CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

COURT : Division Bench III

SERVICE TAX APPEAL No. 621/2011

SERVICE TAX APPEAL Nos. 642 - 643/2011

(Arising out of Order-in-Original Nos. 24 – 26/2011 dated 29.08.2011 passed by the Commissioner of Service Tax, Chennai).

M/s. ETA TRAVEL AGENCY PVT. LTD. Appellant
Arihant NITCO Park,
No. 90, Dr. Radhakrishnan Salai,
Mylapore, Chennai – 600 004.

Vs.

The Commissioner of Service Tax Respondent
MHU Complex,
No. 692, Anna Salai, Nandanam,
Chennai-600 034.

APPEARANCE

FOR APPELLANT : Ms. J. Vamini, Advocatae
FOR RESPONDENT : Ms. Sridevi Taritla, Addl. Commissioner (A.R)

CORAM

Hon'ble MS. SULEKHA BEEVI C.S., MEMBER JUDICIAL
Hon'ble Shri VASA SESHAGIRI RAO, MEMBER TECHNICAL

Date of Hearing: **02.02.2023**
Date of Pronouncement: **20.02.2023**

FINAL ORDER Nos: 40053-40055/2023

Order : Per Hon'ble Vasa Seshagiri Rao

M/s. ETA Travel Agency Pvt. Ltd., Chennai were engaged in providing Air Travel Agent Service (ATAS in short) and Business Auxillary Service (BAS in short). The appellants had

availed the credit of various input services received. Three Show Cause Notices were issued for recovery of Cenvat Credit wrongly taken and also for short payment of Service Tax on Overriding Commission which were commonly adjudicated by the Commissioner confirming the demand of Rs. 2,81,314/- being the irregular Cenvat Credit taken and utilized for the period from October, 2007 to September, 2010 under Rule 14 of Cenvat Credit Rules, 2004 (CCR,2004 in short) and demand of Rs. 60,452/- being the service tax not paid on overriding commission received by the appellants apart from demand of the interest and imposition of penalty.

2. The appellant during the disputed period was functioning as General Sales Agent of M/s. Travel Pie LLC, Arizona (Alaska Airlines), USA. The appellant has received overriding commission for the services provided to M/s. Travel Pie LLC, Arizona. The appellants have submitted that in terms of Rule 3 (3) of Export of Service Rules, 2005, (ESR, 2005 in short) in relation to business auxiliary services, services will be construed as export when such services are provided and used in or in relation to commerce or industry and the recipient of such service is located outside India. Rule 3 (3) of ESR, 2005 reads as follows:-

> "3. Export of taxable service. –
>
> (i) ……
>
> (ii)……
>
> (iii) specified in clause (105) of section 65 of the Act, but excluding,–
>
> (a) sub-clauses (zzzo) and (zzzv);

> (b) those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d), (zzzc), (zzzr) and (zzzzm) does not relate to immovable property; and
>
> (c) those specified in clause (ii) of this rule, when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service."

In terms of the above, to qualify for the export of service, the service should have been provided in relation to business or commerce and the provision of such service should be to a recipient located outside India. As the tickets were sold in India and the recipients of service are in India and the condition of provision of such service to a recipient located outside India has not been fulfilled according to the show cause notices. For not satisfying the above condition, appropriate Service Tax was demanded on the overriding commission received by the appellant.

3.1 However, learned Advocate Ms. J. Vamini for the appellants have contended that in terms of Rule 3(3) of ESR, 2005, in relation to BAS services, it will be construed as export when such services are provided and used in or in relation to commerce or industry and the recipient of such service is located outside India and thus they have satisfied both the conditions. It was submitted further that they are promoting the business of M/s. Travel Pie LLC, Arizona, in India as their General Sales Agent for which they have received the commission called overriding commission, that their services

are availed and used by their foreign company abroad and not in India, that the passengers who book tickets through the appellant are not the service recipients but M/s. Travel Pie LLC, Arizona and the payments for such services were received in convertible foreign currency.

3.2 The appellants have relied on the decision of the Tribunal in the case of *Arafaath Travels Pvt. Ltd. Vs. Commissioner of Service Tax* reported in (2017) 7 GSTL 437 wherein it was held:-

> "Business Auxiliary Service - General Sales Agent (GSA) for Saudi Arabian Airline Limited (Saudia) - Export of Service - Taxability of overriding commission deducted by assessee in INRs on basis of credit notes issued by local office of Saudia in Chennai - *HELD :* Business Auxiliary Services being taxable in terms of Section 65(105)(zzb) of Finance Act, 1994 governed by conditionalities in Rule 3(3) of Export of Services Rules, 2005 - Major requirement of Business Auxiliary Service to be considered as export of service to be that such services provided and used in or in relation to commerce and industry and recipient of such services located outside India - Services provided definitely in relation to commerce and services provided on agreement signed with client Saudi Arabian Airlines Corporation, Jeddah, Saudi Arabia - Thus first two conditionalities satisfied - Commercial services provided inter alia, soliciting, promoting and selling passenger air transportation and cargo and mail transportation for Saudia very much Business Auxiliary Service, to benefit all such service flowing to Saudia's business - Although assessee's activities taking place in India, benefit in terms of business of foreign company accruing outside India - Therefore impugned service satisfying particular requirement in impugned Rule 3(3) ibid - Since outflow of foreign exchange reduced to extent of commission/payment retained within India, such retention to be necessarily treated as saving of foreign exchange and by implication akin to receipt of monies in convertible foreign exchange - Conditionalities of Rule 3(3) ibid as amended and applicable during different periods involved to be deemed to have

been satisfied - Services rendered to foreign recipient to amount to export of Business Auxiliary Services and exempted from liability to Service Tax - Impugned orders cannot be sustained and set them aside in toto - Section 65(105)(zzb) of Finance Act, 1994 and Rule 3(3) of Export of Services Rules, 2005. - *The C.B.E. & C. Circular No. 111/5/2009-S.T., dated 24-2-2009 has advised in para-3, that the law has to be read harmoniously so as to avoid contradictions within a legislation and accordingly, the meaning of the terms "used outside India" has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of Rule 3 of Export of Services Rules, 2005. The circular further gives an example of category of three services [Rule 3(1)(iii)] where it is possible that services may take place even when all the relevant activities take place in India so long as the benefits of the services accrue outside India. Board further clarifies that for Rule 3(1)(iii), the relevant factor is the location of the service receiver and not the place of performance. [paras 7, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 8, 9, 10, 11, 12, 13]*

In the above decision, the Tribunal has held that the overriding commission received on account of services rendered under General Sales Agency agreement service entered with Saudi Arabian Airlines was not liable to be taxed as the same amounts to export of service even when payment was received in Indian rupees, such retention would have to be necessarily treated as savings of foreign exchange by implication akin to receipt of money in convertible foreign exchange by pacing reliance on the decision of the jurisdictional High Court of Madras in the case of *Suprasesh General Insurance Services* – (2016) 41 STR 34. It is informed that the Department's appeal filed against the said decision in *Suprasesh General Insurance Services* (supra) is dismissed by the Supreme Court in Civil Appeal Nos. 17481-17482/2017 dated 14.05.2018 and 06.08.2018. In as much

as, the above decision clearly covers all aspects of the issue involved in demanding of Service Tax on overriding commission, short payment of service tax as demanded in the impugned order is not maintainable and so set aside.

3.3 The second issue in these appeals pertain to eligibility of Cenvat Credit on input services such as Car hire charges, Insurance charges, Staff welfare expenses and Travelling expenses. During the disputed period, as per Rule 2 (1) of Cenvat Credit Rules, 2004, "input service" means any service;-

> "(i) used by a provider of taxable service for providing an output service; or
>
> (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal.
>
> and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal; "

As per Rule 3 of Cenvat Credit Rules, 2004, provider of taxable service shall be allowed to take Cenvat credit paid on any input service received. Rule 3 of the CCR, 2004 reads as follows:

> "(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –
> ……
> ……...
> (ix) the service tax leviable under Section 66 of the Finance Act;
> (x) the Education Cess on taxable services leviable under Section 91 read with Section 95 of Finance (No.2) Act, 2004 (23 of 2004); and

> (xa) the Secondary and higher Education Cess on taxable services leviable under Section 136 read with Section 140 of the Finance Act, 2007 (2 of 2007); and……
> paid on
> (i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and
> (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004.
>
> including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547 (E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004."

In terms of Rule 3 of CCR, 2004 read with Rule 2 (i), Cenvat credit can be availed by the service provider on the input service used for providing output service.

4. Appearing for the department Ld. AR Ms. Sridevi Taritla has contended that the Staff Welfare expenses such as insurance, employee's gratuity fund, Group Insurance Mediclaim, car hire charges, travelling expenses, staff welfare expenses on which the assessee availed the credit of service tax paid, were in no way connected for the provision of output services which are Air travel agent service and BAS and so the appellants were denied input services credit legally and correctly.

5. Whereas, learned Advocate Ms. J. Vamini argued that they are eligible for the credit of input services as these expenses are incurred necessarily and essential for

providing their output service and they were used in or in relation to the business. She has relied upon the decision of the Bombay High Court in the case of *Ultra Tech Cement Ltd.* reported in (2010) 20 STR 577 in this regard.

6. We have heard both sides and also perused the case records and the case laws relied upon by the appellants.

7. During the period covered in these impugned notices, denial of Cenvat credit on input services such as Car hire charges, Insurance charges, Travel expenses and Staff welfare expenses is not legally maintainable in terms of Rule 2 (1) of CCR, 2004, as all these services are input services considering the sweep and depth of definition of input service as per Rule 2 (1) of CCR, 2004. It includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, activities relating to business etc. This being an inclusive definition of an 'input service', these expenses are having a connection with the provision of output services. Hon'ble High Court of Judicature of Mumbai (Nagpur Bench) in the case of *CCE, Nagpur Vs. Ultratech Cement Ltd.* (2010 (20) STR 577 (Bom.), has held that for an input service the expression "activities in relation to business" in the definition of 'input service' postulates activities which are

integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to be input service under Rule 2 (1) of the CCR, 2004. Further, elaborating the scope of definition of input service, the Court has held that the scope of input service is very wide. Input service covers not only services directly, in or in relation to the manufacture of final product but also various services used in relation to the business of manufacture whether prior to manufacture or after manufacture. The definition is not restricted to services used in or in relation to manufacture of final product but extends to all services having direct nexus or integrally connected with the manufacturing of final product. The definition of 'input service' not only covers services which fall in the substantial part of Rule 2 (1) of CCR, 2004 but also covers services which are covered under inclusive part. The services covered under inclusive part are services rendered prior to commencement of manufacturing activity as well as services rendered after manufacture of final products. Inclusive part of definition of 'input service' includes various services rendered in relation to business. The definition of 'input service' seeks to cover every conceivable service used in the business of manufacturing the final products. The categories of services enumerated after the expression 'such as' in the definition of 'input service' do not relate to any particular

class or category of services, but refer to variety of services used in the business of manufacturing final products. Nothing in the definition of 'input service' to suggest that the legislature intended to define the expression 'such as' restrictively. The inclusive part of the definition of input service is only illustrative and not exhaustive. In the absence of any intention of the legislature to restrict the definition of 'input service' to any particular class or category of services used in the business. The learned Advocate also relied upon the decision rendered by the High Court of Judicature of Madras in the case of *Ganesan Builders Ltd. Vs. CST, Chennai* – 2019 (20) GSTL 39 (Mad.) and the Tribunal order in the case of *Sanmar Foundaries Ltd. Vs. CCE, Trichy* – 2016 (43) STR 362 (Tri.-Chenn.).

5. In as much as both the issues stand covered by the decisions as detailed supra, complying with the same, all the three appeals are allowed with consequential relief, if any.

(Order pronounced in the Open Court on 20.02.2023)

(**SULEKHA BEEVI C.S.**)
MEMBER JUDICIAL

(VASA SESHAGIRI RAO)
MEMBER TECHNICAL

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