

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.75877 of 2018

(Arising out of Order-in-Appeal No.107/GHY/CE(A)GHY/2017 dated 08.12.2017 passed by Commissioner(Appeals), CGST, Central Excise & Customs, Guwahati.)

M/s. Zaloni Technologies India Private Limited

(Nexia Park, Christian Basti, Guwahati-781005 &
Grant Thornton India LLP, 10C Hungerford Street, 5th Floor, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Guwahati

.....Respondent

(GST Bhawan, 1st & 2nd Floor, Kedar Road, Machhkowa, Guwahati-781001.)

WITH

(i) Service Tax Appeal No.75878 of 2018 (M/s. Zaloni Technologies India Private Limited Vs. Commissioner of Central Excise & Service Tax, Guwahati); (ii) Service Tax Appeal No.75879 of 2018 (M/s. Zaloni Technologies India Private Limited Vs. Commissioner of Central Excise & Service Tax, Guwahati); (iii) Service Tax Appeal No.75880 of 2018 (M/s. Zaloni Technologies India Private Limited Vs. Commissioner of Central Excise & Service Tax, Guwahati); (iv) Service Tax Appeal No.76496 of 2018 (M/s. Zaloni Technologies India Private Limited Vs. Commissioner of Central Excise & Service Tax, Guwahati); (v) Service Tax Appeal No.76497 of 2018 (M/s. Zaloni Technologies India Private Limited Vs. Commissioner of Central Excise & Service Tax, Guwahati);

(i) to (iii)(Arising out of Order-in-Appeal No.107/GHY/CE(A)GHY/2017 dated 08.12.2017 passed by Commissioner(Appeals), CGST, Central Excise & Customs, Guwahati.)

(iv) & (v) (Arising out of Order-in-Appeal No.12/GHY/CE(A)GHY/2018 dated 31.01.2018 passed by Commissioner(Appeals), CGST, Central Excise & Customs, Guwahati.)

APPEARANCE

Shri Ajay Sanwaria, Chartered Accountant for the Appellant (s)
Shri K.Chowdhury, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75548-75553/2022

DATE OF HEARING : 8 July 2022
DATE OF DECISION : 20 October 2022

P.K.CHOUDHARY :

The Appellant, a private limited company in India, is engaged in providing data management solutions to Zaloni Inc., a company incorporated in USA vide agreement dated June 15, 2007. The Appellant is exclusively engaged in the export of services under the head "Information Technology Software Services" in terms of Rule 6A of the Service Tax Rules, 1994 ("STR"). It has applied for refund of the Cenvat Credit on input services in terms of Rule 5 of the Cenvat Credit Rules, 2004 ("CCR"). The Adjudicating Authority has rejected the refund on the ground that the services rendered by the Appellant do not meet the criteria under Clause (f) of Rule 6A(1) of the STR inasmuch as it is an overseas branch office of Zaloni Inc. and are merely establishments of distinct persons in accordance with Explanation 3(b) of Section 65B(44) of the Finance Act, 1994. The proceedings culminated into Orders-in-original which upheld the rejection of the refund on the following grounds:-

- (a) In terms of the agreement between the parties, the Parent Company (Zaloni Inc.) remits funds to Associate company (Appellant) on day-to-day basis to meet the expenses incurred for running the business of the Appellant. Hence, the expenses incurred are not towards export of services and the Appellant does not remain an independent party. Thus, both the entities are related and are not distinct entities.
- (b) Since the Chairman of the Parent Company is the highest shareholder of the Appellant and the key management personnel of both companies are same, the Appellant cannot be deemed to be an independent unit.

- (c) The Bank Realization Certificate ('BRC') submitted by the Appellant reads "Please note that this is not an export realization certificate" / "Inward remittance for maintenance of offices in India" / "towards operating expense". Hence, the foreign remittance received is not towards export of any services.
- (d) Further, although the Parent Company has the right to terminate the agreement but there is no mention of the rights of the Appellant to terminate the agreement. Hence, even if both the entities are separate companies, Appellant is dependent on Zaloni Inc. for its business. Therefore, both the parties are not distinct persons.

2. The Ld.Counsel, appearing on behalf of the Appellant submitted that :-

- (i) The Appellant and Zaloni Inc. are separately registered entities under different laws and not merely establishments of a distinct person in accordance with Explanation 3(b) of Section 65B(44) of the Act.
- (ii) Determination of an entity as a separate legal entity depends upon the constitution of the entity and not on the key managerial persons.
- (iii) The Appellant is not extension of the head office (Zaloni Inc.) and cannot be classified as a Branch office.
- (iv) The nomenclature used in Foreign Inward Remittance Certificates ('FIRC') cannot be considered in determining that the amount received is not in respect of export of services.
- (v) The existence of the Appellant is not dependent on the termination of the agreement with Zaloni Inc.
- (vi) Impugned order passed without considering relevant documents produced during appellate proceedings, i.e. the revised FIRCs stating that "foreign exchange has been received for providing services of software development".

3. The Ld.Counsel has also filed a compilation consisting of the Copy of Agreement, Statutory Provisions, Certificate of incorporation and shareholding pattern of Zaloni Technologies India Private Limited, Statement of Profit and Loss account, Intimation under Section 143(1) of the Income Tax Act, 1961 and Form 3CEB, copies of invoices issued to Zaloni Inc., copies of FIRC/inward remittance advice and relied upon case laws.

4. I find that the issue involved in the case at hand is no more *res integra* and has already been decided by the Hon'ble Gujarat High Court in the case of Linde Engineering India Pvt.Ltd. Vs. Union of India reported as 2020 (8) TMI 181 – Gujarat High Court. I further find that the facts of the Appellant's case is squarely covered by the aforesaid judgement of the Hon'ble Gujarat High Court. The relevant paragraphs are reproduced hereunder for proper appreciation of the ratio of the judgement :-

12. *However, on analysis of the aforesaid provisions, it appears that the respondents have assumed the jurisdiction on mere misinterpretation of the provisions of explanation 3(b) to Section 65B(44) of the Act, 1994 read with Rule 6A of the Rules, 1994 as by no stress of imagination, it can be said that the rendering of services by the petitioner No. 1 to its parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994, the petitioner No. 1 which is an establishment in India, which is a taxable territory and its 100% holding Company, which is the other company in non-taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service. Therefore, the services rendered by the petitioner No. 1-Company outside the territory of India to its parent Company would have to be considered "export of service"*

as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner No. 1, who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 65B of the Act, 1994.

13. *In such circumstances, the respondents would not have any jurisdiction to invoke the provisions of the Act, 1994 read with Rules, 1994 to bring the services rendered by the petitioner No. 1 to its parent Company within the purview of levy of service tax under the provisions of the Act, 1994.*

14. *Moreover, the impugned show cause notice is also not tenable in law as the same is issued invoking Section 73 of the Act, 1994 for extending the period for the issuing the Notice on the ground of alleged wilful misstatement or suppression of the facts on the part of the petitioner No. 1. The petitioners cannot be said to have made any wilful misstatement or suppressed any fact as the petitioners cannot be made liable for levy of service tax by wrongly treating the petitioners and its parent Company as establishment of the same Company. It is trite law that the petitioner No. 1 Company, which is incorporated under the provisions of the Companies Act, 1956 and its holding Company incorporated at Germany are both distinct persons and therefore, both cannot be treated to be establishments of the same Company distinct artificial jurisdiction person.*

5. I find that the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. Vs. Union of India [2012 (6) S.C.C. 613] has held that a subsidiary and its parent company located in different taxable territories are totally distinct taxpayer (s) or different entities. Further, the Hon'ble Gujarat High Court in the case of Linde Engineering India Pvt.Ltd. (supra) has held that explanation 3(b) under Clause (44) of Section 65B has been considered and it has been held

that service provided by a company in India to its Hundred percent holding company abroad cannot be considered as an establishment of a distinct person and therefore such services would be export of services. Further, the Appellant received the charges for their services in convertible foreign exchange. Therefore by respectfully following the ratio as laid by the Hon'ble Supreme Court and the judgement of Hon'ble Gujarat High Court and considering the fact that the Appellant and the service recipient are two distinct persons, the service provided by the Appellant to Zaloni Inc., USA clearly falls under the category of export of service.

In view of the above discussion, the impugned orders cannot be sustained and are therefore set aside. The Appeals filed by the Appellants are allowed with consequential relief, as per law.

(Order pronounced in the open court on 20 October 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)