ahmd.). The issue of the expenditure incurred by the appellant with reference to the branch office located abroad, which was involved in activities, which may fall under business auxiliary service was considered by the Tribunal. The Tribunal observed as below:-*
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> > ***"5.3*** *On the issue of demand of service tax of Rs. 11,56,32,589/- with respect to remittances made by the appellant to branch offices, both sides have relied upon the case law of M/s. British Airways v. CCE (Adj.) Delhi [2014-TIOL-979-CESTAT-MUM]. It is the case of the appellant that nearly Rs. 7 crore demand is with respect to salary of the employees of the appellant working in the foreign branch offices, treating the branch offices/establishments as service providers held by Revenue as a separate legal entities under the provisions contained in Section 66A(2) of the Finance Act, 1994. Senior Advocate appearing on behalf of the appellant strongly argued that in the light of provisions contained in Section 66A(2) of the Finance Act, 1994, the explanation-I has to be read only to clarify the place of services provided and not for the purpose of creating another service tax liability for an activity provided to self. For the remaining demand of service tax, it is the case of the appellant that this demand pertain to services availed abroad by the branch offices/establishments as separate legal entities, on which VAT/GST of the relevant country was discharged by branch offices directly and receipt of these services is nothing to do with the appellant situated in India. It was fairly agreed by the learned Advocate that where local VAT/GST of a foreign country was not paid by the branch offices and billing was directly made by the foreign service providers to the appellant then in such cases service tax on reverse charge basis is required to be paid, which is being paid by the appellant even if the payment of such services availed and consumed in India were routed either through appellant's branch office or distributors.*
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> > ***5.4*** *Before giving our observations, it is relevant to glance through the provisions of Section 66A(1) of the Finance Act, 1994 reproduced below :-*

"66A. Charge of service tax on services received from outside India. –

(1) Where any service specified in clause (105) of section 65 is,

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or

has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted."

5.5 *Section 66A (1) above is talking of service provider and service recipient as _persons' which has to mean as different business persons. Section 66A(2) and its Explanation I only make a clarification and to fix service tax liability on recipient of services under reverse charge mechanism that both the permanent establishments in India and abroad of a business person are to be treated as separate persons. The above clarification/distinction*

made in Section 66A in our opinion is only for making an identification to determine whether a service is provided and consumed in India or abroad. It is an accepted legal position that one can not provide service to one's own self. If the
_permanent establishment' of the appellant abroad is treated as a service provider to its own head office in India then it will amount to charging service tax for an activity provided to one's own self. Similarly placed branches of the appellant undertaking similar activities in India will not be held so. Therefore, a comprehensive reading of Section 66A of the Finance Act, 1994, a permanent establishment situated abroad as a
_separate person', will be understood to have been prescribed only to determine the provision of service whether in India or out of India. Theoretically it could be possible that a person carrying business through a permanent establishment abroad may like to pay lower rate of local VAT/GST abroad to avoid service tax payment in India by showing the services to have been availed abroad. However, there is no likelihood of such avoidance in case of an assessee who is eligible to Cenvat credit in India for the service tax payable in India for which the assessee is entitled to Cenvat credit. It is also not the case of the of the Revenue that appellant is not capable of utilising Cenvat credit admissible as they have paid more than Rs. 12,000 crores as taxes during the periods 2007-2008 to 2011- 2012.

7. The matter came up before the Tribunal again in the case of Milind Kulkarni – 2016 (44) STR 71 (Tri.- Mum.). The Tribunal after examining the earlier decision observed as below:-

***"19.** The appellant-assessee has established branches for furthering its commercial objectives. The benefit of assigned activities of the branch will, undoubtedly, accrue to the appellant. There is no dispute that it is the appellant-assessee who enters into contractual agreements with overseas customers for supply of*
_information technology services' which have _off-shore' components rendered directly to the overseas entity by the appellant-assessee. _On-site' activity is undertaken by deputing employees working at the site of the customer. These employees are, without doubt, on the rolls of the appellant-assessee which, save for the specific and limited role of Section 66A(2), encompasses the branches within its corporate structure. As Section 66A(2) is limited to being a charging section in a specific context, it is not elastic enough to govern the corporate intercourse and commercial indivisibility of a headquarters and its branches. Therefore, any service rendered to the other contracting party by branch as a branch of the service provider would not be within the scope of Section 66A. Merely because there is a branch and that branch has,

in some way, contributed to the activities of the appellant-assessee in discharging its contractual obligations, the definition of _business auxiliary service'in Section 65(19) of

Finance Act, 1994 may not apply. That is where the impugned order has erred in not reading Section 65(105) along with Section 66A and Rules framed for the purpose of charging tax on services received from abroad. Unless both are applied together, the jurisdiction to tax would be in question.

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23. *The catena of judgments cited for both sides, viz., British Airways v. Commissioner of Central Excise (Adjn) [2014-TIOL-979-CESTAT-Del = 2014 (36) S.T.R. 598 (Tri.-Del.)], Torrent Pharmaceuticals Ltd. v. Commissioner of Service Tax [2015 (39) S.T.R. 97 (Tri.-Ahmd.)] and Infosys Ltd. v. Commissioner of Service Tax [2014-TIOL-409-CESTAT-Bang = 2015 (37) S.T.R. 862 (Tri.-Bang.)] does support the proposition that a service is taxable under Section 66A of Finance Act, 1994 only when such service is rendered in India. The question that arises then in the context of the present dispute is whether the branch renders a service is rendered in India within the meaning of the above statutory provisions. A forced disaggregation merely for the purpose of tax when similar domestic structures are not taxed and when commercial soundness calls for establishment of branches would be clearly inequitable.*

24. *Hence, the legislative intent of this legal fiction may have to be ascertained. In doing so, the goals of*

the appellant as an exporter cannot be far from our mind.

25. *Section 66A requires taxing of taxable services rendered by an overseas branch to its head office and the two sets of Rules limit tax demand only to the extent that these services are received in India in relation to business or commerce. A plain reading would make it apparent that the services referred to must be for pursuit of business or commerce in India. The two sets of Rules provide for availment of Cenvat credit of the tax paid by the Indian entity on _reverse charge basis.' As an exporter, the Indian entity is entitled to claim refund of taxes lying unutilized in Cenvat credit account. There is no dispute that the activities of the branch are in connection with the export activity of the appellant-assessee. That the legislature would prescribe the collection of a tax merely for the purpose of refunding it subsequently does not pass the test of reason. More so, as there is no inference of any monitorial aspect in undertaking such an exercise. An exporter who operates through branches is clearly not the target of the legal fiction of branches being distinct from head office. The proposition that the intent of Section 66A in taxing the activity rendered by an overseas branch to its headquarters in India is limited to the local commercial or business activities of the head office is thereby confirmed. Consequently, mere existence as a branch for the overall*

> *promotion of the objectives of the primary establishment in India which is essentially an exporter of services does not render the transfer of financial resources to the branch taxable under Section 66A.*

7. In view of the above, we are of the considered opinion that the demand on account of reimbursement of expenses to their employees working in the overseas branches does not constitute any remuneration in lieu of a service received by the appellants. Going by the ratio of the decisions cited above, we are in agreement with the learned Counsel's submissions that the issue is no longer *res integra*. Therefore, we set aside the demand on account of services alleged to have been rendered by the overseas branches to the appellant.

8. Coming to the other demand of about Rs.78 lakh and Rs. 7 lakh, we find that the learned Counsel for the appellant submits that the demand and duty has been paid before the issue of SCN and as such no penalty can be imposed. However, learned AR for the Revenue disputes the payment of interest thereof. We are of the considered opinion that in order to verify the competing claims of the appellant and the Revenue, the matter needs to go back to the original authority for verifying the records and arrive at the actual duty and interest payable. Further, we find that no penalties can be imposed at this count.

9. In view of the above, the appeal is partly allowed by way of remand in above terms.

(Dictated and pronounced in open court)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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