

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 14 OF 2016

The Commissioner of Service Tax
Mumbai-VI Commissionerate
4th Floor, New Central Excise Building,
Maharshi Karve Road, Churcgate,
Mumbai – 400 020.

... Appellant.

V/s.

M/s. A.T.E. Enterprises Pvt. Ltd.
Bhagawati House, A-19, CTA No. 689,
Veera Desai Road, Andheri (West),
Mumbai – 400 053.

... Respondent.

Mr. M. Dwivedi, Advocate for the Appellant.
Mr. B.J. Raichandra a/w Mr. Anshul Jain, Advocate for
Respondent.

**CORAM : ANOOP V. MOHTA AND
SMT. ANUJA PRABHUDESSAI, JJ.
DATE : 31st JULY, 2017**

ORDER JUDGMENT (PER ANOOP V. MOHTA, J.):

This is an Appeal under section 35G of the Central Excise
Act, 1944 (for short “**the Act**”).

2. Heard finally by consent at admission stage.
3. The appellant has raised in the memo the following
substantial questions of law:

“5. In the premises stated hereinabove, the appellant submits that the following question of law arises for determination by this Hon'ble Court:

(a) Whether the services provided by the Respondent herein, in accordance with various contracts entered into with overseas manufacturers, is classifiable under “Business Auxiliary Services” as defined under section 65(105)(zzb) of the Finance Act, 1994 and if so, whether the said services provided are to be treated as export of services or not?

(b) Whether the CESTAT was justified in passing the impugned order dated 07-01-2015 relying upon several judgments of the tribunal which are not applicable in the facts and circumstances of the present case?”

4. We have to consider the rival submission keeping in mind the scope and object of such Appeal under the Act.

5. After hearing the parties and consider the reasoning given by the Central Excise Service Tax Appellate Tribunal (for short (“CESTAT”) and specifically the finding so recorded, which was based upon the material placed by the parties, in

our view, there is no case made out by the appellant to interfere with the impugned reasoning and the order:

“8. We find from the records that the appellant does not engage himself in assembling and organizing of the imports. His duty as is ascertained from the agreement, indicates that he is supposed to procure the orders and pass it on to the overseas manufacturers; on receipt of such orders, the overseas manufacturers executes the same on his own and the consideration for such supplies is directly paid to the overseas manufacturers by the person who has placed the order. The entire transaction in our considered opinion seems to be of only procurement of orders and the rendering of services, if any, by the appellant is towards the foreign or overseas manufacturers. In our view, this activity though culminates in supplies to Indian Company, cannot be considered as services provided in India. We are fortified in our view by the ratio of the Tribunal in the case of *Vodafone Essar Cellular Ltd.* (supra).

9. In this case we find that there was an agreement between the appellant and the foreign telecom service provider as per which the appellant had agreed to provide telecom services to the customers of foreign telecom service provider when he is in India and using the appellant telecom networks. Revenue held a view that the consideration for services rendered in India is taxable under

Business Auxiliary Service. The Bench after considering the provisions of “Export Services Rules” and Board clarifications, and the decision of Microsoft Corporation (I) Pvt. Ltd. Case held in favour of the assessee by recording as under:

“54. In view of the above, the difference of opinion on various points is resolved as under:

(i) That the business auxiliary services of promotion of market in India for foreign principal made in terms of agreement dated 01/07/2005 amount to Export of Services and the Hon'ble Supreme Court decision in the case of State of Kerala and Others Vs. The Cochin Shell Company Ltd. [1961 (12) STC 1 (SC) as also *Burmah Shell Oil Storage and Distrusting Co. of India Ltd., Vs. Commercial Tax Officers* [1960 (11) STC 761] = 2002-TIOL-966-SC-CT-CB explaining the meaning of export is not relevant inasmuch as the same deals with the export of goods and not export of services;

(ii) That the Business Auxiliary Services provided by the assessee to their Singapore parent company was delivered outside India as such was used there and is covered by the provisions of Export of Services Rules and are not liable to Service Tax.

(iii) The principal of equivalence between the taxation of goods and taxation of services, as laid down by the Hon'ble Supreme Court in the case of *All India Federation of Tax Practitioners* [2007 (7) STR 625 (SC) = 2002-TIOL-149-SC-ST as also the principles of destination based consumption tax where in the context of Constitutional Authority of levy of Service Tax on certain services and the issue of Export of Service in terms of Export of Service Rules was not the subject matter of said decision. The Export Service Rules, 2005, being destination based

consumption tax are in accordance with the declaration of law by the Hon'ble Supreme Court.

(iv) Inasmuch as the appeal No. ST/828/2010 was not argued by both the sides, the same can be listed for final disposal even though issue involved is identical.

(v) Having held that services involved were export of services, the same are not liable to be sustained against the appellants.”

6. The CESTAT, after recording above has also noted the provisions of law and the judgments read and referred by the parties in this regard. The finding recorded in paras 10 and 11:

“10. In case of Paul Merchants Ltd. Case there was a difference of opinion between the Hon'ble Member (Judicial) and the Hon'ble Member (Technical) which was referred to 3rd Member held in favor of the assessee and by a majority order it was held that:

“The point of difference as mentioned in Para 60 of the referral order has been answered by third Member as under:

“In view of the above discussion, the points of difference, mentioned in para 60 are answered as under:

(i) The term “export” has not been defined either in Article 280(1)(b) or in any of the article of the Constitution of India. Though the Apex Court's judgments in the case of the State of Kerala v. The Cochin Coal Company Ltd. [(1961) 2 STC 1 SC] and *Burmah Shell Oil Storage & Distribution Co. of India v. Commercial Tax Officer & Others* reported in (1960) 11 STC 764 (SC) explain the meaning of the term “export”, the ratio of these judgments which are with

regard to export of goods, is not applicable for determining what constitutes the export of services. There is no question of Export of Services Rules, 2005, being in conflict with Article 286(1)(b) of the Constitution of India.

(ii) The principle of equivalence between the taxation of goods and taxation of service had been laid down by the Apex Court in the case of Association of Leasing & Financial Service Companies v. Union of India (supra) and All India Federation of Tax Practitioners v. Union of India (supra) in the context of constitution's validity of levy of Service Tax on certain services. This principle does not imply that Service Tax should be levied and collected in exactly the same manner in which the export of goods is understood. In fact the question as to what constitutes the export or import of service was neither raised nor discussed in the above-mentioned judgments of the Apex Court. As discussed in this order, the Export of Service Rules, 2005 are in accordance with the Apex Court's ruling in the above-mentioned judgments that Service Tax is a value added tax, which in turn is a destination based consumption tax in the sense that it is levied on commercial activities, and it is not a charge on the business but a charge on the consumers. There is nothing in Export of Service Rules, 2005 which can be said to be contrary to the principle that a service not consumed in India is not to be taxed in India.

In yet another case of Microsoft corporation (I) Pvt. Ltd., also ended up with a difference of opinion on similar facts by majority decision, issue was held in favor of the assessee”.

11. In the recent case of GAP International Sourcing (India) Pvt. Ltd. (supra) the co-ordinate Bench of this Tribunal held in favour of the assessee wherein the facts were more or

less similar. That is, the appellant M/s. GAP International Sourcing (India) Pvt. Ltd., entered into a service support agreement with Gap USA for rendering various services relating to procurement of goods, recommending fabrics to be used for manufacture of garments, recommending vendors from which fabrics, yarn, zippers, buttons, snap fasteners, etc. can be procured, reporting the status of manufacture of products by the chosen vendors, analyzing the reports of the samples sent by the vendors, giving recommendation about the product integrity, inspecting export consignments and issuing inspection certificates, etc. Issue as to these were export of service or taxable in India; it was held that when the service provided by a person in India is consumed and used by a person abroad, coordinate Bench relied upon the judgment of the Paul Merchants Ltd. Case; interpreting provisions of export of service rules to hold such services as rendered by M/s. GAP International Sourcing (India) Pvt. Ltd. would be export of services and would not fall under the category of BAS. The said ratio is applicable in full force in the case in hand.

7. As there is no case made out to interfere with judgments/findings of which are based upon the facts of law.

8. The learned counsel appearing for the Respondent has relied upon the judgment in **The Commissioner of Service Tax, Mumbai-II Vs. SGS India Pvt. Ltd.**¹

“.....24. It is in that sense that the Tribunal 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 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 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.

1. 2014 (34) S.T.R. 554 (Bom.)

25. 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.”

9. The Division Bench of this Court in **Commissioner of Service Tax, Mumbai Vs. Maersk India Pvt. Ltd.**² held that “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.”

10. Therefore, taking overall view of the above position of law, as there is no case made out by the appellant, so also there

² 2015 (38) STR 1121 (Bom.)

is no question of law so stated to be involved in the matter, the
Appeal is dismissed accordingly. No costs.

(ANUJA PRABHUDESSAI, J.)

(ANOOP V. MOHTA, J.)