

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CENTRAL EXCISE APPEAL No.12 of 2014.

The Commissioner of Service Tax- }
Mumbai-I, 5th Floor, New Central }
Excise Building, 115, M.K. Road, }
Churchgate, Mumbai 400 020. }.. **Appellant.**

Versus

M/s Maersk India Pvt Ltd. }
Urmi Estate, Tower “A”,
95, Ganpatrao Kadam Marg,
Lower Parel (W), Mumbai 400 013. }.. **Respondent.**

Mr Pradeep S. Jetly a/with Ms Suchitra Kamble for the Appellant.

Mr S.M.Kamtam i/by Mr Gaurav Agrawal and Mr Bharat Raichandani for the Respondent.

**CORAM : S.C. DHARMADHIKARI &
S.P. DESHMUKH, JJ.
RESERVED ON : 5th JANUARY, 2015.
PRONOUNCED ON:- 24th FEBRUARY, 2015**

JUDGMENT (PER S.P. DESHMUKH,J)

1) The respondent M/s Maersk India Pvt Ltd is engaged in rendering taxable services as Steamer Agent to their overseas clients and is a registered service provider, receiving consideration in convertible foreign exchange. The services being rendered receiving consideration in convertible foreign exchange enjoyed exemption from payment of service tax pursuant to exemption notification bearing No. 6 of 1999 dated 19th April, 1999. The exemption was withdrawn under Notification dated 1.4.2003. The exemption, subsequently, is reinstated under Notification No.21 of 2003 dated 20th November, 2007.

2) Service Tax Authority had issued a show cause cum demand notice dated 25th February, 2005 to the respondent, seeking explanation, as to why the service tax for the period 1st November, 2003 to 19th November, 2003 pursuant to the provisions of section 73(1) of the Finance Act, 1994 be not recovered and as to why interest be not demanded under section 75 for failure to pay tax in accordance with the provisions of

section 68 of the said Act and further as to why penalty should not be imposed under sections 76 and 78 for contravention of the provisions of Section 68 of Chapter V of the Finance Act, 1994.

3) The respondent replied explaining that service tax is not payable in respect of the consideration received in India in convertible foreign exchange pursuant to the exemption granted under Notification No. 21/2003-ST dated 20th November, 2003 and conventionally in respect of such services credit note and remittances of convertible foreign exchange were being issued in the month following the month of rendition of services. It was explained that the service is an export service and not liable to pay service tax and being exempted from the payment of service tax. Service tax has been paid in respect of the service rendered during February, 2003 after withdrawal of the exemption with rescission of exemption of notification bearing No. 6 of 1999.

4) The Commissioner of Service Tax, Mumbai under his order-in-original dated 17th January, 2007 confirmed the demand under the show cause notice directing payment of tax and interest and had dropped the notice in respect of the penalty under

sections 76 and 78 of the Act.

5) The respondent, aggrieved by aforesaid order-in-original, preferred appeal before the Central Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (hereinafter referred to as “the Tribunal”). The Tribunal set aside the order of the Commissioner and allowed the appeal and as such revenue is in appeal before this court.

6) Learned Counsel Mr Jetly for the appellant, submits that Steamer Agent services are taxable under Section 65 of the Finance Act, 1994 being classified as category II service under Rule 3 (1) (ii) of the Export of Service Rules, 2005. He purports to rely on circular dated 24th February, 2009 to submit that only those services would be export, which are performed outside India. In the present case, there is no dispute that the services have been rendered on Indian shores albeit clients are residents abroad. It is further being submitted that the Circular dated 25.4.2003 is of no avail to the respondent-assessee, for, it applies to only export of services, which continue to be tax free after withdrawal of notification bearing No.6/99 dated 4th April, 1999. According to

him, the circular dated 25.4.2003 clarifying that export of service would continue to remain exempted even after rescission of Notification No.6/99 would not cover the present case. According to him, exemption notification No. 21 of 2003 dated 20th November, 2003 does not cover the period concerned, which is from 1.11.2003 to 19.11.2003. He submits that taking into account all aforesaid circumstances and the intent underlying relevant legal provisions holding the field the judgment and order of the Tribunal runs counter to the law and the circumstances.

7) Mr Jetly, submits that the matter gives rise to questions as to whether clarification issued by CBEC is retrospective in its operation and whether benefit of exemption would be available after withdrawal of Notification bearing No. 6/99 till its reinstatement under Notification bearing No.21/03. Since the decision of the Tribunal in the case of **SGS India Pvt. Ltd.** had been under challenge in the High Court, it could not be said that service tax cannot be demanded when Notification No.6 of 1999 had been withdrawn. It is being submitted by Mr Jetly that the services are rendered on Indian shores and as such are taxable.

However, he fairly submits that a Division Bench has decided the issue against the Revenue holding the phrase “destination based consumption tax” would mean that destination of the consumer will decide the event of taxability.

8) A similar question had arisen and fallen for consideration in the case of **Commissioner of Service Tax Mumbai Vs SGS India Pvt Ltd.** in Central Excise Appeal No.51/2012 before this High Court which came to be decided on 23rd April, 2014 and the judgment is reported in 2014 (34) S.T.R. 554 (Bom). Said decision was rendered by a Division Bench of this Court in which one of us had been a Member (Hon'ble Mr S.C.Dharmadhikari, J).

9) In said case, the respondent/assessee had been issued a show cause notice alleging that it had been providing technical inspection and certification agency service and technical testing and analysis agency service at different places in India and was being performed in respect of goods exported to customers located abroad.

It was alleged by revenue that services provided by the

assessee were performed in India and only test reports were sent outside India. Since services were performed in India, those were not export services and as such the service was not covered by clarification issued under the Circular dated 25th April, 2003 and by notice the respondents were called upon to pay the service tax of Rs. 82,16,553/- for the period 1st July, 2003 to 19th November, 2003.

The adjudication at the first instance had resulted in confirmation of demand and imposition of penalty which was the subject matter before the Customs Excise and Service Tax Appellate Tribunal (for short "CESTAT"). The appeal by the respondent/ assessee was allowed and the matter was taken before this court on behalf of the Revenue.

Similar submissions were advanced, as are now being advanced, that the services are rendered in India and as such those are taxable services in India and cannot be said to be export services taking into account the rule. It was further submitted, as is being submitted now, that the notification dated 21/11/2003 reinstated the benefit available yet the demand is in respect of

period in the interregnum when there was no exemption and as such the liability to pay service tax cannot be denied and the demand ought to be confirmed.

10) The observations reproduced hereinbelow from said judgment are relevant in the present matter:

17. *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.*

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20. *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 subsection 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 under section 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.

21. *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.*

22. *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 intersectoral 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. That has 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.21/03ST dated 20th November 2003.

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24. *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 Vs. 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.”

11) While deciding the matter against **CST, Mumbai Vs. SGS India Pvt Ltd.** this Court has elaborately considered and found that the respondent assessee had rendered services to the clients abroad. Goods were tested by the respondent assessee in India. However, the report of the test and analysis was sent abroad. The clients of the respondent-assessee were foreign clients paying the respondent in convertible foreign exchange currency which is termed as export of service and this court had considered that rendition of such service to foreign clients paying consideration in convertible foreign exchange would not visit them with liability to pay service tax. The Court has further observed thus:-

“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 Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case.”

12) Undoubtedly, recipient of service is resident abroad and the consideration for the service is being paid in convertible foreign exchange from abroad. In the present case, it is indisputable position that the respondent-assessee was being allowed and had the benefit of exemption of service tax under Notification No.6/99 till it was rescinded on 1.3.2003. Also a circular had been issued clarifying that the service tax is not leviable on export of services. Subsequently exemption has been reinstated to the services wherein consideration was being received in convertible foreign exchange.

13) The Tribunal has properly considered the facts. The Tribunal has also considered that the appellant has rendered services in convertible foreign exchange and that the Notification Nos. 6/99 and 21/03 are identical providing exemption from

service tax liability in respect of the service provided to any person in respect of which payment is received in India in convertible foreign exchange and that Circular dated 25.4.03 clarifies that the service tax is not payable in respect of the export of service even after withdrawal of the Notification No. 6/99.

14) Having regard to the position at hand, the clients who were serviced were residents abroad, and as such the services rendered to them being export services can hardly be amenable to any debate. The service being exempted from payment of service tax is also clear from two exemption notifications No.6/99 and 21/03, consideration for the same being received by the respondent assessee in convertible foreign exchange in India. In view of aforesaid position, the decision for the reasons given by the Tribunal can hardly be faulted with.

15) The observations reported in **2014 (34) S.T.R.554** (Bom) (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.

(S.P. DESHMUKH, J.)

(S.C. DHARMADHIKARI,J)