(2023) 12 CESTAT CK 0022

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 56266 Of 2013

M/S Carrier Airconditioning Refrigeration Ltd — APPELLANT

Vs

Commissioner Of Service Tax, Amritsar — RESPONDENT

Date of Decision : 08-12-2023

Acts Referred:
Export Of Service Rules, 2005 — Rule 3, 3(1)(iii), 3(2)(a), 3(3)
Finance Act, 1994 — Section 65(19), 65(19)(iv), 75, 76, 77, 78

Citation : (2023) 12 CESTAT CK 0022

Hon'ble Judges : S. S. Garg, Member (J);P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Krati Singh, Shreya Khunteta, Gulrukh Sidhu, Siddharth Jaiswal, Nikhil Kumar Singh

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 31.12.2012 passed by the Commissioner of Service Tax, New Delhi wherein the Ld. Commissioner has confirmed the demand alongwith interest and penalties. The factual details regarding the appeal are given herein below:-

Period

19.04.2006 to 31.03.2010

OIO No.

106-109/AKM/2012 dated 31.12.2012

Show

Cause

Notice

Dated 03.10.2008 (19.04.2006 to 28.02.2008)

Dated 12.10.2009 (March 2008 to March 2009)

Dated 18.01.2010 (April 2009 to September 2009)

Dated 30.06.2010 (October 2009 to March 2010)

Demand

Rs. 13,83,43,721/- under section 73 of the Finance Act, 1994

Interest

Under Section 75 of the Finance Act, 1994

Penalty

Rs. 200 per day or 2% of tax per month whichever is higher under Section 76 of the Finance Act, 1994 Rs. 20,000/- under Section 77 of the Finance Act, 1994 Rs. 7,00,00,000/- under Section 78 of the Finance Act, 1994

2. Briefly the facts of the present case are that the appellant is wholly owned subsidiary of Carrier Corporation, USA and is engaged in manufacturing, selling and distribution of various types of air-conditioning and refrigeration equipment. In the course of its business, the appellant receives queries from various customers for products which are not manufactured by the appellant but are manufactured by other overseas entities of Carrier group outside India. Such enquiries were forwarded by the appellant to the overseas entities of the Carrier Group. After such queries are passed on to the overseas entities, they entered into negotiations with the customers in terms of the product delivery, the price terms etc. and if the deal between the overseas entities and the Indian customers are materialized, the overseas entity entered into a contract with the customer directly and the invoice is also raised by the overseas entity on the customer directly and the goods were imported directly by the customers but for such transactions, the appellant is given some commission as a percentage of the value of the imports which was received in convertible foreign currency. The Appellant also enters into agreement with overseas entities of Carrier Group and one such agreement has been produced on record as Annexure 3 with the Appeal Memo mentioning the terms and conditions.

2.1 An audit of the Appellant was conducted for the period 2003-2008 wherein it was observed that the Appellant was receiving commission payments from overseas entities as a consideration for providing Business Auxiliary Services ("BAS") under Section 65(19)(iv) of the Finance Act and was not discharging service tax on the same by treating them as export of services. Based on these observations, SCN dated 03.10.2008 was issued to the Appellant for the period 19.04.2006 to 28.02.2008 proposing the demand of Rs. 6,27,02,040/- on the ground that the BAS services rendered by the Appellant do not qualify as export of services as the same are being used by Indian customers in India. On the same lines, three show cause notices were also issued to the appellant for the period 01.03.2008 to 31.03.2010 proposing the demand of Rs. 7,56,41,681/-.

2.2 After following due process, the Ld. Commissioner adjudicated all four show cause notices vide common impugned order and confirmed the demand of Rs. 13,83,43,721/- alongwith interest under Section 75 of the Finance Act, 1994 and also imposed various penalties as mentioned above in Para No. 1.

2.3 Aggrieved by the said order, the appellant has filed the present appeal.

3. Heard the parties and perused the case records.

4. Ld. Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedents on the identical issue. She further submits that in the impugned order, demand has been confirmed on the ground that the services rendered by the Appellant are not used outside India and have been consumed in India by the customers located in India and thus the same do not qualify as export of services due to non-fulfilment of the condition laid down in Rule 3(2)(a) of Export of Service Rules whereas the Appellant has been providing business development services relating to refrigeration equipment and products to customers of Carrier, Overseas, in consideration of the commission received in convertible foreign currency and the said services qualify as 'BAS' under Section 65(19) of the Finance Act and accordingly, covered under Rule 3(1)(iii) of the Export of Service Rules. She further submits that for the services falling under Rule 3(1)(iii) should be seen qua the person receiving the services and not the place of performance of the service. She also submits that in the agreement with Carrier China (copy of which annexed with the Appeal Memo), it can be seen that the services are received by Carrier China which is located outside India but the consideration is received by the Appellant in India from Carrier China in foreign exchange and the agreement for rendering the services is between Carrier China and the Appellant and not with the end users of the services i.e., the customers of Carrier China in India. She further submits that the services are rendered by the Appellant to Carrier China and not the customers of Carrier China located in India. She also submits that all the activities performed by the appellant has helped carrier overseas in selling goods in India and also led to increase in the sale of the products of Carrier Overseas and therefore, the actual recipient of the services are the overseas entities.

4.1 She also placed reliance on Circular No. 111/5/2009- ST dated 24.02.2009 issued by department wherein it has been clarified that a service shall be said to have been used outside India if the benefit of service accrues to the recipient outside India and in the instant case, the services are received by Carrier Overseas and the benefit of the same has accrued to the overseas entities which are located outside India and therefore, the services are used outside India.

4.2 She also refers to Notification No. 6/2010-ST dated 27.02.2010 vide which amendment was made in Rule 3 of export of services and the condition of services provided from India and used outside India was deleted on account of pending litigation, further the clarification made by the department vide Circular dated 24.02.2009 shows that the legislature always had the intention that used outside India means the benefit for the same should accrue outside India and the recipient of the services must be located outside India.

4.3 She further submits that the scope and interpretation of "services provided from India and used outside India" has been considered in various judgements and this issue is no more res integra and it has been consistently held that the services rendered by Indian entity to foreign entity qualify as export of services as the actual recipient of the said services is the foreign entity even though the activity may ultimately result in supplies to persons in India. In support of this submission, she relied upon the following decisions:-

• M/s. Arcelor Mittal Stainless (I) P. Ltd vs. Commissioner Service Tax Mumbai-II, 2023-TIOL-469-CESTAT-MUM-LB

• The Commissioner of Service Tax, Mumbai-VI Commissionerate vs. M/S. A.T.E. Enterprises Pvt. Ltd., 2018 (8) G. S. T. L. 123 (Bom.)

• The Commissioner Service Tax-VII vs. M/s. Wartsila India Ltd., 2019 (24) G. S. T. L. 547 (Bom.)

• The Commissioner Service Tax-VII vs. M/s. Blue Star Ltd, 2018-TIOL-1976-HC-MUM-ST

• Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax, Delhi III, Division-XIV & Anr., 2018 (8) G. S. T. L. 32 (Del.)

• M/s Reebok India Company vs. The Commissioner of Central Excise And Service Tax, Panchkula/Delhi, Final Order Nos. 60287-60288/2023 dated 25.08.2023 (Tri.- Chand.)

• M/s Baheti Agri Links vs. Commissioner, Customs & Central Excise, Indore, Final Order No.51027/2023 dated 02.08.2023 (Tri.-Delhi)

• Orbit Research Associates Private Limited vs. Commissioner of Service Tax Appeals-l), New Delhi, Final Order No. 50970/2023 dated 31.07.2023

• IBM India Pvt. Ltd. vs. Commr. Of C. EX. & S.T., Bangalore-LTU, 2020 (34) G.S.T.L. 436 (Tri. - Bang.)

4.4 She further submits that the ratio of all the decisions cited (supra) clearly applies to the facts and circumstances of the present case and accordingly the demand needs to be set-aside.

4.5 She further submits that the demand for the period April 2006 to March 2007 is time barred and extended period of limitation cannot be invoked because the appellant has not suppressed any material fact in respect of the services rendered to Carrier China and has shown all the amounts in their profit and loss account and balance sheet which are public documents.

4.6 She also made submission regarding the interest and the penalties and submitted that when service tax is not payable, the question of payment of interest under Section 75 of the Act and the penalty under Section 76, 77 and 78 does not arise.

5. On the other hand, the Ld. DR reiterated the findings in the impugned order.

6. After considering the submission of both the parties and perusal of material on record and the various decisions relied upon by the appellant cited (supra), we find that the issue involved in the present case, namely, 'whether the services provided from India and used outside India qualify as export of service' which has been the subject matter of various litigation before the Tribunal and the Larger Bench of the Tribunal has settled the issue in favour of the assessee and this issue is no more res integra and has also been followed by coordinate benches of the Tribunal. The relevant portions of the decision of the Larger bench are reproduced herein below:-

"1. xxxxxxxxx. A prospective customer in

India is either approached by Arcelor India or a prospective customer contacts Arcelor India regarding stainless steel requirement, but in either case the request is forwarded by Arcelor India to the foreign steel mills with the technical requirements of the Indian customer. Once the foreign mills and the Indian customer come to an understanding on the terms and conditions of supply, a written contract is executed between the Indian customer and the foreign mills or a purchase order is placed on the foreign mills. The documents are prepared by the foreign mills in the name of the Indian customer and the Indian customer, in turn, pays the foreign mills. Thus, the goods directly pass from the foreign mills to the Indian customer.

2. A part of the commission received by Arcelor France, as the main agent, from the foreign mills is paid to Arcelor India based on the volume of sales in each quarter in convertible foreign currency. A dispute arose in relation to such commission received by Arcelor India from Arcelor France for the period from April 2005 to January 2009. According to Arcelor India, there is no privity of contract between it and the steel mills located outside India and it received the consideration only from Arcelor France. It, therefore, did not collect or pay service tax on the commission received from Arcelor France from April 2005 to January 2009. The department, however, believed that service tax was leviable on the commission received by Arcelor India from Arcelor France since the services were performed and consumed in India and they would not qualify as "export of service" under the Export of Service Rules, 2005. Arcelor India believed that it was not required to pay service tax on the commission received from Arcelor France as the service qualified as "export of service".

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45. The 2005 Export Rules were introduced to achieve the destination based consumption tax concept and so exemption is provided from payment of service tax to services exported out of India. The 2005 Export Rules set out various conditions for a service to qualify as export of service. Basically, the service recipient should be outside India; service should be provided from India and delivered outside India; and payment should be received in foreign currency.

46. Prior to 19.04.2006, under rule 3(3) of the 2005 Export Rules, the export of taxable service would mean, in relation to taxable services, such taxable services which have been provided and used in or in relation to commerce or industry and the recipient of such service is located outside India. For the period between 19.04.2006 and 1. 03.2007, export of taxable service in relation to business or commerce, is the provision of such service to a recipient located outside India when such service is delivered outside India, and used outside India; and payment for such service provided outside India is received by the service provider in convertible foreign exchange. However, as the phrase "delivered outside India" in rule 3(2)(a) did not provide clarity with respect to intangible services, this expression was replaced w.e.f. 01.03.2007 by "is provided from India and used outside India". The Circular dated 29.04.2009 issued by CBEC clarifies that the relevant factor is the location of the service receiver and not the place of performance and the phase "used outside India" is to be interpreted to mean that the benefit of the service should accrue outside India. The term "used outside India", therefore, means that the service is provided to such a service recipient who is located outside India. It is the location of the service-recipient which determines where the service is used. The use of intangible services should be seen with respect to the location of the service recipient and not the place of performance.

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47. Arcelor France and Arcelor India act as main agent and sub-agent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India.

Therefore, even though the goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France.

Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.

48. The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24.02.2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.

49. As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.

54. The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the followingmanner:

(i) Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides "export of service" as contemplated under rule 3 of the 2005 Export Rules; and

(ii) Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange."

(emphasis supplied)

7. Further, we find that the coordinate bench of the Tribunal in the case of Orbit Research Associates Private Limited has also relied upon the larger bench decision of the Tribunal in the case of M/s Arcelor Mittal Stainless (India) Private Limited cited (supra) and held that the assessee is not liable to pay service tax under 'Business Auxiliary Service' because the service provided by the appellant falls under the category of export of service. The relevant para is reproduced herein as under:-

"28. Even if the 2005 Rules were to apply, the issue stands decided in favour of the appellant by a larger bench of the Tribunal in M/s. Arcelor Mittal Stainless (I) P. Ltd. vs. Commissioner of Service Tax, Mumbai-II 12. The factual position before the larger bench was that a prospective customer in India was approached by Arcelor India and the request was forwarded by Arcelor India to the foreign entity which ultimately supplied the goods to the Indian customers. For the service provided by Arcelor India to the foreign entity i.e. Arcelor France, Arcelor India received commission in convertible foreign currency. The department believed that service tax was leviable on this commission received by Arcelor India since the services were performed and consumed in India and they would not qualify as export of service. This contention was repelled by the larger bench and it was observed that though the goods were being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France."

8. Further, we find that the Hon'ble High Court of Bombay in the case of Commissioner of Service Tax, Mumbai-VI vs. A.T.E. Enterprises Pvt. Ltd. cited (supra) has dismissed the appeal of the Revenue and upheld the decision of the Tribunal and held that the assessee is not liable to pay service tax as the services rendered by the assessee falls within the definition of export of services.

9. Further, the Hon'ble Bombay High Court in the case of Commissioner of Service Tax-VII vs. Life Care Medical Systems 2018 (18) GSTL 587 (Bom.) after relying upon its earlier judgement in the case of A.T.E Enterprises Pvt. Ltd. cited (supra) has held in Para 6 as under:-

"6. We find that this Court in SGS India Pvt. Ltd. (supra) has held that where services were rendered in India to a foreign party, then such service is not liable to tax as it would be export of service. Further, in fact almost similar to this case, this Court has held that the Service Tax would not be payable in Commissioner of Service Tax v. A.T.E. Enterprises Pvt. Ltd., 2018 (8) G.S.T.L. 123 in respect of an Indian Agent, rendering the services of marketing the goods of a foreign party within India and receiving commission from the foreign party, as it is export service by following the decision of this Court in SGS India Pvt. Ltd. (supra). In fact, we find that the Central Board of Excise & Customs has issued a clarification by Circular No. 111/2009, dated 24th February, 2009 that in terms of Rule 3(1) (iii) of Export of Services Rules, 2005, it is not the place of performance but the location of the service receiver which will make it an export of services. It clarified that word 'outside India' to mean that the benefit should accrue outside India. The aforesaid Circular of [C.B.E. & C.] is completely in favour of the respondent."

10. By following the ratios of the above said decisions, we are of the considered view that the impugned order is not sustainable in law and therefore, we set-aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

