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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NO.26,Sashtri Bhavan Annexe Building,Haddows Road,Chennai-600006

Order Forwarding Letter

Final Order No. 42400 / 2021

Appeal No. : ST/361/2012-DB

Appellant :
Komatsu India Pvt Ltd

Respondent :
Commissioner of GST & Central Excise - Chennai (South)

I am directed to send herewith a certified copy of the **Final Order No. 42400 / 2021** dated **20/10/2021** .passed by the Tribunal under Section 129 B of the Customs Act 1962/Section 35C of the Central Excise Act 1944/Section 86 (7) of the Finance Act 1994.

21/10/21

Dated: 21/10/2021

Assistant Registrar
CESTAT-Chennai

To:

Komatsu India Pvt Ltd
Plot No. A/1, Sipcot Industrial Park
Growth Centre, Oragadam, Thenneri
Kanchipuram - 603604
Tamil Nadu

Swamy Associates
No. 18, Ram Flats
Ashoka Avenue, Director's Colony,
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Chennai - 600024
Tamil Nadu

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 361 of 2012

(Arising out of Order-in-Original No.13/2012 dated 21.03.2012 passed by the Commissioner of Central Excise, Chennai-II, Chennai)

M/s. Komatsu India (P) Limited **: Appellant**
Plot No.A1, Sipcot Industrial Park Growth Centre
Oragadam
Thenneri (via)
Kancheepuram District 631 604.

VERSUS

The Commissioner of GST &Central Excise **: Respondent**
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 040.

APPEARANCE:

Shri G. Natarajan, Advocate
For the Appellant

Ms.K. Komathi, ADC (Authorised Representative)
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/2400/2021

DATE OF HEARING: 30.09.2021

DATE OF PRONOUNCEMENT: 20.10.2021

Per : SULEKHA BEEVI C.S

Brief facts of the case are that the appellants are engaged in manufacture of Dump Trucks and are a wholly owned subsidiary of Komatsu Asia Pacific Limited (KAP) belonging to the Komatsu Group of companies in Japan. They are registered with the department for payment of service tax under various categories of taxable services. On verification of records of the appellant, it was observed that though the appellant received various services from abroad they had not paid the service tax on such services in terms of Section 66A of the Finance Act, 1994. Show cause notice dated 29.07.2010 was issued proposing to demand service tax under the category of 'Manpower Recruitment or Supply Agency Service', Online Information and Database Access and Retrieval Service, Consulting Engineering Service and Maintenance and Repair Services. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved, the appellants are now before the Tribunal.

2. Learned Counsel Shri G. Natarajan appeared and argued for the appellants. The details of services, period involved and the demands are given as shown in the table below :

S.No.	Category of Service	Period of demand	Service Tax demanded (along with Education Cess/ SHE Cess	Remarks
1.	Manpower recruitment and supply service	2006-07 to 2008-09	Rs.4,48,94,664	Rs.2,21,06,755 paid
2.	Online Information and Database Access and Retrieval Service	2006-07 to 2008-09	Rs.13,96,287	Rs.13,96,287 paid
3.	Consulting Engineering Service	2006-07 to 2008-09	Rs.18,41,572	Rs.18,43,520 paid
4.	Maintenance and Repair service	2007-08 to 2008-09	Rs.5,69,54,639/-	
			Total	Rs.2,53,46,562

3. Learned counsel submits that the appellant is not contesting the liability to pay service in regard to Online Database Information Access and Retrieval Service and also Consulting Engineers Service. Only the penalties imposed under these services are contested by the appellants. That service tax in respect of these services have been paid by the appellants along with interest. Non-payment of service tax was only due to appellant's bonafide belief that such services rendered by overseas entities are not liable to service tax in the hands of the appellant. The levy of service tax under reverse charge mechanism on the service recipient was introduced only w.e.f 19.04.2006 vide Section 66A of the Act. The period involved being just immediate to the introduction of Section 66A of the Act, appellant had not paid the service tax due to litigations pending on this issue before various forums. Alternatively, it is submitted that even if service tax is paid by the appellant under reverse charge

mechanism, the appellant would be eligible to avail cenvat credit and the situation is entirely revenue-neutral. For the same reason, the allegation that appellant intended to evade payment of service tax so as to impose penalty cannot sustain. He prayed that the penalties imposed under Section 78 of the Finance Act, 1994 in regard to these two services may be set aside.

4. With regard to demand of service tax under Manpower Recruitment and Supply Agency Service, the learned counsel explained that appellant company belong to Komatsu Group of Japan (Komatsu Limited, Japan, Komatsu Asia Pacific Limited, Singapore). During the initial setting up of their factory premises, the appellant had entered into Secondment Agreement with their parent companies by which employees of the parent companies were deputed to work in the appellant's factory. The appellant entered into individual employment contracts with such employees. While a part of their salaries was paid directly to such employees in India in Indian currency, a part of the salary was paid by the appellant to the parent company in foreign currency for being paid over to the families of the employees. The department has alleged that such payment made by the appellant to the parent companies would come within the purview of 'Manpower Recruitment or Supply Agency Service' as defined under Section 65 (105) (k) read with Section 65 (68) of the Finance Act, 1994.

5. It is submitted by him that the very same issue was considered by the Tribunal in the appellant's own case for the subsequent period and demands have been set aside by the Tribunal vide Final Order No.41735/2019 dated 24.09.2019. The Tribunal in the said case relied upon the decision in the case of *Nissin Brake India Pvt. Ltd. Vs CCE Jaipur*

– 2019 (24) G.S.T.L. 563 (Tri.-Del.) and *Ivanhoe Cambridge Investment Advisory India (P) Ltd. Vs CST Delhi* – 2019 (21) G.S.T.L 553 (Tri.-Del.) and other decisions. He prayed that the demand may be set aside.

6. With regard to demand of service tax under Management, Maintenance and Repair Service, Learned counsel sought our attention to page No.126 of the appeal book which contains a Memorandum entered between the appellant-company and the foreign company. He pointed out that the said agreement is only with respect to marketing, sales promotion and product support service activities undertaken by the appellant for manufacture and sale of the products namely Dump Trucks. The main activity that is rendered by the above stated agreement is marketing and sales promotion of the dump trucks in India. As part of the said activity, the appellant also undertakes after-sales service of the products which have been sold in India on behalf of the parent company. Such activity of repair and servicing of the vehicles is only incidental to the marketing and sales activity. When there is bundle of services, the service has to be classified on the basis of main service rendered. In the present case, the essential service being in the nature of marketing and sales promotion would fall within the category of "Business Auxiliary Services" as defined under Section 65 (105) (zzg) of the Finance Act, 1994 and these services would then qualify as 'Export of Services' in terms of Rule 3 (1) (iii) of the Export of Service Rules, 2005 as the service recipients are outside India. He pointed out that individual product support agreements with Komatsu Do Brazil Ltd. (KDB), Komatsu (Changzhou) Construction Machinery Corporation (KCCM) and Komastu Shantui Construction Machinery Co. (KSC) refer to the Memorandum with appellant and M/s.Komatsu Asia &

Pacific Pte. Ltd. (KAP) and hence the entire scope of services are to be inferred from this memorandum. To support his argument, he relied upon the decision in the case of *Simpra Agencies Vs CCE* - 2014 (36) STR 430 (Tri.-Del.). The said appeal was with respect to rejection of rebate claims under Notification No.11/2005-S.T. The findings of the authorities below that the services cannot be classified as 'Business Auxiliary Service' and therefore cannot be treated as 'export of services' was set aside by Tribunal after examining the agreements entered by the appellants with the foreign clients. It was held by the Tribunal that the appellant's function was in the nature of promotion of sales of the products of their foreign clients in India, conduct market survey and if required to conduct inquiries with regard to solvency and reliability of the clients. Besides this, they also provide after-sale warranty service in testing etc. on behalf of their foreign clients to the buyers in India. The Tribunal held that essential character of the services have to be examined and if the services fall under 'Business Auxiliary Service', these services have to be treated as 'Export of Services'. The matter was remanded for verification and to consider eligibility of rebate.

7. It is submitted by the counsel that the Tribunal in the case of *CST Vs Life Care Medical Systems – 2016-TIOL-1007-CESTAT-MUM* had analysed similar issue. The Tribunal in this decision relied on the Bombay High Court judgment in CGS Vs SGS India Pvt. Ltd. - 2014 (34) STR 554 (Bom.) and the majority decision in the case of *Microsoft Corporation (I) (P) Ltd.* - 2014 (36) STR 766 (Tri.-Del.). In this regard, decision of Tribunal in *Samsung India Electronics Pvt. Ltd. Vs CCE* – 2016 (42) STR

831 (Tri.-Del.) was also relied on by Counsel. He prayed that demand may be set aside.

8. Learned Authorized Representative Ms. K. Komathi appeared for the department. She supported the findings in the impugned order.

9. Heard both sides.

10. The appellant is not contesting the demand on Online Information Database Access and Retrieval service as well as Consulting Engineer services. He is contesting only penalties imposed under Section 78 of the Finance Act, 1994 in this regard. We have to agree with the argument of Learned counsel that question as to whether service tax has to be paid under reverse charge mechanism prior to the introduction of Section 66A in the Finance Act, 1994 was debated before various forums. In the case of *Indian National Ship Owners' Association Vs UOI* – 2009 (13) STR 235 (Bom.), the Hon'ble Bombay High Court held that only with effect from 19.04.2006, service recipients are liable to service tax under reverse charge mechanism . It is also to be noted that even if the appellant pays service tax, they would be eligible for the credit and the situation is entirely revenue-neutral. The appellant has paid service tax along with interest. Taking into consideration all these aspects, we are of the considered opinion that the penalties cannot sustain and the same require to be set aside, which we hereby do.

11. The first issue of tax liability under consideration is demand of service tax on "Manpower Recruitment or Supply Agency Service". "Manpower Recruitment or Supply Agency Service" is defined under Section 65 (105) (k) of the Finance Act, 1994 which reads as under :

"any service provided or to be provided to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate."

The term "manpower recruitment or supply agency" is defined in section 65 (68) of the Act, as *"manpower recruitment or supply agency means any person engaged in providing any service, directly or indirectly, in any manner of recruitment or supply of manpower, temporarily or otherwise, to any other person".*

12. The agreement entered between the appellant and M/s.Komatsu Asia & Pacific Pte Ltd. (KAP) dated 18.12.2006 (Secondment Agreement) is furnished in pages 109, 215 of the appeal paper book. Para 2.3 of the said agreement reads as under :

"2.3 Salary, Service Fees and Other Costs

KIPL shall be responsible for and bear the cost of paying the salary for each Seconded Service Engineer in the amount specified in the relevant Individual Secondment Contract. The said salary shall consist of a portion to be paid at the seconded area / country ("Local Salary") and a portion to be paid in the country of origin of the Seconded Service Engineer ("Home Country Salary")

In addition, KIPL shall bear and reimburse KAP for all expenses incurred in relation to the preparation work and appointment of the Seconded Service Engineers.

In case that KIPL desires to retain the Seconded Service Engineer after finishing his assignment, KAP shall continue remain the employment of the Seconded Service Engineer on 'Standby' basis for next assignment and KIPL bear the full costs for the employment. The detailed terms and conditions of this "Standby" employment shall be defined separately."

It is seen that the agreement is for secondment of service engineers from the foreign companies to the appellant company. In Article 1, it is stated 'that the foreign company in consideration of the payment of salaries, fees and other cost listed in Article 2.3 despatches its service engineers to KIPL on a secondment basis, to render after-sale services for Komatsu brand construction equipment'.

13. From the terms of the agreement, it is clear that the parent company has deputed its employees to work in the appellant's factory for doing after-sales work and other related works. It is seen in para 2.3 of the agreement that the payment made by the appellant to the parent company is nothing but part of the salary. We do not find any payment of consideration towards rendering of Manpower Recruitment or Supply Agency Service. The appellant company and the parent company being of same group, the secondment employees cannot be said to have been recruited by the parent company to the appellant company. Once the employees are deputed to the appellant, the appellant would enter into individual contract for employment with such employees. A part of the salary that is to be paid to these employees is paid to the parent company in foreign currency for payment to their families. The said amount is not a consideration for services of man power recruitment. The very same issue was considered by the Tribunal in the case of *Ivanhoe Cambridge Investment Advisory India (P) Ltd. Vs CST Delhi* (supra). The Tribunal observed as under :

> "12. Next, we turn to the demand of Service Tax under Manpower Recruitment or Supply Agency Service. The holding company of the appellant have made available the service of certain experts to the appellant in India. The adjudicating authority took the view that the amounts paid to the expatriates are to be considered as consideration for manpower supply and liable to Service Tax, on reverse charge basis. The appellant has drawn our attention to the "Employment Secondment Agreement", which governs the terms and conditions under which the expatriates have been placed at the disposal of the appellant. We have also seen some of the payment letters issued by the appellant to the expatriates which make it clear that such expatriates will be employees of the appellant during the period of their assignments to the appellant. Further, the Income Tax returns filed by the expatriates clearly show the appellant as their employer and Income Tax has also been paid for the amounts received by the expatriates in India, under the category of salary.

13. In view of the above, we are of the view that there can be no levy of Service Tax under the category of manpower supply since the expatriates were enjoying the employee-employer relationship with the appellant."

14. In the case of *Nortel Networks (I) Pvt. Ltd. Vs CST New Delhi* - 2017 (52) STR 489 (Tri.-Del), it was held as under :

"Service Tax of Rs.2,52,20,279/- stands confirmed by the impugned order in respect o remittances by the appellant to overseas entities whose employees were seconded for service with the appellant. The remittances were prior to 18-4-2006. Revenue alleged and confirmed this allegation in the impugned order that Manpower Supply and Recruitment was provided by overseas entities to the appellant and sine the overseas entities did not have permanent establishment in India, the inherence of tax liability fell on the appellant. This reversal of the normal inherence of tax mandated by the provisions of the Act was introduced by the legislative dynamics of Section 66A introduced by the Finance Act, 2006, w.e.f. 18-4-2006. Prior to 18-4-2006, a recipient of Manpower Supply and Recruitment service was not liable to remit tax in the law stands concluded by the decision of the Supreme Court in Indian *National Shipowners Association v. UOI – 2009 (13) S.T.R. 235 (Bom.)*=2010 (17) S.T.R. J57 (SC). **Secondment of employees from abroad for serving in India does not constitute rendering of Manpower Supply or Recruitment service is declared in *Computer Science India Pvt. Ltd.V. CST, Noida*** – 2014 (35) S.T.R. 94 (Tri.Del.), *Bain & Co. India Pvt. Ltd. V. CST, New Delhi* – 2014 (35) S.T.R. 553 (Tri.-Del.) *and in Volkswagen India Pvt. Ltd. Vs. CCE, Pune* – 2014 (34) S.T.R. 135 (Tri.-Mum.). The decision of this Tribunal in *Computer Science India Pvt. Ltd.* Stands confirmed by the Allahabad High Court in *CST, Noida v. Computer Science India Pvt. Ltd.* – 2015 (37) S.T.R. 62 (All.)."

15. In *Volkswagn India (Pvt.) Ltd. Vs CCE Pune* - 2014 (34) STR 135 *(Tri.-Mum.)* it was held as under :

"3.1 Further, a part of the salary of such global employees was remitted abroad in their home country, the same was done using the services of the holding company or other group companies as applicable and such amounts were reimbursed to the other company. It is further contended that apart from the part salary of the global employees (by way of reimbursement), the appellant have not paid any amount to their holding/foreign company. Merely because a part of the salary of such global employee was paid in their home country through the holding/foreign company, it cannot be said that the foreign/holding company rendered supply of manpower or labour to the appellant. He also placed reliance on the decision of the Tribunal in the case of *ITC Ltd.* v. *Commissioner of Service Tax, New Delhi* - 2012-TIOL-855-CESTAT-DEL = 2013 (29) S.T.R. 387 (Tribunal) and *Paramount Communication Ltd.* v. *Commissioner of Central Excise, Jaipur* - 2013-TIOL-37-CESTAT-DEL = 2013 (29) S.T.R. 317 (Tribunal) = 2013 (287) E.L.T. 213 (Tribunal) in support of his contentions.

3.2 It is further contended that the holding/foreign company is not a "manpower recruitment or supply agency service" as required under Section 65(105)(k) of the Finance Act, 1994. Further, reliance is placed on C.B.E. & C. Circular No. 96/7/2007-S.T., dated 23-8-2007, wherein it has been clarified that in the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another person, for a consideration. Employer-employee relationship in such case exists between the agency and the individual and not between the individual and the person who uses the services of the individual.

4. The learned Commissioner (AR) appearing for the Revenue reiterates the findings of the adjudicating authority. It is his contention that the Indian entity should have paid full salary directly to the employee of the appellant company other than routing a part through the foreign/holding company. It is also the contention of the Revenue that after a period of 3-4 years such global employees go back to the foreign/holding company and even during the intervening period, during the employment in the appellant company, the social security liability has been discharged in their home country. Accordingly, he submits that the transaction is one of supply of labour/manpower by the foreign company to the appellant-Indian company. Accordingly, he pleads for upholding the Order-in-Original.

5. We have carefully considered the submissions made by both sides and also perused the entire company agreements (Annexure-B) as well as the clauses of agreement with the global employee (Annexure-A).

5.1 In view of the clauses of agreements noticed herein above and other facts, we hold that the global employees working under the appellant are working as their employees and having employee-employer relationship. It is further held that there is no supply of manpower service rendered to the appellant by the foreign/holding company. The method of disbursement of salary cannot determine the nature of transaction."

16. After appreciating the facts and following the decisions, we have no hesitation to hold that the payment made to the foreign company which has been subjected to service tax under Manpower Recruitment or Supply Agency Service cannot sustain and requires to be set aside, which we hereby do.

17. The second issue of tax liability is with regard to demand under Management, Maintenance and Repair service. The agreement / memorandum entered by the appellant M/s.Kamatsu India Pvt. Ltd. (KIPL)

with M/s.Komatsu Asia Pacific Pte Ltd. (KAP) dated 01.04.2007 is enclosed in pages 126-128 of the appeal paper book which reads as under :

> "This MEMORANDUM is made on April 1, 2007 by and between Komatsu India Private Limited ("KIPL") and Komatsu Asia & Pacific Pte. Ltd. (KAP) with respect to the marketing, sales promotion and product support service activities undertaken by KIPL for Komatsu construction and mining equipment sold toward Indian market by KAP (the "Subject Products")
>
> 1. Subject Products
> The Subjects Products means (i) the complete units of Komatsu construction and mining equipment sold by KAP to the customers in India (including but not limited to those sold through Larsen &Toubro Ltd., appointed as agent of KAP), and (ii) the spare parts of construction and mining equipment sold by KAP toward the customers in India (including but not limited to those sold to Larsen &Toubro Ltd., and other spare part distributor of Komatsu mining equipment.
>
> 2. KIPL Undertaking
> For the purpose to maximize sales volume of the Subject Products in India, KIPL undertakes the services as listed in APPENDIX attached hereto, and to set up and maintain marketing and after-sale-service organization staffed with qualified personnel for such purpose."

From the above agreement, it can be seen that agreement is entered between parties for marketing, sales promotion and products support service activities undertaken by KIPL for Komatsu Construction and Mining Equipment sold in Indian market by the foreign company. The main purpose is for marketing and sales promotion as is seen from the Appendix of the agreement. In page 129 the Appendix of the Agreement reads as under :

> APPENDIX
>
> KIPL undertakes to perform following services, in India in the interest of KAP
>
> 1) Sales and Marketing
>
> a) Coordinating in distributor and customers' network
> b) Marketing research
> c) Joint advertising and marketing activities
> d) Planning of sales &product strategies (mainly co-ordination)
> e) Advising prising strategies (together with KAP)

f) Joint participation in launching and marketing of new products

g) Providing marketing information and intermediary service of potential customers

h) Conduct regular or ad-hoc technical and marketing meeting with customers.

2) Product Support

a) Provision of technical support services relating to application engineering, product support and after sales service

b) Procurement planning and strategy

c) Improvement of product quality

d) Product training and support

In connection with promotion of sales, marketing survey and providing such activities, the appellants is also undertaking after sales service which is in the nature of product support. The department has classified the activity under 'Management, Maintenance and Repair Service'. There is a major element of promotion of sales and marketing involved. The appellant is doing promotion of the sales and marketing the products manufactured by the foreign company. Needless to say the products can be effectively marketed only by ensuring after sales support. The products can be marketed and sold only if there is proper repairs / maintenance and warranty assurance for the products. They have appointed M/s.Larsen & Toubro Ltd. to carry out warranty repair and maintenance for the products sold in India.

18. Section 65A (2) (b) deals with classification of services when two or more services are rendered to the appellant. It reads as under :

> **"SECTION 65A. Classification of taxable services**.- (1) for the purposes of this chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;

> (2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
> ....
>
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable."

As per the above section, when the services are bundled together, it has to be classified under head which gives the essential character of the service.

19. In similar set of facts the Tribunal in the case of *CST Vs Life Care Medical Systems (*supra) held that sales promotion and marketing being essential character of the bundle of services have to be classified under 'Business Auxiliary Service'. Relevant findings of the Tribunal are reproduced as under :

> "5. On careful consideration of the submission made by both sides and perusal of the records, we find that there is no dispute that the appellant herein is engaged in the business of canvassing, promotes, market, does after sale services to products manufactured by M/s.Viasys International Corporation to the customer located in India, for which is an amount is received as commission for such services rendered. It is to be noted that there is also no dispute that the appellant has received commission in convertible foreign exchange for the period of tax liability from 01.07.2003 to 31.03.2008.
>
> 6. We find the issue is no more res integra as the service is rendered by the appellant on the goods which was manufactured by overseas manufacturer. It would mean the services rendered by the appellant is to an overseas manufacturer on whom Service Tax liability does not arise. The service rendered to such a person situated based at overseas and no Service Tax liability arises on him but under reverse charge mechanism appellant is made liable to pay, however, in this services are consumed y a person not in India, no Service Tax liabilities arises on appellant is the law settled which is supported by judgement of Hon'ble Bombay High Court in the case of SGS India Pvt. Ltd.(supra), we reproduced the relevant paragraphs :-
>
> **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 inter-sectoral 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. Thas 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. 21/2003-S.T., dated 20th November, 2003.

23. We are of the opinion that the services rendered in the present case are fully covered by the clarification given and even by the principle laid down in the decision of the Hon'ble Supreme Court of India. In this regard, if one refers to the allegations in the show cause cum demand notice, it is apparent that the same refers to the testing charges received by the respondent in convertible foreign currency in respect of services rendered by it in India to its foreign clients. Though the show cause notice refers to the circulars, what is apparent from the judgment of the Hon'ble Supreme Court in the case of *All India Federation of Tax Practitioners* v. *Union of India*, 2007 (7) S.T.R. 625 that Service Tax is a tax on each activity. When it comes to a Service Tax on professions, the services rendered are of advise and hence, the Hon'ble Supreme Court with regard to the nature of the tax concluded that it is rendered by a Chartered Accountant, for example when he advises his client or audits his account. Similarly, a cost accountant charges his client for advise as well as doing his work of costing. For each transaction or contract, Chartered Accountant/Cost Accountant renders professional based services. However, Mr. Sridharan submits if the taxable event is the provision of services, then, the place where the services have been rendered is of significance. The services will be taxable only if they are provided within India. Mr. Sridharan submits that Service Tax is a destination based consumption tax and therefore, it is not applicable on export of services.

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.* 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.

7. In view of the foregoing and in the facts and circumstances of this case, we hold that the impugned order is unsustainable and liable to be set aside and we do so. The impugned order is set aside and appeal is allowed."

20. The Tribunal in the aforesaid decision relied on Bombay High Court judgment in *CST Vs SGS India Pvt. Ltd.* 2014 (34) STR 554 (Bom.) and the majority decision of the Tribunal in the case of *Microsoft Corporation (I) (P) Ltd.* - 2014 (36) STR 766 (Tri.-Del.). The facts being similar to the facts as reflected from the agreement placed before us in the present case, we are of the considered opinion that the services are classifiable under "Business Auxiliary Service" and not under Management, Maintenance and Repair Service. In such circumstances, when the appellant has rendered services (BAS) to the foreign company, such service would qualify as 'Export of Service' in terms of Rule 3 (1) (ii) of the Export of Service Rules, 2005 as the service recipient is situated outside India. When the services are exported, they are not taxable in India and for this reason the demand under this category cannot sustain. The department has classified the said service as Management, Maintenance and Repair Service and construed that as the place of performance of this service is in India, these services cannot be treated as 'Export of Service'. We have already made clear that since the essential character of the agreement is marketing and sales promotion, the activity

has to be classified under 'Business Auxiliary Service'. In the case of BAS, as the recipient is situated outside India, such services are to be treated as 'Export of Service'.

21. From the foregoing we hold that demand under Management, Maintenance and Repair Service cannot sustain and requires to be set aside, which we hereby do.

22. In the result, the impugned order is modified to the extent of setting aside demands under the category of "Manpower Recruitment or Supply Agency Service", "Management, Maintenance and Repair Service"

23. The demands under "Consultancy Engineering Service" and "Online Database Access and Retrieval Services" are upheld along with interest. However, penalties imposed under these services are set aside.

The appeal is partly allowed in the above terms with consequential reliefs, if any.

(Order pronounced in the open court 20.10.2021)

-Sd-

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

-Sd-

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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21 OCT 2021
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