

(2020) 12 CESTAT CK 0010

Customs, Excise And Service Tax Appellate Tribunal Principal Bench, New Delhi

Case No: Service Tax Appeal No. 51772 Of 2014

M/s. Sara Sae P Ltd.

APPELLANT

Vs

Commissioner, Customs, Central
Excise And Service Tax,
Commissionerate, Meerut-I

RESPONDENT

Date of Decision: Dec. 17, 2020

Acts Referred:

- Service Rules 2005 - Rule 3(1), 3(2)

Hon'ble Judges: Dilip Gupta, J; P. Anjani Kumar, Technical Member

Bench: Division Bench

Advocate: B.L. Narasimhan, Kunal Aggarwal, Shagun Arora, K. Poddar

Final Decision: Allowed

Judgement

Sl. No., "Category of

Demand", "Transaction", "Quantum of Service

Tax", "Findings of the OIO,

1., "Commission on Sale, -, "Rs. 43,466", "Dropped as service tax
had been paid.",

2., "Export Incentives", "Relates to income from
sale of DEPB licenses", "Rs. 1,06,77,889", "Dropped as not taxable,

3., "Foreign Commission

Service charge", "Services rendered to
foreign companies.

Services rendered to

Global in respect of supply
of personnel.", "Rs.46,61,774/-
confirmed (partially
dropped for the period
after 27.02.2010 and
extending cum-tax
benefit)", "Demand partially
Confirmed",
4., "Miscellaneous
Income", "Relates to amounts
received from
workers/employees as
notice pay or amounts
payable to the employees
but remained unpaid", "Rs.3,56,474", "Dropped as not taxable,
5., Royalty, "Services received by the
Appellant", "Rs.1,63,385", "Service tax paid before
issuance of SCN, hence
demand dropped.
Interest confirmed
and deposited.",
6., "Commission paid to
foreign agents", "Commission paid for
receipt of services", "Rs.6,75,403 confirmed
and Rs. 21,705 dropped
as evidence of payment
of service tax was
available", "Demand partly

confirmed",

(ii) For the period February 27, 2010, the condition in relation to service being used outside India has been omitted. However, since the" ,,,,,

appellant could not substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon, service" ,,,,,

tax demand of Rs.71,190/- has been confirmed." ,,,,,

10. With respect to the Commission paid to foreign agents, the Commissioner has confirmed the demand as documentary evidence for the claims" ,,,,,

made by the appellant had not been submitted. ,,,,,

11. This appeal deals with service tax on foreign commission received for services rendered to foreign companies and on commission paid to foreign ,,,,,

agents. ,,,,,

12. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:" ,,,,,

(i) The appellant is not liable to pay service tax on commission received from foreign companies and the findings recorded in the impugned order are ,,,,,

clearly contrary to the principles laid down in various decisions that promotion and marketing of goods of foreign companies in India would qualify as ,,,,,

export of service under the 2005 Rules; ,,,,,

(ii) The Commissioner has misread the Circular dated May 13, 2011 in as much as the said Circular provides that services would be used outside India" ,,,,,

if a benefit of such service accrues outside India and accrual of benefit should be tested beyond the factor of the person who pays for such service; ,,,,,

(iii) The promotional and marketing services of goods of foreign companies would ultimately result in increase in business and revenue of such foreign ,,,,,

companies. Hence, even by virtue of the Circular dated May 13, 2011, service rendered by the appellant would qualify as export;" ,,,,,

(iv) The 2005 Rules were amended w.e.f February 27, 2012 and the condition ""such service is provided from India and used outside India"" was" ,,,,,

deleted from Rule 3(2) of the 2005 Rules. Thus, for the period 2010-11, the only requirement is that the service recipient should be situated outside" ,,,,,

India and consideration is received in foreign currency. Since both the conditions have been satisfied, no service tax was payable by the appellant, as" ,,,,,

the service provided by the appellant to the foreign companies qualifies as export; and,,,,,

(v) The demand on commission paid to foreign agents is not sustainable, as the same has been discharged by the appellant. In the connection it has" ,,,,,

been pointed out of the demand amount of Rs.6,75,403/-, the appellant has already discharged service tax of Rs.4,28,369/- and rest of the amount of" ,,,,,

Rs.2,47.034/- is not payable." ,,,,,

13. Shri K. Poddar, learned authorized representative for the Department has however supported the impugned order and has made the following" ,,,,,

submissions:,,,,,

(i) The services provided by the appellant is in India and is used in India and, therefore, would not qualify as "export of services" under the 2005" ,,,,,

Rules and the appellant is liable to pay service tax on the commission paid by the appellant to foreign agents. ,,,,,

14. The submissions advanced by the learned counsel for the appellant and the learned authorized representative of the Department have been ,,,,,

considered. ,,,,,

15. The first issue is regarding the levy of service tax on the commission received from foreign companies has recently been decided against the ,,,,,

Revenue by this Bench in M/s Involute Engineering Pvt. Ltd. Service Tax Appeal No. 55146 of 2013, both with regard to the period prior to February" ,,,,,

27, 2010 and w.e.f. February 27, 2010. The relevant portion of the decision is reproduced below:" ,,,,,

18. A perusal of rule 3(2) of the 2005 Rules, as it existed prior to February 27, 2010, would indicate that the provision of any taxable" ,,,,,

service specified in sub-rule (1) of rule 3 shall be treated as export of service when the following two conditions are satisfied: ,,,,,

(a) such service is provided from India and used outside India; and ,,,,,

(b) payment of such service is received by the service provider in convertible foreign exchange. ,,,,,

19. There is no dispute in the present appeal that the payment for the service was received by the appellant in convertible foreign exchange. ,,,,,

The dispute is whether the service was provided from India and used outside India. The Commissioner has observed, for the period prior to" ,,,,,

February 27, 2010, that the appellant was providing services in relation to procurement of orders from customers located in India and these",,,,,

services cannot be delivered outside India. Thus, the appellant would not satisfy the condition of requiring the services to be used outside",,,,,

India and in this connection, the Commissioner placed reliance upon the Circular dated May 13, 2011. Thus, the demand has been",,,,,

confirmed on the premise that the appellant was rendering services in relation to promotion of goods in India (including procurement of",,,,,

orders; collection of payment, etc.), and therefore, the services were being
â€œprovided and used in Indiaâ€™. On this basis, the",,,,,

transactions have been held to not qualify as export of services in terms of rule 3(2) of the 2005 Rules.,,,,,

22. It would be seen from the aforesaid factual position stated by the appellant in reply to the show cause notice that the appellant had been",,,,,

representing various foreign companies in India and these foreign companies did not have any business or any other office in India. The",,,,,

appellant promoted the business of such foreign companies in India and as a consideration for this service, received commission from the",,,,,

foreign companies in convertible foreign exchange. In fact, the appellant has also described the manner in which it had promoted the",,,,,

business of such foreign companies. The appellant has stated that it procured orders on behalf of such foreign companies in India and",,,,,

whenever any Indian company issued a tender, the appellant sent it to the foreign companies and also bid on behalf of the foreign",,,,,

companies under their instructions. If the bid is accepted, the appellant procures orders from the Indian company on behalf of the foreign",,,,,

companies. The purchase orders are raised in the name of foreign companies. The foreign companies thereafter export the goods to the",,,,,

customers in India and the invoices are raised directly on the customers. The appellant thereafter raises an invoice for its commission on the",,,,,

foreign companies and receives the commission amount in convertible foreign currency. It is, therefore, clear that the appellant supports",,,,,

such foreign companies to procure orders in India. Such service is provided from India and used outside India. The service rendered by the",,,,,

appellant would, therefore, satisfy the twin conditions set out in rule 3(2) of the 2005 Rules as has also been clarified by the Circular dated",,,,,,

February 24, 2009." ,,,,,,

33. The Commissioner, in regard to the period post February 27, 2011 has recorded a finding that though the condition relating to service",,,,,,

being used outside India has been omitted, but the appellant could not substantiate the quantum of services provided after February 27," ,,,,,,

2010 and the consideration received thereon and so the entire demand has to be confirmed.,,,,,,

Year,"Taxable

value","Amount

confirmed","Amount

deposited",Balance,Comments

2007-08,0,0,0,0,-

2008-09,"Rs.25,52,026","Rs.3,15,430","Rs.2,45,430

plus interest of

Rs,9,817

deposited on

20.07.2009

(Annexure-7)","Rs.70,000","Amount of

Rs.1,69,197 as

commission has been

reflected twice

erroneously in the

ledger. Further, the

amount of

commission was paid

in May 2009, when

effective rate of ST

was reduced from

12.35% to 10.30%.

Therefore, total tax
payable on

Rs.23,83,829 was

Rs.2,45,430/ which

has been deposited.

(Annexure-7)

2009-10,-,"Rs.4,885/-","Rs.4,885/-",-,"Paid alongwith
interest (Annexure-

B)

2010-11,"Rs.34,47,460

out of which

Rs.12,49,800

was reversed","Rs.3,55,088/-

o n amt. of

Rs.34,47,460/-","Rs.1,78,054 on

actual

commission of

Rs.17,38,681)","Rs.1,77,034/-","Service tax is

payable only on the

amount of

commission actually

paid.

TOTAL,,"6,75,403/-","4,28,369/-","2,47,034/-",