

**(2014) 04 BOM CK 0081**

**In the Bombay High Court**

**Case No :** Central Excise Appeal No. 57 of 2012

Commissioner of Service Tax

APPELLANT

Vs

SGS India Pvt. Ltd.

RESPONDENT

**Date of Decision :** 23-04-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35G  
Finance Act, 1994 — Section 64, 65, 65(105), 65(106), 65(106)(zzh)

**Citation :** (2014) 268 CTR 434 : (2014) 34 STR 554 : (2014) 72 VST 272

**Hon'ble Judges :** S.C. Dharmadhikari, J;G.S. Kulkarni, J

**Bench :** Division Bench

**Advocate :** P.S. Jetly and Ms. Suchitra Kamble, Advocate for the Appellant; V. Sridharan, Sr. Counsel and Ms. Beena Pillai, Advocate for the Respondent

## **Judgement**

S.C. Dharmadhikari, J.—This Appeal u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 is directed against the order passed by the Central Excise Service Tax Appellate Tribunal, Mumbai dated 10th February, 2011 [ 2011 (24) S.T.R. 60 ]. By the order under Appeal, the Tribunal has set aside the order passed by the Commissioner of Central Excise, Mumbai, dated 18th July, 2007.

2. The facts necessary to appreciate the argument of Shri P.S. Jetty, learned counsel appearing in support of the Appeal are that the respondent was providing Technical Inspection and Certification Agency Service (for short "TICA") and Technical Testing and Analysis Agency Service (for short "TTAA") at different places in India in respect of goods imported by their customers located abroad. For such services, the respondent received consideration in convertible foreign exchange.

3. The Notification No. 6/99-S.T. dated 9th April, 1999, exempted Service Tax on services specified u/s 65(48) of the Finance Act, 1994, provided to any person in respect of which payment was received in convertible foreign exchange. This notification was rescinded vide Notification No. 2/2003-S.T. dated 1st March,

2003. However, the Central Board of Excise and Customs issued a circular being Circular No. 56/5/2003-S.T. dated 25th April, 2003, clarifying that the Service Tax is a destination based consumption tax and not applicable on export of services. Export of services would continue to remain tax free even after withdrawal of Notification No. 6/99 dated 9th April, 1999. It is also clarified that by Notification No. 21/2003-S.T. dated 20th November, 2003, the department exempted taxable services specified u/s 65(105) of the Finance Act provided to any person in respect of which payment was received in India in convertible foreign exchange. Annexures A, A1 to A3 are the copies of the notifications referred by us hereinabove.

4. A show cause notice was issued by the Directorate General of Central Excise Intelligence Mumbai Zonal Unit dated 6th January, 2006 alleging that services provided by the respondents were performed in India though test reports thereof were sent outside India. Since the services were performed in India, there was no export of services. The matter was therefore not covered by the clarification given vide Circular dated 25th April, 2003. The respondents before us therefore, were called upon to pay Service Tax amounting to Rs. 82,16,553/for the period 1st July, 2003 to 19th November, 2003. This demand was disputed and that is how the adjudicating authority namely, Commissioner of Service Tax Mumbai heard parties. He passed an order on 18th July, 2007 confirming the demand and imposing penalty. It is this order of the Commissioner/adjudicating authority which was challenged by the respondent in Appeal before the CESTAT, Mumbai, and by the impugned order, the same has been allowed. The demand is thus dropped and equally the penalty. Mr. P.S. Jetly, therefore, submits that this Appeal raises substantial question of law and particularly the one formulated at paragraph No. 4 of the memo of present Appeal. Mr. Jetly submits that the Notification No. 21/2003 may be reinstating the benefit available, yet, we are concerned in this Appeal with the interregnum period i.e. 1st July, 2003 to 19th November, 2003. At that time, there was no exemption and of the nature claimed by the respondent assessee. It is submitted that once the liability had to be discharged, the demand raised by the Commissioner should have been confirmed and not interfered by the Tribunal. Mr. Jetly has invited our attention to the order of the Tribunal and particularly the observations and findings at paragraph No. 7 page 74 of the paper book. Mr. Jetly submits that the circular dated 25th April, 2003 is not applicable to the services rendered by the respondent in the present case. He invited our attention to this circular in some details. Mr. Jetly submits that paragraph No. 3 thereof has no application to the services provided and rendered by the respondent. It is submitted that the conditions have to be fulfilled before the benefit of the circular can be claimed. Mr. Jetly submits that it has been clarified specifically that the Service Tax is destination based consumption tax and it is not applicable on export of services. True, it is that export of services would continue to remain tax free even after withdrawal of Notification No. 6/99 dated 9th April, 1999 but, for service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of

Service Tax paid can be availed or reimbursed during the relevant time as inter-sectoral tax credit between services and goods are not allowed. Mr. Jetly submits that this paragraph of the circular at page 19 has application to the facts and circumstances of the present case. Mr. Jetly therefore submits that the findings of the Tribunal are contrary to this notification and law. In the present case, the exporter is in India. The importer is abroad. The importer has placed orders for certain goods on the exporter in India. The respondent renders services by testing the samples in India. The certification after such testing is in India. The origin of the goods is in India. Hence, Mr. Jetly submits that the respondent is not entitled to the benefit of the exemption notification. Once this clear position emerges and in the backdrop of the services rendered, then, the Tribunal was in error in allowing the Appeal. Therefore, the reframed question of law would arise for determination and consideration as it is a substantial one.

5. Mr. Sridharan, on the other hand, submitted that the issue in question is fully covered by the exemption notification, Apart therefrom, and assuming that exemption notification stood withdrawn for a brief period and thereafter reinstated, the position is that what is not taxable need not be exempted. In other words, the services rendered by the respondent were never taxable at all. Once they were not taxable at all, there is no question of exempting them. In such circumstances, this Appeal does not raise any substantial question of law. The view taken by the Tribunal is in consonance with law. For all these reasons, he submits that the Appeal deserves to be dismissed.

6. Elaborating his submission further, Mr. Sridharan submits that "Section 65(105) of the Finance Act as it stood during the relevant period defined "taxable services" to mean any service provided to and by persons specified under the various sub-clauses of that section. Section 66 of the Finance Act which was the charging section provided that Service Tax was to be levied on the value of taxable services referred to in the various sub-clauses of Section 65(105). Thus, undisputedly, the taxable event of Service Tax is the provisions of services. However Section 64 of the Finance Act provides that the Chapter relating to Service Tax extends to the whole of India except the State of Jammu and Kashmir. Therefore value of services will be taxable u/s 66 of the Finance Act only if the taxable event occurs in India i.e. only if the place of provision of service is in India.

7. Mr. Sridharan further submits that "Services" are intangible in nature and hence the place of provision of services has to be laid down by legislature or by judicial pronouncements. This proposition is supported by the decision of Hon. Supreme Court in the case of The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . Before the enactment of the Central Sales Tax Act, 1956 there was considerable dispute amongst the States as to situs of sales in cases where sales transactions were partly completed in one State and partly in another. In this context Justice S.R. Das observed as follows while delivering the majority judgment:

The situs of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by judges as part of the judge-made law of the land, or by some legislative authority.

8. Mr. Sridharan further submits that similar observations were made by Hon. Supreme Court in the case of 20th Century Finance Corp'n. Ltd. and Another Vs. State of Maharashtra, in the majority judgment delivered by Justice V.N. Khare as under:

The situs of sale can only be fixed wither by the appropriate legislature or by Judge made law, and there is no settled principles for determining the situs of sale.

9. Mr. Sridharan submits that there was apprehension in the industry that export of services will become taxable because of the withdrawal of the aforementioned Notification Number 6/99 which granted exemption to taxable services for which payment was received in convertible foreign exchange. Therefore, C.B.E. & C. issued a circular on 25th April, 2003 to clarify the position with regard to the export of services. The C.B.E. & C clearly stated that Service Tax was a destination based consumption tax and therefore it was not applicable on export of services. The relevant extract of the circular to this effect is as under:

The Central Government has issued Notification No. 2/2003 dated 1-3-2003 in the current year's Budget rescinding the earlier Notification No. 6/99 Service Tax, dated 9-4-1999 which exempted taxable services from payment of Service Tax so long as payment for services rendered is received in convertible foreign exchange which is not repatriated outside India. Consequent to the issue of Notification No. 2/2003 cited above, Service Tax would be leviable on all taxable services consumed or rendered in India, irrespective of whether the payment thereof is received in foreign exchange or not.

In this regard various representations have been received by the Board raising apprehension that because of the withdrawal of the Notification No. 6/99 export of service would be affected as it would be costlier in the international markets.

The Board has examined the issue. In this connection I am directed to clarify that the Service Tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax free even after withdrawal of Notification No. 6/99 dated 9-4-1999...

10. Mr. Sridharan further submits that on the same day on which the aforestated circular was issued, the Finance Minister also made a similar clarification in the Lok Sabha with regard to the taxability of export of services. The relevant extract of his speech in the Parliament is as follows:

Some Hon. Members as also some trade representatives have also expressed apprehension that the withdrawal of exemption from Service Tax arising from payments received in convertible foreign exchange could affect our export of services. I want to clarify that a Service Tax is location based. Whatever service

is exported abroad whether it be through outsource computer or medical, it will, by law, be outside the proposed code of Service Tax. Therefore, there ought to be no apprehension or worry in this regard.

11. Mr. Sridharan further submits that although there was no provision in the statute which laid down the place of provision of services, there were clear administrative guidelines to the effect that Service Tax will not be applicable if services are consumed outside India. It is submitted that in the absence of any statute or judicial pronouncement to the contrary, such administrative guidelines should be considered to be the applicable legal position in this regard.

12. Mr. Sridharan further submits that the respondent is not contending that the Parliament is not constitutionally empowered to levy Service Tax on a transaction which is completed outside India. The respondent is aware that Hon. Supreme Court had rejected such a contention with respect to sales tax in the case of *Popatlal Shah v. The State of Madras - (1953) 4 STC 188 (SC)*. In that case the Madras State sought to levy sales tax on a transaction in which goods were dispatched from Madras to Calcutta. One of the contentions raised by the assessee was that the legislature was incompetent to levy tax on a sale which was concluded outside the Province. Although the appeal of the assessee was allowed on construction of the language of the Statute, the contention relating to competence of the legislature to tax a transaction which was concluded outside the Province was rejected by the Supreme Court by holding that the entry in the Constitution relating to tax on sale of goods did not suggest that a legislation imposing sales tax could be made only in respect of sales taking place within the boundaries of the Province. It was observed that although a Provincial legislature could not pass a taxation statute which would be binding on any other part of India, it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the Province, provided there was sufficient and a real territorial nexus between such transactions and the taxing province.

13. Mr. Sridharan further submits that although the Parliament is competent to levy tax on services which are provided to recipients located outside India, in the absence of any legal provision regarding fixation of the place of provision of service and having regard to the Finance Minister's Speech in Parliament and C.B.E. & C. circular, export of services were outside the Service Tax net even during the interregnum period by applying the canon of purposive construction of statutes.

14. Mr. Sridharan therefore submits that the principle that Service Tax is a destination based consumption tax is in conformity with international practice. It has been accepted internationally in order to avoid double taxation. It has also been recognized by the judgment of the Hon'ble Supreme Court in the case of *All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others*, . Mr. Sridharan therefore submits that the Appeal does not raise any substantial question of law and deserves to be and should be dismissed. Mr. Sridharan submits that in any case, there was no suppression of facts. The

respondent was under a bona fide belief that it had exported services and therefore the extended period has been erroneously invoked. The demand has been held to be barred by limitation. For all these reasons, and when the demand is raised on 6th January, 2006 in relation to a liability to pay Service Tax from July to November, 2003 it is ex facie time barred and cannot be sustained. For this reason, as well, the Appeal deserves to be dismissed.

15. We have with the assistance of the learned Counsel appearing for the parties, perused the memo of Appeal and all annexures thereto, including the impugned order. We have also perused the relevant statutory provisions, notifications and decisions brought to our notice.

16. The Tribunal was considering the respondents' challenge to the order of the adjudicating authority confirming the demand and penalty. The argument before the Tribunal on behalf of the respondent was that the respondent is a testing agency. The contract of service was with the overseas purchaser of goods. Thus, the privity of contract of the respondent is with the buyers of the goods who are located or situated outside India. Further, the argument was that this is a contract based tax. The contract is of services. There is no contract in this case with the manufacturer of goods in India. Further, there is no contract and no privity between the respondent and the exporter of the goods who is stated to be based in India. It is in these circumstances that the exemption notification though required to be strictly construed has rightly been construed in favour of the respondent assessee before us.

17. The Tribunal has found that the clients of the respondents are located abroad. The tests reports may have been prepared in India. The tests may have been conducted in India. However, the certificates have been forwarded to the clients of the respondent abroad. It is in such circumstances the Tribunal concluded that the facts in the case of (2010) 21 STJ 72 which was followed by the Tribunal's single member in the case of (2010) 21 STJ 253 are identical.

18. The respondent before us had exported the services by way of testing and analysis in India and transmitting the test report/analysis report to the foreign clients. The service was complete when the report was delivered to the foreign client. Since the delivery of the report to the foreign client was considered to be an essential part of the service that the demand of Service Tax was set aside.

19. This view of the Tribunal is in accord with the statutory provision and particularly the circular relied upon. In the circular which is relied upon and at page 17 of the paper book, the Government of India in the Ministry of Finance (Department of Revenue) exempted the taxable service specified in sub-section (48) of Section 65 of the Finance Act, 1994 provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the Service Tax leviable thereon u/s 66 of the said Act. The proviso to this exemption notification is not attracted to facts of our case. It is conceded before us that the respondent received payment in India in convertible foreign

exchange and that this payment is not repatriated by the respondent from or sent outside India.

20. The definition of the term taxable service is inclusive. It also includes technical testing and analysis [see Section 65(106)(zzh)]. By Section 65(106), technical testing and analysis has also been defined. In such circumstances, when technical inspection and certification is also a service and goods in question have been inspected or tested, but the services were of the nature noted by us above, the payment was also made in terms aforesaid, then, the benefit of the notification at page 17 of the paper book was available. That was on the footing that the services rendered were exempt from whole of the liability to pay Service Tax.

21. The circular dated 25th April, 2003 (Annexure A2) is issued on the subject of non-levy of Service Tax on export of services. It has referred to earlier circular of 1st March, 2003 and 9th April, 1999. The 9th April, 1999 is a notification of exemption. The April 2003 circular clarifies that Service Tax would be levied on all taxable services consumed or rendered in India, irrespective whether the payment thereof is received in foreign exchange or not. Since representations were received by the Board with regard to the withdrawal of the Notification No. 6 of 1999, exports of service would be affected as it would be costlier in the international market, that the board clarified that service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of Service Tax paid can be availed or reimbursed till April, 2003 because inter-sectoral tax credit between service and goods are not allowed. Mr. Sridharan has placed reliance on clause (4) of the circular dated 25th April, 2003. That is where it has been clarified that the question of taxability of secondary services which are used by primary service provider for the export of services. Thus been clarified in paragraph No. 4 of its circular. It is in these circumstances that we are of the opinion that the Tribunal has not erred in law in holding that the services provided by the respondent were not taxable. This aspect once becomes more clear if one peruses the Notification No. 21/2003-S.T. dated 20th November, 2003.

22. We are of the opinion that the services rendered in the present case are fully covered by the clarification given and even by the principle laid down in the decision of the Hon'ble Supreme Court of India. In this regard, if one refers to the allegations in the show cause cum demand notice, it is apparent that the same refers to the testing charges received by the respondent in convertible foreign currency in respect of services rendered by it in India to its foreign clients. Though the show cause notice refers to the circulars, what is apparent from the judgment of the Hon'ble Supreme Court in the case of All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, that Service Tax is a tax on each activity. When it comes to a Service Tax on professions, the services rendered are of advise and hence, the Hon'ble Supreme Court with regard to the nature of the tax concluded that it is rendered

by a Chartered Accountant, for example when he advises his client or audits his account. Similarly, a cost accountant charges his client for advise as well as doing his work of costing. For each transaction or contract, Chartered Accountant/Cost Accountant renders professional based services. However, Mr. Sridharan submits if the taxable event is the provision of services, then, the place where the services have been rendered is of significance. The services will be taxable only if they are provided within India. Mr. Sridharan submits that Service Tax is a destination based consumption tax and therefore, it is not applicable on export of services.

23. In the present case, the Tribunal has found that the assessee like the respondent rendered services, but they were consumed abroad. The clients of the respondents used the services of the respondent in inspection/test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were foreign clients, paid the respondent for such services rendered, in foreign convertible currency. It is in that sense that the Tribunal holds that the benefit of the services accrued to the foreign clients outside India. This is 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 case 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 noncommercial 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.

24. The view taken by the Tribunal therefore, 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.

25. We are of the view that any larger or wider controversy and based on the submissions of Shri Sridharan need not be decided in this case. Suffice it to hold that the view taken by the Tribunal does not raise any substantial question of

law. The Appeal is devoid of merits and it is accordingly dismissed. There would be no order as to costs.