CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Application(s) Involved:

Service Tax Additional Evidence Application No. 20079 of 2020
IN
Service Tax Appeal No. 551 of 2012

Appeal(s) Involved:

Service Tax Appeal No. 551 of 2012

[Arising out of Order-in-Appeal No. 439/2011 dated 12/12/2011 passed by the Commissioner of Service Tax, Bangalore.]

M/s. MANAV MARKETING PVT. LTD.
NO.430/431, 12TH CROSS,
4TH PHASE, PEENYA INDUSTRIAL AREA,
BANGALORE - 560 058.

Appellant(s)

VERSUS

The Commissioner of Service Tax
BANGALORE SERVICE TAX- I
1ST TO 5TH FLOOR,
TTMC BUILDING,
above BMTC BUS STAND, DOMLUR
BANGALORE – 560 071.
KARNATAKA

Respondent(s)

AND

Application(s) Involved:

Service Tax Additional Evidence Application No. 20080 of 2020
IN
Service Tax Appeal No. 552 of 2012

Appeal(s) Involved:

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[Arising out of Order-in-Appeal No. 440/2011 dated 12/12/2011 passed by the Commissioner of Service Tax, Bangalore.]

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Respondent(s)

Appearance:

Shri S. Prabhakar, Advocate for the Appellant
Shri P. Rama Holla, Authorised Representative for the Respondent.

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

Final Order No.20239-20240/2022

Date of Hearing: 17.02.2022
Date of Decision:14.06.2022

Per: P ANJANI KUMAR

The appellants, M/s Manav Marketing Private Limited, have filed these appeals contesting Order-in-Appeal No.439-440/2011 dated 12.12.2011 issued by Commissioner (Appeals-II), Bangalore.

2. Brief facts of the case are that the appellants are engaged in providing 'Business Support Service' and 'Management and Repair Service'; the appellants are Marketing of HAS Standard Model CNC Machine Tools and have entered into an agreement with HAAS Automation Inc. USA as per which the appellant receives payment towards the service so rendered to the foreign company in foreign exchange. Claiming that the services rendered by them are export of services and are not liable to service tax, the appellants have filed two refund claims of Rs.62,40,422/- and Rs.35,63,543/-, on

04.06.2009, for the years 2006-07 & 2007-08 and 2008-09 respectively. Revenue has issued show cause notices and rejected the refund claims on merits as well as limitation. On an appeal, Commissioner (Appeals) has upheld the orders of the lower authority. Hence, these appeals.

3. Shri S. Prabhakar, Learned Counsel for the appellants submits that during the course of audit of their unit on 23.02.2009 and 21.03.2009, it was noticed that the amount received under foreign currency is sales commission which is export of services in terms of Circulars No.111/05/2009-ST dated 24.02.2009; he filed the refund application immediately. He submits that the show cause notice suffers from legal infirmity as it does not spell out the reasons for rejection. He further submits that application for refund was filed within time, as the circular was issued on 24.02.2009 and audit was conducted 21.03.2009. He further submits that sales commission received is wrongly taken as machine commissioning charges; there is no scope for the commissioning of the machines as per agreement; the appellant has acted as an agent of the principal. He submits that it is not disputed that the service tax was paid under mistaken notion of law and therefore, Government cannot retain the same. He relies on the following case laws:

(i) Ashok Shety & Associates C.A. Vs. CCE, Mangalore-2017 (4) GSTL 53 (Tri. Bang.).
(ii) 3E Infotech Vs CESTAT Chennai and CCE Chennai (2018) CMA 601/2018.
(iii) Parijat Construction Vs CCE, Nasik, 2018 (359) ELT 113 (Bombay).
(iv) CCE, Nagpur Vs SGR Infrateck Ltd.
(v) Pallavapuram Tambaram MSW Pvt. Ltd. Vs Commissioner of Service Tax, Mumbai 2018 ACR 132 CESTAT Mumbai.
(vi) Ishwar Metal Industries Vs CCE, Jaipur (Service Tax appeal No.51834 of 2018, Final Order No.50064/2022 dated 28.01.2022.)
(vii) Sunrise Immigration Consultants Pvt. Ltd. Vs CCE, Chandigarh-I (Service Tax appeal No.60065 of 2021, Final Order No.A/60858/2021 dated 14.06.2021.

4. Shri P. Rama Holla, learned Authorized Representative for the Department submits that the OIO and OIA are legal proper and justified; the activities undertaken by the appellants are not export and the refund claims are also hit by limitation, the appellants misrepresented that the services

rendered by them are 'Business Support Services' whereas it is clear from the bills raised that they are 'Machine Commissioning Charges'. He submits that all refunds are to be governed by provisions of Section 11B as held by the Apex Court in the case of *Mufatlal Industies Ltd. Vs UOI- 1997 (89) ELT 247 (SC)*. He also relies on the following case laws:

> *(i) M.G.M International Exports Ltd. Vs The Asst. Commissioner of Service Tax, Chennai- 2021 (TMI) 1167 (Madras High Court).*
> *(ii) Veer Overseas Ltd. Vs CCE, Panchkula- 2018 (15) GSTL 59 (Tribunal LB).*
> *(iii) Asst. Commissioner of S.T., Chennai Vs Nataraj and Venkat Associates- 2015 (40) STR 31 (Mad.)*
> *(iv) Future Foundations Pvt. Ltd. Vs Commissioner of Central Tax and Central Excise- 2020 (2) TMI 44- CESTAT.*
> *(v) Syfab Sales & Industries Ltd. Vs CCE- Service Tax- Surat-I, 2019 (3) TMI 876-CESTAT Ahmedabad.*

5. Heard both sides and perused the records of the case. We find that brief issues that require our consideration in the impugned case are as to whether the services rendered by the appellants can be considered as export of services and as to whether the refund claims are hit by limitation. Coming to the first question, we find that in terms of the distributor agreement, the appellant entered into, the appellants are appointed as distributors. In terms of Clause-2 a, the appellants as distributors as its own expense, exert its best efforts, through advertising and other promotional devices to sell and promote the sale and use of the Products throughout the Territory. Distributor's efforts will include use of facility signage, showroom display kits and other display and advertising materials described in the HAAS Factory Outlet manuals, Distributors shall obtain the prior approval of HAAS for any advertising and promotional materials not prepared by HAAS, which approval shall not be unreasonably withheld or delayed. The learned Counsel for the appellants submits that the amount received by them from their overseas principals is towards sales commission.

6. We find, however, on-going through the records of the case, that the original authority has gone through the bills and has given a clear finding that the bills raised were raised as follows:

Year	No. of bills raised	Description mentioned in the Bill	Amount equivalent to Indian Rs.
2006-07	4	Machine commissioning charges	95,01,418/-
	2	Office maintenance charges	4,02,160/-
	1	Commission	3,56,842/-
Total	7		**1,02,60,420/-**
2007-08	10	Machine commissioning charges	4,41,02,634/-
	3	Office maintenance charges	5,88,282/-
	2	Commission	3,27,650/-
Total	15		**4,50,18,566/-**
2008-09	9	Machine commissioning charges	3,61,89,792/-
	1	Commission	3,43,530/-
Total	10		**3,65,33,322**

7. The Original Authority finds that: from the foregoing table, it can be seen that the claimant has actually undertaken the activity of commissioning of machines supplied by the foreign supplier in the premises of the customers located within India and accordingly raised bills towards machine commissioning charges on the foreign supplier; the bill raised towards commission mentioned above which is small amount an also be treated as towards commissioning of machines since, the activity involved is commissioning of machines and the taxable amount is the gross amount charged; the activity of commissioning of machines fall under the category of "Erection, Commissioning or Installation" specified under Section 65(105) (zzd) of Finance Act, 1994. As per Rule 3(1) (ii) of Export of Rules, 2005, the export of taxable service shall in relation to the said service, be provision of such service as is performed outside India; in the instant case, the services are performed within India the same does not amount to export of services under the said Rule; accordingly, the services rendered are leviable to Service Tax; hence, question of filing of refund claim does not arise and the claim is liable for rejection for the entire period 2008-09, on merits.

8. We find that neither from the agreement nor from the records of the case, it is forthcoming as to whether the appellants have given any submissions countering the above claim. We also find that learned Counsel for the appellants did not counter the claim of the Department on this count and the learned Counsel has mainly focussed on his arguments on limitation. We find that either in the written submissions or during the course of arguments learned Counsel for the appellants has countered this allegation by the Revenue. There were literally no submissions or arguments on the merits of the case, except for claiming that the services are exported and the payment of Service Tax was under a mistaken notion of law.

9. We find that from the bills raised most of the amount received by the appellants appears to be for machine commissioning charges. Other charges are on account of office maintenance charges and commission. It is seen that the charges on account of machine commissioning are for the services rendered by the appellant to the purchasers of the machine. In terms of the agreement and as per records of the case, it is seen that the overseas suppliers deliver the machines directly at the premises of the customers. In such circumstances, it cannot be said that the services rendered by the appellants are export of services, notwithstanding the fact that payment is received from the overseas suppliers. It is understood that as a business model, the overseas suppliers does not charge their customers in India for installation and commission of the machines and the same are borne by them and paid to the appellants. For this reason, also, we are not inclined to consider such service as Export of Service. As far as the amounts received by the appellant under the Head 'Office expenses', the same are understandably the reimbursement of the expenses incurred by the appellants. There is no element of service rendered by the appellants to the overseas principals on this count.

10. Under the circumstances, we are of the considered opinion that the appellants have no case on merits as far as machine commissioning charges and office expenses are concerned. The learned Counsel for the appellants has taken us through the agreement. We find that there is no clause in the agreement about the payment of commissioning charges and office

expenses though as a distributor the payment of commission is understandable. Moreover, we find that liability to service tax does not depend only on the wordings of the agreement and the essence of the agreement needs to be considered provided the other aspects of levy are decided. In case of machine commissioning charges, the appellant is a service provider and the Indian purchaser of the machine is the service recipient. The appellant may have rendered the service as an agent of his overseas principals and may have received the consideration from them towards such service. Service Tax being "Destination Based Consumption Tax", as the service is rendered and consumed in the country, the service cannot be said to have been exported. For this reason, we find that the contentions of the appellants are not acceptable. In respect of reimbursed office expenses, we do not find any service aspect in the same. Even if one assumes that it is a service rendered by the appellant, it is a service rendered to themselves. Therefore, we find that the service tax is not leviable. Coming to the commission received by the appellants, we find prima facie that there is an element of service and the same appears to have been rendered to the overseas principals.

11. In view of the above, we are of the considered opinion that the appellants are not required to pay service tax on the amounts received by them by way of 'Office Expenses' and 'Commission'. We find that the appellants have relied upon some cases to argue that the provisions of Section 11B are not applicable when any tax is paid under mistaken notion of law and any such amount paid should be treated as a deposit. We find that Apex Court in the case of Mafatlal Industries (supra) has categorically held that all refunds are governed by the provisions of Section 11B. We find that Hon'ble Madras High Court in a recent judgment in the case of M/s M.G.M International Exports Ltd. Vs the Assistant Commissioner of Service Tax, Chennai, 2021 (4) TMI 1167 held that "the refund of tax if any borne by the petitioner had to be made only within a period of limitation prescribed under Section 11B of the Central Excise Act, 1944". We also find that this Tribunal has been holding the same in a number of cases. Reference is made particularly the cases cited by the learned Authorized Representative.

12. In view of the above, we partly allow the appeals and partly dismiss the same in the following terms:

(i) Payment of Service Tax by the appellants on account of 'Machine Commissioning Charges' is in order and therefore, the appellants are not entitled to any refund on this ground.

(ii) The appellants are not required to pay Service Tax on 'Office Expenses' and 'Commission'.

(iii) For the limited purposes of (ii) above, the appeals are remanded back to the Original Authority with a direction to examine if any refund is due, subject to limitation and if otherwise admissible.

(iv) The miscellaneous applications for additional evidence are also disposed of.

(Order pronounced in the Open Court on **14/06/2022**)

(P ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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