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

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10321 of 2013-DB

[Arising out of Order-in-Original/Appeal No 27-28-ST-COMMR-SURAT-II-2012 dated 31.12.2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-II]

Solvay Specialities India Pvt Limited .... Appellant
Plot No, 3526- 27, G.I.D.C., Panoli
BHARUCH, GUJARAT

VERSUS

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

APPEARANCE :

Shri Vinay Kansara, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

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

DATE OF HEARING : 10.04.2023
DATE OF DECISION: 20.04.2023

FINAL ORDER NO. A/10934 / 2023

RAMESH NAIR :

The issues involved in the present case are as under:-

(a) As regards the demand of service tax amounting to Rs. 1,49,24,272/-, whether the services of sales promotion and marketing provided outside India and for which commission received by the appellant is liable to service tax;

(b) As regards the demand of service tax amounting to Rs. 23,67,163/- whether the services of sales promotion and marketing received by the appellant from foreign based agents and commission paid to them is liable to service tax under Reverse Charge basis.

2. Shri Vinay Kansara, learned Counsel appearing on behalf of the appellant, for the first issue submits that the appellant have provided the

sales promotion and marketing service in foreign country to the foreign company and the payment was received in foreign exchange therefore, this activity is amounting to export of service in terms of Export of Service Rules. He submits that the commission which falls under the head of Business Auxiliary Service, the services were exported by the appellant. The said services fall under sub-clause (zzb) of Section 65(105) of the Finance Act, 1994. As per Rule 3 of Export of Service Rules, 2005, the services which are described under sub-clause (zzb), fall under clause (iii) of Rule 3(1) of Export of Service Rules. He submits that only condition provided under Rule 3(1) to qualify the service as export of service is that the service is required only in relation to business or commerce, be provision of such service to recipient located outside India and when provided otherwise be provision of such service to a recipient located outside India at the time of provision of such service. Accordingly, the service being export of service would not liable to payment of service tax. He also relied on Board Circular No. 111/5/2009-ST dated 24.02.2009. He submits that this issue has already been decided in the following judgments:-

(a) Evonik Specialty India Pvt. Limited - Final Order No. A/11778/2022 dated 20-11-2022

(b) Yamazaki Mazak India Pvt. Limited -2018 (12) GSTL 66 (Tri-Mumbai)

(c) Pulcra Chemicals (India) Pvt. Limited -2015 (39) STR 700 (Tri.-Mumbai)

(d) Wartsila India Limited- 2019 (24) G.S.T.L. 547 (Bom.)

(e) Citi Bank N.A.- 2018 (18) G.S.T.L. 580 (Bom.)

(f) Life Care Medical Systems - 2018 (18) G.S.T.L. 587 (Bom.)

(g) A.T.E. Enterprises Pvt. Limited- 2018 (8) G.S.T.L. 123 (Bom.)

2.1 As regards the demand of service tax amounting to Rs. 23,67,163/- related to sales promotion and marketing service provided to foreign

Company and the payment thereof was maded to the Company outside India, the appellant did not pay service tax as they were under impression that the service tax is not required to be paid. However, subsequently they paid service tax of Rs. 14,64,388/- along with interest of Rs. 2,34,461/- upto 30.09.2009. He submits that with effect from 01.10.2009 the service tax was exempted vide Notification No. 18/2009-ST dated 07.07.2009 in respect of service provided by a commission agent located outside India. He submits that Adjudicating Authority has denied the notification on the ground that appellant have not declared the amount of commission paid in the shipping bills. He submits that except this procedural requirement, the appellant have fulfilled all the conditions as mentioned in the notification. Therefore the exemption cannot be denied. He placed reliance on following judgments:-

(a) CCE vs. A.B.G. Shipyard Limited - 2011 (24) S.T.R. 620 (Tri.-Ahmd.)

(b) HEG Limited vs. CCE -2019 (29) G.S.T.L. 730 (Tri.-Del.)

(c) Praj Industries Limited vs. CCE - 2017 (3) G.S.T.L. 341 (Tri.-Mumbai)

(d) Radiant Textiles Limited vs. CCE- 2017 (47) S.T.R. 195 (Tri.-Chan.)

He further submits that even if it is assumed that the benefit of the Notification is not available, in such a case, the appellant would have paid the service tax and availed Cenvat credit and the same would have been utilized for discharge of Central Excise duty liability. Therefore the entire situation is Revenue neutral and in such a case, extended period cannot be invoked. Hence, the demand is not sustainable on this count also.

3. Shri Rajesh K Agarwal, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. As regards the demand of service tax amounting to Rs. 1,49,24,272/- related to service of sales promotion and marketing provided outside India and commission thereof received in India in foreign exchange, we find that since the recipient of service is located outside India and the payment of commission against said service is received in India, service clearly falls under the category of Export of Service in terms of Rule 3(1) of Export of Service Rules, which is reproduced below:-

> **Export of taxable service. –**
>
> 3. (1) Export of taxable services shall, in relation to taxable services,– (i) specified in sub-clauses (d), (m), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz), (zzzza) & (zzzzm) of clause (105) of section 65 of the Act, be provision of such services as are provided in relation to an immovable property situated outside India;
>
> (ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), [* * *], (n), (o), [* * *], (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv),(zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzp), (zzzzg), (zzzzh), (zzzzi), (zzzzk) and (zzzzl) of clause (105) of section 65 of the Act, be provision of such services as are performed outside India:
>
> **Provided** that where such taxable service is partly performed outside India, it shall be treated as performed Outside India;
>
> **[Provided further** *that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated outside India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed outside India, shall be treated as the taxable service performed outside India;]*
>
> (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), and (zzzr) 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:
>
> **Provided** that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India:

Provided further *that where the taxable service referred to in sub-clause (zzzzj) of clause (105) of section 65 of the Act is provided to a recipient located outside India, then such taxable service shall be treated as export of taxable service subject to the condition that the tangible goods supplied for use are located outside India during the period of use of such tangible goods by such recipient.*

[(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

(b) payment for such service is received by the service provider in convertible foreign exchange.

Explanation.- For the purposes of this rule "India" includes the designated areas in the continental shelf of India and the exclusive economic zone of India, as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated 18th July 1986 and S.O. 643(E), dated 19th September, 1996]

From the above Rule 3(1) clause (iii), it can be seen that service being Business Auxiliary Service falling under sub-clause (zzb) of Section 65(105) of the Finance Act, 1994 is covered under clause (iii). There is no dispute that service of Promotion and Marketing was provided in relation to business or commerce and such service was received by the recipient located outside India. Therefore, the service is clearly covered under Export of Service Rules. Accordingly the same cannot be charged to service tax. This issue is clarified in the Board Circular No. 111/05/2009-ST in Para 2 and 3. Identical issue has been considered by this Tribunal in the case of *Yamazaki Mazak India Pvt. Limited (supra)* wherein after considering various decisions, the Tribunal has observed as follows:-

"54. In view of the above, the difference of opinion on various points is resolved as under :

(i) That the Business Auxiliary Services of promotion of market in India for foreign principal made in terms of agreement dated 1-7-2005 amount to Export of Services and the Hon'ble Supreme Court decision in the case of *State of Kerala and Others* v. *The Cochin Coal Company Ltd*. - 1961 (12) STC 1 (S.C.) as also *Burmah Shell Oil Storage and Distributing Co. of India Ltd.* v. *Commercial Tax Officers* [1960 (11) STC 764] explaining the meaning of export is not relevant inasmuch as the same deals with the export of goods and not export of services;

(ii) That the Business Auxiliary services provided by the assessee to their Singapore parent company was delivered outside India as such was used there and is covered by the provisions of Export of Services Rules and are not liable to Service Tax.

(iii) The principle of equivalence between the taxation of goods and taxation of services, as laid down by the Hon'ble Supreme Court in the case of *All India Federation of Tax Practioners* [2007 (7) S.T.R. 625 (S.C.)] as also the principles of destination based consumption tax were in the context of Constitutional Authority of levy of Service Tax on certain services and the issue of Export of Service in terms of Export of Services Rules was not the subject matter of said decision. The Export of Services Rules, 2005, being destination based consumption tax are in accordance with the declaration of law by the Hon'ble Supreme Court.

(iv) Inasmuch as the appeal No. ST 828/20 10 was not argued by both the sides, the same can be listed for final disposal even though issue involved is identical."

Relying on the aforesaid decision, we hold that services provided by the appellant classify as export of service and consequently appeal is allowed.**"**

5. In view of above observation, the service of the appellant in present case being absolutely identical, under the same set of facts, it amounts to Export of Service hence it is not liable to service tax. Accordingly, the demand on the Export of Service i.e. Business Auxiliary Service is not sustainable hence the same is set-aside.

6. As regards the demand of Rs. 23,67,163/- related to commission paid to the foreign based agent towards the service of sales promotion and marketing received by the appellant, we find that there is no dispute that the receipt of service from the service provider located outside India and the recipient of service is in India, the appellant is liable to pay service tax under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994. The appellant up to 30.09.2009 paid service tax along with interest. As regard the balance service tax amount for the period 01.10.2009 onwards, the appellant claimed exemption Notification No. 18/2009-ST dated 07.07.2009. We find that exemption was denied only on the ground that the appellant have not mentioned invoice number in the shipping bills for export of goods. However, the use of input service received is meant for export of goods only. Except the lapse of not mentioning invoice number in the

shipping bill, there is no other violation of notification. Merely for the small procedural lapse exemption cannot be denied as held in various decisions cited by the appellant. Therefore, we are of the view that the appellant is entitled for the exemption Notification No. 18/2009-ST dated 07.07.2009.

7. As regards the imposition of penalty, we find that since the appellant have admittedly paid service tax along with interest and moreover, they were otherwise entitled for the Cenvat credit for the service tax they have paid, in a routine course, no malafide intention can be attributed to the appellant, therefore invoking Section 80, in the facts and circumstance of the case, the penalty is not imposable accordingly, the same is set-aside.

8. As per our above discussion and finding, the appeal is allowed in the above terms.

(Pronounced in the open court on 20.04.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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