

(2012) 11 AP CK 0086
In the Andhra Pradesh High Court
Case No : C.E.A. No. 7 of 2009

Commissioner of Customs and Central Excise, Hyderabad-IV
Commissionerate

APPELLANT

Vs

M/s. Deloitte Tax Service India Pvt. Ltd., Hyderabad

RESPONDENT

Date of Decision : 27-11-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 35G
Finance Act, 1994 — Section 65, 65(19)

Citation : (2013) 39 STT 246

Hon'ble Judges : M.S. Ramachandra Rao, J;Goda Raghuram, J

Bench : Division Bench

Advocate : A. Rajasekhar Reddy, for the Appellant; S.R. Ashok, Senior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Ramachandra Rao

1. This appeal is filed by the Revenue u/s 35-G of the Central Excise Act, 1944 challenging the Final Order No. 455 of 2008 dated 13-03-2008 in Appeal No. ST/310/07 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore. The respondent/assessee is M/s. Deloitte Tax Services India Private Limited, a private limited company, under 100% EOU registered with the Software Technology Park of India, Hyderabad(for short "STPI"). The assessee provided various services to M/s. Deloitte Tax LLP, USA like back office services, lead tax services, international assignment services, etc under an Agreement for Services and Development dated 27-09-2004. The assessee got registered under the categories of "business auxiliary service" and "management consultancy service" with the jurisdictional service tax authority.

2. On 31-03-2006, it applied for a refund of Rs. 8,57,424/- to the Commissioner of Customs and Central Excise, Hyderabad-IV Commissionerate, Hyderabad. It contended that it had received various services in India such as equipment hiring

charges, professional consultation service, recruitment service, security service, telephone service, transport service, training service, facility operation service, courier service, cafeteria service and other input services like advertisement service, recruitment service and security service on which it is entitled to input service credit and is entitled to refund of the above amount for the period May 2005 to February 2006 under Rule 5 of the Cenvat Credit Rules, 2004 (as amended by notification No. 4/2006-CE(NT) dated 14-03-2006) and Notification No. 5/2006-CE (NT) dated 14-03-2006 issued under Rule 5. Subsequently by letter dated 07-12-2006, the assessee restricted their refund claim to Rs. 8,47,004/- as some of their input invoices did not contain the requisite information required under Rule 4-A of the Service Tax Rules, 1994.

3. Section 65(19) of the Finance Act, 1994 (for short "the Act") at the relevant time was as follows:

(19) "business auxiliary service" means any service in relation to-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client, or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production of goods on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses

(i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).

Explanation:-For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;" The Commissioner issued a show cause notice dated 12-03-2007 to the assessee to show cause why its refund claim should not be rejected stating that export of computer software is excluded from the definition of "business auxiliary service" in Section 65(19) of the Act, that the assessee's output service appears to be a non-taxable service, that under Rule 6 (1) of the above Rules, if any output service is

exempt from payment of service tax, the assessee is not eligible for availment of Cenvat Credit on any input service and the resultant refund claim filed by the assessee prima facie appears unsustainable. He was also of the prima-facie view that, even otherwise, the assessee can avail Cenvat Credit only on those input services which are "used in" providing output service and that the input services mentioned above are not used by the assessee in providing the output service and they have no nexus with the output services provided by the assessee and asked the assessee.

4. The assessee submitted a reply dated 01-03-2007 to the above show cause notice contending as follows:

(a) with regard to "Business Auxiliary Service" that they are not engaged in the development of software, which is evident from the export clearance certificate of STPI, Hyderabad wherein the said certificate is granted for the export of software services and not software development; that they have declared their exports as "others-back office services"; that the brief note on nature of service provided by them to their customers is submitted along with reply; that CBEC vide its Circular No. 1/2007 dated 03-01-2007 had clarified that the term "export of software" includes all the activities of manufacture or development of software, data entry and conversion, data processing, data analysis and control data management or call center services; that the permission granted by STPI for computer software is permission to provide services such as "data entry and conversion, call center services etc." and the said permission cannot be restricted only to software development; that they are not providing designing, developing or maintaining of computer software or computerized data processing or system networking as giving in the definition of "Information Technology" and in view of the same the services provided by them to their clients do not fall under the excluded category of "information technology service" and that the services provided by them are taxable services and fall within the purview of "Business Auxiliary Service."

(b) With regard to the eligibility of input service credit, they submitted that the definition of "input service" has two parts viz., specific part and inclusive part; that as per specific part, the input service means any service used by a provider of taxable service for providing an output service; that the inclusive part contain general services, which are required for the building up the structure of the business of providing any output service and for smooth conduct of business; that any services in respect or activity relating to business can also be treated as "input service", even though such as a service is not specifically used to provide particular service; that they are eligible to take Cenvat credit on input services which are relevant for their business and that they have fulfilled all the conditions specified in Cenvat Credit Rules, 2004 and Notification No. 5/2006-CE (NT) dated 14-03-2006 and requested for grant of refund of Cenvat credit paid on input services.

5. By Order in Original (R) No. 01/2007-S. Tax dated 12-03-2007, the

Commissioner held that the services provided by the assessee to M/s. Deloitte Tax LLP/USA fall under the term "export of software", that this is evident from the permission granted by the STPI certificate No. 13-09-2004 which indicates that the items of production by the assessee as "computer software", that the assessee's services are nothing but "computerized data processing" which falls under the description of Information Technology, that under the category of "Business Auxiliary Service" defined in S. 65(19) of the Act, "Information Technology" (i.e. Computer Software) is not included and therefore under Rule 6, the assessee is not eligible for availment of Cenvat Credit on any input service. He held that the resultant refund claim by the assessee is not sustainable. He also held that the input services declared by the assessee do not appear to have any nexus with the output services provided by them and therefore the assessee is ineligible to avail input service credit. He therefore rejected the claim of the assessee for refund.

6. Challenging the same, the assessee filed an appeal to the Commissioner of Customs and Central Excise (Appeals), Hyderabad. The appellate authority vide Order in Appeal No. 1/2007(H-IV) ST dated 09-04-2007 set aside the order in original dated 12-03-2007. The appellate authority noted that the assessee was providing the services of preparation of Federal Tax Returns, preparation of State, Local Tax Returns, Co-sourcing services, Analyzing Client Data and calculating estimates of tax amount, preparation of the extension requests, preparation of the Consolidated Federal and the State/Local Returns and in filing of returns and from preparing and filing of property tax bills on behalf of their clients. He held that these services clearly fall under the category of "Business Auxiliary Services" more particularly clauses (iii), (vi) and (vii), that the activities of the assessee are in the nature of back office support and assistance to M/s. Deloitte Tax LLP, USA and merely because the assessee, in the process of delivering these output services to its clients utilizes Computers and Internet Leased Lines, they cannot be said to be engaged in the business of developing any computer software and it is not appropriate to classify the activities of the assessee as "Export of Computer Software". He held that the nature of service provided by an assessee has to be examined with reference to the explanation provided in Section 65(19) of the Act to the definition of "Business Auxiliary Service" and only such output services which qualify to be IT Services in terms of the said explanation would remain excluded from taxable service under the heading "Business Auxiliary Service". He also noted that the SOFTEX forms submitted by the assessee to the STPI for certifying the export of services refers to the assessee's exports as "export of services" only and not "export of software" and in the said forms, they had declared their exports as "Others-Back Office Services". It also held that the definition of the term "input service" in Rule 2 (L) of the above Rules was wrongly interpreted by the Commissioner, that the words "directly used" or "directly relatable" to the taxable output services are absent in clause (1) of Rule 2(L) and the input services declared by the assessee are eligible for input service credit and therefore the assessee is entitled to

refund of Cenvat Credit availed on the said input services.

7. Aggrieved by the same, the Revenue filed appeal No. ST/310/2007 to the CESTAT, Bangalore. The said appeal was dismissed by the Final Order No. 455/2008. The Tribunal held that the output services provided by the assessee are not in relation to designing, developing or maintaining of computer software or computerized data processing or system networking or any other service primarily in relation to operation of computer systems as mentioned in the explanation to Section 65 of the Act as it stood then and therefore it did not fall under "Information Technology Services", that the CBEC in its circular dated 21-08-2003 had clarified that the mere fact that a personal computer or a laptop has been used for providing the service does not, ipso facto, make the service an "Information Technology Service" and that the business auxiliary service is taxable and so the assessee is entitled to take credit on the service tax paid on the input services. He also held that the input services availed by the assessee are necessary for providing output services and they satisfy the condition of the input services as given in Rule 2(L).

8. Challenging the same, the Revenue has filed the present appeal u/s 35-G of the Act.

9. On 09-02-2009, this appeal was admitted to consider the following substantial questions of law:

1. Whether the Hon"ble Tribunal was justified in holding that "computerized data processing" did not fall under "Information Technology Service?"

2. Whether the Hon"ble Tribunal was justified in holding that computerized data processing in the instant case did not fall under "Information Technology Service" especially when the Hon"ble Tribunal itself was ambivalent in Para 5.1 of its Order by expressing the view that "even if the services rendered by them are taken to mean "Information Technology Services" by virtue of the decision of the Apex Court in the case of Tata Consultancy Services"?

3. Whether the Hon"ble Tribunal was justified in holding that the amendment to Rule 5 of the Cenvat Credit Rules, 2004 on 14-03-2006 is applicable to the refunds emanating from the exports made prior to the said date when such Order creates a new obligation on the Department to refund the duty on input services which was not there hitherto under Rules existed prior to the said amendment on 14-03-2006?

10. Heard Sri A. Rajasekhar Reddy, learned Senior Standing Counsel for the Revenue and Sri S.R. Ashok, learned Senior Counsel for the Respondent/assessee.

11. Sri A. Rajasekhar Reddy, counsel for the Revenue, contended that the Tribunal erred in confirming the order of the Commissioner (Appeals), that it should have held that the services provided by the assessee to M/s. Deloitte Tax LLP, USA are in the nature of "Information Technology Services" as admittedly

the assessee is providing services which include data entry, data processing as can be seen from the description of services in the Agreement for Services and Development dated 27-09-2004, that the said services do not form part of "Business Auxiliary Service" as defined in Section 65(19) of the Act, therefore under Rule 6(1), the assessee is not eligible for availment of Cenvat Credit on any input service and the resultant refund claim filed by the assessee is unsustainable. He also contended that under Rule 2(L) of the said Rules, the scope of input service for a service provider is restricted whereas the scope of input service for a manufacturer is wide as the words "whether directly or indirectly, in or in relation to the manufacture" were used, that the input services availed by the assessee clearly have no nexus with the output services provided by it rendering it ineligible for utilizing the input service credit on such services. He also relied upon the definition of the term "data" in Section 2(O) of the Information Technology Act, 2000 and contended that the activity of the assessee is in relation to operation of computer systems and therefore is "Information Technology Service". He also relied upon the decision of the (2009) 19 STJ 112 (TRI-Bangalore) which was confirmed by the Supreme Court in Civil Appeal No. 2624 of 2010 dated 12-03-2010 and contended that in the said case it had been held that the activity of computerized data processing for billing and accounts management by the assessee in the said case under an agreement with the Andhra Pradesh Central Power Distribution Company Limited was held to be an Information Technology Service and excluded from "business auxiliary services" at the relevant time and as the assessee herein is doing a similar activity, the said judgment would apply.

12. The counsel for the assessee refuted the above contentions and contended that the orders of Tribunal and the Commissioner (Appeals) do not suffer from any infirmity warranting interference u/s 35-G of the Act, that the classification of a service as "information technology service" or "business auxiliary service" is an issue which cannot be gone into in an appeal u/s 35-G of the Act and that in the grounds raised by the Revenue in this appeal the question of lack of nexus between the input services and output services has not been raised by the Revenue and the Revenue cannot be permitted to urge the said issue at the stage of final hearing of this appeal.

13. We have considered the submissions of the respective parties.

14. The nature of services provided by the assessee to M/s. Deloitte Tax LLP, USA under the agreement dated 27-09-2004 have been extracted in the order of the Tribunal at para-5 as follows:

Description of Services:

In connection with the Deloitte Tax's business and engagements, Deloitte Tax India will provide preparation and consulting services and back office and technology support as requested by Deloitte Tax for the activities of Deloitte Tax, especially in providing assistance to Deloitte tax with respect to continued

support for Deloitte Tax's clients and the design, implementation and upgrade of various Deloitte Tax Programme. The services to be provided by Deloitte Tax India to Deloitte Tax under this agreement may include data entry, data processing and such other incidental and support services as may be requested by Deloitte Tax for preparation and filing of US Federal, State and local tax returns, and property tax returns, as well as for computing advance tax estimates, wage card processing, and transfer pricing planning and execution.

15. Section 65(19) of the Act defines "business auxiliary service" and excludes "information technology service" which is defined in the explanation to the said Section as "any service in relation to designing, developing or maintaining of computer software, or computerised data processing or system networking, or any other service primarily in relation to operation of computer systems. The CBEC in its circular No. 59/8/2003 dated 20-06-2003 clarified that only if the output service provided by a service provider is in the nature of the above operations i.e. in relation to operation of computer systems, the exclusion of such output service from "business auxiliary service" would operate and that the mere fact that a personal computer or a laptop has been used for providing the service does not, ipso facto, make the service an "information technology service". It directed that in such cases, individual service has to be examined with reference to the explanation provided in the definition of business auxiliary service and only such output services which qualify to be IT services in terms of the said explanation shall remain excluded from taxable service under the heading "business auxiliary service".

16. Therefore, the question one has to consider is whether the services of "preparation of Federal Tax Returns, preparation of State, Local Tax Returns, Co-sourcing services, Analyzing Client Data and calculating estimates of tax amount, preparation of the extension requests, preparation of the Consolidated Federal and the State/Local Returns and in filing of returns and from preparing and filing of property tax bills" on behalf of their clients by the assessee are activities primarily in relation to computer systems/programming.

17. In our view the Commissioner (Appeals) and the Tribunal have rightly held that the above activities even though performed by using computer programmes are not in relation to computer systems, that this is supported by the SOFTEX forms submitted by them to STPI wherein they have mentioned that they export "services" only and not "software" and they have declared their exports as "others-Back Office Services". Let us take an illustration where a person is providing a service of analysis of case law/precedents by using software such as Manupatra or SCC online to another. In such a case, the service provider, merely because he is using a computer to provide the said service, cannot be said to be providing "information technology service" to the service receiver. The contention of the Revenue, if accepted, would require this Court to ignore the words "primarily in relation to computer systems/programming" in the explanation in Section 65(19) of the Act. Such an interpretation cannot be given because it is

settled principle of law that effort should be made to give meaning to each and every word used by the legislature in a statute and one cannot brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute as held in *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*,

18. In *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, , the Supreme Court held as follows:

It is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application.

19. In *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, , the Supreme Court held as follows:

In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part thereof should have effect.

20. It may be that in *Gandhi and Gandhi's* case (1 supra), the CESTAT had held that computerized data processing for billing and accounts management service rendered by the assessee therein to APCPDCL would be an "information technology service" and excluded from "business auxiliary service". The Tribunal in the said case does not appear to have noticed the words ""primarily in relation to computer systems/programming" in the explanation to Section 65(19) of the Act. The fact that the said decision was confirmed by a non-speaking order by the Supreme Court does not mean that the reasoning in the order of the Tribunal was approved by the Supreme Court. In our view there is no ratio decidendi discernable from the order of the Supreme Court. Therefore the view of the Tribunal in the said case cannot bind us.

21. We are also of the view that the definition of the term "data" in Section 2(O) of the Information Technology Act, 2000 cannot be of any assistance to the Revenue as the definition in the said Act cannot be imported or read into any of the provisions of the Finance Act, 1994.

22. Moreover, u/s 35G of the Central Excise Act, 1944, issues of classification of service i.e. whether a particular service falls under the category "business auxiliary service" or "information technology service" cannot be gone into in view of the bar in sub section (1) thereof.

23. We are also of the view that the Revenue is not entitled to raise in this appeal, the contention that there is no nexus between the input service availed by the assessee and the output service provided by it as such a substantial question of law was not framed by it at the time of filing of the appeal and the appeal was not admitted to consider the said issue. Be that as it may, we are of the view that the Tribunal and the Commissioner (Appeals) have given valid reasons to reject the said contention. For the above reasons, we find no merit in

the appeal and therefore the appeal is dismissed. No costs.