CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 13528 of 2013-DB

[Arising out of Order-in-Original/Appeal No CCEA-SRT-I-SSP-247-2013-14 dated 18.07.2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I (Appeal)]

Aegis Limited **.... Appellant**

Essar Engineering Service Division,
27 Kms, Surat Hazira Road, SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-I **.... Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

APPEARANCE :

Shri Vishal Agarwal, Advocate for the Appellant
Shri G. Kirupanandan, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 05.04.2023
DATE OF DECISION: 09.06.2023

FINAL ORDER NO. A/11222/2023

RAMESH NAIR :

The brief facts of the case are that the appellant filed a refund claim of Rs. 4,80,21,610 with the Assistant Commissioner, Service tax, Surat-I on 16.11.2011 on the ground that the service provided by M/s Essar Engineering Limited, Hazira (Now merged with M/s AEGIS Ltd.) under the category of services "consulting Engineers Services" to M/s Minnesota Steel Industries, LLC, USA (now known as Essar Steel Minnesota LLC) are export of services and service tax was not leviable under the Finance Act, 1994 as the services rendered by M/s Essar Engineering Ltd. were consumed outside the India. Service tax inadvertently paid by them on receipt of payment in Indian Rupee made by M/s Essar Engineering Services Ltd. consequent to the novation agreement entered with M/s Essar Engineering Services Limited. (EESL) M/s Essar Steel Minnesota LLC, UAE (ESML) and M/s Essar Projects (India) Ltd. (EPIL). The appellant in para 1 (g) of refund claim and in their letter dated 21.02.2012 clarified that the payment for the services would be received in foreign exchanges by M/s Essar Projects (India) Ltd. (EPIL) at a future time. Since payment for said services has not been

received in convertible foreign exchange as stipulated in Rule 3(2)(b) of Export of Services Rules, 2005, condition required to be fulfilled for treating as export of services had not been fulfilled. On this ground Assistant Commissioner, Service tax vide order issued in the form of letter dated 30.04.2012 directed the appellant to file the refund claim duly completed in all respects. Being aggrieved, Appellant filed the Appeal before the Commissioner (Appeals), who vide impugned Order-In-Appeal No. CCEA – SRT-I/SSP/247/2013-14/U/S/35A-(Final Order) dated 18.07.2013 rejected the appeal of appellant on the ground that Assistant Commissioner's communication dated 30.04.2012 was only interim and administrative communication and no decision has been reached by him by passing any order on refund claim and therefore there are no valid ground for filing an appeal against such letter. Therefore, the present appeal was filed by the appellant.

2. Shri Vishal Agarwal Learned Counsel appearing on behalf of the appellant submits that the issue raised before the Commissioner (Appeals) was whether the refund claim filed by the appellant could have been returned as premature, when in fact, it was complete in all aspects and no further compliance was lacking at the Appellant's end. The Assistant Commissioner's order cannot be considered as interim in nature and appeal against the same ought to have been admitted and allowed.

3. He also submits that appellant specifically argued before the Commissioner (Appeals) that the order-in-original was passed without considering or dealing with the ground raised in the refund claim application that Service tax was not leviable as the service rendered by the appellant were consumed outside India by ESML; and service tax being destination – based consumption tax, only such service which are consumed in India are taxable under the Finance Act, 1994, as was evident from Section 64 of the said Act and CBEC's Instruction F.No. V/DGST/03/Gen/Ins/01/2004 dated 17.08.2004, wherein the board has clarified that no service tax is leviable on services intended for consumption in Jammu & Kashmir, to which the Finance Act; 1944 did not apply. He placed reliance on the following decisions.

(i) All India Federation of Tax Practitioners Vs. UOI [2007(7)STR 625 (SC).

(ii) Association of Leasing & Financial Service Companies Vs. UOI [2010(20)STR 417 (SC).

4. He also argued that the services which are consumed outside the India are not leviable to Service tax in India. He also placed reliance on the following judgments:-

(i) Comm. of ST, Delhi Vs. Dewan Travels Pvt. Ltd. [2018(14)GSTL 390(Tri. Del.)

(ii) Comm. of ST, Delhi Vs. Paras Holidays Pvt. Ltd. [2016 (44)STR 257 (Tri.- Del.)]

(iii) Grey Worldwide (India) Pvt. Ltd. Vs. Comm. Of ST, Mumbai [2015(40)STR1104 (Tri.- Bang.)

(iv) Akbar Travels & Tours Vs. Comm. Of CEx, Cus. & ST, Calicut [2016(45)STR 444 (Tri. Bang.)

(v) Al-Hussam India Hajj &Umrah Services Management Vs. CCE & ST, Cochin [2016(44) STR 280 (Tri.-Bang.)]

(vi) Cox& Kings India Ltd. Vs. Comm. Of ST, Delhi [2014(35)STR 817 (Tri. Del.) affirmed by the Hon'ble Supreme Court at [2015(39)STR J308(SC)]

(vii) SGK Consultations Pvt. Ltd. Vs. Comm. Of ST, Delhi [2016(44)STR 690 (Tri. Del.)

5. He further submits that the Ld. Commissioner (Appeals) has grossly erred in not dealing with the plea that there is no provision in law by which a refund claim can be returned back as being premature. The courts have held in number of cases that a refund claim filed by an assessee cannot be returned back by the refund sanctioning authority and the claim needs to be decided by the department, whether in favour or against the asseseee. He Placed reliance on the following decisions.

(i) Usha International Vs. Comm. Of Customs (I), Mumbai [2017(357)ELT 532 (Tri. –Mum)

(ii) Persistent Systems Ltd. Vs. Comm. Of CE & ST, Pune –III [2016 (43) STR 117 (Tri. –Mum.)

6. He also submits that return of claim with a direction to file it duly complete in all aspects, i.e. after receipts of payment in foreign currency, would result in the claim becoming time-barred as the claim had to be filed within one year of the erroneous payment.

7. Shri G. Kirupanandan, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He placed reliance on the following decisions.

(i) RMS Risk Management Solutions India Pvt. Ltd. Vs. Commissioner of Central Excise, New Delhi- 2022(63)GSTL 245(Tri. Del.)

(ii) Kobelco Machinery India Pvt. Ltd. Vs. Commissioner of S.T., Kolkata – 2017(3)GSTL 260 (Tri. Kolkata)

8. We have considered the submissions made by both the sides and perused the records

9. We find that Section 35(1) of Central Excise Act, 1944 provides for filing appeals before Commissioner (Appeals). This section states that any person aggrieved by any decision or order passed under this Act by a Central Excise officer may appeal to the Commissioner (Appeals). The words used are 'decision' or 'order'. In many judgments, the Tribunal as well as Hon'ble High Courts have held that a letter issued informing the decision which affects the right of the assessee can be considered as an appealable order. In the cases of *Instant Clearing Services (I) Pvt. Ltd.* v. *CC, Chennai* [2016 (341) E.L.T. 468 (Tri-Chennai)], *Mandvi Casting Pvt. Ltd.* v. *CE, Goa* [2012 (276) E.L.T. 103 (Tri-Mum)] and *Bhagwati Gases Ltd.* v. *CCE, Jaipur-I* [2008 (226) E.L.T. 468 (Tri-Del)] the instances were communications issued by department and the issue for consideration was that can such comunications constitute an appealable order or not. It was held that when such communication/letter affects the right of assessee/party then appeal was maintainable. The finding of the Commissioner (Appeals) is that such a communication is merely an administrative action is absurd as the Asstt.

Commissioner, while deciding a refund application, is required to act as a quasi-judicial authority. The legal position in this regard is settled by several decision of this Tribunal such as *Koya& Co. Construction P. Ltd.* v. *CCE* - 2010 (262) E.L.T. 1014 (Tri.-Bang.) = 2011 (24) S.T.R. 120 (Tribunal), *Hyderabad Industries Ltd.* v. *CCE* - 2002 (145) E.L.T. 463 (Tri.-Del.), *Gujarat Ambuja Cement Ltd.* v. *CCE* - 2006 (197) E.L.T. 39 (Tri.-Del.) and *Bhagwati Gases* v. *CCE, Jaipur* - 2008 (226) E.L.T. 468 (Tri.-Del.).

10. We find that once an application of refund has been filed before the refund sanctioning authority, the said authority is duty bound to decide the refund application one way or the other. The refund application can either be rejected or allowed in part or in full. The provisions of refund do not give liberty to the fund sanctioning authority to return the refund application by terming the same to be premature. Therefore the action of the Asstt. Commissioner in holding the application as premature is really an act of refusal to exercise a statutory duty to decide upon the refund application one way or the other. For this reason also, the order of the lower authority is untenable.

11. We find that every issue raised before the Tribunal is required to be dealt with, especially when the appellant argued the matter with documentary evidences on disputed refund claim, and therefore issue cannot be left open as it is obligatory on the part of the Tribunal, which is the last fact finding authority to deal with the said aspect. Accordingly, we proceed to decide the said plea of the assessee on the issue that whether refund claim is admissible or not in this matter to appellant.

12. We have gone through the refund application filed by the Appellant before the Assistant Commissioner. In para 1 (f) Appellant raised the ground for refund as under: -

> *"(f) That service tax was not leviable under the Finance Act, 1994 as the services rendered by EESL were consumed outside India (By ESML, USA). Service tax being a destination –based consumption tax, only such services which are consumed on India are taxable under the Finance Act, 1944. This position is evident from Section 64 of the said Act, read with CBEC FAQ and instruction F.No.*

V/DGST/03/Gen/Ins/01/2004 dated 17.08.2004 wherein, in the context of the territorial coverage of the Finance Act, 1994 to the state of the Kashmir, the Board had clarified that no service tax is leviable on services intended for consumption in Kashmir. The concept that Service tax legislation in India is a destination –based consumption tax finds a clear expression in the board circular Nos. 56/5/2003-ST dated 25.04.2003 and 334/3/2011-TRU dated 28.02.2011."

In para 1(g) of refund application appellant also submitted as under:

"that though e provision of the Export of Service Rules, 2005 are not relevant when the services in question are not taxable at all (as explained above) , even if a contrary view is taken it would not make a difference to the conclusion as even under the Export of Service Rules, Services rendered by EESL would amount to Export as it is covered under category (iii) of the said Rules. Where the location of the recipient of the services is the relevant factor for determining whether or not export has taken place. Further, the condition in the export of services rules to the effect that the consideration for the services should have been received in Foreign Exchange by the Service provider would also stand satisfied as payment for the services would be received in foreign exchange, albeit at a future point of time. Also, by virtue of the novation agreement, EPIL will be regarded as the service provider and therefore the receipts of foreign exchange by EPIL will amount to receipt of such foreign exchange by the service provider."

In view of above it is clear that in the present matter, Appellant filed the refund claim firstly on the ground that services provided by them are not taxable since the same was consumed outside India.

13. We find that the grounds for refund, as aforementioned, have not been considered by both the authorities nor the judgments relied upon by the appellant considered by both the authorities, nor there is any finding distinguishing the same. Thus clearly, there is serious violation of principles of natural justice apparent on the fact of record.

14. We find that if the tax itself is not leviable, it would be immaterial whether the payment for the services is received in Indian Currency or foreign currency. When the services in question were not taxable at all, as they were consumed outside India, the refund claim could not have been returned as premature on the ground that payment for the services were to be received in foreign exchange by M/s EPIL on a future date. Therefore the impugned order–in-appeal passed by the Ld. Commissioner in the present matter legally not correct.

15. We find strong force in appellant's claim on service being outside the taxable territory of India. Admittedly the disputed transaction related to services happened outside India. The service in respect of such transaction is rendered, received and consumed outside India. The Tribunal's decision in *Cox & Kings India Ltd.*- 2014 (35) S.T.R. 817. (supra) is applicable to the present case. The essence of taxability of service is that it should be taxed in the jurisdiction of its consumption and where is provided. Here, the service, namely "consulting engineering services, is rendered outside India and duly consumed by the recipient-M/s. Minnestoa Steel Industries, LLC, USA (Now known as Essar Steel Minnesota LLC) outside India. We find service tax liability on such service is not sustainable for want of jurisdiction. It is on records that the identified service element has been wholly rendered and consumed abroad. As Hon'ble Supreme Court in the case of *Ishikawa-Ima-Harima Heavy Industries Ltd.* - 2007 (6) S.T.R. 3 (S.C.) held that in respect of offshore services, there should be sufficient nexus between the rendition of services and territorial limits of India. It was held that applying the principle of apportionment to composite transactions which have some operation in one territory and same in other, it is essential to determine taxability of the service operations. Applying this principle, we find that in the present case the whole of service rendered and consumedoutsideIndia is beyond the taxable territory as per Finance Act, 1994, hence not liable to service tax.

16. In the present case, the department and both the adjudicating authority nowhere disputed the facts that the services rendered by Appellant to ESML were provided and consumed at a place outside India and therefore, not leviable to Service tax, as the services was provided beyond the territorial jurisdiction of India. Thus, we are of the view that in the instant

case, the amount deposited by the appellants without any authority of law cannot be considered as Service Tax. Therefore, the appellant are entitled to get the refund and we hold the same.

17. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the Learned Commissioner (Appeals). Accordingly, by setting aside the same, the appeal is allowed in favour of the appellant with consequential relief, as per law.

(Pronounced in the open court on 09.06.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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