CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 50419 OF 2017

[Arising out of the Order-in-Appeal (de novo) No.111/ST/DLH/2016-17 dated 18.10.2016 passed by Commissioner (Appeals-I) Service Tax, New Delhi – 110 002.]

M/s. GAP International Sourcing (India) Pvt. Ltd. **...Appellant**
Unit No. 201 DLF South Court, District Centre,
Saket,
New Delhi – 110 017.

Versus

Commissioner (Appeals – I), Service Tax, **....Respondent**
New Delhi.

APPEARANCE:

Shri Vikas Agarwal & Shri Manish Sachdeva, Chartered Accountants for the appellant
Shri SK Meena, authorised representative for the Department.

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 55616/2024

DATE OF HEARING: 20.12.2023
DATE OF DECISION: 23.04.2024

P.V. SUBBA RAO

M/s. GAP international Sourcing India Pvt. Ltd.[1] filed this appeal to assail the order-in-appeal (de-novo)[2] dated 18.10.2016 passed by the Commissioner (Appeals) in

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1. **the appellant**
2. **the impugned order**

pursuance of the directions of this Tribunal in final order dated 2.12.2014.

2. The appellant is registered with the service tax under the category of 'Business Auxiliary Services'. It entered into a Service and Support Agreement dated 1.4.2005 with GAP International to provide sourcing support for procuring fabrics, accessories, inspection, quality control, price negotiation, documentation, etc. to promote the business opportunities for GAP International.

3. As the appellant had rendered the services to an international organisation, it filed 17 refund applications seeking refund of accumulated Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004[3] read with Notification No. 5/2006-CE (NT) dated 14.3.2006.

4. The applications were rejected by the Assistant Commissioner by order dated 26.2.2010 on the following grounds :

(a) the service was not business auxiliary service during the material period;

(b) it does not qualify as export of service under the Export or Service Rules, 2005;

(c) the services on which the Cenvat credit was taken do not qualify as 'input services' and

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3. CCR

(d) that the correlation between the exporter's invoices and the foreign exchange received could not be established.

5. The appellant appealed to the Commissioner (Appeals), who, by his order dated 1.12.2011, upheld the order of the Assistant Commissioner. On appeal, this Tribunal, by order dated 2.12.2014, remanded the matter to the Commissioner (Appeals) since the order of Commissioner (Appeals) dated 1.12.2011 did not contain findings on whether the services in respect of which credit was taken and refund of which was sought qualified as 'input services' or not.

6. Thereafter, the Commissioner (Appeals) passed the order impugned in this appeal.

Submissions on behalf of the appellant

7. Learned consultant for the appellant made the following submissions:

(i) the services rendered by the appellant to M/s. GAP International were business auxiliary services;

(ii) these services qualify as export of services;

(iii) there is no need to prove the nexus between the input services and output services in case of exports;

(iv) the issue is no longer *res integra* and this Tribunal has already held so in the case of the appellant itself for the period January 2010 to March 2010 and allowed refunds by Final Order No. 54014/2016-ST (SM) dated 4.8.2016; and

(v) judicial discipline has to be followed and the Commissioner (Appeals) was bound to follow the decision of this Tribunal but he did not.

8. Learned authorised representative for the Revenue supported the impugned order and made the following submissions:

(i) the services rendered by the appellant to M/s. GAP International do not qualify as 'export of services' under Export of Services Rules, 2005;

(ii) the definition of input service as per Rule 2(l) of the CCR was not met in this case;

(iii) the Final Order 54014/2016-ST (SM) dated 4.8.2016 of this Tribunal followed the previous decision of the Tribunal in **Paul Merchants Ltd. vs Commissioner of Central Excise, Chandigarh**[4];

(iv) the decision of this Tribunal in **Paul Merchants Ltd**. was appealed by the Revenue before Supreme Court in Civil Appeal No. 6556 of 2015 which is pending;

(v) the appeal may be rejected and the impugned order may be upheld.

9. We have considered the submissions advanced by the learned consultants for the appellant and the learned authorised representative for the Revenue and perused the records.

10. The undisputed fact is that the appellant had provided services to M/s. GAP International. It was registered with the service tax for providing 'Business Auxiliary Services'. Since the services rendered to M/s. GAP International were export of services, it had filed refund claims.

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4. Final Order No. ST/A/50780/2014-CU (DB) dated 28.2.2014

11. For a different period, January 2010 to March 2010, the appellant's refund claims on the same issue were rejected by the original authority and the Commissioner (Appeals). The appellant submitted that the issue has been decided by this Tribunal in the case of **Paul Merchants**. In that case, the Commissioner (Appeals) refused to follow judicial discipline on the ground that the department had not accepted **Paul Merchants** and filed a Civil Appeal before the Supreme Court. This Tribunal, by final order dated 4.8.2016 set aside the order of the Commissioner (Appeals) and allowed the appellant's appeal.

12. For another period, in the appellant's own case, this Tribunal, by final order No. 54795/2014 dated 2.12.2014, allowed refund following **Paul Merchants.**

13. In this case, the Commissioner (Appeals) displayed gross judicial indiscipline and refused to follow the orders of this Tribunal on the ground that **Paul Merchants** was not accepted by the department and a Civil Appeal has been filed before the Supreme Court.

14. The question of judicial discipline was examined by a three member bench of the Supreme Court in **Union of India** versus **Kamlakshi Finance Corporation Ltd.**[5] The Assistant Collectors in that case flouted the orders of the Appellate

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5. 1991 (55) E.L.T. 433 (S.C.)

Collector on the ground that the order of the Appellate Collector were not acceptable to the department. The assessee filed a Writ Petition before the Bombay High Court which passed strictures against the Assistant Collectors. Union of India filed an appeal before the Supreme Court which upheld the strictures passed by the Bombay High Court. The relevant portions of this judgment of the Supreme Court are reproduced below:

> "5. **The learned Additional Solicitor General, however, submits that the learned Judges have erred in passing severe strictures against the two Assistant Collectors who had dealt with the matter. He submitted that these officers had given reasons for classifying the goods under Heading 39.19 and not 85.46 and could do no more. He submitted that they acted *bona fide* in the interests of Revenue in not accepting a claim which, they felt, was not tenable.**
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> 6. Sri Reddy is perhaps right in saying that the officers were not actuated by any *mala fides* in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual *mala fides* but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. **The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.**

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs [Direct Taxes] comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. **In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.**

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. **It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee-public without any benefit to the Revenue.** We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.

15. Evidently, in this case, the Commissioner (Appeals) has refused to follow judicial discipline on the ground that the order of this Tribunal on the ground that it has not been accepted by the department. The very statement that a judicial decision is 'not acceptable' is an objectionable phrase as held by in **Kamlakshi Finance** and the Commissioner (Appeals) was bound to have followed the order of this Tribunal since it was not stayed, suspended or set aside by a higher court. By displaying gross judicial indiscipline, the Commissioner (Appeals) has caused considerable harassment to the appellant without any benefit to the Revenue. It is to curb this tendency that the Supreme Court had dealt with the issue at length in **Kamalakshi Finance.** This judgment of the Supreme Court on judicial discipline is over three decades old and is well known. In this case, the Commissioner (Appeals) has not only NOT followed the decisions of this Tribunal but displayed scant regard to the principles of judicial discipline laid down by the Supreme Court in **Kamlakshi Finance.**

16. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced in open court on 23/04/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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