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

Service Tax Appeal No.1964 Of 2012

[Arising out of OIO No.19-22/AKM/CST (Adj.)/2012 dated March 2012 passed by the Commissioner (Adjudication), Service Tax, Delhi]

M/s Baxter India Private Limited : Appellant
2nd Floor, Tower-C, Building No.8, DLF,
Cyber City, DLF, Phase-II, Gurgaon, Haryana

VERSUS

The Commissioner of Service Tax, Delhi : Respondent
17-B.I.A.E.A. House, M.G. Road,
I.P. Estate, New Delhi-110002

With

Service Tax Appeal No.57925 of 2013

[Arising out of OIO No.30/GB/2013 dated 28.02.2013 passed by the Commissioner of Service Tax, Delhi]

M/s Baxter India Private Limited : Appellant
2nd Floor, Tower-C, Building No.8, DLF,
Cyber City, DLF, Phase-II, Gurgaon, Haryana

VERSUS

The Commissioner of CGST, Gurugram : Respondent
Plot No.36-37, Sector-32, Gurugram-122001

APPEARANCE:
Ms. Priyanka Rathi and Ms. Shubangi Gupta, Advocates for the Appellant
Shri Anurag Kumar and Shri Aneesh Dewan, Authorised Representatives for the Respondent

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

FINAL ORDER No.60163-60164/2024

DATE OF HEARING: 15.03.2024
DATE OF DECISION: 05.04.2024
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PER: P. ANJANI KUMAR

Vide these appeals, the appellant, M/s Baxter India Private Limited, challenges the impugned orders. As the issue involved is common, both of them have been taken up for consideration together.

2. Brief facts of the case are that the appellant is engaged in providing taxable services under the category of "Business Auxiliary Services", "Maintenance and Repair Services", "Intellectual Property Rights Services", "Management Consultants", "Consulting Engineering Services", "Sponsorship and Franchise Services" and "Transportation of Goods Service". On conducting an investigation, it appeared to the Department that the appellants are not discharging service tax and certain reimbursements made to the foreign entities for the services received under Reverse Charge Mechanism. Five show-cause notices were issued which culminated in the issue of the impugned orders.

3. Ms. Priyanka Rathi, assisted by Ms. Shubangi Gupta, learned Counsels for the appellants, submits that there are five issues discussed in the impugned orders.

3.1. Regarding the allegation of non-payment of service tax on services provided by the Appellant to M/s Baxter Singapore and the misclassification thereof, she submits that irrespective of the classification of services, the services qualify as exports as these services were provided to M/s Baxter Singapore which is located outside of India and the consideration for such services was also received in foreign convertible currency; even otherwise, the services provided by the Appellant merit classification under "Business

Auxiliary Services" being in the nature of promotion and marketing services;Service tax is a destination based consumption tax and hence exports cannot be taxed in view of the Circular No. 56/5/2003 dated April 25, 2003;even if the services are held to be management consultancy services, then also the services will qualify as export of services. She relies on Anglo American Services (India) Pvt. Ltd. Vs Commissioner of Service Tax, Delhi, 2019 (22) GSTL 415 (Tri. - Del) and submits that the nature of service is similar to the services provided by the Appellant. The Tribunal held that the services qualify as export of services and hence, are outside the ambit of service tax.

3.2. Regarding the allegation of non-payment of service tax on mark up on transfer price income charged by the appellants from Baxter World Trade Corporation, i.e., BWT, Corporation, she submits that the services provided by the Appellant qualify as export of services.Learned Counsel takes us through the conditions required to be satisfied to qualify as exports during the relevant period and submits that the services provided by the Appellant are "Business Support Services" and fall under Category III [Rule 3(1)(iii)] of the Export of Service Rules, 2005; the important criteria to qualify as exports is that the recipient must be located outside of India and place of performance of the services is immaterial; the services rendered by the Company are used outside India by the overseas company who are benefitted by the same and hence qualify as export of services; all the conditions have been met and therefore, the services provided by the Appellant qualify as exports and the consideration received from

the service recipient (cost + mark-up) is outside the ambit of service tax. She also relies on the following:

- Circular No. 111/05/2009-ST February 24, 2009
- Commissioner of Central Excise & Service Tax v. Glaxo SmithKline Pvt. Ltd. (2024) 15 Centax 307 (Tri Chand.)
- Arcelor Mittal Stainless India Pvt. Ltd. v. CST. 2023-VIL-516-CESTAT-MUM-ST
- B.G. India Energy Pvt. Ltd. v. Commissioner of Central Excise, Delhi, 2019 (24) GSTL 430 (Tri. - Del.)

3.3. Regarding the classification of services received from M/s Baxter USA to the Appellant and Non-payment of service tax on royalty paid by M/s Baxter India to Baxter, USA for such receipt of service, she submits that the Appellant was granted non-exclusive right of Baxter USA's patent, trademarks, knowhow and proprietary software to manufacture and sell certain healthcare products vide the license agreement dated Such services were classified as 'Intellectual property services by the Appellant;however, the Department has erroneously classified them as 'Franchise Service'; the services are not classifiable as 'franchise service' as there is no grant of representational rights by the franchisor to franchisee, which is compulsorily required to be categorized under franchise services'. She relies on Reckitt Benckiser (India) Pvt. Ltd. v. CCE, 2021 (46) GSTL 41 (Tri. - Chan.).

3.4. Regarding the allegation of non-payment of service taxon networking charges and technical services received by the Appellant, she submits that service tax on services received by the Appellant from overseas entity is not payable prior to April 18, 2006 inasmuch as the relevant charging section for tax on import of service under

reverse charge mechanism, i.e., Section 66A of the Act, came into effect only from April 18, 2006. She relies on Indian National Ship Owners Association v. Union of India, 2009 (13) STR 235(Bom.) maintained by the Hon'ble Supreme Court in 2010 (17) S.T.R. J57 (S.C.) and CST Delhi v. Sojitz Corporation, 2022 (65) GSTL 130 (SC).

3.5. Regarding the allegation of non-payment of servicetax on reimbursements made by the Appellant for certain services received, she submits that the reimbursements are not includible in the taxable value and hence the reimbursements made by the Appellant to its overseas company for certain services is not liable to be taxed under the Finance Act, 1994. She submits, without prejudice to the above, that the Appellant has reimbursed the overseas company for certain testing of products and certain conferences attended by doctors; these are performance-based services, which are performed outside of India and such expenses are incurred by the Appellant in course of its business thus, no service tax is payable on such services. She relies on Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India 2013 (29) STR 9 (Del.) reaffirmed by the Hon'ble Supreme Court 2018 (10) GSTL 401 (S.C.)

4. Shri Anurag Kumar, assisted by Shri Aneesh Dewan, learned Authorized Representatives for the Department, takes us through the scope of the services as per the agreement and submits that the services provided by the appellants to the overseas entities or in collection, assimilation, compilation and provision of information/ advice to M/s Baxter, Singapore; the services are advisory in nature and no way connected with market development, assistance in the

product handling and promotion/ publicity of the products; this activity falls in the ambit of services as "Management Consultant". Regarding the markup transfer price income, learned Authorized Representative submits that the appellants are charging consideration on cost plus markup; as the services are rendered in India, the same cannot be treated as export.

5. Learned Authorized Representative submits, on the demand related to 'Franchise Service', that as per the License Agreement dated 27.10.2003, the appellants were given non-exclusive rights on patents, trademarks, know-how and proprietary software to manufacture and sell healthcare products; the same is correctly classified under 'Franchise Services'. Regarding the demand on networking charges and technical services, he submits that the appellants have received the same from M/s Baxter Healthcare Corporation, U.S.A for a consideration and therefore, liable to pay service tax on Reverse Charge Mechanism basis. He further submits that the Adjudicating Authority holds that the appellants have not contested the liability under this category and the demand under "Management Consultancy Services". Regarding the demand of service tax on various reimbursements/ payments made by the appellants, learned Authorized Representative submits that the argument of the appellants is not substantiated and has been rightly denied by the Adjudicating Authority.

6. Heard both sides and perused the records of the case. The instant case requires us to consider as to whether:

- the services provided to Baxter Healthcare Far East Pte. Ltd. (Baxter Singapore), merit classification under the category of Management Consultant's Services or under"Business Auxiliary Services".
- Mark-up on transfer price income, charged by Baxter India from Baxter World Trade Corporation (BWT), qualifies as 'export consideration
- Royalty paid by Baxter India to Baxter Healthcare Inc., USA is classifiable under the taxable category of 'Franchise Services' or under 'Intellectual Property Services'.
- the appellants are liable to discharge service tax on networking charges and technical services procured by Baxter India from overseas entities.
- the appellants are liable to discharge service tax liability on the reimbursements/payments of various expenses, made by Baxter India to overseas entities.
- the appellants are liable to discharge service tax on markup income reimbursements i.e. total consideration received by them for provision of services to Baxter World Trade Corporation (BWT) or the same qualifies as export of services under Export of Service Rules, 2005.

7. On going through the records of the case, we find that demands of Rs.64,09,313/- (only demand in Appeal No. ST/57925/2013) and Rs.42,99,058/- (among other demands in respect of Appeal No. ST/1964/2012) was raised, on the markup on transfer price income received by the appellants, from their overseas entities. Learned

Counsel for the appellants submits that the appellants were rendering various "Business Support Services" in terms of the Agreement dated April 01, 2006; the services were in the nature of Training and Performance Services, System Data Entry, Human Resource System Support, Payment Processing, Employees Stock Purchase Plan etc. and these services were exported. On going through the agreement, we find that it is entered into between the appellant and Baxter World Trade Corporation; as per the Agreement, the appellant shall provide BWT in the following services:

1.1. **Training and Performance System Data Entry**

1.1.1. User set-up for training systems

1.1.2. Archiving and maintenance of data for performance management too

1.1.3. Preparation of reports as requested

1.2. Reporting

1.2.1. Queries and reports from PeopleSoft based on user requests

1.2.2. Human Resource data auditing

1.3. Human Resources Systems Support

1.3.1. PeopleSoft job record data entry
1.3.2. PeopleSoft position record data entry

1.3.3. Job requisition data entry for new hires and internal candidates in online tool

1.3.2. PeopleSoft position record data entry
(Brassring)

1.3.4. Support mailbox maintenance and 'ticket' creation for issues raised by Human Resources, employees or managers

1.3.5. System Password resets for (Talent Management, WeComply, and PeopleSoft Self-Service systems)

1.3.6. Audit and reconciliation of payroll data

1.4. Employee Stock Purchase Plan

1.4.1. Stock balancing, auditing, and clerical activities

1.4.2. Mailbox maintenance and 'ticket' creation for stock related issues

7.1. On going through the above agreement, it is clear that the appellant is rendering services to their overseas entities. Though, the services are performed in India, the beneficiary of the services is abroad and the payment for the same is coming to the appellants along with the reimbursed expenses; therefore, in view of the Circular No.111/05/2009-ST dated February 04, 2009, the services qualify to be export of services in view of the Export of Service Rules as the service is used outside India. We find that the Tribunal has held similarly in the case of CCE & ST Vs Glaxo SmithKline Pvt. Ltd. (supra) and Arcelor Mittal Stainless India Pvt. Ltd. (supra).

8. Coming to the classification of services rendered by the appellant to M/s Baxter, Singapore, we find that the same are rendered in terms of Agreement dated February 25, 1997; we find that the scope of the services are as follows:

3.1.

(a) information on all the applicable and relevant policies of the Government of India from time to time;

(b) annual estimates of market development over a five-year period;

(c) advice on the relevance and contents of promotional and publicity material addressed at the Indian market,

(d) advice and inputs to Baxter Singapore as may be required from time to time on such matters as may be within the technical, legal and resourcecapabilities of BIPL;

(e) arrange discussions which may be necessary or desirable with customers in the Territory

(f) up-to-date information concerning health, safety and environmental Information and product handling Instructions Including advice on the legal requirements for product handling and transportation within the Territory,

(g) giving assistance and guidance, on legal requirements in connection with the performance by Baxter Singapore of its contracts;

(h) advice about administrative and fiscal matters such as changes in customs regulations and foreign exchange controls;

(i) advice in respect of payment method, credit terms and the availability of foreign exchange in the Territory and of political risks in the Territory;

(j) provide information on banks suitable for letters of credit or for documentary collection, based on reputation and financial strength which shall be updated when significant changes occur and at least annually.

8.1. The Department opines that the above activity falls under Management Consultancy Service whereas it is the contention of the appellants that it falls under Business Support Services and that as

long as the export of services is not disputed, the classification of the services does not matter as held in Anglo American Services (India) Pvt. Ltd. (supra). We find that the activity of the appellants as seen from the Agreement is not in the nature of Management Consultancy Services; though, at some places, the word "Advice" is used; on going through the terms of the Agreement, it will be clear that this is in the nature of giving or passing on of information rather than giving a management advice. We find that the appellants are providing various information which is available in India to M/s Baxter, Singapore. We find that the contentions of the appellants are correct. Moreover, as contended by the appellant, classification of service does not matter as long as they are exported. We find that there is no such averment on the part of the Revenue that the services are not exported.

9. We find that the Department would like to tax the amounts paid, towards royalty, by the appellant to M/s Baxter, U.S.A under 'Franchise Services' whereas, the appellants contended the same is 'Intellectual Property Services' as there is no grant of representational rights by M/s Baxter, U.S.A to the appellant. We find that the definition of 'Intellectual Property Service' and 'Franchise Service' are defined as under:

> **(i)** Section 65(55b): "Intellectual property service" means:
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> (a) transferring temporarily; or
>
> (b) permitting the use or enjoyment of, any intellectual property right;"
>
> **(ii)** Section 65(47): "franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods

> or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved."

9.1. On going through the terms of Agreement dated 27.10.2003, we find that the same is titled 'License Agreement' provides that:

(i) 2.1. The Licensor (M/s Baxter, U.S.A) grants to the licensee, subject to the limitation and restrictions herein contained, a non-exclusive license under the Patents Rights to make, use, distribute and sell the licensed products in the Territory. This license specifically excludes the rights to grant sub-licenses under the Patents Rights unless authorized by the licensor.

(ii) 2.3. The Licensor hereby grants to the Licensee, subject to the limitations and restriction herein contained, a non-exclusive to the use of know-how Rights and the Software Copyright Rights in the manufacture and supply of the Licensed Products in the Territory. This license specifically excludes the right to grant sub-licenses under the know-how Rights or Software Copyright Rights, unless authorized by the Licensor.

9.2. It is clear from the Agreement that it is a license to use the 'Intellectual Property Rights' but not a 'Franchise Agreement'. We find that there is no mention of grant of Representational Right so as to fall under the category of 'Franchise'.Therefore, we are of the considered opinion that the Department has not made out any on this issue also. We find that the facts of this case are similar to the case of

Reckitt Benckiser (India) Ltd. (supra) wherein this Bench has held as follows:

> **47.** The Commissioner committed an error in holding that the service received by the Appellant would fall under 'franchisee' service. The Commissioner completely overlooked that in a franchisee agreement, what was required to be examined was whether any "representational right" was granted to sell or manufacture goods or to provide service or to undertake any process identified with the franchisor. It is only because the Appellant was engaged in the manufacture and sale of products identified with the franchisor that the Commissioner concluded that the agreement was a franchisee agreement, without considering whether any 'representational right' was granted.

10. Regarding the allegation of non-payment of service tax on networking charges and technical services, the appellant submits that service tax on the Reverse Charge Mechanism is not payable prior to 18.04.2006. We find that the submission is acceptable as per the ratio of the judgment in Indian National Ship Owner's Association and CST Delhi v. Sojitz Corporation (both supra). Similarly, the appellant's plea on the non-payment of service tax on reimbursement made by the appellant for certain receipt of services is acceptable. The appellant submits that these services are performance-based services and are performed outside India; the expenditure incurred by them in holding medical conferences abroad and attended by Indian doctors is reimbursed by their overseas entities. We find that learned Commissioner takes a long-drawn argument that the doctors after attending the conference come back to India and products whose quality has been tested abroad by the doctors are sold in India and therefore the same should form part of the assessable value. We are not in agreement with this conclusion for the reason that service tax is

not on expenses but is on that portion of the expenses which are paid for the services received. The ratio of the case of Intercontinental Consultants & Technocrats (supra) is solely applicable. Hon'ble High Court of Delhi held as follows:

> 18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes

> far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427: -
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> "The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."
>
> Thus Section 94(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

11. In view of the above, we find that the appellants have a strong case in their favour on all the issues, under which demands were raised and confirmed against them by the Adjudicating Authority. The impugned order is not sustainable for the reasons as discussed above and accordingly, is liable to be set aside. We do so and allow both the appeals.

(Order pronounced in the open court on 05/04/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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