CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 51192 Of 2017

[Arising out of Order-in-Original No.DLI-SVTAX-002-COM-078-16-17 dated 10.04.2017 passed by the Commissioner, Service Tax Commissionerate, Delhi-II]

M/s The Indure Private Limited **……Appellant**
Indure House, Greater Kailash, Part-II,
New Delhi-110048

Versus

The Commissioner of Service Tax, **……Respondent**
Delhi-II, 5th Floor, 14-15, Farm Bhawan,
Nehru Place, New Delhi-110019

APPEARANCE:
Shri A.K.Batra, Chartered Accountant for the Appellant
Shri Rakesh Kumar, Authorized Representative for the Department

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing:06.11.2024
Date of Decision:05.03.2025

FINAL ORDER No.50366/2025

HEMAMBIKA R. PRIYA

The appeal has been filed by M/s The Indure Private Limited (hereinafter referred to as the appellant) against the order-in-original no.DLI-SVTAX-002-COM-078-16-17 dated 10.04.2017 passed by the Commissioner, Service Tax Commissionerate, Delhi-II whereby the demand of Rs.1,99,19,333/- along with interest and penalty was confirmed.

2. The brief facts of the case is that the Appellant is engaged in the business of manufacturing, procurement and commissioning of ash

handling equipment including EPC Projects for thermal power plants and also in providing operation and maintenance of ash handling projects. The Appellant, was showing expenses incurred in foreign currency (a) Technical Know-how, (b) Consultancy and (c) Selling Commission.

2.1 With respect to expenses "Technical know-how" and "consultancy", the Appellant discharged the Service Tax under Reverse Charge Mechanism (RCM). The Appellant also discharged service tax under 'Works Contract Services' in respect of procurement and commissioning work However, as regards the expenses of Rs. 24,56,96,992/- incurred as "Selling Commission" paid by them, in foreign currency for receiving service from abroad i.e, from M/s Parah International FAZCO but for M/s. Furjiah Cement Industries in Dubai for the period 2008-09 to 2010-11, no Service Tax was paid by the Appellant.

2.2 An investigation was initiated against the Appellant vide letter dated 01.05.2008 and following allegations were raised:

(i). The department alleged that the turnover reported in WCT/VAT returns for the period 2007-08 to 2011-12 is higher than the amount on which tax was discharged by the appellant in ST-3 returns. Thus, the Appellant has short paid service tax of Rs. 18,95,70,057/- on the differential amount received towards provision of 'Works Contracts Services' for the period 2007-08 to 2011-12.

(ii). The department alleged that the appellant was not eligible to claim benefit of abatement under notification no. 01/2006-ST dated 01.03.2006 as they are availing CENVAT Credit on input services, resulting in payment of service tax of Rs. 48,42,464/-.

(iii). The department alleged that the foreign currency expenses incurred by the appellant on the services from M/s. Parah International FCO were taxable under 'Business Auxiliary Services (BAS).

2.3 Vide the impugned order, the Department confirmed the demand for Rs. 1,99,19,334/- under BAS in respect of selling commission paid by the appellant, and the demand for Rs. 70,33,142/- was dropped. The present appeal is filed against the confirmed demand.

3. The Learned Counsel submitted that the services received from Parah International were not in the nature of BAS. One of the essential ingredients of BAS is that the services must be provided on behalf of the recipient i.e., the Appellant. In the present case, Parah International neither provided services on behalf of the recipient nor did they represent the recipient to prospective customers. The services provided by Parah International were on a principal-to-principal basis. He contended that Parah International generates leads and submits these leads to the Appellant, who in turn, approaches the prospective clients on their own. In other words, Parah International provides market research and consultancy services and not BAS.As the services received by the Appellant are not classifiable under BAS, the receipt of the same cannot be said to be import of services as they are covered under clause (iii) (c) of Rule 3 of Taxation of Services (provided from outside India and received in India) Rules, 2006.

3.1 Learned counsel also submitted that the Appellant had entered into an agreement with M/s Fujairah Cement Company, UAE to set up a power station plant in UAE. The Appellant had also entered into another agreement dated 05.09.2007 with M/s Parah International FAZCO, Dubai, UAE for the procurement of orders and availment of

services for the execution of setting up of power station plant in UAE. In respect of the availment of services from M/s Parah International FAZCO, UAE, the learned counsel contended the appellant had made the payment in convertible foreign exchange under the head 'selling commission'. The learned Adjudicating Authority has confirmed the demand of service tax of Rs. 1,99,19,333/- in terms of Section 66A of the Act read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 on the amount paid by the Appellant in foreign currency in the impugned order.

3.2. Learned counsel further contended that it was evident that the entire act carried out by M/s Parah International FAZCO, UAE was outside India in respect of the project undertaken by the Appellant in UAE for M/s Fujairah Cement Company. Thus, the service had been performed outside India, and no part of service had been rendered in India. Therefore, no service tax was leviable in terms of Section 64 of the Finance Act, 1994,which extends only in India. He also stated that the services had been received and consumed by the Appellant on foreign soil in UAE i.e., outside India (the taxable territory) and the said services were provided by the entity located in UAE i.e., also outside India (the taxable territory). Hence, the Appellant was not liable to pay any service tax on the amount paid by it to M/s Parah International FAZCO in foreign currency. Accordingly, the demand confirmed under the impugned Order is not tenable and thus the impugned Order is liable to be quashed.

3.3 Learned counsel placed reliance on **All India Federation of Tax Practitioners** Vs. **UOI**[1] judgement wherein the Hon'ble Supreme Court held that service tax is VAT which in turn is both a general tax

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1. 2007-TIOL-149-SC-ST : 2007(7)STR 625(SC): AIR 2007 SC 2990: 2007(10)SCALE 178 : (2007)7 SCC 527

as well as destination based consumption tax leviable on services provided within the country. Further, in Para 7 Supreme Court also held that it would, logically, be available only on services provided within the country. Reliance was also placed on **M/s. Haridas Exports Vs. All India Float Glass Mfrs. Association**[2].

3.4 Learned counsel additionally submitted that even if it is assumed that Service Tax is required to be paid on the transaction in question CENVAT credit thereof would have been available to them by virtue of Section 66A of the Finance Act, 1994. In this context he submitted that settled position of law that in revenue neutral situations, no mala fide intention can be attributed to the Appellant to invoke longer period of limitation. He relied on the following decisions:

- **Jet Airways (1) Ltd Vs. CST, Mumbai dated 29.07.2016 cited as 2016 (44) STR 465 (Tri- Mumbai) wherein the Hon'ble Tribunal held as under.**
- **The aforesaid decision has been affirmed by the Hon'ble Apex Court (Jet Airways (India) Ltd. v. Commissioner cited as 2017 (7) G.S.T.L. J35 (S.C.)**
- **M/s Indus Valley Partners (India) Pvt. Ltd. Versus Commissioner Of Central Goods & Services Tax, Noida dated 17.01.2024 cited as 2024 (1) TMI 886 - CESTAT Allahabad**
- **NCR Corporation India Pvt. Ltd. versus COMMR. OF C.T., Bangalore North dated 19.04.2021 cited as 2021 (55) G.S.T.L. 6 (Tri. - Bang.)**

3.5 Learned counsel submitted that the appellant was under a bona-fide belief of the Appellant that the amount paid in convertible foreign exchange to the foreign company in respect of procurement of orders and the availment of services in execution of the power station plant in UAE is not liable to service tax as the service was performed outside India i.e. non-taxable territory. The Appellant had also provided all necessary documents/information as and when required by the

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2.2002 (145) ELT 241 (SC): AIR 2002 SC 2728: (2002) 6 SCC 600

Department. Thus, in view of the facts and circumstances learned counsel submitted that the allegation that the Appellant has suppressed the facts during the relevant period is incorrect and unsustainable.

4. Learned Authorised Representative submitted that it was apparent from the agreement between the appellant (the service recipient) and the overseas entity (the service provider) that the appellant had engaged the overseas entity for marketing and selling of their products and services to all the new cement companies of UAE. Not only this, the overseas company had also been entrusted with the task to focus on existing Cement Companies of UAE which use Diesel Engines for making Power so that the appellant could sell their steam power plants. The appellant had indisputably paid consideration to the said overseas company in lieu of said services. Such services squarely come within the bracket of Business Auxiliary Service and not under Business Support Service as claimed by them. Further, in terms of provision of Section 65A of the Finance Act, 1994 sub-clauses of Section 65(105) which provides the most specific description shall be preferred to sub-clauses providing a more general description.

4.1 Learned Authorised Representative relied on decision of **M/s. Vijay Travels** vs. **CST, Ahmedabad**[3] whereas it was held that whether a service falls under a particular category or not will depend upon the nature of service being provided and the legal interpretation of the documents, like contracts, agreements etc., entered by the service provider with the customers.

4.2. In view of the above, the plea that their services being performed outside India do not come within the purview of service tax

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3. 2010(19)STR (671)-CESTAT Ahmedabad

by virtue of Section 64 of the Finance Act, 1994 also becomes otiose and redundant. Learned authorised representative further submitted that the appellant's contention regarding revenue neutrality cannot be accepted as it will render Section 66A of the Finance Act, 1994 redundant where the importer of the services is also its consumer. The question of right to CENVAT Credit arises only when the tax is paid and not before that.

4.3 The Tribunal in the case of **'Forbes Marshall Private Limited** V. **Commissioner of Central Excise, Pune-I[4]'**- has held that simply because a situation leads to revenue neutrality does not imply that tax need not be paid in time. Where law requires tax to be paid, it has to be paid as per time specified.

4.4 Learned authorized representative submitted that in the case of **The Paper Products Ltd Vs. Commissioner Of Central Excise[5]**, the Tribunal by a majority decision has held that revenue neutrality is not embedded in Central Excise Act or Central Excise Rules.

5. We have heard the learned counsel for the appellant and the learned authorized representative for the department. The issue before us for consideration is:

(i) Whether the appellant is liable to pay service tax on selling commission on RCM basis?

(ii) Whether extended period is invokable in revenue neutral situations?

(iii) Whether interest and penalties are rightly imposed?

4.2015 (1) TMI 458-CESTAT MUMBAI
5. MUMBAI-2015-TIOL-559-CESTAT-MUM

6. In order to appreciate the issue, it would be appropriate to reproduce the relevant definitions:

"business auxiliary service" means any service in relation to—

(i) promotion or marketing or sale of goods produced or provided by orbelonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[Explanation.-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of, the client;

(vi) provision of service on behalf of the client; or

(vii)a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and evaluation remittance, inventory management, or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods.

Explanation.-For the removal of doubts, it is hereby de-clared that for the purposes of this clause, -

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person-

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv)undertakes any activities relating to such sale or purchase of such goods or services;

(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (A) of section 2 of the Central Excise Act, 1944 (1 of 1944);"

"**BSS:**"support services of business or commerce" means services provided in relation to business or commerceand includes evaluation of prospective customers,telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services,accounting and processing of transactions,[operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

> Explanation.-For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;]"

7. From a study of the relevant provisions it is seen that Section 65(19) of the Finance Act, 1994, as substituted by the Finance Act, 2004, with effect from 10.09.2004 contained a category of taxable service called "business auxiliary service".

8. Further, we note that Section 65(105) of the Finance Act, 1994 lists the categories of "taxable services". Sub-clause (zzb) of the section defines the taxable service as "any service provided or to be provided to a client, by any person in relation to business auxiliary service". In the instant case, we note that the service is provided in a country outside India, the provisions of Section 66A will also come into play. Section 66A, inserted by the Finance Act, 2006, contains provisions regarding service tax liability where 'service' is provided by a service provider who is based outside India to a service recipient who is based in India. The relevant provisions of the section are as hereunder:

> "Charge of service tax on services received from outside India.
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> (1) Where any service specified in clause (105) of section 65 is-
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> a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his payment address or usual place of residence, in a country other than India, and
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> b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence in India,
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> such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and according all the provisions of this Chapter shall apply."

9. The above provisions have to be read with the provisions of

Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, which states that in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Act, the recipient of such services shall discharge service tax liability.

10. In the instant case, it is not disputed that M/s. Parah had provided the service of selling agent to the appellant. The agreement between the appellant and M/s. Parah clearly evidences that the service provider was engaged to provide services of marketing and sale of appellant's products in UAE. The payment made in convertible foreign exchange was under the head "selling commission". Hence, against the factual matrix, it is evident that the appellant is liable to pay service tax on RCM basis. We note that the services provided by a commission agent are included in the category of taxable service termed as "business auxiliary service", where 'service' is provided by a service provider who is based outside India to a service recipient who is based in India. Section 66A, inserted by the Finance Act, 2006 read with the Service Tax Rules, 1994 mandate that service tax liability is to be discharged by the service recipient.

11. The learned counsel for the Appellants submitted that the persons abroad from whom the service has been received by the Appellants are not Commission Agents, as no agreements between the foreign service provider and the Appellants exist. He has stated the service providers are freelance middlemen in different countries who keep contact with the users/customers in respective country and are abreast of their requirement. The Appellant is informed of the quotation from the buyers which is responded by the appellant. On customer's confirmation of the Appellant's offer, the Appellants

affect the export supplies. In this context, we note that there is an agreement between the appellant and M/s Parah International FAZCO UAE dated 05.09.2007. The relevant para is reproduced below:-

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At the same time Parah International FAZCO will concentrate to sell products and services of the Indure Private Limited to existing cement companies which uses Diesel engines for making power ----------"

We note that during the period of dispute, the definition of 'Business of Auxiliary Service' as given under Section 65(19) of the Finance Act, 1994, among other things, covered - "any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client". The middlemen abroad find the prospective buyers and their requirement and inform the Appellants about the same. Thus, M/s. Parah provided a service in relation to the marketing or sale of the goods produced by the appellant. Therefore, the service is being received by the Appellant is covered by the definition of 'Business of Auxiliary Service'.

12. It has also been contended that the service is being provided by persons who do not have any office or business establishment in India and the same is being provided from off shore location and that the specific provision for making the service recipient in India as the "person liable to pay the service tax" in such a situation were made by introducing Section 66A of the Finance Act, 1994 w.e.f. 18-4-06 and therefore, prior to 18-4-06, the service tax liability could not be fastened on the recipient of service in India. In this regard, the judgments of this Tribunal in the cases of Foster Wheeler Energy Ltd.

v. CCE (supra) and CCE, Raipur v. Jindal Steel & Power Ltd. (supra) have been cited. However, we find that this very issue has been considered by the Larger Bench of the Tribunal in the case of **Hindustan Zinc Ltd.** v. **CCE, Jaipur**[6] wherein the Tribunal held that in cases where taxable service is provided by a non-resident or a person from outside India who does not have any office in India and is received by a person in India, the service tax liability can be fastened on the service recipient in India only w.e.f. 1-1-05 and in arriving at this conclusion, the Tribunal had noted the fact that w.e.f. 18-4-06, Section 66A has been inserted in Finance Act, 1994 by the Finance Act, 2006 incorporating provisions regarding charge of service tax on the services received from outside India and that a number of taxable services can be provided inside India as well as from abroad.

13. We, therefore, hold that the Appellants as recipient of taxable service from offshore service providers are liable to pay the service tax under Rule 2(1)(d)(iv) of the Service Tax Rules only.

14. Learned counsel has placed reliance on **All India Federation of Tax Practitioners vs. Union of India**[7] which can be distinguished as it relates to the challenge made regarding the constitutional validity of service tax levy.

15. In **Orient Crafts Ltd. Vs. Union of India**[8] the Delhi High Court has upheld service tax liability as follows:

> "5. We are not at all convinced by this argument of learned counsel for the Petitioner. The Rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India and received in India is liable to Service Tax. In the example given by the learned counsel for the Petitioner, there is no question on the service of a haircut having been received in India.

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6. 2008 (11) STR 338 (Tribunal-LB)
7. 2007 (7) S.T.R. 625 (S.C)
8. 2006 (4) S.T.R. 81 (Del.)

> 6. In the present case, the Petitioner is an exporter and has availed the services of a commission agent situated in a foreign country for procuring business of export of goods from India to other foreign countries. It appears that according to the authorities the services of the Commission Agent are taxable in India, while according to the Petitioner these services are not liable to Service Tax."

16. We now consider the Learned Counsel's submissions regarding revenue neutrality. It has been argued before us that in revenue neutral situations, no malafide intentions can be attributed. In this context, we note that the Apex Court's decision in the case of **Formica India Division Versus Collector of Central Excise**[9], the Hon'ble Supreme Court approved an alternative plea of availability of CENVAT credit leading to Revenue neutral situation. It was also held that mere Non Registration and non filing of return cannot be a reason to dismiss the plea of bonafide belief to non taxable nature of the activity of the appellant in that case. This was followed by coordinate Bench of this Tribunal in **Jet Airways (I) Ltd. Versus Commissioner Of Service Tax Mumbai**[10] wherein it was reiterated that the extended period cannot be invoked due to applicability of Revenue neutrality.

17. We also note that this issue is further relied by this Tribunal by explaining in detail the inapplicability of extended period of limitation in **Commissioner of Customs, Central Excise and Service Tax, Hyderabad-I Versus Parker Markwel Industries Pvt. Ltd. (Vice-Versa)**[11]**.** The Tribunal held that on non payment of tax on Management Consultancy services and export sales commission, the eligibility of CENVAT credit on the tax payable on the two services and the situation will be revenue neutral. Hence there was no intention to evade service tax and accordingly the demand under extended period of limitation is hit by limitation. This order inter alia laid down that

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9. 1995(3) TMI 98 - SUPREME COURT
10. 2015 (8) TMI 989 - CESTAT MUMBAI
11. 2019(1) TMI 826 - CESTAT HYDERABAD

even if payment is made through CENVAT for GTA services, which is impermissible, it cannot be stated that the assessee had misstated or suppressed any information or evaded tax in as much as the details of the payment were available in the return. The order also determined the applicability of Penalty in case where an assessee failed to pay the due tax under Reverse Charge which is an eligible credit for further payment of Tax for output services. If an Assessee fails to discharge tax liability under the bonafide belief that no tax need be paid due to Revenue neutrality, then as the judgement stated that as "the issue involved in this case was purely of interpretation, we hold that no penalty is leviable on the Appellant".

18. In view of the above discussions, we hold as follows:-

(i) & (ii) Service tax on selling commission is liable to paid by the appellant. However, the demand for the extended period is held to have been wrongly invoked in view of the discussions on revenue neutrality.

(iii) Penalties imposed under Section 77(2) and 78 is set-aside for the same reason.

19. Accordingly, the impugned order stands modified to the extent indicated above and the appeal is allowed partially.

(Order pronounced in the open Court on **05.03.2025**)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Archana