CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.828 Of 2010

[Arising out of OIO No.10/JM/2010/ dated09.03.2010 passed by the Commissioner (Adjudication), Service Tax, New Delhi]

M/s Microsot Corporation (India) Pvt. Ltd. : Appellant
10th Floor, Tower-C, DLF Building No.5,
Cyber City, Gurgaon, Haryana-122002

VERSUS

The Commissioner of Service Tax, Delhi : Respondent
MG Marg, IP Estate, IAEA House,
New Delhi-110002

WITH

Service Tax Appeal No.54991 of 2014

[Arising out of OIA No.254/SVS/GGN/2014 dated 09.05.2014 passed by the Commissioner (Appeals), Delhi-III, Gurgaon]

The Commissioner of Service Tax, Delhi : Appellant
MG Marg, IP Estate, IAEA House,
New Delhi-110002

VERSUS

M/s Microsot Corporation (India) Pvt. Ltd. : Respondent
10th Floor, Tower-C, DLF Building No.5,
Cyber City, Gurgaon, Haryana-122002

WITH

Service Tax Appeal No.60154 Of 2018

[Arising out of OIA No.F.No. ST/APPL-II/MICROSOFT/84/2017-889-894 dated 29.08.2017 passed by the Commissioner (Appeals), CGST, Gurgaon]

M/s Microsot Corporation (India) Pvt. Ltd. : Appellant
10th Floor, Tower-C, DLF Building No.5,
Cyber City, Gurgaon, Haryana-122002

VERSUS

The Commissioner of Central Excise and Service Tax, Gurgaon-I : Respondent
Plot No.36-37, Sector-32, Opposite
Medanta Hospital, NH-IV, Gurgaon,
Haryana 120001

AND
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Service Tax Appeal No.62018 of 2018

[Arising out of OIA No.104/ST/CGST/Appl./GGN/2018-19 dated 29.08.2018 passed by the Commissioner of Central Tax & CGST Gurugram, Haryana]

The Commissioner of Central Tax,
And CGST, Gurugram **: Appellant**
Plot No.36-37, Sector-32, Opposite
Medanta Hospital, NH-IV, Gurgaon,
Haryana 122001

VERSUS

M/s Microsot Corporation (India) Pvt. Ltd. **: Respondent**
10th Floor, Tower-C, DLF Building No.5,
Cyber City, Gurgaon, Haryana-122002

APPEARANCE:
Shri Prasad Paranjape, Advocate for the Assessee
Shri Ajay Jain, Special Counsel, Authorised Representative for the Department

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINALORDER Nos.60214-60217/2024

DATE OF HEARING: 23.04.2024
DATE OF DECISION: 03.05.2024

PER: P. ANJANI KUMAR

The appellants, M/s Microsoft Corporation India Pvt. Ltd., are engaged in providing Marketing Support Services under an agreement entered with Microsoft Operations PTE Ltd., Singapore; the appellant is not engaged in direct selling of the products belonging to Microsoft, Singapore which are dealt by Microsoft Singapore through independent third-party distributors in India; the appellants are paid on the cost-plus basis for the services rendered to the foreign entity; the appellants, claiming that the said services are exports, filed a refund claim of Rs.1,77,01,623/- under Rule 5 of CENVAT Credit Rules; 80 per cent of the eligible refund was sanctioned to the appellants, vide two orders dated 12.12.2017; a Show-Cause Noticed dated 09.06.2008 was issued to the appellants to reject the refund and to recover the refund already granted to them; vide corrigendum dated 31.12.2008, it was also sought

to impose penalty under Sections 76 & 77; Order-in-Original dated 09.03.2010 was passed by the learned Commissioner rejecting the refund and confirming the demand of refund already granted. Hence, the Appeal No.ST/828/2010. For the subsequent period, Commissioner (Appeals) had sanctioned the credit and the Department is in appeal against such order, vide Appeal No. ST/54991/2014, the Revenue is in appeal that the Marketing Support Services rendered by the appellant to M/s Microsoft, Singapore should not be treated as export of services for the purpose of Rule 5. Appeal No.ST/60154/2018 was filed by the appellants questioning the order of the Commissioner (Appeals) in rejecting the claim of interest; Revenue is in appeal in ST/62018/2018 against the order of Commissioner (Appeals) in sanctioning interest on the refund and the appellants are in appeal against the order of the Commissioner (Appeals) in Appeal No.ST/60154/2018 on the point that Commissioner (Appeals) erred in rejecting the interest claiming that the same was required to be agitated before the Original Authority.

2. Shri Prasad Paranjape, learned Counsel for the appellants submits that For BAS to qualify as export as per the Export Rules existing during the relevant period, three conditions were required to be satisfied i.e. (i) The Recipient should be located outside India;(ii) Such service should be delivered outside India and used outside India; and(iii) Payment for such service provided outside India is received by the service provider in convertible foreign exchange; it is admitted that the conditions with respect to Recipient being located outside India and receipt of consideration in foreign exchange is not disputed; the only dispute is with respect to (i) used outside India (ii) delivered outside India and (iii) provided outside India.

3. Learned Counsel further submits that the Appellant is engaged in carrying out marketing support services with respect to products sold by Microsoft Singapore from Singapore to the independent third-party distributors in India; while the geographical location of performing the services of the Appellant is in India, since the nature of services being BAS, which is covered under Rule 3 (1)(iii) of Export Rules, the terms delivered outside India, used outside India and provided outside India has to be read in connection with location of the service recipient, which is undisputedly in Singapore; the benefits of the services rendered by the Appellant accrued to Microsoft Singapore by an increase in their sales volumes or market penetration; therefore, in terms of Circular no.111/05/2009-ST dated 24.02.2009, the services rendered by the Appellant would qualify as export; it is not free for the Revenue to take a view contrary to their own Circular, which as per the settled principles of law, is binding on them.

4. Learned Counsel also submits that the issue is no longer *res integra*; three Member Bench at the Tribunal in their own case 2014 (36) STR 766 (Tri. Del.) decides the issue in their favour; as held by the Tribunal in the case of Larsen & Tubro – 2013 (32) STR 410 (Tri.) following the Hon'ble Delhi High Court's judgment in the case of P.C. Puri – 1984 SCC ONLINE December 42 = (1985) 151 ITR 584 and held that judgment delivered after reference to third Member should be considered as a decision of the Larger Bench.

5. Adverting to the applicability of interest on the refund claims, learned Counsel submits that interest on refund is required to be paid from 03 months of the date of application and that interest on belated refund is a statutory mandate of law. He relies on the following cases:

- Union of India vs Hamdard (Waqf) Laboratories, 2016(333) E.L.T. 193 (S.C.)

- Ranbaxy Laboratories Ltd. v. Union of India, 2011 (273) E.L.T. 3 (S.C.)
- Manisha PharmoPlast Pvt. Ltd. vs Union of India, 2020 (374) E.L.T. 145 (S.C.)
- Jindal Drugs Pvt. Ltd. vs Union of India, 2016 (342) E.L.T. 17 (Bom.)
- Garden Silk Mills Ltd. v. Union of India, 2016 (338) E.L.T. 670 (Bom.)
- Qualcomm India Pvt. Ltd. vs Union of India, 2021 (50) G.S.T.L. 269 (Bom.)

6. Shri Ajay Jain, learned Special Counsel for the Department, reiterates the findings of the impugned order in respect of the appeals filed by the appellant and the grounds of appeal in respect of the Department's appeal. He submits that though the issue has been decided in favour of the appellants in their own case, the issue has not attained finality as an appeal has been filed by the Department before the Hon'ble Apex Court and the same is pending. At this juncture, learned Counsel for the appellants submits that as held by Hon'ble High Court of Bombay in the case of Tahanee Heights Cooperative Housing Society- 2016 (339) ELT 356 (Bom.), refund and interest are payable despite appeal before the Hon'ble Supreme Court.

7. Heard both sides and perused the records of the case. We find that the issue is squarely covered being decided by the Tribunal in the case where it was referred to third Member. The third Member has observed as follows:

> **49.** Inasmuch as the same issue is involved in the present matter also, by adopting the said majority decision in the case of *Paul Merchants Ltd.* laying down that the services provided by the agents and some agencies being delivery of money to the intended beneficiary of the customer of the western units abroad, which may be located in India and the services provided being business auxiliary services is also to the western unit who is recipient of services and consumers of services, it has to be held that services were being exported in terms of Export of Services Rules, 2005 and not liable to Service Tax.

50. In a recent decision the Tribunal in the case of *Larsen & Toubro* [Misc. Order No. 59225-59226/13, dated 9-9-2013] [2013 (32) S.T.R. 410 (T)] held that a majority decision is Larger Bench decision having the same binding criteria as that of Larger Bench. If that be so, the majority decision in the case of *Paul Merchant* is required to be followed.

51. Even otherwise also, I find that the disputed service is the service being provided by the appellant to his principal located in Singapore. The marketing operations done by the appellant in India cannot be said to be at the behest of any Indian customer. The service being provided may or may not result in any sales of the product in Indian soil. The transactions and activities between the appellant and Singapore principal company are the disputed activities. As such, the services are being provided by the appellant to Singapore Recipient company and to be used by them at Singapore, may be for the purpose of the sale of their product in India, have to be held as export of services.

52. Apart from the above, we note that there was identical issue was before the Bench of the Tribunal in the case of *Gap International Sourcing (India) Pvt. Ltd.* [2014-TIOL-465- CESTAT-Del]. Vide its detailed order and after considering the various decisions of the higher Court as also various circulars issued by the Board, it stand held that services of identifying the Indian customers, for procurement of various goods on behest of foreign entity is the service provided by a foreign entity and such service provided by a person in India is consumed and used by a person abroad. It has to be treated as export of services. I also take note of the Tribunal's decision in the case of *Vodafone Essar Cellular Ltd.* v. *CCE, Pune* [2013-TIOL-566-CESTAT-Mum = 2013 (31) S.T.R. 738 (T)] wherein it stand held that when the services is rendered to third party at the behest of the assessees' customers, the service recipient is assessees' customer and not the third party i.e. his customer's customer. As such, the services being provided at the behest of the foreign telecommunication services provided to a person, roaming India were held to be constituting export services under the Export of Services Rules, 2005. The said decision stand subsequently followed by the Tribunal in the case of *CESTAT, Mumbai* v. *Bayer Material Science Pvt. Ltd.* v. *CST, Mumbai* [2014-TIOL-1064-CESTAT-Mum]. Business Auxiliary services provided by the assessee to their members located outside India by marketing their product in India was held to be export of services inasmuch as the service

was held to be provided to the foreign located person who was also paying to the assessee on such services in convertible foreign exchange.

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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 1-7-2005 amount to Export of Services and the Hon'ble Supreme Court decision in the case of *State of Kerala and Others* v. *The Cochin Coal Company Ltd.* - 1961 (12) STC 1 (SC) as also *Burmah Shell Oil Storage and Distributing Co. of India Ltd.* v. *Commercial Tax Officers* [1960 (11) STC 764] 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 Service Rules and are not liable to Service Tax.

(iii) The principle 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 Practioners* [2007 (7) S.T.R. 625 (S.C.)] as also the principles of destination based consumption tax were 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 Services Rules was not the subject matter of said decision. The Export of Services Rules, 2005, being destination-based consumption tax are in accordance with the declaration of law by the Hon'ble Supreme Court.

8. We find that this Bench in the appellant's own case 2018 (18) GSTL 465 (Tri. Chan.) following the above decision held that:

14. Accordingly, by following the Larger Bench decision in the appellant's own case cited above (Final Order No. ST/A/53737/2014-Cus. (DB), which has been decided in their favour holding that such services provided to M/s. Microsoft Operations P. Ltd. Singapore, amount to export of services and hence are not liable to Service Tax, we hold that the services being provided by appellants satisfy the conditions of

Export of Services Rules, 2005, hence are not liable to service tax.

9. In view of the above, we are of the considered opinion that the services rendered by the appellant to the overseas entity i.e M/s Microsoft, Singapore qualify to be exports and for that reason, the issue stands decided in favour of the appellants. As far as the grant of interest is concerned, we are in agreement with the submissions of the learned Counsel for the appellant that the provision of interest are automatic and the appellants are entitled to payment of interest, at the rate prescribed statutorily from time to time, on the refunds which are delayed beyond the statutory period of three months.

10. In view of the above, Appellant's Appeal No. ST/828/010 and ST/60154/2018 are allowed and Department's Appeal No.ST/54991/014 and ST/62018/2018 are rejected.

(Order pronounced in the open court on 03/05/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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