2020-TIOL-1032-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, KOLKATA
COURT NO. II

S.Tax Appeal No.78139 of 2018

Arising out of Order-in-Appeal No.86-88/SKS/Bol/ST/2017-18, Dated: 19.03.2018
Passed by Additional Director General (Taxpayer Services), Central Excise, Customs & Service Tax, Kolkata Zonal Unit

Date of Hearing: 19.06.2019
Date of Decision: 19.06.2019

M/s IMERYS STEELCASTING INDIA PVT LTD
ST.GEORGES GATE ROAD, 6TH FLOOR, HASTINGS
KOLKATA-700022

Vs

CGST AND CENTRAL EXCISE
BOLPUR, NANOOR CHANDIDAS ROAD
SIAN,BOLPUR, DIST.-BIRBHUM, PIN.-731204
WEST BENGAL

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri S S Chattopadhyay, AR

CORAM: P K Choudhary, Member (J)

ST - The assessee is providing services to M/s Stollberg for rendering their services in respect of marketing, procurement of order, sales, realization and remitting the same proceed, on which they have received commission during the period April, 2008 to October, 2008 and November, 2008 to March, 2009 - SCNs were issued, which culminated in two adjudication orders, wherein the demand of service tax was confirmed along with interest and penalties of equal amounts were imposed under section 76 and 78 and also imposed a penalty under Section 77 of FA, 1994 - The services in the instant case have been delivered outside India and used outside India and since payment for the service has been received in convertible foreign exchange, the same would have to be treated as exported out of India - By following the decision in ***ATE Enterprises Pvt. Ltd. 2017-TIOL-1906-HC-MUM-ST***
, the services provided by assessee qualify as the export of services and accordingly, the service tax is not payable on the commission earned on such services - Consequently, the impugned orders are set aside: CESTAT

Appeal allowed

Case laws cited:

Yamazaki Mazak India Pvt. Ltd. Vs. CCEx., Pune I - 2017-TIOL-2674-CESTAT-MUM... Para 2

CST, Mumbai VI Vs. ATE Enterprises Pvt. Ltd - 2017-TIOL-1906-HC-MUM-ST ... Para 2

FINAL ORDER NO. 75776/2019

Per: P K Choudhary:

The facts of the case in brief are that the appellant, M/s Imerys Steelcasting India Pvt. Ltd., (formerly M/s Stollberg India Pvt. Ltd.), is providing services to M/s Stollberg, GMBH, Germany, for rendering their services in India in respect of marketing, procurement of order, sales, realization and remitting the same proceed, on which they have received the commission of Rs.28,61,638/- during the period April, 2008 to October, 2008 and Rs.1,11,116/- during the period November, 2008 to March, 2009. Show-cause notices dated 13.05.2009 and 21.01.2010, were issued, which culminated in two adjudication orders, wherein the demand of service tax was confirmed along with interest and penalties of equal amounts were imposed under section 76 and 78 and also imposed a penalty under Section 77 of the Finance Act, 1994. The Assessee preferred the appeal before the lower appellate authority. The Additional Director General, DGTS, KZU, Kolkata, vide Order-in-Appeal No.86-88/SKS/Bol/ST/2017-18 dated 19.03.2018, upheld the demand of service tax and also upheld the penalties under Sections 77 & 78 and set aside the penalty imposed under Section 76. Hence, the present appeal before the Tribunal.

2. The ld. C.A., appearing on behalf of the appellant, submits that the Appellant Company acts as a "Representative" of its parent Company, M/s Stollberg, GMBH, Germany, for exclusive representation in the Territory of India by virtue of a Representative Agreement dated 27.03.2001. As per the said Agreement, the appellant shall negotiate contract of sale in the Territory of India on behalf of its parent Company and for this, the appellant shall be paid an agreed commission of every transaction made with M/s Stollberg, GMBH, Germany. The ld.C.A. further submits that they were under the bonafide belief based on interpretation of Rule 3(1)(iii) and Rule 3(2)(b) of the Export of Services Rules, 2005 as amended from time to time that "Business Auxiliary Service" provided in relation to business or commerce to a recipient outside India, who at the time of provision of such service was located outside India and payment for which has been received by the provider of such service in convertible foreign exchange, would be treated as export of service and according to Rule 4 of Export of Service Rules, 2005, no service tax would be payable by the appellant on such receipt. Accordingly, the appellant did not recognize and discharge any service tax liability on such export of taxable service. He further refers to the CBEC Circular No. **111/05/2009-ST** dated 24.02.2009, which is a clarificatory circular. He also refers to the various decisions of the Tribunal and the Hon'ble High Court in support of his contentions, which are as under :

> ***(i) Yamazaki Mazak India Pvt. Ltd. Vs. CCEx., Pune I : 2018 (12) GSTL 66 (Tri.-Mumbai) = 2017-TIOL-2674-CESTAT-MUM***
>
> ***(ii) CST, Mumbai VI Vs. ATE Enterprises Pvt. Ltd. : 2018 (8) GSTL 123 (Bom.) = 2017-TIOL-1906-HC-MUM-ST***

3. The ld.D.R. appearing on behalf of the Department, justified the impugned order.

4. Heard both sides and perused the appeal records.

5. I find that the appellants have received commission from its parent entity, M/s Stollberg, GMBH, Germany for rendering their services in India in respect of marketing, procurement of order, sales, realization. The issue is no more res-integra in view of the various decisions on this subject by the Co-ordinate Bench of the Tribunal and the Hon'ble High Court. The relevant paras of the Tribunal's decision in the case of ***GAP International Sourcing (India) Pvt. Ltd. Vs. CST, Delhi reported in 2015 (37) STR 757 (Tri.-Del.) = 2014-TIOL-465-CESTAT-DEL*** are reproduced below :

> ***"7. In our view the arguments of the department are absurd as the DR has not mentioned as to who is the consumer of the services in India, if the services, in question, provided in India by the appellant have not been used and consumed by their principal in U.S.A. When the appellant identify the vendors for their principal abroad on the basis of the quality of their products, their manufacturing infrastructure, compliance with child labour laws and pollution control norms and also provide the services of inspection of the export consignments, besides identifying the logistic service providers for smooth transportation of the goods purchased to the port for their export, the user and beneficiary of all these services is their principal abroad. It would be absurd to say that the recipient and user of these services are the persons in India and not M/s. GAP, U.S.A. for whom all these services provided by the appellant are meant, who have used these services for their business and have made payment for these service in convertible foreign exchange.***

8……

9. In this case, M/s. GAP, U.S.A. do not have any branch or project or business establishment in India. The service in relation to procurement of goods being provided by the appellant are entirely meant for M/s. GAP, U.S.A. and the service in question, - business auxiliary service, covered by Rule 3(1)(iii) of the Export of Services Rules, 2005 have obviously been used by M/s. GAP, U.S.A. in relation to their business located abroad. Therefore these services have to be treated as delivered outside India and used outside India and since payment for the service has been received in convertible foreign exchange, the same would have to be treated as exported out of India. The impugned order passed by the Commissioner is an absurd order contrary to the provisions of Export of Services Rules, 2005.

10. In any case, the issue involved in this case is identical to the issue involved in the case of Paul Merchant Ltd. and Ors. v. CCE (supra) which stands decided in favour of the appellant."

The relevant paras in the decision of the Bombay High Court in the case of ATE Enterprises Pvt. Ltd. (cited supra), are also reproduced below :

"8. The learned counsel appearing for the respondent has relied upon the judgment in the Commissioner of Service Tax, Mumbai-II v. SGS India Pvt. Ltd. [2014 (34) S.T.R. 554 (Bom.)] = 2014-TIOL-580-HC-MUM-ST.

It is in that sense that the Tribunal "24. holds that the benefit of the services accrued to the foreign clients outside India. This termed as 'export of service'. In these circumstances, the Tribunal takes a view that if services were rendered to such foreign clients located abroad, then, the act can be termed as 'export of service'. Such an act does not invite a Service Tax liability. The Tribunal relied upon the circulars issued and prior thereto the view taken by it in the cases of KSH International Pvt. Ltd. v. Commissioner and B.A. Research India Ltd. The case of the present respondent was said to be covered by orders in these two cases. To our mind, once the Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non-commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. It is this finding and conclusion of the Hon'ble Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case.

The view taken by the Tribunal therefore, 25. cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. If the emphasis is on consumption of service then, the order passed by the Tribunal does not raise any substantial question of law."

9. The Division Bench of this Court in Commissioner of Service Tax, Mumbai v. Maersk India Pvt. Ltd. [2015 (38) S.T.R. 1121 (Bom.)] = 2015-TIOL-516-HC-MUM-ST held that "the observations reported in 2014 (34) S.T.R. 554 (Bom.) = 2014-TIOL-580-HC-MUM-ST .(supra) aptly apply in the present case. The situation shows that the consideration by the Tribunal about service by the respondent-assessee to a foreign recipient being outside the purview of the collection of service tax, can seldom be flawed, the question sought to be raised in the appeal as such stand answered accordingly. The appeal fails and stands dismissed with no order as to costs."

10. Therefore, taking overall view of the above position of law, as there is no case made out by the appellant, so also there is no question of law so stated to be involved in the matter, the appeal is dismissed accordingly. No costs."

6. I find that the services in the instant case have been delivered outside India and used outside India and since payment for the service has been received in convertible foreign exchange, the same would have to be treated as exported out of India. By following the decisions cited above, I find that the services provided by the appellant, qualify as the export of services and accordingly, the service tax is not payable on the commission earned on such services. The facts of the present case are squarely covered by the decisions cited supra. Consequently, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential benefit.

(Dictated and pronounced in the open court)