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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.1349 Of 2011

[Arising out of OIO No.07/Commissioner/2011 dated 28.02.2011 passed by the Commissioner of Central Excise and Service Tax, LTU, New Delhi]

The Commissioner of Central Excise and Service Tax, Delhi : Appellant (s)
MG Marg, IP Estate, 17-B, IAEA House
I.P Estate, New Delhi-110002

Vs

M/s Glaxo SmithKline Asia Pvt. Ltd. : Respondent (s)
NBCC Plaza, Pushp Vihar, Sector-III,
Saket, New Delhi

APPEARANCE:
Ms. Shivani, Authorised Representative for the Appellant
Ms. Krati Singh, Advocate for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60528/2023

Date of Hearing:16.10.2023

Date of Decision:20.10.2023

Per: P. ANJANI KUMAR

M/s Glaxo SmithKline Asia Private Limited, the respondents, are engaged in providing "Business Support Services" and "Manpower Recruitment and Supply Services" to M/s SmithKline Beecham Plc. (SB Plc), U.K. as per an Agreement entered into between them. Revenue was of the opinion that the services rendered by the respondents do not qualify as "export of services" in terms of Rule 3(1)(c) of Export of Service Rules, 2005; a show-cause notice
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dated 15.04.2010 was issued demanding service tax of Rs.51,92,481/- for the period January 2009 to September 2009 along with interest and penalty. Learned Commissioner of Central Excise, New Delhi has dropped the proceedings initiated. On a review by the Committee of Chief Commissioners, Revenue is in appeal against the impugned order.

2. Ms. Shivani, learned Authorized Representative for the Department, reiterates the grounds of appeal and submits that for a service to be provided by any party to be treated as "export of service", the following three conditions must be satisfied:

(a) The recipient of the service is located outside India;

(b) The service is provided from India and used outside India;

(c) Payment is received in convertible foreign exchange.

In the instant case, condition (b) is not satisfied as the service is not used outside India. The issue stands clarified by Board's Circular No.141/10/2011-TRU dated 13.05.2011; though the benefit of service has been accrued outside India, the noticee did not fulfil the condition of service that it must be "used outside India".

3. Learned Authorized Representative further submits that the noticee has not produced any credible evidence to the effect that the services have been actually used outside India; moreover, the payments have been to a third party. In respect of "Manpower Recruitment and Supply Service", the respondents have assigned some of their employees to their overseas associates; however, these

employees were working from the premises of the respondents only in India.

4. Ms. Krati Singh, learned Counsel for the respondents, submits that as per Rule 3 of Export Rules (during relevant period), the services rendered by the respondents fall under Category 3 Services; Rule 3(1)(iii) should be seen *qua* the person receiving the service but not the place of performance of service; Board's Circular No.111/5/2009-ST dated 24.02.2009 clarifies that the phrase "used outside India" is interpreted to mean that the benefit of service should accrue outside India; the services rendered by the respondents are used by SB Plc, U.K. which are outside India; legislative intent is clear as the amendment to Rule 3, deleting services provided from India and used outside India, by Notification No.06/2010-ST dated 27.02.2010. She submits that the issue is no longer *res integra* in view of the following decisions:

- B.G. Energy India Pvt. Ltd.- 2019 (24) GSTL 430 (Tri. Delhi).
- Arcelor Mittal Stainless (I) Pvt. Ltd.- 2023-TIOL-469-CESTAT-MUM-LB.
- A.T.E. Enterprises Pvt. Ltd.- 2018 (8) GSTL 123 (Bom.).
- Wartsila India Ltd.- 2019 (24) GSTL 547 (Bom.)
- Blue Star Ltd.- 2018-TIOL-1976-HC-MUM-ST.
- Verizon Communication India Pvt. Ltd.- 2018 (8) GSTL 32 (Del.).
- Reebok India Company- Final Order Nos.60287-60288/2023 dated 25.08.2023 (Tri. Chan.).
- Baheti Agri Links- Final Order No.51027/2023 dated 02.08.2023 (Tri. Delhi).
- Orbit Research Associates Pvt. Ltd.- Final Order No.50970/2023 dated 31.07.2023.
- IBM India Pvt. Ltd.- 2020 (34) GSTL 436 (Tri. Bang.)

5. Learned Counsel for the respondents further submits that it is incorrect on the part of the appellant/ Department to state that the respondent has not submitted enough evidence to prove that the service is used outside India and that in view of the Circular dated 13.05.2011 (supra), the phrase "used outside India" should be interpreted in the context of place of effective use and the enjoyment of service. She submits that the Circular is clear that it will not operate in case where the services are merely being provided from India and there is no conflict between the accrual of benefit and used outside India; therefore, the reliance of the Department on the said Circular is misplaced. She submits that the Department's reliance on Microsoft Corporation India Pvt. Ltd.- 2009 (16) STR 545 (Del.) is of no help as the same is decided ultimately in favour of the respondents by the Larger Bench in 2014 (36) STR 766 (Tri. Del.).She also submits that extended period cannot be invoked as the respondent was regularly filing ST-3 Returns and had bona fide belief that the provision of services qualified to be export; penalty is also not imposable as the demand itself is not sustainable.

6. Heard both sides and perused the records of the case. The contention of the Department is that the services rendered by the respondents are performed in India and therefore cannot be considered as export. On the perusal of the Agreement, it appears that the respondents are rendering services with respect to clinical trials for the overseas company located in U.K. who undertake further research on the basis of the reports submitted by the respondent;

therefore, it is not correct that the use of services is in India; it is evident that the services rendered by the respondents are used by the overseas company who are benefitted by the same. It cannot be said that service is not used outside India just because the payment is made to third-party i.e.M/s Glaxo SmithKline Services, Unlimited, UK. It has been clarified that the said third-party has been maintaining the accounts of M/s SB Plc, UK. We find that as long as the service is enjoyed by the contracting party, routing of payment or consideration through a third-party does not alter the position. In this regard, we find that learned Commissioner has categorically observed that:

> "23.2. It is alleged in the SCN that noticee had issued invoices in the name of M/s Glaxo Smithkline Services, Unlimited, UK which appeared to be a different entity since the agreement was between noticee and SB Plc, UK. Therefore, it was further alleged that noticee had provided the services in India to Glaxo Smithkline Services Unlimited, UK and raised invoice in their name. Therefore, it was evident from the agreement that the entire services had been provided in India and also consumed in India.
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> 23.3. However, on perusal of the aforesaid agreement between notice and SB Plc, UK, it is seen that there is no such evidence in the agreement which would indicate that the services have been consumed in India. Moreover, the scope of services in the agreement includes services like sending the ultimate reports w.r.t. clinical trials being done in India to M/s SB Plc, UK with whom the noticee had entered into agreement. Therefore, once the reports are being sent outside India for the benefit of SB Plc UK, then these services cannot be treated as consumed in India as the beneficiary or recipient of these services is SB Plc, UK which is based outside India i.e. in U.K. Thus, I hold that it is wrongly alleged in the SCN that it is evident from the agreement that services have been consumed in India".

7. Learned Counsel for the respondents submits that the issue is no longer *res integra* as settled by a number of cases including the Larger Bench decision in the case of Arcelor Mittal Stainless India Pvt. Ltd. (supra), the Larger Bench has observed as follows:

> 43. It needs to be remembered that service tax is a value added tax which is a destination-based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the 30 ST/88483/2014 consumer. Service tax is levied at the place where the service is consumed, rather than the place where it is provided. This is what was observed by the Supreme Court in All India Fedn. of Tax Practitioners vs. Union of India17 and the relevant portions of the decision is reproduced below:
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> "6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer."
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> 7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination-based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax."
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> 44. The concept that service tax is a destination-based consumption tax is also in conformity with international practice in respect of value added taxes. Thus, in a destination-based consumption tax, the tax is levied only at the place where the consumption takes place. It is for this reason that exports are not taxed and imports are taxed on same basis as domestic supplies.
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> 45. The 2005 Export Rules were introduced to achieve the destination-based consumption tax concept and so exemption is provided from payment of service tax to

services exported out of India. The 2005 Export Rules set out various conditions for a service to qualify as export of service. Basically, the service recipient should be outside India; service should be provided from India and delivered outside India; and payment should be received in foreign currency.

46. Prior to 19.04.2006, under rule 3(3) of the 2005 Export Rules, the export of taxable service would mean, in relation to taxable services, such taxable services which have been provided and used in or in relation to commerce or industry and the recipient of such service is located outside India. For the period between 19.04.2006 and 01.03.2007, export of taxable service in relation to business or commerce, is the provision of such service to a recipient located outside India when such service is delivered outside India, and used outside India; and payment for such service provided outside India is received by the service provider in convertible foreign exchange. However, as the phrase „delivered outside India" in rule 3(2)(a) did not provide clarity with respect to intangible services, this expression was replaced w.e.f. 01.03.2007 by „is provided from India and used outside India". The Circular dated 29.04.2009 issued by CBEC clarifies that the relevant factor is the location of the service receiver and not the place of performance and the phase „used outside India" is to be interpreted to mean that the benefit of the service should accrue outside India. The term „used outside India", therefore, means that the service is provided to such a service recipient who is located outside India. It is the location of the service-recipient which determines where the service is used. The use of intangible services should be seen with respect to the location of the service recipient and not the place of performance.

47. In the present case, Arcelor India is a sub agent of Arcelor France which is an agent for the steel mills situated outside India. For procuring sale orders for the

products manufactured by the foreign mills from customers in India, the requests of prospective customers identified by Arcelor India is forwarded to the foreign mills who, 32 ST/88483/2014 thereafter, directly get in touch with the Indian customer to determine the terms and conditions and execute a contract after which the goods are supplied by the foreign mills directly to the Indian customers. For this provision of service, Arcelor India receives consideration from Arcelor France in convertible foreign exchange. Thus, there exists a relationship of service provider and service recipient between Arcelor India and Arcelor France.

48. A service recipient is a person who makes a request for a service, in exchange of a consideration. In fact, he is the person who is liable to pay for the services received. Service recipient is not a person who is affected by the performance of the service. The Finance Act does not define the term „service recipient". However, the same has been clarified in the CBEC Education Guide as follows:

> "5.3.3 Who is the service receiver? Normally, the person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf."

49. It is, therefore, clear that the recipient of service is the person at whose desire the activity is done in exchange for a consideration, i.e., the person who is obliged to make payment for the service. The recipient of service would, therefore, be a person at whose instance and expense the service is provided, whether or not he is the beneficiary of the service.

50. Arcelor France and Arcelor India act as main agent and subagent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor

India and the customers in India. Therefore, even though the 33 ST/88483/2014 goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France. Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.

51. The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24.02.2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.

52. As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.

53. The division bench, while making the reference, intended to deviate from this settled position of law only because, in its considered view, the decision of the Supreme Court in GVK Industries. The division bench, after recording a finding that there was no dispute that Arcelor India was providing BAS to Arcelor France, noted that the dispute was only as to whether the service rendered by Arcelor India will qualify as export of service in terms of the 2005 Export Rules. The division bench concluded that since the services provided to Arcelor France was for developing its business in India, the services received by Arcelor

> France, even though it is located outside India, would be in relation to business activities in India in view of the decision of the Supreme Court in GVK Industries. Reliance placed by the division bench on GVK Industries, as noticed above, is misplaced. The decision of Supreme Court in GVK Industries is based on an interpretation of Explanation (2) to section 9(1)(vii)(b) of the Income Tax Act, under which the income is deemed to have accrued in India. The Finance Act and the 2005 Export Rules do not contain a provision providing a deeming fiction. The distinguishing features of the decision of the Supreme Court in GVK Industries have been pointed in the earlier paragraphs of this order. The decision of the Supreme Court in GVK Industries, therefore, cannot be applied to the facts of the present case.

8. We further find that the Tribunal in the case of B.G. India Energy Pvt. Ltd. (supra) observed as follows:

> 7. Having considered the rival contentions, we are satisfied that under the facts and circumstances as per the requirement of Export of Services Rules, 2005 read with the explanatory Circular No. 111/05/2009-S.T., as the services provided by the appellant are in the nature of Business Auxiliary Service, the export of services is complete as the principal is located outside India with whom there is contract of service and such principal have paid for such services to the appellant in convertible foreign exchange, which is not disputed. So far as the clause "used outside India" is concerned, the said clause is deleted with effect from 27-2-2018. Thus, we hold that the appellant is entitled to rebate as claimed by them and the same shall be allowed subject to arithmetical correction, if any. Thus appeal is allowed with consequential benefit. We further direct the adjudicating authority to disburse the rebate within a period of 75 days from the date of receipt of copy of this order, as the matter is of the year 2006.

9. In view of the facts and circumstances of the case and the judgments of Tribunal, we are of the considered opinion that the services rendered by the respondents to M/s SB Plc, UK constitute export of service as the services are utilized by a company situated outside India and used outside India. To that extent, we find that the Department has not made out any case for intervening with the impugned order. We find that the impugned order is proper and legally sustainable. Accordingly, we dismiss the appeal filed by the Department.

(Pronounced on 20/10/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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